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The 'Wall' Decisions in Legal and Political Context

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Recommended Citation

Geoffrey R. Watson, The 'Wall' Decisions in Legal and Political Context, 99 AM. J. INT'L L. 6 (2005).

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nor do they apply to situations governed by the laws of armed conflict. Rather, when states act outside their own territory in a military context, the relevant law is international humanitarian law, not human rights law. *Dennis* contends that states parties to human rights treaties have never acted as though the provisions of such treaties (including those on derogations) were applicable to extraterritorial military action, and that in contrast to the *lex specialis* of international humanitarian law, human rights law does not supply workable and properly tailored guidance for the conduct of military operations.

Evaluation

The contributors offer divergent points of view on the likely effect of the advisory opinion on the quest for a just resolution of the Israeli-Palestinian conflict, the substantive law on the several subjects addressed, and the Court's own authority within the UN system and as a judicial organ. At one end of the spectrum, *Falk* perceives the ruling as highly significant for efforts to reorient the peace negotiations within the framework of international law; in light of the Court's capacity to speak with virtual unanimity, he goes so far as to contend that the formal view of advisory opinions as technically nonbinding is "outmoded and regressive" and that the authoritativeness of this ruling should approach that of a binding judgment. For her part, *Pomerance* asserts that a Court bent on aggrandizing its own role beyond consensual jurisdiction jeopardizes its own authority, which poses a threat to the search for a peaceful settlement.

Throughout the Agora, the contributors bring out ways in which the Court could have done a much better job of discharging its obligations under Articles 53, 56, and 68 of its Statute to render decisions that are well-founded in fact and law and to state the reasons on which the advisory opinion was based. Not only those who disagree with the Court's general approach to the questions addressed (for example, *Wedgwood* and *Murphy* on self-defense, and *Dennis* on human rights), but even those generally supportive of the decision (for example, *Scobbie* and *Imseis*) question the quality of judicial reasoning in aspects of the advisory opinion and offer alternative explanations (of the law of self-defense and humanitarian law, respectively) that are more precisely reasoned than those stated by the Court. In this vein, *Kretzmer* asserts that the Court's failure to articulate the legal reasons underlying its conclusions on humanitarian law may negatively affect the prospects for compliance.

Our hope is that the reasoned critiques of the advisory opinion expressed in this Agora will contribute to informed debate on the role of international judicial proceedings, including advisory proceedings, in an ongoing violent conflict, especially from the perspective of promoting international peace and security, the peaceful settlement of disputes, and the authority of the Court.

THE "WALL" DECISIONS IN LEGAL AND POLITICAL CONTEXT

*By Geoffrey R. Watson**

In June 2002, the Israeli cabinet approved a plan to construct a continuous "security fence" separating much of the occupied West Bank of the Jordan River from Israel proper.¹ The stated purpose of the barrier was to prevent Palestinian terrorists from entering Israel and killing Israeli civilians. Construction began in 2002, and a significant portion of the structure had been completed by early 2004. The current route of the wall deviates significantly from the "Green Line"—the 1949 armistice line that separates the West Bank from Israel. The fence frequently enters and traverses the West Bank, encircling Jewish settlements there. Eventually, about

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¹ Herb Keinson, *Cabinet Okays 'Security Concept'*, JERUSALEM POST [J.M. POST], June 24, 2002, at 1.

15 percent of the territory of the West Bank, home to several hundred thousand Palestinians, will lie between the wall and the Green Line.²

The “fence” or “wall”³ actually has several components. The centerpiece is the fence or wall itself. In most places this structure consists of chain-link fencing, but in a few areas it is a concrete wall. The barrier is outfitted with electronic sensors. The complex often includes a four-meter ditch, a two-lane access road, a strip of sand to detect footprints, and, at the perimeter, barbed wire.⁴

The barrier has prompted vigorous protests from the Palestinian Authority and many states around the world. Even Israel’s closest ally, the United States, has criticized the project.⁵ In October 2003, however, the United States vetoed a draft Security Council resolution condemning the wall as illegal.⁶ On November 19, 2003, the United States and its three partners in the “Quartet”—the European Union, Russia, and the United Nations—sought and obtained Security Council approval for their “Performance-based Roadmap” for peace in the Middle East, which envisioned interim steps leading to a two-state solution to the conflict.⁷ But the road map said nothing about the wall, and many UN member states pushed for the General Assembly to take up the matter.

On December 8, 2003, the Tenth Emergency Special Session of the General Assembly adopted Resolution ES-10/14, which requested an advisory opinion from the International Court of Justice (ICJ) on the following question:

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

The International Court moved quickly in response to the request. On December 19, the Court decided, in accordance with Article 66(2) of its Statute, that the United Nations, its member states, the Organization of the Islamic Conference, and the Arab League would all be “likely to be able to furnish information” on the question. Moreover, the Court decided that Palestine should also be entitled to file a written submission, on the grounds that Palestine enjoys special observer status at the United Nations and that it was a cosponsor of the General Assembly resolution propounding the question.⁸

The Court received forty-nine written statements, including submissions from Israel, Palestine, the Arab League, and the United States.⁹ In these statements, Palestine and most other participants urged the Court to find that construction of the wall was unlawful. Neither Israel nor the United States addressed the merits of the question presented, instead urging the ICJ to exercise its discretion not to issue an advisory opinion. From February 23 to 25, 2004, the Court also heard oral submissions from representatives of twelve states, the Arab League, the Organization of the Islamic Conference, and Palestine.¹⁰ Again, most of these oral submissions

² AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: THE PLACE OF THE FENCE/WALL IN INTERNATIONAL LAW (AI Index No. MDE 15/016/2004, Feb. 2004), available at <<http://web.amnesty.org/library/index/engmde150162004>>.

³ Even the name of the structure is a matter of disagreement. Israel insists that it is a “fence” or a “barrier,” and indeed in most places its core structure is a chain-link fence, not a solid wall. Palestinians refer to it as a “wall,” stressing that it is impassable and in a few places quite solid. Greg Myre, *Fencing Off: In the Middle East, Even Words Go to War*, N.Y. TIMES, Aug. 3, 2003, §4, at 3. This essay will use the terms interchangeably.

⁴ Photographs and diagrams of the fence can be found at the Web site of Israel’s Ministry of Defense, <<http://www.seamzone.mod.gov.il/Pages/ENG/operational.htm>>.

⁵ Todd S. Purdum, *U.S. Criticizes Israel’s New Electronic Fence Along West Bank*, N.Y. TIMES, June 18, 2002, at A6.

⁶ UN Doc. S/PV.4842 (2003); UN Doc. S/2003/980 (draft resolution); see also UN Doc. S/PV.4841 (2003).

⁷ SC Res. 1515 (Nov. 19, 2003).

⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, paras. 4, 6 (Int’l Ct. Justice July 9, 2004), 43 ILM 1009 (2004) [hereinafter *Advisory Opinion*].

⁹ *Id.*, para. 9. The written statements are available on the Court’s Web site, <<http://www.icj-cij.org>>.

¹⁰ Advisory Opinion, para. 12. The oral submissions are available on the Court’s Web site, *supra* note 9.

argued that construction of the wall violated international law. Neither Israel nor the United States made an oral presentation.

On July 9, 2004, the Court issued an advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which described the construction of the wall as a violation of international law and concluded that states must take steps to avoid supporting continued construction of the wall. The vote on most subparagraphs of the *dispositif* was 14-1. Seven judges contributed separate opinions, but some who voted with the majority nonetheless expressed misgivings about the Court's reasoning. Judge Thomas Buergenthal cast dissenting votes on all but one subparagraph of the *dispositif*.

In the meantime, the Israeli Supreme Court, sitting as the High Court of Justice, was entertaining several petitions challenging the construction and routing of the wall on various legal grounds. On June 30, 2004—just nine days before the International Court issued its advisory opinion—the Supreme Court invalidated military orders for the construction of several portions of the fence. The Court found that some deviation from the Green Line was acceptable, but that in many instances the Israel Defense Forces (IDF) had routed the wall so as to cause disproportionate harm to the Palestinian population.¹¹

Part I of this essay describes the decision of the International Court, including highlights from the separate opinions of individual judges. Part II describes the decision of the Israeli Supreme Court. Part III compares and contrasts the methodology of the two opinions. Part IV offers some comments on the political and legal context of the decisions.

I. THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE

Jurisdiction

The Court's opinion began by considering Israel's arguments that the ICJ lacked jurisdiction. The Court first noted that Article 65(1) of its Statute authorizes it to give an advisory opinion on "any legal question" submitted by a competent authority, and it observed that Article 96(1) provides that "[t]he General Assembly or the Security Council" may request the Court to give an advisory opinion on "any legal question."¹²

In its written statement, Israel argued that the General Assembly had acted *ultra vires* the Charter when it adopted its resolution requesting the advisory opinion. In particular, Israel contended that the Assembly lacked authority to adopt such a resolution when the Security Council was already seized of the matter. Israel pointed to Article 12(1) of the UN Charter, which provides: "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."

The Court dismissed this argument on two grounds. First, it asserted that a request for an advisory opinion is not a recommendation, and thus not prohibited by Article 12(1).¹³ Second, the Court said that the Council was not, in any case, "exercising" its "functions" on the matter. The Court acknowledged that early United Nations practice had held that the Council was exercising its "functions" if it had a matter on its agenda, but the Court noted that the practice had evolved to the point where the Assembly is precluded from acting only if the Council is exercising its functions "at this moment," or at least was exercising them in the recent past.¹⁴ The Court found the modern practice of the Assembly "consistent with" Article 12(1).¹⁵

¹¹ HCJ 2056/04, *Beit Sourik Village Council v. Israel* (June 30, 2004), 43 ILM 1099 (2004) [hereinafter *Beit Sourik*].

¹² Advisory Opinion, *supra* note 8, paras. 14–15.

¹³ *Id.*, para. 25.

¹⁴ *Id.*, para. 27 (quoting the UN legal counsel, UN Doc. A/C.3/SR.1637, para. 9 (1968)).

¹⁵ *Id.*, para. 28.

The ICJ also rejected Israel's arguments that the Assembly's request was incompatible with the Uniting for Peace Resolution, which authorizes the Assembly to make "appropriate recommendations to Members for collective measures" when the Council "fails to exercise its primary responsibility" to maintain international peace and security.¹⁶ The Court observed that a permanent member of the Council (the United States) had vetoed draft resolutions condemning settlements and, in particular, the construction of the wall itself.¹⁷ The Court found it "irrelevant" that the Council had not taken up a resolution specifically considering a request for an advisory opinion.¹⁸ Nor did the Court seem to think it relevant that the Security Council had adopted Resolution 1515, endorsing the Quartet's road map for peace, on November 19, 2003, just nineteen days before passage of the resolution requesting an advisory opinion on the wall.

The Court likewise dismissed Israel's procedural arguments that the Tenth Emergency Special Session of the Assembly lacked the authority to request the advisory opinion. The Court found no legal basis for challenging the "rolling" character of the special session, which was initially convened in 1997 and has met eleven times since.¹⁹ Nor did the Court find any "rule of the Organization" forbidding the special session to meet and conduct business at the same time as the regular session of the General Assembly.²⁰ Finally, the Court noted that the special session appeared to have been convened in accordance with the Assembly's Rules of Procedure, and it saw no reason to rebut the usual presumption that a resolution of a UN organ is valid if adopted in accordance with that organ's procedural rules.²¹

Next the Court took up Israel's contention that the issue was not a "legal question" within the meaning of Article 96(1) of the Charter and Article 65(1) of the Court's Statute. Israel contended, among other things, that the question was not phrased with sufficient clarity and specificity and did not lend itself to judicial resolution.²² Indeed, there were certain ambiguities in the question posed by the Assembly. For example, it asked what the "legal consequences" of construction of the wall were, but it did not ask whether construction of the wall itself was unlawful. In addition, the Assembly did not specify whether it meant consequences for all states, for international organizations, or for Israel and the Palestinians alone.

The Court found that the question presented was "legal." Lack of clarity did not "deprive the Court of jurisdiction" but, instead, required "clarification in interpretation" by it. The Court noted that it had answered ambiguous or unspecific requests on several prior occasions.²³ Interpreting the Assembly's request, the Court found that it would indeed be obliged to address the underlying substantive question of the lawfulness of construction of the wall.²⁴ And it did not find the task of assessing any resulting "legal consequences" to be unduly abstract or incapable of determination.²⁵ Likewise, the Court rejected any suggestion that the question was "political" rather than "legal." Relying on the advisory opinion on *Nuclear Weapons*, the Court found that

¹⁶ GA Res. 377A (V), para. 1 (Nov. 3, 1950).

¹⁷ Advisory Opinion, *supra* note 8, para. 31.

¹⁸ *Id.*, para. 32.

¹⁹ *Id.*, para. 33.

²⁰ *Id.*, para. 34.

²¹ *Id.*, para. 35 (citing 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, 22, para. 20 (June 21)).

²² Written Statement of the Government of Israel on Jurisdiction and Propriety 83 (Jan. 30, 2004), Advisory Opinion, *supra* note 8 [hereinafter Israel Written Statement].

²³ Advisory Opinion, *supra* note 8, para. 38 (citing Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928 PCIJ (ser. B) No. 16(I), at 14-16; Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 ICJ REP. 73, 87-89 (Dec. 20); Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 ICJ REP. 325, 348 (July 20); Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, 1956 ICJ REP. 23, 25 (June 1); Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ REP. 151, 157-62 (July 20)).

²⁴ *Id.*, para. 39.

²⁵ *Id.*, para. 40.

the “fact that a legal question also has political aspects” did not mean the question was not a legal one.²⁶ By a unanimous vote, the Court found that it had jurisdiction.²⁷

Propriety of Exercising Jurisdiction

The Court next turned to the arguments of Israel and the United States that it should exercise its discretion not to hear the case. Article 65(1) of the Court’s Statute provides that the Court “may” give an advisory opinion if requested, not “shall” give one. The Court reiterated its traditional position that this language gives it discretion not to give an opinion, but that ordinarily it should not exercise this discretion without “compelling reasons.”²⁸

Israel and the United States had argued that the Court should exercise its discretion because an interested party, Israel, had never consented to any adjudication of its dispute with the Palestinians. These states cited the Permanent Court’s refusal to issue an advisory opinion in *Status of Eastern Carelia* because Russia, an interested party, had (among other things) refused to consent to any form of dispute resolution.²⁹ But the International Court found that *Eastern Carelia* was not controlling here. The Court distinguished *Eastern Carelia* on the grounds that it had involved a state that was not a member of the League of Nations or a party to the Court’s Statute.³⁰

Nor was the Court persuaded by the argument that an advisory opinion might interfere with the Middle East peace process, in particular the road map to peace sponsored by the Quartet.³¹ The Court said it was “not clear . . . what influence the Court’s opinion might have” on negotiations, and it mentioned that states had conflicting views on this question. Accordingly, it held that the possibility of interference was not a “compelling reason” to refuse to issue an opinion.³²

The ICJ then turned to the argument that it did not have sufficient facts on which to base a decision. In its written submission, Israel had asserted that a complete and thorough examination of the question would require a detailed inquiry into the nature of the terrorist threat, the effectiveness of various alternative routes, the motives behind construction of the fence, the extent of infringements on Palestinian life and freedom of movement, and a variety of other complex factual questions.³³ Even in a contentious proceeding, Israel argued, it would be difficult, if not impossible, to conduct a fair inquiry into such highly politicized factual questions. In this advisory proceeding, Israel noted, participants were given only six weeks in which to file written materials. Under all these circumstances, Israel argued, the Court “could not possibly have the necessary material before it” to make “findings of fact.”³⁴ Accordingly, Israel observed that it would not file a submission on the merits in such circumstances. Because Israel chose not to address the merits, it argued that the Court should follow its precedent in *Eastern Carelia*, in which Russia likewise refused to participate in an advisory proceeding.³⁵

²⁶ *Id.*, para. 41; see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226, 234, para. 13 (July 8).

²⁷ *Id.*, para. 163(1) (*dispositif*).

²⁸ *Id.*, para. 44 (quoting *Certain Expenses of the United Nations*, *supra* note 23, at 155).

²⁹ *Status of Eastern Carelia*, Advisory Opinion, 1923 PCIJ (ser. B) No. 5, at 27–29 (July 23).

³⁰ Advisory Opinion, *supra* note 8, para. 44 (quoting *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 26, at 235–36, para. 14).

³¹ See *A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, UN Doc. S/253/2003, annex. The road map proposes a three-phase peace process leading to a two-state solution. The first phase calls for an end to terrorism and the construction of Palestinian civic institutions. The second, transitional phase would include conferences and confidence-building measures, all of which would culminate in the establishment of a Palestinian state. The third and final phase would lead to a permanent status agreement on issues such as borders, refugees, settlements, and Jerusalem, as well as a larger peace agreement involving other Arab states, such as Syria and Lebanon. Although the details and timing of the road map differ from those of the Oslo Accords, the essential ingredients are similar: interim measures that lead eventually to a permanent status agreement.

³² Advisory Opinion, *supra* note 8, para. 53.

³³ Israel Written Statement, *supra* note 22, at 107–10.

³⁴ *Id.* at 110.

³⁵ *Id.*

The opinion for the Court's majority rejected these arguments. The Court observed that it had in its possession a voluminous report by the secretary-general³⁶ and detailed submissions from Palestine and other participants. The Court also noted that while Israel's written statement was confined to jurisdiction and propriety, it "contained observations on other matters," including security concerns. The Court added that many other documents relating to Israel's security concerns were already in the "public domain."³⁷ "Moreover," the Court wrote, "the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task."³⁸

Next, the Court dismissed the contention that an advisory opinion would serve no useful purpose. It acknowledged that the General Assembly had already declared the wall illegal and that the Assembly had not made clear why it wanted an opinion. But the Court invoked its reasoning from the *Nuclear Weapons* advisory opinion, in which it had rejected a similar argument.³⁹ It held that it could not "substitute its assessment of the usefulness of the opinion" for that of the General Assembly, and that the Assembly "has not yet determined all the possible consequences of its own resolution."⁴⁰

Finally, the Court rejected Israel's argument that an advisory opinion was inappropriate because of the doctrine *nullus commodum capere potest de sua injuria propria*—i.e., that Palestine came to the proceedings without "clean hands" insofar as it was responsible for terrorist attacks on Israeli civilians. The Court quickly dismissed this doctrine as not "pertinent" because the General Assembly, not Palestine, had requested the advisory opinion.⁴¹ Thus, the Court found, by a vote of 14-1, that there was no "compelling reason" to decline to give an advisory opinion.⁴² Judge Buerghental, the lone dissenter on this holding, filed a detailed separate opinion.⁴³ Other judges, including Judge Hisashi Owada and Judge Rosalyn Higgins, voted with the majority on this issue but, in separate opinions, expressed qualms about the Court's reasoning.⁴⁴

The Merits

Proceeding to the merits, the International Court first presented a general overview of the facts, beginning with a rather brief history of the Israeli-Palestinian conflict,⁴⁵ and concluding with a somewhat more detailed description of the wall and its route.⁴⁶ The Court then articulated what it saw as the governing principles of law. It started by invoking the prohibition on the use of force in Article 2(4) of the UN Charter.⁴⁷ It then reaffirmed the existence of a right of peoples to self-determination, a right the Court characterized as *erga omnes*.⁴⁸ And the Court found that various norms of international humanitarian law were relevant.⁴⁹

³⁶ Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13, UN Doc. A/ES-10/28 (2003) [hereinafter S-G Report] (containing a later Written Statement of the United Nations and accompanied by a dossier of documents, both available at <<http://www.icj-cij.org>>).

³⁷ Advisory Opinion, *supra* note 8, para. 57.

³⁸ *Id.*, para. 58.

³⁹ *Id.*, para. 61 (quoting Legality of the Threat or Use of Nuclear Weapons, *supra* note 26, at 237, para. 16).

⁴⁰ Advisory Opinion, *supra* note 8, para. 62.

⁴¹ *Id.*, para. 64.

⁴² *Id.*, para. 163(2) (*dispositif*).

⁴³ See *infra* p. 19.

⁴⁴ See *infra* pp. 16–19. For examinations of the Court's view of its advisory function in the *Wall* case, see Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AJIL 26 (2005) (in this Agora); Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AJIL 42 (2005) (in this Agora).

⁴⁵ Advisory Opinion, *supra* note 8, paras. 70–78.

⁴⁶ *Id.*, paras. 79–85.

⁴⁷ *Id.*, para. 87.

⁴⁸ *Id.*, para. 88.

⁴⁹ *Id.*, para. 89.

The ICJ's discussion of humanitarian law was particularly noteworthy for its treatment of the Fourth Geneva Convention.⁵⁰ Israel has long taken the position that the Convention does not apply *de jure* to the Israeli occupation of the West Bank and the Gaza Strip, but it has nonetheless voluntarily applied the humanitarian provisions of the Convention *de facto*. The Palestinians and most states have long taken the view that the Convention does apply *de jure* to the Israeli occupation. Common Article 2 of the Convention provides, in part:

[1] In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of 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.

[2] The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Israel has long argued that the only basis for applying the Convention to an occupation of territory of a party to the Convention is set forth in paragraph 2, and that paragraph 2 by its terms limits its applicability to occupation of the territory of a high contracting party. Israel argues that the West Bank is not such territory, since only two states (Britain and Pakistan) ever recognized Jordan's assertion of sovereignty over the West Bank, which Jordan held from 1948 to 1967.

The International Court rejected Israel's reading of common Article 2. The Court observed that paragraph 1 lays down only two conditions for applicability: first, that there be armed conflict; and second, that it take place between two or more contracting parties. If these conditions are satisfied, the Court said, then "the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties." In other words, the Court adopted the view that *both* paragraphs 1 and 2 cover certain instances of occupation of enemy territory. Paragraph 2, it said, was not intended to limit the scope of paragraph 1 by "excluding therefrom territories not falling under the sovereignty of one of the contracting parties." Instead, paragraph 2 added to, rather than subtracted from, the universe of occupations already covered by paragraph 1. According to the Court, paragraph 2 merely says that "even if occupation effected during the conflict met no armed resistance, the Convention is still applicable."⁵¹ The Court found support for its interpretation in the *travaux préparatoires* of the Convention, the practice of the contracting parties after the adoption of the Convention, the practice of the International Committee of the Red Cross, the practice of the UN General Assembly and Security Council, and the jurisprudence of the Israeli Supreme Court.⁵²

The Court found one further source of law to be relevant: international human rights law. Israel has taken the position that the human rights treaties to which it is party, including the Civil and Political Covenant and the Economic and Social Covenant, are intended to apply only in time of peace, and that humanitarian law is applicable in time of armed conflict. The Court noted that it had rejected a similar argument in the *Nuclear Weapons* advisory proceeding, having dismissed the argument that human rights law applies only in peace. Instead, the Court reasoned there, the "right to life" norm in human rights law did apply in time of war, but its content was defined by the overlapping *lex specialis*—humanitarian law.⁵³ Reiterating this point in somewhat broader terms, the *Wall* advisory opinion took the view that "the protection offered by human rights conventions does not cease in case of armed conflict," except insofar as that protection can be derogated from pursuant to the terms of human rights treaties.⁵⁴

⁵⁰ Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287 [hereinafter Fourth Geneva Convention].

⁵¹ Advisory Opinion, *supra* note 8, para. 95.

⁵² *Id.*, paras. 95–100.

⁵³ *Id.*, para. 105 (quoting Legality of the Threat or Use of Nuclear Weapons, *supra* note 26, at 240).

⁵⁴ *Id.*, para. 106.

The opinion went on to conclude that the Human Rights Covenants apply to the human rights practices of a state outside its own territory. Article 2(1) of the Civil and Political Covenant provides that each party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights” guaranteed by the Covenant.⁵⁵ Canvassing the *travaux préparatoires* of the Covenant, and in particular the Human Rights Committee’s view that this provision has extraterritorial effect, the Court concluded that it applied to the conduct of Israel outside its own territory.⁵⁶ The Economic and Social Covenant does not contain a provision on its territorial scope, but the International Court embraced the view of the Committee on Economic, Social and Cultural Rights that a “State party’s obligations under the Covenant apply to all territories and populations under its effective control.”⁵⁷ The Court reached a similar conclusion about the extraterritorial scope of the Convention on the Rights of the Child.⁵⁸

Having determined the applicable law, the Court then sought to apply it to the facts. It first took note of conflicting views of participants on the purpose and effect of the wall. Palestinians and many other participants argued that the purpose of the wall was not simply to combat terror, but also to “create facts” on the ground that would lead to a de facto annexation of a significant portion of the West Bank. These participants also stressed the deleterious effects of the wall on Palestinian daily life, the Palestinian economy, and basic liberties like travel and work. By contrast, Israel has argued that the purpose of the wall is solely to prevent terrorist attacks, not to “create facts”; Israel says the wall will be temporary. In addition, Israel claims that any burden on Palestinian day-to-day life is far outweighed by the security benefits of the wall, which prevents suicide bombers and other terrorists from attacking Israeli civilians in Israel and in Israeli settlements on the West Bank.⁵⁹

The Court then developed an argument that construction of the wall violated Palestinian rights of self-determination—an argument that Palestine and other participants had pressed in their written submissions.⁶⁰ First citing Security Council Resolution 242, the Court reaffirmed the general rule against acquisition of territory by force. Citing, next, Israel’s recognition of the Palestine Liberation Organization (PLO) as the representative of the “Palestinian people,” the Court reaffirmed this people’s right of self-determination. Finally citing Article 49(6) of the Fourth Geneva Convention, which forbids the occupying power to “deport or transfer parts of its own civilian population into the territory it occupies,” the Court reached the conclusion that Israeli settlements are unlawful.⁶¹ Israel has long argued that “drop by drop” settlement by individuals is not a state-sponsored “transfer” within the meaning of Article 49(6), but the ICJ apparently adopted the view that state-sponsored subsidies and incentives are the equivalent of a “transfer” of the population to those settlements. The Court invoked the practice of the Security Council in support of this conclusion.⁶²

This holding on settlements led the Court to its conclusions on self-determination. The Court “note[d] the assurance given by Israel” that the wall would be temporary, but it concluded that the wall creates “a ‘fait accompli’ on the ground that could well become permanent” and lead to de facto annexation.⁶³ Moreover, the wall was an “expression *in loco*” of Israel’s “illegal” settlement

⁵⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 2(1), 999 UNTS 331 [hereinafter ICCPR].

⁵⁶ Advisory Opinion, *supra* note 8, paras. 109–11.

⁵⁷ *Id.*, para. 112 (quoting Concluding Observations: Israel, UN Doc. E/C.12/1/Add.90, paras. 15, 31 (2003), available at <<http://www.unhcr.ch/tbs/doc.nsf>>). For the Covenant, see International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 [hereinafter ICESCR].

⁵⁸ Advisory Opinion, *supra* note 8, para. 113. For the Convention, see Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3.

⁵⁹ Advisory Opinion, *supra* note 8, paras. 115–16.

⁶⁰ See, e.g., Written Statement Submitted by Palestine 305–06 (Jan. 30, 2004), Advisory Opinion, *supra* note 8; Written Statement Submitted by the Hashemite Kingdom of Jordan 126–30 (Jan. 30, 2004), Advisory Opinion, *supra*; Written Statement of the League of Arab States 62–65 (Jan. 2004), Advisory Opinion, *supra*.

⁶¹ Advisory Opinion, *supra* note 8, paras. 117–20.

⁶² *Id.*, para. 120.

⁶³ *Id.*, para. 121.

policy, one that posed a "risk of further alterations to the demographic composition" of the West Bank because of the possible Palestinian "departure" from affected areas. The Court concluded that construction of the wall "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right."⁶⁴

The majority opinion next turned to humanitarian law and human rights law. It first noted that Article 6(3) of the Fourth Geneva Convention states that certain provisions of the Convention remain applicable "for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory." These provisions include Article 49 (prohibiting deportations from occupied territory, and transfer of the occupier's civilian population into it), Article 53 (restricting the destruction of private property), and Article 59 (obliging the occupier to permit relief supplies to flow into occupied territory).⁶⁵ The Court likewise noted that some provisions of human rights law are applicable to the occupation, and it observed that Israel had exercised its right of derogation only from Article 9 of the Civil and Political Covenant, relating to liberty and security of person, as well as arbitrary arrest and detention.⁶⁶ In particular, the Court emphasized the applicability of Article 17(1) of the Covenant, which forbids "arbitrary or unlawful interference" with "privacy, family, home or correspondence," and Article 12, which protects freedom of movement.⁶⁷ Various provisions of the Economic and Social Covenant were also deemed pertinent, including Articles 6 and 7, which guarantee the right to work, and the protections relating to food, hunger, children, health, and education in Articles 10 through 14.⁶⁸ The Court reached similar conclusions regarding various provisions of the Convention on the Rights of the Child.⁶⁹

Interestingly, the Court also found relevant several instruments obliging Israel to afford free access to holy places. The Court indicated that access to the holy places had been guaranteed in the British Mandate for Palestine and in the 1947 UN General Assembly Plan of Partition for Palestine.⁷⁰ And it found that Israel remained bound by undertakings in its 1949 General Armistice Agreement with Jordan, which obliged the parties to establish a joint committee to deal with matters on which "agreement in principle already exists," including "free access" to the holy places.⁷¹ The Court considered that this obligation had "further been confirmed" by Article 9(1) of the 1994 peace treaty between Israel and Jordan, which provides in general terms that each party will provide "freedom of access to places of religious and historical significance."⁷² The Court's reliance on these materials was surprising, given that neither Palestine nor Jordan had emphasized the holy places in its written statement.⁷³

The Court next found that Israel had violated various provisions of humanitarian law relating to economic and social rights.⁷⁴ Citing a report of the secretary-general, the Court stated that the wall had imposed substantial restrictions on the movement of Palestinians (but not of Israeli citizens), and that it had had serious deleterious effects on the agriculture, education, health

⁶⁴ *Id.*, para. 122.

⁶⁵ *Id.*, para. 126; see Fourth Geneva Convention, *supra* note 50, Arts. 6(3), 49, 53, 59.

⁶⁶ Advisory Opinion, *supra* note 8, para. 127.

⁶⁷ *Id.*, para. 128; see ICCPR, *supra* note 55, Arts. 17(1), 12.

⁶⁸ Advisory Opinion, *supra* note 8, para. 130; see ICESCR, *supra* note 57, Arts. 6, 7, 10–14.

⁶⁹ Advisory Opinion, *supra* note 8, para. 131.

⁷⁰ *Id.*, para. 129.

⁷¹ General Armistice Agreement, Apr. 3, 1949, Isr.-Jordan, Art. VIII(2), available at <<http://www.yale.edu/lawweb/avalon/mideast/arm03.htm>>.

⁷² Treaty of Peace, Oct. 26, 1994, Isr.-Jordan, Art. 9(1), 34 ILM 43 (1995), quoted in Advisory Opinion, *supra* note 8, para. 129.

⁷³ See Written Statement Submitted by Palestine, *supra* note 60, at 302–07 (summarizing Palestine's legal argument); Written Statement Submitted by the Hashemite Kingdom of Jordan, *supra* note 60, at 152–55 (summary of Jordan's argument); see also Written Statement of the League of Arab States, *supra* note 60, at 62–103 (emphasizing self-determination, humanitarian law, and human rights law but not instruments relating to the holy places).

⁷⁴ Advisory Opinion, *supra* note 8, para. 132 (citing Regulations Respecting the Laws and Customs of War on Land, Arts. 46, 52, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Fourth Geneva Convention, *supra* note 49, Art. 53).

care, and overall economy of Palestine.⁷⁵ The Court acknowledged that Israel had provided access gates along the wall, but they were “few in number in certain sectors and opening hours appear to be restricted and unpredictably applied.” In this connection, the ICJ suggested that the wall “is tending to alter the demographic composition” of the West Bank, contributing to what the Court described as a violation of Article 49(6) of the Fourth Geneva Convention.⁷⁶

Acknowledging that some provisions of humanitarian law permit an occupier to take certain security measures when militarily necessary, the Court still noted that other provisions contained no such exception. For example, no exception for military necessity could be found in Article 49(6) of the Fourth Geneva Convention (restricting transfers of population into occupied territory) or Article 46 of the Hague Regulations (obliging respect for, and prohibiting confiscation of, private property). On the other hand, the Court conceded that Article 49(1) of the Fourth Geneva Convention, which prohibits deportations and mass transfers of population from occupied territory, is qualified by Article 49(2), which permits “evacuation” if the “security of the population or imperative military reasons so demand.” Likewise, the Court acknowledged that Article 53 of the Convention prohibits destruction of private property except “where such destruction is rendered absolutely necessary by military operations.”⁷⁷ But the Court concluded simply that “on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.”⁷⁸

The Court quickly rejected Israel’s self-defense arguments, observing that Article 51 of the Charter covers attacks “by one State against another State” and that Israel was not claiming that terror attacks against it were “imputable to a foreign State.” In addition, Israel “exercises control” over the West Bank, and the terrorist threat “originates within, and not outside, that territory.” The situation was thus “different” from those elaborated in Security Council Resolutions 1368 and 1373, which reaffirmed the inherent right of self-defense in the context of international terrorism. Therefore, the Court concluded, Article 51 of the Charter had “no relevance” to the current case.⁷⁹

Finally, the Court held that Israel could not justify the wall on grounds of necessity. According to Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, an act can be justified on grounds of necessity if it is “the only way for the State to safeguard an essential interest against a grave and imminent peril.”⁸⁰ After quoting this provision, the Court said simply that it was “not convinced” that the wall was “the only means” for Israel to combat the terrorist threat.⁸¹

Thus, by a 14-1 vote, the Court concluded that construction of the wall was “contrary to international law.”⁸² The applicable portion of the *dispositif*, paragraph 3(A), was not broken down in any more detail. As we shall see, at least one or two judges voted for this subparagraph of the *dispositif* despite not agreeing with all the analysis supporting it.

The Court next turned to the legal consequences of this violation. Beginning with consequences for Israel, the Court said that Israel had a duty to cease construction of the wall and dismantle those parts of it that extend past the Green Line into the West Bank, including East Jerusalem.⁸³ Invoking *Chorzów Factory*, the Court added that Israel was obliged “to make reparation

⁷⁵ *Id.*, paras. 132–33 (citing S-G Report, *supra* note 36).

⁷⁶ *Id.*, para. 133.

⁷⁷ Fourth Geneva Convention, *supra* note 50, Arts. 49, 53.

⁷⁸ Advisory Opinion, *supra* note 8, para. 135.

⁷⁹ *Id.*, para. 139.

⁸⁰ Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its First-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, Art. 25, UN Doc. A/56/10 (2001), reprinted in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002).

⁸¹ Advisory Opinion, *supra* note 8, para. 140.

⁸² *Id.*, para. 163(3)(A) (*dispositif*). Again, Judge Buergenthal’s was the sole dissenting vote. See *infra* p. 19.

⁸³ Advisory Opinion, *supra* note 8, paras. 149–51.

for the damage caused to all the natural or legal persons concerned.”⁸⁴ This obligation entailed restitution of private property or, if that was impossible, compensation.⁸⁵ These conclusions garnered 14 votes, with Judge Buergenthal again alone in dissent.⁸⁶

The Court next articulated various legal consequences for other states and international organizations. Citing *Barcelona Traction*, the Court ruled that Israel had violated some obligations *erga omnes*, such as those respecting Palestinian self-determination and certain provisions of humanitarian law.⁸⁷ The majority also took the view that common Article 1 of the Fourth Geneva Convention, which obliges states to “respect and ensure respect for” the Convention, meant that every state party was obliged “to ensure that the requirements of the instruments in question are complied with.”⁸⁸ Consequently, states are bound “not to recognize the illegal situation resulting from the construction of the wall” and “not to render aid or assistance in maintaining the situation created by such construction.”⁸⁹ The vote on this particular holding was 13-2, with Judge Kooijmans joining Judge Buergenthal in dissent.⁹⁰ Lastly, “the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation” brought about by construction of the wall.⁹¹

The Court ended its opinion with some broader thoughts on the Middle East peace process. “Illegal actions,” it said, had been taken by “all sides” of the conflict, and both Israel and Palestine were obliged to respect humanitarian law. It called for a peaceful, negotiated solution to the conflict in accordance with Security Council resolutions, it noted that the road map is the most recent diplomatic effort to achieve such a solution, and it encouraged the General Assembly—the addressee of the advisory opinion—to take action to facilitate such a solution.⁹²

The Separate Opinions

Seven judges filed separate opinions. Judge Abdul Koroma stated that construction of the wall “has involved the annexation” of parts of the West Bank.⁹³ He endorsed all the Court’s holdings and emphasized what he saw as the particular importance of those on self-determination, humanitarian law, and obligations *erga omnes*.⁹⁴ Judge Awn Al-Khasawneh stressed the importance of the Court’s holding on the applicability of the Fourth Geneva Convention, but he expressed less enthusiasm for the Court’s repeated references to the road map. While he found “nothing wrong” with endorsing negotiated settlement, Judge Al-Khasawneh said that negotiations were a “means to an end” rather than an end in and of themselves, and he expressed doubt about the viability of the road map.⁹⁵

Judge Nabil Elaraby also praised the advisory opinion, in particular its conclusions on humanitarian law and the role of the United Nations, but he maintained that the *dispositif* should have contained some reference to the Court’s condemnation of de facto annexation.⁹⁶ He also adverted to Israel’s unsuccessful motion to disqualify him because of statements he had made before he joined the Court. He insisted that he had been guided by Judge Manfred Lachs’s “wise

⁸⁴ *Id.*, para. 152 (citing *Factory at Chorzów* (Ger. v. Pol.), 1928 PCIJ (ser. A) No. 17, at 47 (Sept. 13)).

⁸⁵ *Id.*, para. 153.

⁸⁶ *Id.*, para. 163(3)(B), (C) (*dispositif*).

⁸⁷ *Id.*, para. 154 (citing *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Second Phase, 1970 ICJ REP. 5, 32, para. 33 (Feb. 5)).

⁸⁸ *Id.*, para. 158.

⁸⁹ *Id.*, para. 159.

⁹⁰ *Id.*, para. 163(3)(D) (*dispositif*).

⁹¹ *Id.*, para. 160.

⁹² *Id.*, para. 162.

⁹³ Advisory Opinion, *supra* note 8, Separate Opinion of Judge Koroma, 43 ILM at 1056, para. 2.

⁹⁴ *Id.*, paras. 5–10.

⁹⁵ Advisory Opinion, *supra* note 8, Separate Opinion of Judge Al-Khasawneh, 43 ILM at 1075, para. 13.

⁹⁶ Advisory Opinion, *supra* note 8, Separate Opinion of Judge Elaraby, 43 ILM at 1081, para. 2.5.

maxim," in his separate opinion in the *Nicaragua* Judgment, that a judge should be "impartial, objective, detached, disinterested and unbiased."⁹⁷

Judge Owada, also writing separately, suggested that the Court's treatment of the justiciability question was not sufficiently nuanced. Judge Owada agreed that *Eastern Carelia* was distinguishable because Russia had not been a member of the League of Nations, and he stressed that the Permanent Court had found it "unnecessary" to decide more generally whether the absence of consent should preclude an advisory proceeding when there was an ongoing bilateral dispute.⁹⁸ But he thought that Israel's refusal to consent should at least be a "factor" in deciding whether to issue an advisory opinion, and he expressed concern that the Court had relied too heavily on the *Namibia* advisory opinion as precedent—a case in which the consequences of the act of a UN organ were at issue.⁹⁹ Likewise, Judge Owada observed that Israel's nonparticipation imposed an obligation on the Court to be scrupulously fair. In that connection, Israel would have been justified in seeking a judge ad hoc for the proceedings;¹⁰⁰ furthermore, the available evidence was "wanting" as to the "Israeli side of the picture."¹⁰¹ More generally, Judge Owada emphasized the need to recall the broader context, including "violence perpetrated by both sides against innocent civilian population of each other."¹⁰²

Judge Higgins similarly found the question of propriety less "straightforward" than the Court's majority, though (like Judge Owada) she ultimately voted with the majority. Also like Judge Owada, she quoted the *Western Sahara* advisory opinion, which maintained that "lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character."¹⁰³ In *Western Sahara*, the Court had emphasized that it was not issuing an opinion "in order that [the General Assembly] may later, on the basis of the Court's opinion, exercise its powers and functions" but, instead, to assist the Assembly in carrying out its duties with respect to decolonization.¹⁰⁴ In the *Wall* case, Judge Higgins wrote, "it is the reverse circumstance that obtains," a point on which she found the Court's majority "strikingly silent."¹⁰⁵

Echoing Judge Owada, Judge Higgins emphasized the need to consider the dispute in a broader context. The Court's treatment of the history of the Arab-Israeli dispute was "neither balanced nor satisfactory."¹⁰⁶ According to Judge Higgins, the Court should have "spelled out what is required of both parties," using Resolution 242 as a frame of reference. She added that the *dispositif* should have included some reference to the parties' mutual obligations to move forward simultaneously on a peaceful resolution of their dispute.¹⁰⁷

Judge Higgins voted for paragraph 3(A) of the *dispositif*—the general finding that Israel had violated international law—but she was critical of much of the Court's analysis supporting that conclusion. She found the Court's treatment of humanitarian law "somewhat light," and she chided the Court for not indicating more clearly which provisions of humanitarian law Israel had violated, and which it had not. In fact, she read the opinion as finding that Israel had violated only Articles 49 and 53 of the Fourth Geneva Convention and Articles 46 and 52 of the Hague

⁹⁷ See *id.*, 2d para. (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 158 (June 27) (Lachs, J., sep. op.)); see also Advisory Opinion, *supra* note 8, para. 8; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Order (Int'l Ct. Justice Jan. 30, 2004) (rejecting Israel's motion by a vote of 14-1); *id.*, Dissenting Opinion of Judge Buerghenthal.

⁹⁸ Advisory Opinion, *supra* note 8, Separate Opinion of Judge Owada, 43 ILM at 1091, para. 7 (quoting Status of Eastern Carelia, Advisory Opinion, 1923 PCIJ (ser. B) No. 5, at 27 (July 23)).

⁹⁹ *Id.*, paras. 10–11.

¹⁰⁰ *Id.*, para. 19.

¹⁰¹ *Id.*, para. 22.

¹⁰² *Id.*, para. 31.

¹⁰³ Advisory Opinion, *supra* note 8, Separate Opinion of Judge Higgins, 43 ILM at 1058, para. 10 (quoting Western Sahara, Advisory Opinion, 1975 ICJ REP. 12, 25, paras. 32–33 (Oct. 16)).

¹⁰⁴ *Id.*, para. 12 (quoting Western Sahara, *supra* note 103, at 26–27, para. 39).

¹⁰⁵ *Id.*, paras. 12, 13.

¹⁰⁶ *Id.*, para. 16.

¹⁰⁷ *Id.*, para. 18.

Regulations.¹⁰⁸ As to the Human Rights Covenants, Judge Higgins wondered whether it was appropriate for the Assembly to seek an advisory opinion when a committee for each Covenant already monitors compliance in detail. She added: “[W]hile many, many States are not in compliance with their obligations under the two Covenants, the Court is being asked to look only at the conduct of Israel in this regard.”¹⁰⁹ Judge Higgins also criticized the Court’s holding that the wall violates Palestinian rights of self-determination. She accepted the existence of a post-colonial right of self-determination, “[b]ut it seems . . . quite detached from reality for the Court to find that it is the wall that presents a ‘serious impediment’ to the exercise of this right.”¹¹⁰ Judge Higgins further found fault with much of the Court’s self-defense analysis, reiterating her view that Article 51 does not in itself require an armed attack by a “state.” In any case, she disputed the Court’s conclusion that an attack originating in the West Bank could not be an armed attack by a “state.”¹¹¹

Judge Higgins voted for the remaining portions of the *dispositif*, but she again expressed reservations about the supporting analysis. She concurred with the Court’s holding that states had a duty not to recognize or support the resulting illegal situation, but she saw no need to invoke the concept of obligations *erga omnes* in support of this conclusion.¹¹² She, too, expressed reservations about the availability of evidence reflecting the Israeli perspective.¹¹³

Judge Kooijmans also expressed some reservations about the Court’s analysis, and on one issue—the legal consequences for states—he cast a dissenting vote. Like Judges Higgins and Owada, he thought the question should have been dealt with in a broader context, taking account of legal obligations on both sides of the Israeli-Palestinian conflict.¹¹⁴ He concurred with the Court that the request for the advisory opinion was valid, but he believed that the General Assembly would have been barred from making its request “if the Security Council had been considering the specific issue of the construction of the wall without yet having taken a decision.”¹¹⁵ Judge Kooijmans felt “considerable hesitation” about the propriety of giving an opinion, partly out of fear of “politicization” of the Court, and partly because he did not fully understand how the General Assembly intended to use the opinion in its work.¹¹⁶ On the merits, Judge Kooijmans shared some of Judge Higgins’s doubts about the applicability of the right of self-determination.¹¹⁷ He also said that Security Council Resolutions 1368 and 1373 had broadened the notion of self-defense so as to include “international terrorism” not necessarily attributable to a particular state, and he chided the Court for having “bypassed” this wrinkle on self-defense law. Nonetheless, he did not see terror attacks emanating from occupied territory as “international.”¹¹⁸

Judge Kooijmans did, however, dissent from the Court’s holding in paragraph 3(D) of the *dispositif* that all states are under a duty not to “recognize the illegal situation” created by the wall, and that states party to the Fourth Geneva Convention have a further duty to “ensure compliance by Israel” with that Convention. Judge Kooijmans had no problem with a duty not to recognize an illegal “promulgation,” such as the annexation of Manchuria by Japan, but he found it meaningless to speak of an obligation not to recognize an “illegal fact.”¹¹⁹ As to the Fourth Geneva Convention, he cited one recent study of the *travaux préparatoires* suggesting that the “ensure respect” language was “mainly intended to ensure respect of the conventions by the

¹⁰⁸ *Id.*, paras. 24, 25.

¹⁰⁹ *Id.*, para. 27.

¹¹⁰ *Id.*, para. 30.

¹¹¹ *Id.*, paras. 33, 34.

¹¹² *Id.*, paras. 37–39.

¹¹³ *Id.*, para. 40.

¹¹⁴ Advisory Opinion, *supra* note 8, Separate Opinion of Judge Kooijmans, 43 ILM at 1065, paras. 3–13.

¹¹⁵ *Id.*, para. 18.

¹¹⁶ *Id.*, paras. 14–28.

¹¹⁷ *Id.*, paras. 31–33.

¹¹⁸ *Id.*, paras. 35–36.

¹¹⁹ *Id.*, paras. 43–44.

population as a whole.”¹²⁰ While Judge Kooijmans did not necessarily support as restrictive a reading as might have originally prevailed in 1949, he was nonetheless uncertain about both the correctness of the Court’s holding as a statement of “positive law,” and what the obligation would entail other than “diplomatic demarches” to Israel.¹²¹

Judge Buergenthal voted against every subparagraph of the *dispositif* except the finding that the Court had jurisdiction. His dissenting votes did not mean he disagreed with everything the Court said; in fact, he found “much in the Opinion with which I agree.” Instead, his votes reflected his view that the Court should have exercised its discretion not to issue an opinion because it lacked the factual record necessary to reach an informed conclusion.¹²² In his view, the “nature” and “impact” of cross-Green Line terror attacks were “never really seriously examined by the Court.” Had the majority considered Israel’s justifications for the wall more carefully, Judge Buergenthal said, “that would have given the Opinion the credibility I believe it lacks.”¹²³

Judge Buergenthal also criticized the Court for so quickly dismissing Israel’s self-defense arguments. Like some of the concurring judges, Judge Buergenthal noted that Article 51 is not by its terms limited to state-sponsored “armed attack,” and he stressed the broad wording of the Security Council’s recent resolutions on terrorism. He therefore took the view that an attack emanating from the West Bank across the Green Line did implicate Article 51, and he faulted the Court for having failed to analyze whether the wall was a necessary and proportionate response to the terror threat.¹²⁴

More generally, Judge Buergenthal expressed dismay over what he saw as the conclusory nature of much of the Court’s analysis. He chided the Court for asserting without explanation that it was “not convinced” that the “military necessity” exceptions in humanitarian law were applicable.¹²⁵ Finally, he stressed that Israel had no legal obligation to participate in the proceedings, and that the Court was bound not to draw any “adverse evidentiary conclusions” from Israel’s failure to appear.¹²⁶

II. THE ISRAELI SUPREME COURT DECISION

In early 2004, residents of various villages northwest of Jerusalem filed petitions with the Israeli Supreme Court seeking to invalidate military orders for the construction of portions of the fence.¹²⁷ The petitions alleged that the orders violated Israeli administrative law and public international law.¹²⁸ Interestingly, some Jewish residents of the Israeli town Mevasseret Zion joined in the Palestinian petition, though others opposed it.¹²⁹ The Supreme Court, sitting as the High Court of Justice,¹³⁰ temporarily enjoined construction while it considered the petitions.¹³¹ On June 30, 2004—just nine days before the ICJ issued its advisory opinion—the High Court of Justice handed down its opinion in *Beit Sourik Village Council v. Israel*, which invalidated orders for the construction of several parts of the fence and instructed the IDF to reroute the wall so as to decrease its negative impact on daily Palestinian life.

¹²⁰ *Id.*, para. 47 (citing Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 1999 Y.B. INT’L HUMANITARIAN L. 3).

¹²¹ *Id.*, para. 50.

¹²² Advisory Opinion, *supra* note 8, Declaration of Judge Buergenthal, 43 ILM at 1078, para. 1.

¹²³ *Id.*, para. 3.

¹²⁴ *Id.*, paras. 4–6.

¹²⁵ *Id.*, paras. 7–9.

¹²⁶ *Id.*, para. 10.

¹²⁷ Etgar Lefkovits & Yaakov Katz, *Court Stops Work on Part of Barrier*, J.M. POST, Mar. 1, 2004, at 1.

¹²⁸ *Beit Sourik*, *supra* note 11, para. 9.

¹²⁹ *Id.*, para. 22.

¹³⁰ Israeli law authorizes the Supreme Court to sit as a High Court of Justice in the first instance on certain questions of administrative and constitutional law. BASIC LAW: Judiciary §15(c), (d) (Isr.).

¹³¹ *Beit Sourik*, *supra* note 11, para. 16.

President Aharon Barak, writing for a unanimous three-justice panel, began by announcing what law applied. He reiterated the Supreme Court's longstanding view that the Hague Regulations apply and are enforceable in Israeli courts because they are customary international law, which is part of Israeli law. As for the Fourth Geneva Convention, the Court assumed, without deciding, that it was applicable because "the parties agree that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review."¹³²

Justice Barak then considered whether the military commander had the authority to erect the fence. In particular, the Court considered whether the fence was motivated by "security" concerns, which could be a valid purpose, or by "political" desires to annex territory, which could not. The Israeli government pointed to its repeated assertions that the purpose of the wall was to fight terror, that it was temporary, that it could be moved, and that it was not intended to establish borders. Affidavits from IDF personnel made similar points.¹³³ In response, Palestinian villagers argued that the wall effected a creeping annexation. Had the purpose been purely military, they argued, the fence would have followed the Green Line.¹³⁴ But the Court drew the opposite inference: security considerations would be more (not less) likely to require deviation from the Green Line. The Court also noted that the IDF had agreed to move the wall several times over the course of seven judicial hearings on the matter, further indicating that the purpose was related to security. The Court concluded that the purpose of the wall was to promote security.¹³⁵

The Court also found that the IDF had the authority to seize private property in order to construct the fence. It noted that humanitarian law permits such seizures for military purposes, provided that compensation is paid. In the Court's view, the crucial question became whether the route of the fence was justified by military necessity.¹³⁶ It was on this question—whether the route struck an acceptable balance between security and humanitarian concerns—that the Court focused most of its attention.

Justice Barak began his exploration of that question by discussing, at considerable length, the content of the requirement of proportionality.¹³⁷ He concluded that proportionality required (1) a reasonable relationship between means and ends, (2) a showing that there were no less restrictive alternatives that achieved the same security aims, and (3) a showing that the increased security derived from a given routing decision was proportionate to the corresponding increased harm to civilians.¹³⁸ He then proceeded to apply this test to a series of individual military orders, each concerning a particular portion of the wall.

In each case, the Court found that the fence satisfied the first test—whether there was a reasonable fit between the means (the fence) and the ends (security). The Court had before it conflicting military opinions on this question; some members of the Council of Peace and Security (a group of retired Israeli military officials) argued that the wall was not reasonably related to its goal, protecting security. The IDF, of course, took the opposite view.¹³⁹ In resolving this conflict, Justice Barak enunciated a moderately deferential standard of review: "whether a reasonable military commander would have set out the route as this military commander did."¹⁴⁰ The Court found that the overall decision to place the fence, as well as the specific routes in question, passed this test.¹⁴¹

¹³² *Id.*, para. 23; cf. HCJ 4764/04, *Physicians for Human Rights v. Commander of IDF Forces*, para. 19 (May 30, 2004) (holding that the Fourth Geneva Convention applies to IDF military operations in the Gaza Strip).

¹³³ *Beit Sourik*, *supra* note 11, paras. 28–29.

¹³⁴ *Id.*, para. 30.

¹³⁵ *Id.*, para. 31.

¹³⁶ *Id.*, para. 32.

¹³⁷ *Id.*, paras. 36–40.

¹³⁸ *Id.*, para. 41.

¹³⁹ *Id.*, paras. 45–47.

¹⁴⁰ *Id.*, para. 46.

¹⁴¹ *Id.*, paras. 46–47, 56–57, 70, 75.

Likewise, the Court found that each portion of the fence at issue satisfied the second prong of his three-part test: was there a less restrictive route that achieved the exact same security benefit? Again, the Court had before it conflicting testimony from current and former Israeli military officers. And again, the Court deferred to the expertise of the current military officials, holding that it would not “intervene” in the exercise of their discretion.¹⁴²

In several instances, however, the Court found that sections of the fence violated the third prong of the test—the requirement of a balance between security benefits and harm to the civilian population. One ten-kilometer segment, for example, was routed so as to preserve Israeli military control of the strategic mountainous area of Jebel Muktam, which dominates the highway from Jerusalem to Modi’in. The Court indicated that this route separated thirteen thousand farmers from their land, and that access gates would result in long lines and require farmers to take circuitous routes to reach their land.¹⁴³ Noting that the Council for Peace and Security had proposed an alternative, the Court ordered the IDF to find a different route. “Such an alternate route exists. It is not a figment of the imagination. It was presented before us. It is based on military control of Jebel Muktam”¹⁴⁴ The Court made similar findings as to another four-and-a-half kilometer segment of the wall, this one between the villages of Katane and Har Adar; it again stressed the damage to the livelihood of farmers.¹⁴⁵ Likewise, a five-and-a-half kilometer segment near Beit Sourik had to be rerouted, as the “way of life” of the inhabitants had been “completely undermined.”¹⁴⁶ Yet another five-kilometer section, this one near Bidu and Beit Daku, had to be altered.¹⁴⁷

The Court then stepped back to assess all of the wall segments at issue, totaling some forty kilometers in length. It had asked the government about compensating farmers with land instead of cash but said it “did not receive a satisfactory answer.” The government was obliged to try to find new land for these farmers. “Monetary compensation,” the Court held, “may only be offered if there are no substitute lands.”¹⁴⁸

Finally, President Barak reflected on the tension between the war on terror and democratic ideals. He quoted his own opinion in *Public Committee Against Torture in Israel v. Israel*: “A democracy must sometimes fight with one arm tied behind her back.”¹⁴⁹ He added: “Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for.”¹⁵⁰

III. THE DECISIONS IN POLITICAL AND LEGAL CONTEXT

The *Wall* advisory opinion and the *Beit Sourik* decision share a few characteristics, but on the whole they reflect fundamentally different judicial approaches to the problem of the security fence. Of course, some of these differences derive from the different procedural postures of the cases and from the very different characteristics of the courts in question. But most of the differences are deeper. In this part, I briefly assess the commonalities between the opinions, then the differences. In part IV, I then offer some concluding thoughts on the broader political and legal context.

¹⁴² *Id.*, paras. 58, 70, 75.

¹⁴³ *Id.*, para. 60.

¹⁴⁴ *Id.*, para. 61.

¹⁴⁵ *Id.*, para. 67 (holding that the parties “must continue to discuss this issue” with a view to a negotiated change in route).

¹⁴⁶ *Id.*, paras. 70–71 (annulling the corresponding military order).

¹⁴⁷ *Id.*, para. 80.

¹⁴⁸ *Id.*, paras. 82–83.

¹⁴⁹ *Id.*, para. 86 (quoting HCJ 5100/94, Public Comm. Against Torture v. Israel, 53(4) P.D. 817, 845 (Sept. 6, 1999)).

¹⁵⁰ *Id.*

Commonalities

The ICJ and the Israeli Supreme Court agreed on a few substantive issues. For starters, each court applied the Fourth Geneva Convention to the fence dispute, notwithstanding Israel's longstanding position that the Convention does not apply *de jure* to Israel's occupation of the West Bank. Admittedly, the Supreme Court did so only because the parties did not make it an issue, a tack the Court has followed in the past. But the bottom line is welcome: as I have argued elsewhere, the better view is that the Convention is applicable.¹⁵¹

That said, the Supreme Court's jurisprudence on the Fourth Geneva Convention is somewhat puzzling. A court might readily accept the parties' stipulations on *facts*, but should a court always defer to the parties' agreement on what *law* should apply? If in fact the Convention was not applicable, one might think it would be the duty of the Israeli Supreme Court to "say what the law is."¹⁵² One hopes the Court will have more to say not only on whether the Convention applies to the Israeli occupation but also on the extent to which it is directly binding in Israel as customary international law.¹⁵³ Nevertheless, the Court's application of the Convention in cases like *Beit Sourik* is certainly an auspicious development. Likewise, it is helpful to have an authoritative statement on the same point from the International Court of Justice.

Of course, the ICJ and the Israeli Court agreed on more than just the applicability of the Fourth Geneva Convention. Each tribunal found that the "security fence" to some extent violates humanitarian law, insofar as it disrupts the daily life and livelihood of the civilian Palestinian population. Obviously, the International Court's holding was far more sweeping than the Israeli Court's limited holding, while the Israeli Court's methodology was more meticulous, both in enunciating the law and in applying it to the facts in a particularized fashion. Nevertheless, the core of the analysis was the same: to at least some extent, the wall strikes an inappropriate balance between security and humanitarian concerns.

The two opinions share one other feature. Neither found it necessary to advert to the legal framework constructed by the Israelis and Palestinians themselves—the Oslo Accords and earlier instruments, such as the Camp David Accords. This methodology may reflect an assumption that the Oslo Accords were never legally binding—or, perhaps, an assumption that they are legally, and not just politically, dead.

Such assumptions are misplaced. The accords were intended to be legally binding. They speak of "enter[ing] into force."¹⁵⁴ They use language of obligation, such as "shall" and "will." They are characterized by a high degree of legal formality: they are in writing, they were signed at treatylike ceremonies, and they were executed by the highest representatives of the parties. They may not be agreements "between states," as envisioned by Article 2 of the Vienna Convention on the Law of Treaties,¹⁵⁵ but they are agreements between a state and the PLO,¹⁵⁶ which might well be considered a "subject of international law" that can be bound by an international

¹⁵¹ On the Court's past practice, see, for example, HCJ 5591/02, *Yassin v. Commander of Kziot Military Camp*, para. 12 (Dec. 18, 2002) (finding the Fourth Geneva Convention applicable because "Israel sees itself as bound by the humanitarian provisions of the convention"); HCJ 3278/02, *Center for Defense of Individual v. IDF Commander*, para. 23 (Dec. 18, 2002) (similar). My argument can be found in GEOFFREY R. WATSON, *THE OSLO ACCORDS* 136–42 (2000).

¹⁵² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁵³ Customary international law has the force of law in Israeli courts, whereas conventional law must be incorporated into domestic law by implementing legislation. See generally Ruth Lapidoth, *International Law Within the Israeli Legal System*, 24 *ISR. L. REV.* 451 (1990).

¹⁵⁴ See, e.g., Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, *Isr.-PLO*, Art. XVII(1), 32 *ILM* 1525 (1993) [hereinafter Declaration of Principles]; Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, *Isr.-PLO*, 36 *ILM* 551 (1997) [hereinafter Interim Agreement].

¹⁵⁵ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 2(1)(a), 1155 *UNTS* 331.

¹⁵⁶ The PLO signed the accords, not the Palestinian Authority. The accords recognized the PLO as having some competence to sign international agreements "for the benefit" of the PA, whereas the PA's competence was restricted to domestic matters. Interim Agreement, *supra* note 154, Art. IX(5). Apparently, this arrangement was intended to allay Israeli concerns that a unified PLO/PA might be regarded as a state. But there is no evidence that this configuration was intended to relieve the accords of binding force.

agreement. Article 3(a) of the Vienna Convention provides that it does not affect the “legal force” of agreements involving “subjects of international law,” and some state practice, mostly involving decolonization agreements, suggests that states have treated agreements with substate entities as legally binding.¹⁵⁷ The Israeli-Palestinian dispute may not involve decolonization in the traditional sense, but it is plainly analogous. Palestine appears to be a state in *statu nascendi*. It enjoys observer status at the United Nations; the PLO has attempted to accede to the Geneva Conventions; Palestine was permitted to make written and oral submissions before the ICJ in the *Wall* case; it has embassies around the world; and dozens of states recognize it. In the view of some judges of the ICJ, the Court should have reminded Palestine (and not just Israel) of its obligations to respect humanitarian law. If such obligations exist, then surely bilateral treaty obligations can, too.

Even if the PLO or Palestine is not a subject of international law, the accords might still be seen as binding declarations made by a state (Israel) in good faith, in the manner of *Nuclear Tests*.¹⁵⁸ Or, as Israel’s former legal adviser Robbie Sabel suggests, one might construct “a legal theory whereby a state would be under a legal obligation to comply with undertakings made to a substate entity—the obligation being unilateral but conditional on the compliance by the substate entity with its commitments as defined by the agreement.”¹⁵⁹

If the Oslo Accords were binding when entered into, they are still, generally speaking, in force today. It may well be that Oslo is politically dead, as Ariel Sharon and countless other politicians and pundits like to say. But that does not mean they are dead legally. Yes, there have been material breaches of the accords, but international agreements do not terminate automatically upon breach, even material breach, by one party or the other; one party must invoke the other’s breach as a basis for termination.¹⁶⁰ In this case, neither party has formally invoked breach by the other as a basis for termination. Prime Minister Sharon has pronounced them “dead,” but his government has not formally declared them no longer in force. In fact, Israel has continued to abide by several of its central obligations under Oslo. It continues to recognize the Palestinian Authority. It has, from time to time, continued to transfer tax revenue to the Palestinian Authority,¹⁶¹ as required by the Interim Agreement.¹⁶² It continues to favor a negotiated peace along the general lines envisioned by the accords. Israeli law still implements the Oslo Accords, and that implementing legislation has not been repealed. The Palestinians, for their part, continue to recognize Israel and continue to operate their Palestinian Authority within the framework envisioned by Oslo, although they still have not held new elections for the Palestinian Legislative Council.¹⁶³

It is also not plausible to suggest that the Oslo Accords have terminated simply because of the passage of time. To be sure, they describe themselves as “interim” agreements that were intended to lead to a permanent status agreement. They originally envisioned a five-year interim period ending on May 4, 1999, but did not provide that they would terminate automatically if success was not achieved by that date. In fact, the agreements contain no termination clauses at all. As the May 4 deadline approached, Yasir Arafat initially threatened to declare Palestinian statehood unilaterally,¹⁶⁴ but he was persuaded not to do so, and the parties appear to have tacitly agreed to keep the agreements in force after May 4, 1999. That date came and went

¹⁵⁷ For a fuller discussion of this practice, see WATSON, *supra* note 151, at 91–99.

¹⁵⁸ *Nuclear Tests* (Austl. v. Fr.), 1974 ICJ REP. 253 (Dec. 20).

¹⁵⁹ Robbie Sabel, Book Review, 95 AJIL 248, 250–51 (2001) (reviewing WATSON, *supra* note 151).

¹⁶⁰ See Vienna Convention on the Law of Treaties, *supra* note 155, Art. 60(1).

¹⁶¹ See, e.g., Herb Keinon, *US Envoy Talks to Focus on Outposts*, JM. POST, July 13, 2004, at 2 (reporting on Israeli commitments to return tax revenue to the PA); Herb Keinon, *Israel to Transfer Additional NIS 130m. in Taxes to PA*, JM. POST, Jan. 2, 2003, at 1.

¹⁶² Interim Agreement, *supra* note 154, Annex V, app. 1, Art. V(4)(a), (b).

¹⁶³ Cf. Written Statement Submitted by Palestine, *supra* note 60, at 49 (asserting that elections have not been held because of the “prevailing coercive situation” in the occupied territories).

¹⁶⁴ See Mohammed Najib et al., *Palestinians Reaffirm Plan to Declare Statehood at the UN*, JM. POST, Sept. 25, 1998, at 2.

without much fanfare,¹⁶⁵ and four months later the parties reaffirmed their Oslo commitments in the Sharm el-Sheikh Memorandum.¹⁶⁶

In any case, neither the ICJ nor the Israeli Supreme Court relied to any significant extent on the Oslo Accords, not even as guides to interpretation of other instruments. This methodology is perhaps understandable in the case of the Israeli Court, which is part of a legal system that, like many others, maintains that some obligations are binding only on the international plane. But it is less understandable in the case of the ICJ, which went to great lengths to rely on legal sources that seem further removed from the *Wall* controversy than the Oslo Accords—instruments such as the Convention on the Rights of the Child and the Economic and Social Covenant.¹⁶⁷ After all, if the accords are binding, then they have much to say about the fence case. The Interim Agreement forbids both parties to “change the status” of the West Bank pending the outcome of permanent status negotiations.¹⁶⁸ Settlements, borders, and Jerusalem are all reserved as “permanent status issues,” to be settled by negotiation.¹⁶⁹ The Palestinians are obliged to combat terrorism and cease supporting it; in exchange, Israel is obliged to redeploy from the West Bank.¹⁷⁰ These obligations all seem highly relevant to the “legal consequences” of construction of the wall.

Differences

The differences between the opinions outweigh the similarities. The International Court adopted a broad, sweeping holding that every inch of the fence violates international law. The Israeli Court found that many, but not all, segments of a portion of the wall violate international law. The ICJ applied a wide range of legal sources, including humanitarian law, the two Human Rights Covenants, the Convention on the Rights of the Child, and the right of self-determination. The Supreme Court focused narrowly on humanitarian law and Israeli administrative law. Again, some of these differences stem from the different characteristics of the two tribunals and the differing procedural posture. But they also reflect deeper differences on questions of methodology and substance.

The Israeli Court employed a meticulous and particularized methodology that seems more satisfying than the generalized approach of the International Court, even allowing for the fact that the latter court was ruling in an advisory capacity. In ascertaining and applying the law, the International Court spoke in conclusory terms, whereas the Israeli Court engaged in a much fuller (though sometimes also conclusory) analysis. The International Court asserted without explanation that the “military necessity” exceptions in humanitarian law were inapplicable.¹⁷¹ It curtly announced that Article 51 of the Charter had “no relevance” to the case. It characterized the case as different from those described in the 2001 Security Council terrorism resolutions because the terror attacks originated within occupied territory, but it did not explain why that difference matters. It found that the fence violated the right of self-determination without fully explaining how. By contrast, the Israeli Court spent several paragraphs developing, in painstaking detail, a three-part test of “proportionality” that rivals the most intricate constructions

¹⁶⁵ See Ben Lynfield, *Erekat: May 4 Will Be a Normal Day*, J.M. POST, May 4, 1999, at 1.

¹⁶⁶ Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, Sept. 4, 1999, Isr.-PLO, 38 ILM 1465 (1999).

¹⁶⁷ For a critique of the Court's use of human rights law in the *Wall* advisory opinion, see Michael J. Dennis, *Application of Human Rights Treaties in Times of Armed Conflict*, 99 AJIL 119 (2005) (in this *Agora*).

¹⁶⁸ Interim Agreement, *supra* note 154, Art. XXXI(7).

¹⁶⁹ Declaration of Principles, *supra* note 154, Art. V(3).

¹⁷⁰ See, e.g., Dennis Ross, U.S. special Middle East coordinator, Note for the Record (Jan. 15, 1997), 36 ILM 665 (1997), reprinted in WATSON, *supra* note 151, at 375 (summarizing each side's major responsibilities under the accords).

¹⁷¹ For a critique of this and other aspects of the Court's treatment of humanitarian law, see David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AJIL 88 (2005) (in this *Agora*).

of American constitutional law. Intricacy is not always a good thing, but at least the analysis was full-bodied enough to give the reader a thorough understanding of the Israeli Court's reasoning.

Likewise, the Israeli Court was much more careful about finding facts and applying law to those facts. It engaged in a careful, detailed, case-by-case analysis of a number of segments of the wall involving lengths of about five to ten kilometers each. It frankly weighed security concerns against humanitarian ones, and more often than not found that insufficient attention had been paid to the humanitarian concerns. By contrast, the International Court had little to say about facts relating to security and terrorism. Obviously, this silence resulted partly from Israel's decision not to participate on the merits. But even without active Israeli participation, it is difficult to believe that the Court could not have considered the security considerations in more detail simply on the basis of information available in the public domain. For example, a lively debate has taken place in public fora in Israel on whether the wall has in fact saved lives. Commentators and the Israeli government have published various statistics comparing pre-fence deaths with post-fence deaths.¹⁷² But the ICJ's opinion contained no argument or counterargument on these factual questions.

These differences in methodology are not all attributable to the difference between the procedural postures of the two cases or the difference between an international and a domestic court. The differences suggest a deeper difference in the two courts' conceptions of their judicial role. The Israeli Supreme Court's jurisprudence is not just restrained—too restrained at times, as when it avoids questions relating to the applicability of the Fourth Geneva Convention—but also eminently pragmatic. In *Beit Sourik*, the Court issued an opinion that can be understood and implemented by the military personnel responsible for the route of the fence, and that can be accommodated politically by the Israeli politicians responsible for authorizing and funding it. The decision is a reasonable mix of the retrospective (finding past and present violations of law) and the prospective (fashioning practical relief to cure those violations).

By contrast, the decision of the International Court is not simply expansive and sweeping; it is primarily retrospective and relatively unconcerned with practical implementation. The great bulk of the opinion is given over to finding past and present violations of law. Those sections devoted to prospective implementation have the virtue of simplicity—they merely instruct Israel to tear down the entire wall—but they are not likely to influence Israeli (or American) decision making. Perhaps no decision of the ICJ would have commanded respect in Israel; but it is at least worth asking whether the Court might have achieved more had it engaged in a detailed, fact-based inquiry into whether particular segments of the wall could or could not be justified on security grounds. The International Court's decision was studied, after all, not just by lawyers in the Israeli government, but also by lawyers in the government of Israel's most important ally, the United States. If the ICJ had hoped to encourage the United States to press for modification of the most troubling segments of the fence, the Court missed an opportunity to provide guidance on where to begin.

IV. CONCLUSION

Where, then, do these decisions leave the wall, and, more broadly, the Israeli-Palestinian dispute? Obviously, the decision of the International Court is nonbinding, whereas Israel has said it will abide by the decisions of its own courts. Thus, in the short run the likely result is some relocation of segments of the wall but no cessation of construction. Interestingly, the Israeli Supreme Court did instruct the government to "assess" the International Court's decision after it came down.¹⁷³ At about the same time, Israeli attorney general Menachem Mazuz warned that the ICJ opinion might lead to international sanctions against Israel and that it "could gradually

¹⁷² See, e.g., Matthew Gutman, 'In the Last Five Months, We've Had Zero Attacks,' J.M. POST, June 2, 2004, at 1.

¹⁷³ Steven Erlanger, *Israeli Court Orders Assessment of West Bank Barrier*, N.Y. TIMES, Aug. 20, 2004, at A1.

have an effect on rulings by Israeli courts about the administration of military authority in the territories and about the building of the fence."¹⁷⁴

The broader implications, of course, are more difficult to predict. The most likely conclusion is that the fence will make it harder to reach a comprehensive settlement of the conflict. It adds yet one more "permanent status" issue to an already long list of intractable matters. Israel hopes that the wall will decrease terrorism, and that a less violent atmosphere might actually be more conducive to peace. It is too early to assess whether the barrier has actually achieved its goal of deterring terrorism, if only because it has not yet been completed, although it does appear that terrorist attacks have subsided somewhat over the past year. But even if the wall does succeed in this aim, it will also have enraged a substantial segment of the Palestinian population, deprived thousands of farmers of access to land, and fostered still more distrust between Israelis and Palestinians. The best that can be hoped for is that this anger can be curbed through a generous program of compensation in kind, or at least in money, and that mutual trust can be rebuilt over a period of years and decades.

Will the "security fence" ever come down? Israel insists it is temporary, and that it will disappear once terror disappears. But terrorism will not entirely disappear, certainly not in our lifetimes. Nor is it likely that the fence will disappear. In fact, the wall is a sort of self-fulfilling prophecy. The more successful it is in suppressing terror, the more likely it is to become permanent. And if terror continues, then the natural impulse will be to improve the wall's defenses, not to tear them down. Thus, the most likely result is that the fence will eventually demarcate the Israeli side of a negotiated border between Israel and Palestine. The route of the wall will change as part of the agreement to demarcate this border, but the wall itself will not disappear. That prospect is, to say the least, depressing.

Still, there is cause for hope. The passing of Arafat and the emergence of a new set of Palestinian leaders may have brightened prospects for peace. The Bush administration now seems more committed to an active role in pursuing a negotiated settlement. More fundamentally, the impulses that drove the Oslo process have not disappeared: Israel has an interest in relieving itself of the political, financial, and military burdens of occupation; and the Palestinians have an interest in self-government and the benefits of statehood. Oslo will rise again, clad in new clothes and endowed with a new name. Oslo is not dead; it merely sleeps.¹⁷⁵

THE ICJ'S ADVISORY JURISDICTION AND THE CRUMBLING WALL BETWEEN THE POLITICAL AND THE JUDICIAL

*By Michla Pomerance**

It is hardly surprising that the controversial advisory opinion of the International Court of Justice in the case concerning the Israeli security fence raised serious concerns in many quarters, on multiple grounds. Most prominently, as some of the judges and numerous commentators have noted, the restriction of the right of self-defense under Article 51 of the United Nations Charter to attacks by "states" is unwarranted on the basis of the text.¹ It is also, of course, illogical in an era when the worldwide terrorist threats stem primarily from nonstate actors. Additionally,

¹⁷⁴ Yuval Yoaz, *Mazuz: Hague Ruling on Fence Could Lead to Sanctions on Israel*, HAARETZ, Aug. 20, 2004 (Eng. ed.), available at <<http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=467077>>.

¹⁷⁵ Cf. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2 ("The law hath not been dead, though it hath slept."), quoted in *Waldron v. Brit. Petroleum Co.*, 231 F.Supp. 72, 89 n.30 (S.D.N.Y. 1964) (referring to the Logan Act, 18 U.S.C. §953).

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¹ See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (Int'l Ct. Justice July 9, 2004), 43 ILM 1009 (2004) [hereinafter *Advisory Opinion*], Declaration of Judge Buergenthal, 43 ILM at 1078, para. 6 [hereinafter *Buergenthal Declaration*]; *id.*, Separate Opinion of Judge Higgins, 43 ILM at 1058, para. 33 [hereinafter *Higgins Opinion*].