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The Legality of the West Bank Wall: Israel's High Court of Justice v. the International Court of Justice

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ABSTRACT

This Article offers a critique of the decision reached by Israel's High Court of Justice in the Mara'abe Case (2005) as well as some aspects of the International Court of Justice's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004). The Article takes a socio-legal and facts-based approach to analyzing the decisions' discussions of settlements, self-determination, and self-defense, examining all three topics in light of several recent legal and political developments.

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"Is the separation fence legal? That is the question before us."

—Judge Barak, *Mara'abe v. The Prime Minister of Israel*, introductory paragraph.

I. INTRODUCTION

On September 15, 2005, the Israel Supreme Court, sitting as the High Court of Justice (HCJ), rendered its decision in *Mara'abe v. The Prime Minister of Israel*,[1] in which it questioned a number of points of law arising from the Advisory Opinion of the International Court of Justice (ICJ) on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[2] The case in Israel arose as a

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1. HCJ 7957/04 [2005] (Isr.), *translated in* 45 I.L.M. 202 (2006).

2. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9), *reprinted in* 43 I.L.M. 1009 (2004) [hereinafter ICJ Wall Advisory Opinion]. For further commentary on this Advisory Opinion, see generally Susan Akram & Michael Link, *The Wall and the Law: A Tale of Two Judgments* (2006); Aeyal M. Gross, *The Construction of a Wall Between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 LEIDEN J. INT'L L. 1 (2006); *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AM. J. INT'L L. 1 (2005) (including contributions from Watson, Pomerance, Falk, Wedgwood, Murphy, Scobbie, Kretzmer, Imseis and Dennis); Pieter H.F. Bekker, *The World Court's Ruling Regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective*, 38 CORNELL INT'L L.J. 553 (2005); Paul J. I. M. De Waart, *International Court of Justice Firmly Walled in the Law of Power in the Israeli-Palestinian Peace Process*, 18 LEIDEN J. INT'L L. 467 (2005); Jean-François Gareau, *Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 18 LEIDEN J. INT'L L. 489 (2005); Andrea Bianchi, *Dismantling the Wall: The ICJ's Advisory Opinion and Its Likely Impact on International Law*, 47 GERMAN Y.B. INT'L L. 343 (2004); and Marco Pertile, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Missed Opportunity for International Law?*, 4 ITALIAN Y.B. INT'L L. 121 (2004). *See also* 39 ISR. L. REV. (2006) (dedicating a special double issue to discuss the

result of a number of petitions filed against the Prime Minister of Israel, the Minister of Defence, the Commander of the Israeli army, the "separation fence" authority, and the *Alfe Menashe* local council.[3] The petitioners, Palestinian residents of a number of villages affected by the route of the wall, argued that in light of the ICJ's Advisory Opinion, Israel's actions in continuing its construction were unlawful.[4] On July 9, 2004, the ICJ concluded that the wall and its *associated régime* of settlements, checkpoints, and closed military zones are contrary to international law.[5] The HCJ therefore had to rule on the legality of the wall that its government has been building in Occupied Palestinian Territory (OPT) of the West Bank since June 2002, while taking into account the advice of the principal judicial organ of the United Nations (U.N.).[6]

The terminology used by the ICJ and the HCJ to describe Israel's vast concrete-and-wire barrier differed. The HCJ referred to it as the "separation fence," and the ICJ simply called it the "wall," as this was the language the General Assembly used in its request for an Advisory Opinion.[7] In deference to the ICJ and the world organization, the terminology they employed will be used throughout

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domestic and international legal issues arising from the construction of the "separation barrier"); 13 PALESTINE Y.B. INT'L L. 337 (2004–2005) (reprinting the Advisory Opinion, Palestine's written statement to the Court, and several articles).

3. *Alfe Menashe* is an Israeli settlement situated close to the Palestinian town of *Qalqilya* in the West Bank.

4. Interestingly, the HCJ issued simultaneous versions of the judgment in both English and Hebrew, something it does not normally do. The other time it issued versions in both languages was in the *Beit Sourik* case. Iain Scobbie notes that neither decision has been issued in an official Arabic text. Unlike English, Arabic is one of the High Court's official languages and is the tongue spoken by the principle petitioners in both cases. Iain Scobbie, *Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's Wall Advisory Opinion*, 5 CHINESE J. INT'L L. 269, 287 (2006).

5. As Roger O'Keefe writes:

> What is meant . . . by its '*associated régime*' is to be found among paragraphs 114 to 137. One aspect of this régime is obviously the range of legislative and regulatory measures associated with the Wall, from the requisitions of land to the restrictions imposed on the Palestinian populace by the declaration of the Closed Area. . . . In short, the opinion finds not only the construction of the Wall to be illegal but with it the policy and practice of Israeli settlements in the occupied territories, considered as part of its '*associated régime*.'

It follows that the checkpoints and the closed military zones associated with the Wall are also *per se* unlawful. Roger O'Keefe, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary*, 37 REV. BELGE DROIT INT'L 92, 133 (2004).

6. The Advisory Opinion was acknowledged by the U.N. General Assembly on 2 August 2004. G.A. Res. 10/15, U.N. GAOR, 10th Sess., U.N. Doc. A/RES/ES-10/15 (Aug. 2, 2004).

7. ICJ Wall Advisory Opinion, *supra* note 2, at 1029, para. 67.

the remainder of this Article.[8] This Article employs a socio-legal and facts-based approach in analyzing the decisions reached by the HCJ and the ICJ on the legality of the wall, since it is usually the facts of the Israeli-Palestinian conflict rather than the substance of the law that prove to be a point of contention. After all, it was on the basis of "the facts" that Israel's HCJ would ultimately reject the ICJ's Advisory Opinion.[9] In the following pages, the ICJ's opinion and the decisions of the HCJ will be compared and contrasted, concentrating on three areas of controversy: (a) Israeli civilian settlement activity, (b) self-determination, and (c) self-defense. These inter-related topics have been chosen for further analysis because they are at the core of the Israel-Palestine conflict. The right of self-defense cannot be debated without an understanding of why there is a conflict in the first place, and an understanding of why there is a conflict between Israelis and Palestinians cannot be comprehended without taking into account the question of self-determination. Correspondingly, it will be necessary to refer to the Israeli civilian settlements constructed in and around East Jerusalem and scattered throughout the West Bank because they are of direct relevance to any discussion of self-determination. Special attention has been devoted to the issue of self-defense, as the ICJ's opinion on this issue has proved to be particularly contentious. To date, the Israeli government has said that it will not abide by the ICJ's Advisory Opinion, but will only adhere to the decisions reached by its HCJ.[10] It is therefore essential to clarify some of the substantive issues that arose in these cases, especially as Israel is still building the wall. Therefore, the final

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8. Although it should be said that structure only takes the form of eight-meter-high-concrete slabs when it passes through areas densely populated by Palestinians such as Qalqilya, Tulkarem, Bethlehem, and East Jerusalem. The remainder of the structure is a fenced complex with electronic sensors and surveillance cameras surrounded by rolls of barbed wire, accompanied by ditches, an earth-covered tracer road (so footprints can be seen), patrol roads and "closed military zones" approximately 40-100 meters wide. For a description of the wall, see generally the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967*, U.N. Doc. E/CN4/2004/6 (Sept. 8, 2003) (*prepared by* John Dugard).

9. *See* HCJ 2056/04 Beit Sourik Village Council v. Israel [2004] (Isr.), *translated in* 43 I.L.M. 1099, ¶ 28 (2004).

> [T]he Fence is motivated 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.

Id.

10. "Israel vowed to press on with the construction of the West Bank separation fence after the General Assembly overwhelmingly adopted a resolution condemning the barrier late Tuesday." Shlomo Shamir, *Israel Summons EU Envoys Over Support for Anti-fence Ruling*, HA'ARETZ (Jerusalem), July 21, 2004.

section of this Article will be devoted to the debate over the legal effect of Advisory Opinions generally, and particularly the effect of the Advisory Opinion on the wall as a guide for the U.N. in its quest for peace in the Middle East.

Although the Israeli Government's written statement to the ICJ was replete with references to Palestinian terrorism,[11] it is noteworthy that the statement did not justify the building of the West Bank wall as necessary to stop Palestinian terrorist attacks against its nationals in Israel and in West Bank settlements.[12] This is because Israel did not raise the merits of the case in its written statement, which was solely concerned with issues of jurisdiction and propriety.[13] Palestine's written statement argued that the wall is tantamount to annexation because it is being constructed primarily in occupied territory rather than in Israeli territory, which circumvents Israeli civilian settlement blocs, by-passes roads and land designated for their future construction and expansion, and encompasses underground aquifers and water wells.[14] In other words, the issue is the not the wall itself, but its *route* through OPT.[15] This concern was reflected in the question submitted by the U.N. General Assembly to the ICJ in December 2003, which asked:

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11. *See* Written Statement of the Government of Israel on Jurisdiction and Propriety, ¶¶ 3.53–.86 (Jan. 30, 2004), *available at* http://www.icj-cij.org/docket/files/131/1579.pdf (last visited Oct. 16, 2007); Letter from Alan Baker, Ambassador, Deputy Dir. and Legal Advisor, Isr. Ministry of Foreign Affairs, to the Int'l Court of Justice (Jan. 29, 2004), *available at* http://www.icj-cij.org/docket/files/131/1579.pdf (accompanying the Written Statement of the Government of Israel on Jurisdiction and Propriety to the ICJ).

12. According to Israel, the purpose of including factual information on Palestinian terrorist attacks in its written statement was to assist the ICJ "properly to exercise its discretion under Article 65 (1) of the Statute and decide whether or not to answer the question referred to it." Written Statement of the Government of Israel on Jurisdiction and Propriety, *supra* note 11, ¶ 3.54.

13. Written Statement of the Government of Israel on Jurisdiction and Propriety, *supra* note 11.

14. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Written Statement, Submitted by Palestine, ¶¶ 280–297 (Jan. 30, 2004), *available at* http://www.icj-cij.org/docket/files/131/1555.pdf (last visited Oct. 16, 2007).

15. As pointed out by Vaughan Lowe in his oral pleadings:

> The issue here is not whether Israel has a right to build a Wall: it is whether it has a right to build the Wall in the Occupied Palestinian Territory. Palestine's main point is that whatever security effects the Wall might have could be secured by building the Wall along the Green Line, on Israeli territory, so that there is no legal justification for building it in the Occupied Palestinian Territory.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Public Sitting, at 47 (Req. for Advisory Op.) (Feb. 23, 2004), *available at* http://www.icj-cij.org/docket/files/131/1503.pdf (last visited Oct. 16, 2007) [hereinafter Request for Wall Advisory Opinion].

> What are the legal consequences arising from the construction of the wall being built by Israel, the Occupying Power, *in the Occupied Palestinian Territory, including in and around East Jerusalem*, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[16]

II. THE HCJ AND THE WALL

The HCJ has handed down two principal decisions concerning the legality of the wall. On June 30, 2004, some nine days before the ICJ rendered its Advisory Opinion, the HCJ first ruled in *Beit Sourik Village Council v. the Government of Israel*[17] that the wall could be built in the West Bank, in and around occupied East Jerusalem, but that in a number of sections the wall's route did not satisfy the proportionality test established by the court.[18] In response to the petitioner's argument that the route of the wall was motivated by political reasons (i.e. to incorporate into Israel certain Israeli civilian settlements established inside the West Bank), the HCJ held: "[I]t is the security perspective—and not the political one—which must examine a route based on its security merits alone, *without regard for the location of the Green Line.*"[19] Of course the HCJ could only reach this conclusion by not addressing the applicability to the West Bank of Article 49(6) of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 1949 (hereafter Geneva Convention IV).[20] This is because that article prohibits an occupying power from transferring its civilian population to the

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16. G.A. Res. 10/14, U.N. GAOR, 10th Sess., U.N. Doc. A/RES/ES-10/14 (Dec. 8, 2003) (emphasis added).

17. HCJ 2056/04 [2004] (Isr.), *translated in* 43 I.L.M. 1099 (2004).

18. This begs one to ask what is, and what is not, proportional, from an Israeli-security perspective. Alain Pellet has observed:

> [P]roportionality seems more a general directive than a criterion in the proper sense of the word; its appraisal rests on the subjective judgment of those involved and, for this reason, it is ill-suited to serve as a means of distinguishing that which is lawful from that which is not, a process which is the *raison d'être* of a criterion.

Alain Pellet, *The Destruction of Troy Will Not Take Place*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 169, 173 (Emma Playfair ed., 1992); *see generally* Gross, *supra* note 2 (detailing criticisms of the ICJ's application of the proportionality principle).

19. HCJ 2056/04 Beit Sourik Village Council v. Israel [2004] (Isr.), *translated in* 43 I.L.M. 1099, ¶ 30 (2004) (emphasis added).

20. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

territory it occupies.[21] Had the HCJ examined the legality of the Israeli settlements in East Jerusalem and the West Bank by applying the relevant provisions of Geneva Convention IV, it would have been difficult for the HCJ to have reached the conclusion that the wall was a lawful measure to protect the settlements. Instead, the HCJ uncritically accepted the Israeli government's position that the wall is not a political measure, even though most of it is being constructed in territory over which it has no sovereignty.[22] This may also explain why there was so little reference to international law in its judgment, particularly on the question of self-determination and human rights law.[23] Instead, the HCJ decided that there was a lawful basis for constructing the wall according to its interpretation of the law of belligerent occupation and Israeli administrative law.[24] On this basis the HCJ found that a small section of the wall (approximately 30 kilometers) should be re-routed because it inflicted disproportionate harm upon Palestinian residents and could not be justified by Israel's security needs.[25] It was up to the individual military commander in the occupied territories to balance Israel's security needs with the needs of the local inhabitants. As the HCJ's decision in *Beit Sourik* was delivered before the ICJ's Advisory Opinion, the remainder of this article will focus on the *Mara'abe* case, which challenged the ICJ's Advisory Opinion on both factual and legal grounds.

In *Mara'abe*, the HCJ chose to avoid the question of the applicability of Geneva Convention IV as it did in the *Beit Sourik* case[26]—and as it had done several times in earlier decisions—by relaying the position of its government, which has declared that it practices the "humanitarian parts" of the Convention:

> In light of that declaration on the part of the government of Israel, we see no need to re-examine the government's position. We are aware that the Advisory Opinion of the International Court of Justice determined that *The Fourth Geneva Convention* applies in the Judea and Samaria area [that is, the West Bank], and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions. As mentioned, seeing as the government of Israel accepts that the humanitarian aspects of the *Fourth Geneva Convention* apply

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21. *Id.*
22. HCJ 2056/04 *Beit Sourik*, ¶ 28.
23. See *infra* notes 140, 464–65 and accompanying text for a discussion of this lack of reference to international law by the ICJ.
24. *See* HCJ 2056/04 *Beit Sourik*, ¶¶ 26–32 ("Regarding the central question raised before us, our opinion is that the military commander is authorized—by the international law applicable to an area under belligerent occupation—to take possession of land, if this is necessary for the needs of the army.").
25. *Id.* ¶ 80.
26. *Id.* ¶ 24.

> in the *area*, we are not of the opinion that we must take a stand on that issue in the petition before us.[27]

It may fairly be asked what parts of Geneva Convention IV the HCJ does not consider to be "humanitarian." As it has never taken a stance on its applicability to the OPT, this issue will remain a mystery.[28] Yet on the day the Israeli army took over the West Bank on June 7, 1967, the military commander of the Israeli army issued a proclamation that he had assumed all governmental powers in the area, and that the prevailing law would remain in force subject to any orders that he would promulgate.[29] Attached to this proclamation was the Security Provisions Order that contained detailed provisions for Israeli rule in the occupied areas.[30] According to these provisions,

> [a] military tribunal and the administration of a military tribunal shall observe the provisions of the Geneva Convention of August 12, 1949 . . . with respect to legal proceedings, and in case of conflict between this Order and the said Convention, the provisions of the Convention shall prevail.[31]

David Kretzmer writes that after the 1967 war ended, it became clear to the Israeli political establishment that the Israeli army's perception of the territories during that war as "occupied territories" was incompatible with their political stance because they viewed the territories as "liberated."[32] He opines that this was most probably the reason why the above provision was revoked soon after the war.[33] Michael Lynk notes that the HCJ shares a common narrative with the Israeli government and military on the origins and principal features of the Israel-Palestine conflict: "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

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27. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶ 14 (2006).

28. *See* U.S. Dep't of State [USDOS], Bureau of Democracy, Human Rights, and Labor, *Israel and the Occupied Territories* (Feb. 25, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27929.htm (describing, in its section on "The occupied territories," disagreement between the Israeli government and other groups over how the Hague Regulations and Geneva Convention applied to Israel's authority in OPT, and whether Israel "largely observed the Geneva Convention's humanitarian provisions").

29. DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 32 (2002).

30. *Id.*

31. *Id.* (emphasis added); ICJ Wall Advisory Opinion, *supra* note 2, at 1035–36, para. 93; *see also* Mazen Qupty, *The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel, in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 18, at 119–20 n.126 (citing *Booklet No. 1* (1967), 5, at 12). Kretzmer cites in footnote 2 the Proclamation Regarding the Taking of Power by the IDF (7.6.1967) in 1 *Proclamations, Orders and Appointments of the Judea and Samaria Command* at 3.

32. KRETZMER, *supra* note 29, at 32–33.

33. *Id.*

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."[34] That the HCJ is security-minded and government-oriented in its decisions relating to the OPT is also a view endorsed by Israeli lawyers and academics in Israeli universities.[35]

The HCJ is well aware that the position of the Israeli government on Geneva Convention IV is at odds with the views of the international community and the International Committee of the Red Cross (ICRC), the body charged with the task of monitoring the Convention[36] and the application of International Humanitarian Law (IHL).[37] In 1990, the U.N. Security Council adopted a resolution that called on the Geneva Convention IV parties to make sure that Israel respects its obligations, in accordance with Article 1 of the Convention.[38] The U.N. Security Council has reaffirmed that Geneva Convention IV is applicable to the Palestinian and other Arab territories occupied by Israel since June 1967, and has called upon Israel to "abide scrupulously by its legal obligations and responsibilities" under that Convention.[39] The U.N. General Assembly has adopted several resolutions to the same effect.[40]

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34. Michael Lynk, *Down by Law: The High Court of Israel, International Law, and the Separation Wall*, 35 J. PALESTINE STUD. 6, 8–9 (2005).

35. *See generally* KRETZMER, *supra* note 29, at 196. For a more recent exposition of his views, see David Kretzmer, *The Supreme Court of Israel: Judicial Review During Armed Conflict*, 47 GERMAN Y.B. INT'L L. 392 (2005). *See also* Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada*, 33 L. & SOC'Y REV. 319, 322–24 (1999).

36. *See* Statutes of the International Committee of the Red Cross, art. 4(c), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/icrc-statutes-080503 (last visited Oct. 17, 2007) (providing that the ICRC shall "undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law").

37. *See* Declaration of the Conference of the High Contracting Parties to the Fourth Geneva Convention and Statement of the ICRC, Dec. 5, 2001, http://www.icrc.org/web/eng/siteeng0.nsf/html/5FLDPJ (last visited Oct. 17, 2007) (discussing the applicability of Geneva Convention IV to the OPT); *United Kingdom Materials on International Law 2002*, 73 BRIT. Y.B. INT'L L. 942 (2002) (discussing British State practice). *See also* Matthew Happold, *The Conference of High Contracting Parties to the Fourth Geneva Convention*, 4 Y.B. INT'L HUM. L. 389 (2004); Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65–138 (2003); Hussein A. Hassouna, *The Enforcement of the Fourth Geneva Convention in the Occupied Palestinian Territory, Including Jerusalem*, 7 ILSA J. INT'L & COMP. L. 461 (2001).

38. S.C. Res. 681, ¶¶ 1–8, U.N. Doc. S/RES/681 (Dec. 20, 1990).

39. S.C. Res. 1322, ¶ 3, U.N. Doc. S/RES/1322 (Oct. 7, 2000); S.C. Res. 605, ¶ 2, U.N. Doc. S/RES/605 (Dec. 22, 1987).

40. *See* G.A. Res. 43/21, ¶ 4, U.N. GAOR, 43d Sess., 45th plen. mtg., U.N. Doc. A/RES/43/21 (Nov. 3, 1988) ("*Demands* that Israel, the occupying Power, abide immediately and scrupulously by the Geneva Convention relative to the Protection of

Common Article 1 to the Geneva Conventions requires the Contracting Parties "to respect and *to ensure respect* for the present Convention *in all circumstances*." The ICJ held in *Nicaragua v. United States of America* that this requirement derives not only from the Conventions, "but from the general principles of humanitarian law to which the Conventions merely give specific expression."[41]

III. THE WALL AND ISRAELI CIVILIAN SETTLEMENT ACTIVITY

On the question of the legality of Israeli civilian settlement activity in the OPT, Judge Barak, the President of the HCJ who presided over the hearings and wrote the unanimous decision for the three-judge panel, declared:

> 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*. It is not relevant whatsoever to this conclusion 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.[42]

With the benefit of hindsight and with the availability of an array of literature published on the topic, including Pictet's official commentary (which was published *before* Israel occupied the West Bank in 1967),[43] Judge Barak was in an ideal position to examine the legality of Israeli civilian settlements in the OPTs. It is therefore perplexing that he chose to avoid addressing the issue.[44] This is

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Civilian Persons in Time of War."); G.A. Res. 38/180A, ¶ 6, U.N. GAOR, 38th Sess., 102d plen. mtg., U.N. Doc. A/RES/38/180 (A-E) (Dec. 19, 1983) ("*Reaffirms its determination* that all relevant provisions of the Regulations annexed to the Hague Convention IV of 1907, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, continue to apply to the Syrian territory occupied by Israel since 1967."); G.A. Res. 37/123A, ¶ 6, U.N. GAOR, 37th Sess., 108th plen. mtg., U.N. Doc. A/RES/37/123 (A-F) (Dec. 16, 1982) ("*Reaffirms its determination* that all the provisions of the Hague Convention of 1907 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, continue to apply to the Syrian territory occupied by Israel since 1967."); G.A. Res. 32/91A, ¶ 3, U.N. GAOR, 32d Sess., 101st plen. mtg., U.N. Doc. A/RES/32/91(A-C) (Dec. 13, 1977) ("*Calls again upon* Israel to acknowledge and to comply with the provisions of that Convention in all the Arab territories it has occupied since 1967.").

41. Geneva Convention IV, *supra* note 20, art. 1 (emphasis added); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 220 (June 27).

42. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶ 19 (2006).

43. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet ed., 1958).

44. One reason may be that Barak was seeking to avoid a clash with the legislature. Since the HCJ's jurisdiction over acts of the Israeli military in the OPTs rests on an interpretation of an Israeli statute, the Knesset (Israel's parliament) can

especially true because the settlements violate not only international law, but also, to the extent that they are built on private Palestinian property, Israeli municipal law.[45] Instead, Judge Barak (who recently retired as President of the Supreme Court) concluded that the military commander of the West Bank is authorized to construct the wall for the purpose of defending the lives and safety of the Israeli settlers.[46] In reaching this conclusion, the HCJ in effect directly challenged the ICJ, which was unanimous on this finding of law.[47] Judge Buergenthal (who dissented from the decision to hear the case) agreed with his colleagues when it came to the settlement issue in his Declaration. Referring to Article 49, paragraph 6 of Geneva Convention IV, he wrote:

> I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law.[48]

Note the use of terminology by Judge Buergenthal: where the wall is being built to protect the settlements, it is in violation of IHL by its very existence. In other words, one of the consequences of the illegality of the settlement enterprise is that any measures undertaken to protect settlers must also be considered unlawful. In this respect, it should be said that the illegality of Israeli civilian settlement activity has never been in any doubt, not even in Israel.

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always redefine the court's jurisdiction so as to limit its review over decisions relating to the occupied territories. This is because Israel has no formal constitution, and, thus, judicial rulings on any subject can be overruled by legislation. *See* Yoav Dotan, *Judicial Review and Political Accountability: The Case of the High Court of Justice in Israel*, 32 ISR. L. REV. 448, 469 (1998) (suggesting that "unlike other systems with entrenched constitutions (such as the United States), the fear of 'judicial tyranny' is far from being real").

45. *See* Talia Sasson Report, Summary of the Opinion Concerning Unauthorized Outposts, http://www.fmep.org/documents/sassonreport.html (last visited Oct. 18, 2007) [hereinafter Sasson Report] (explaining that the summary opinion has been prepared at the request of the Prime Minister's bureau). According to the report, written by Talia Sasson, a former State prosecutor: "It is absolutely prohibited to establish outposts on private Palestinian property. Such an action may in certain circumstances become a felony." In this regard, Sasson cites the HCJ ruling in the case of Elon Moreh, HCJ 390/79 Dweikat et al. v. Israel [1979] IsrSc 34(1) 1. *See* 9 ISR. Y.B. HUM. RTS. 345 (1979) (offering an English summary of the case); *see also* Steven Erlanger, *West Bank Settlements on Private Land, Data Shows*, INT'L HERALD TRIB., Mar. 14, 2007, *available at* http://www.iht.com/articles/2007/03/14/africa/web-0314israel.php ("An up-to-date Israeli government register shows that 32.4 percent of the property held by Israeli settlements in the occupied West Bank is private, according to the advocacy group that sued the government to obtain the data.").

46. For a recent commentary on Judge Barak's legacy, see Nimer Sultany, *The Legacy of Justice Aharon Barak: A Critical Review*, 48 HARV. INT'L L.J. ONLINE 83 (2007), http://www.harvardilj.org/online/113.

47. ICJ Wall Advisory Opinion, *supra* note 2, at 1055, 1080–81.

48. *Id.* at 1080–81, para. 9 (declaration of Judge Buergenthal).

In fact, in 1967, Theodor Meron, who was then working as the legal counsel to Israel's Foreign Ministry, wrote in a "Top Secret" Memorandum: "My conclusion is that civilian settlement in the administered territories contravenes the explicit provisions of the Fourth Geneva Convention."[49] In contrast, Judge Barak advanced two principal reasons that the wall could protect the settlements (although he refrained from ruling on their legality): (1) "The authority to construct the wall for the purpose of defending the lives and safety of Israeli settlers is derived from the need to preserve 'public order and safety,' as mentioned in Article 43 of the Hague Regulations;"[50] and (2) "Israelis living in the area are Israeli citizens. The State of Israel has a duty to defend their lives, safety, and well-being."[51]

Judge Barak then qualified this last point by holding that "the scope of the human right of the Israelis living in the *area*, and the level of protection of the right, are different from the scope of the human right of an Israeli living in Israel and the level of protection of that right."[52] This was because the area in question (a part of the West Bank between *Qalqilya* and the *Alfe Menashe* settlement) "is not part of the State of Israel."[53] Consequently, Israeli law does not apply there, and those who live in the area "live under the regime of belligerent occupation."[54] However, according to a leaked EU document, the HCJ (in an important decision relating to the Gaza Disengagement Plan that has not been translated)[55] reiterated the distinction[56] it makes between the legal status of occupied East

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49. GERSHOM GORENBERG, THE ACCIDENTAL EMPIRE: ISRAEL AND THE BIRTH OF THE SETTLEMENTS, 1967–1977, at 99–102 (2006). Since the 1970s, legal advisors at the U.S. State Department have accepted that the settlements contravene Article 49(6) of Geneva Convention IV. *See* Letter of H. J. Hansell, Legal Advisor, USDOS to House Comm. on International Relations, Apr. 21, 1978, *in* 17 I.L.M. 777 (1978) (giving advice on the illegality of Israeli civilian settlement activity).

50. Hague Convention (IV) Respecting the Laws and Customs of War on Land, and Its Annex: Regulations Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, U.S.T.S. 539 [hereinafter 1907 Hague Regulations]; HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶¶ 18–20 (2006).

51. HCJ 7957/04 *Mara'abe*, ¶ 21.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See* Disengagement Plan of Prime Minister Ariel Sharon, April 16, 2004, *available at* http://www.knesset.gov.il/process/docs/DisengageSharon_eng.htm (last visited Oct. 18 2007) (containing an outline of the Gaza Disengagement Plan and links to related documents).

56. *See* Muhammad Abdullah Iwad & Zeev Shimshon Maches v. Military Court, Hebron District & Military Prosecutor for the West Bank Region, *reprinted in* 48 INT'L L. REP. 63 (1975) (making a distinction between the legal status of East Jerusalem and other Palestinian cities in the West Bank); *see also infra* note 111 (discussing the court's decisions in *Hanzalis* and elsewhere).

Jerusalem and the West Bank and Gaza.[57] Apparently, the HCJ ruled that it was legal to take into account political considerations, in addition to security considerations, for the routing of the wall in East Jerusalem because that part of the city has been "Israeli territory" since its annexation in 1967.[58] The Court thus clarified its earlier ruling in the *Beit Sourik* case, in which it had found that the military commander could not construct the wall in the West Bank if his reasons were political.[59]

If this is indeed the case, then the HCJ seems to have drawn a distinction between East Jerusalem, which the Israeli government considers part of Israel under its municipal law, and the West Bank and Gaza, which under IHL is classified as occupied territory.[60] However, it should be emphasized that this finding of law is at complete odds with international law.[61] Even in a war of self-defense, the acquisition and annexation of territory by forcible means is illegitimate.[62] Although the question of whether an international law

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57. *See* SEPARATION BARRIER/WALL, JERUSALEM AND RAMALLAH HEADS OF MISSION, REPORT ON EAST JERUSALEM (2005), http://www.passia.org/jerusalem/meetings/2005/EU-Report-Jerusalem.htm (discussing the separation barrier that separates most of East Jerusalem from the West Bank, separating Palestinians from other Palestinians). The suppressed report was an internal EU document written by British staff at that country's consulate in East Jerusalem and was leaked to the press.

58. *Id.*

59. HCJ 2056/04 Beit Sourik Village Council v. Israel [2004] (Isr.), *translated in* 43 I.L.M. 1099, ¶ 27 (2004).

60. *See* Law and Administration Ordinance—Amendment No. 11- Law, 5727-1967, 13 LSI 75, 75 (1967) (Isr.) ("The law, jurisdiction and administration of the State shall extend to any area of Eretz Israel designated by the Government by order."); Sabri Jiryis, *Israeli Laws as Regards Jerusalem*, *in* THE LEGAL ASPECTS OF THE PALESTINE PROBLEM WITH SPECIAL REGARD TO THE QUESTION OF JERUSALEM 182 (Hans Kochler ed., 1981) (citing Official Gazette (*Kovetz Ha-Takanot*), No. 2064, 28 June, 1967, at 2690–91 (Hebrew)).

61. *See* S.C. Res. 478, para. 3, U.N. Doc. S/RES/478 (Aug. 20, 1980) (determining "that all legislative and administrative measures and actions taken by Israel, the Occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent 'basic law' on Jerusalem, are null and void and must be rescinded forthwith"); LORD MCNAIR & A.D. WATTS, THE LEGAL EFFECTS OF WAR 369 n.2 (1966); S.C. Res. 298, para. 3, U.N. Doc. S/RES/298 (Sept. 25, 1971) ("[A]ll legislative and administrative actions taken by Israel to change the status of the City of Jerusalem . . . are totally invalid and cannot change that status."); S.C. Res. 446, para. 3, U.N. Doc. S/RES/446 (Mar. 22, 1979) ("*Calls once more upon* Israel, as the occupying Power . . . to desist from 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."); S.C. Res. 452, para. 3, U.N. Doc. S/RES/452 (July 20, 1979) ("*Calls upon* the Government and people of Israel to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem.").

62. See the first principle to the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, approved by the General Assembly—with the assent of Israel—in G.A. Res. 2625, at 121, U.N. GAOR, 25th Sess., U.N. Doc. A/8082

overrides a municipal law when the two conflict will depend exclusively (at the municipal level) on the constitutional law of that state, it is interesting to note that Judge Barak, in his latest treatise, has written that "the theoretical principle of rule of law leads to a number of presumptions," which include "the need to ensure rule of law on the international plane by making sure domestic law is compatible with public international law."[63] Evidently, there is a difference between Judge Barak's decisions on the judicial level and his scholarly work, and in this respect his scholarly writings seem to be a more accurate reflection of the law as it should be, especially since, for the purposes of state responsibility, a state may not rely on the provisions of its internal law to justify a failure to comply with international law.[64] It is important to stress this inability on the part of the state to rely on its internal law because declarative statements of customary international law by the ICJ could be viewed by some Israeli judges as part of domestic Israeli law. Some judges could take this view because, in Israel, customary international law (as opposed to treaty law) automatically becomes part of municipal law, with no need for an act of the Israeli legislature to make it binding.[65] Although Geneva Convention IV is a treaty, certain of its provisions reflect customary international law.[66] According to a recent ICRC study, state practice establishes that Article 49(6) is a norm of customary international law.[67] Presumably then, this provision is binding in Israeli law and could be invoked by Israeli judges to outlaw those settlements established in the occupied territories.

A. *The Settlements and Article 43 of the Hague Regulations*

The HCJ's finding that the need to preserve "public order and safety" in the OPT—as mentioned in Article 43 of the 1907 Hague

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(1970). *See also* ROBERT YEWDALL JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 55 (1963) (writing four years before Israel captured East Jerusalem, the West Bank, Gaza, the Golan Heights and the Sinai Peninsula that "it would be a curious law of self-defence that permitted the defender in the course of his defence to seize and keep the resources and territory of the attacker"); D. W. Bowett, *International Law Relating to Occupied Territory: A Rejoinder*, 87 LAW Q. REV. 473 (1971) (conceding that "states cannot acquire territory by resort to force").

63. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW: TRANSLATED FROM THE HEBREW BY SARI BASHI 360 (2005) (citing M. HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS (1997)).

64. JAMES CRAWFORD, INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS art. 32 (2002).

65. *See, e.g.*, Ruth Lapidoth, *International Law Within the Israeli Legal System*, 24 ISR. L. REV 451, 452 (1990) (noting that in Israel, international custom is part of municipal law and that this position was adopted very early in Israel's history by the Supreme Court).

66. *See* Geneva Convention IV, *supra* note 20, art. 49.

67. *See* JEAN-MARIE HENCKAERTS & LOUIS DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 1 RULES 462–63, rule 130 (2005).

Regulations—gives the military commander the authority to construct the wall for the purpose of defending the lives and safety of Israeli settlers in the West Bank is also unpersuasive.[68] Article 43 provides:

> The authority of the legitimate power having *in fact* passed into the hands of the occupant, that latter shall take all the measures in his power *to restore and ensure*, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[69]

In 1967, the legitimate power in East Jerusalem and the West Bank was Jordan, which claimed that its title rested not on conquest but on the consent of the inhabitants.[70] Even if Jordan was not viewed as the "legitimate" power, it still had the rights and duties of an occupying power before it annexed those territories.[71] Article 31 of the Vienna Convention on the Law of Treaties of 1969 (VCLT) provides that, as a general rule of interpretation, a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in light of its object and purpose.[72]

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68. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶¶ 18–19 (2006).

69. 1907 Hague Regulations, *supra* note 50, art. 43 (emphasis added).

70. The United Kingdom granted de jure recognition to the union, but most states withheld de jure recognition (although they may have granted de facto recognition). In particular, the other Arab states denounced the union as a betrayal of the Palestinian cause and as a breach of a resolution passed by the Arab League prohibiting the annexation of any part of Palestine. *See The Policy of the Arab States Towards the Question of Palestine, Resolution 320-Sess.12—Sched.6, Apr. 13, 1950, in* MUHAMMAD KHALIL, THE ARAB STATES AND THE ARAB LEAGUE: A DOCUMENTARY RECORD VOLUME II 166 (1962). Eventually a compromise was reached; Jordan declared that the annexation of the West Bank was without prejudice to the final settlement of the Palestine issue, which the other Arab states accepted. *See* Michael Akehurst, *The Place of the Palestinians in an Arab-Israeli Peace Settlement*, 70 ROUND TABLE 443 (1980) (discussing Resolution 242, which outlined the terms of the settlement).

71. Jordan incorporated East Jerusalem and the West Bank into its Kingdom in 1950 after overrunning the territory in the 1948 war and subsequently occupying it. It did this in collusion with the Provisional Government of Israel. *See generally* AVI SHLAIM, COLLUSION ACROSS THE JORDAN: KING ABDULLAH, THE ZIONIST MOVEMENT, AND THE PARTITION OF PALESTINE (1988).

72. *See* Vienna Convention on the Law of Treaties art. 4, May 23, 1969, 1155 U.N.T.S. 331 (providing that "the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States"). Although the ICJ has held that Articles 31 and 32 reflect customary international law, and although there is evidence to indicate that this represented the law in the mid-1950s, it has been argued that there is less evidence to suggest that this was reflective of international law in 1907 at the time of the Hague Peace Conference. However, in the *Iron Rhine Arbitration, Between Belgium and the Netherlands*, Permanent Court of Arbitration (May 24, 2005), *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1155, the Arbitral Tribunal, which included three ICJ judges (Judges Higgins, Simma, and Tomka) and two Professors (Alfred H.A. Soons and Guy Schrans), held at paragraph 45 that Articles 31 and 32 of the VCLT reflect pre-existing customary international law, and thus may be (unless there are particular

Assuming that when Article 43 was drafted its authors envisaged the possibility of a prolonged occupation, it is clear from the plain and ordinary meaning of Article 43's text that it is concerned with restoring and ensuring—as far as possible—public order and safety, while respecting the laws *already in force* in the country.[73] After all, "good faith," as Judge Barak has recently written, "is a fundamental principle that permeates the objective purpose of every statute."[74] Evidently, one can only restore and ensure public order and *life* (the word "safety" was a mistranslation from the original, official, and authoritative French text) for those persons who already inhabit the area in question.[75] Those Israeli civilian settlements established in the OPTs *after* those territories were captured by Israel in June 1967 necessarily violated Article 49(6) of Geneva Convention IV, which prohibits an occupying power from transferring its civilian population into the territory it occupies.[76] The settlements have also violated Article 43 of the Hague Regulations because Israel changed its laws to facilitate the settlement enterprise.[77] Moreover, Jordan ratified Geneva Convention IV on May 29, 1951. Consequently, the laws embodied in Geneva Convention IV were part of Jordanian law when

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indications to the contrary) applied to treaties concluded before the entry into force of the Vienna Convention in 1980. They reached this conclusion by referring to the ICJ's jurisprudence in the *Kasikili/Sedudu Island* and *Pulau Ligitan/Sipadan* cases which concerned treaties concluded in the 19th century. *Id.*

73. Some have argued that this refers to the status quo ante (i.e. the situation in the OPTs before its capture by Israeli forces on 4 June 1967). *See, e.g.*, HCJ 337/71 Christian Soc'y for the Holy Places v. Minister of Def. et al., *translated in* 2 ISR. Y.B. HUM. RTS. 354 (1972) (Cohn, J., dissenting) (arguing that the intention of the words to restore and ensure public order and life in Article 43 is concerned with "the status quo ante . . . to ensure their continued existence").

74. BARAK, *supra* note 55, at 361. *See also* Robert Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, 53 NETH. INT'L L. REV. 1, 13–25 (2006) (discussing good faith in depth).

75. According to Edmund Schewnk, a comparison of the original French text of the Hague Regulations with the English translation of "la vie publique" has been translated into "safety." The literal translation of "la vie publique" is "public life." Edmund Schewnk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 YALE L.J. 393, 393 n.1 (1945).

76. *See* COMMENTARY ON THE GENEVA CONVENTIONS, *supra* note 43, at 283.

> It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to *occupied territory* for political and racial reasons or in order, as they claimed, *to colonize those territories.* Such transfers worsened the economic situation of the *native population* and endangered their separate existence as a race.

Id. (emphasis added).

77. In his seminal study, Raja Shehadeh describes the various legal tools Israel has used to facilitate its settlement policy in the occupied territories by declaring Palestinian land to be "State land," "State property," "abandoned"; requisitioning it for "military purposes"; expropriating it for "public purposes"; and acquiring it for "Jewish purchase." RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK 15–59 (1985).

Israel captured the West Bank from Jordan in the June 1967 war. Israel is bound by that Convention not only because it has ratified it,[78] but also because it is the occupying power under Article 43 of the Hague Regulations, which reflected customary international law years before Israel occupied the West Bank.[79] Thus Geneva Convention IV was, prior to Israel's occupation, one of the "laws in force in the country," which Israel was obliged to respect.[80]

Because Article 4 restricts the scope of Geneva Convention IV to "protected persons," the HCJ has sought to rely on the Hague Regulations where there are no such restrictions.[81] However, this still does not change the fact that the settlements, which the HCJ has admitted the wall is designed to protect, are contrary to Article 49(6) of Geneva Convention IV.[82] It is therefore hardly surprising that the HCJ refuses to address its applicability. Yet the Hague Regulations are supposed to be supplemented by the relevant provisions of Geneva Convention IV, as well as the Additional Protocols of 1977 (which Israel has not ratified, although Additional Protocol 1 (AP1) may be said to represent customary international law, and was even mentioned in the General Assembly's December 2003 resolution

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78. Israel signed the Convention on December 8, 1949, and ratified it on July 6, 1951. Geneva Conventions of 12 August 1949, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (last visited Oct. 19, 2007).

79. Article 43 was considered as reflecting customary international law before Israel captured the West Bank in the 1967 war. *See Trial of the German major war criminals*, 41 AM. J INT'L L. 248–249 (1947) ("[B]y 1939 these rules laid down in the [Hague] Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war. . . ."); *Cessation of vessels and tugs for navigation on the Danube* case, 1 R.I.A.A. 104 (1921). In fact, almost identical words to Article 43 of the Hague Regulations had been used in previous Conventions. *See* Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 43, July 29, 1899; The Laws of War on Land arts. 43–44, Sept. 9, 1880; Project of an International Declaration Concerning the Laws and Customs of War arts. 2–3, Aug. 27, 1874. For a survey of this legislation, see DORIS APPEL GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914 (1949).

80. Geneva Convention IV, *supra* note 20. With regard to the first part of Article 43, one highly-respected jurist in Israel has noted that it "must not be seen as a source of supplementary rights and authority for the Occupying Power, transcending the limits determined by the constraints of discharging its duty. *See* Yoram Dinstein, *The Israel HCJ and the Law of Belligerent Occupation: Article 43 of the Hague Regulations*, 27 ISR. Y.B. HUM. RTS. 1, 16 (1995).

81. Geneva Convention IV, *supra* note 20, art. 4. Article 4 of Geneva Convention IV provides that it only applies to "protected persons" who are defined as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." This obviously cannot include nationals of the State of Israel, the occupying power.

82. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶ 19 (2006).

requesting the Advisory Opinion from the ICJ).[83] Thus, contrary to the findings of the HCJ, Article 43 cannot be construed as providing the Israeli military commander with the obligation to defend the lives and safety of Israelis living in illegal settlements by constructing a wall. Article 43 was never drafted to accommodate a settler population; rather, it was intended to safeguard the interests of the local population who found itself under belligerent occupation. Hence, the whole of Article 43 is written in the past tense.[84]

It may also be queried whether establishing Israeli civilian settlements amidst a Palestinian population struggling for independence and statehood in East Jerusalem, the West Bank, and the Gaza Strip for nearly four decades is likely to restore and ensure public order and life.[85] Indeed, it would seem that the very presence of the Israeli settlements contributes to acts of violence, riots, and civil disturbance.[86] Some would even argue that the continued construction of the settlements was one of the primary factors that led to the collapse of the "Oslo Peace Process."[87] Therefore,

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83. *See* G.A. Res. ES-10/14, *supra* note 16 (reaffirming in the preamble "the applicability of the Fourth Geneva Convention *as well as Additional Protocol 1 to the Geneva Conventions* to Occupied Palestinian Territory, including East Jerusalem" (emphasis added)). On the customary status of some of AP1's provisions, see Fausto Pocar, *Protocol 1 Additional to the 1949 Geneva Conventions and Customary International Law*, 31 ISR. Y.B. HUM. RTS. 145 (2002).

84. 1907 Hague Regulations, *supra* note 50, art. 43.

85. There have been numerous studies on the impact of population transfers on the communities affected by the transfer. *See, e.g.*, U.N. Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Final Report of the Special Rapporteur on human rights and population transfer*, U.N. Doc. E/CN.4/Sub.2/1997/23 (June 27, 1997). This report was preceded by a Preliminary Report UN doc. E/CN.5.Sub.2/1993/17 and Corr.1 and a Progress Report UN Doc. E/CN.4/Sub.2/1994/19 and Corr.1. For criticisms of the Draft Declaration on Population Transfer and Implantation of Settlers, see Emily Haslam, *Unlawful Population Transfer and the Limits of International Criminal Law*, 61 C.L.J. 66 (2002). On population transfer generally, see, for example, Eric Kolodner, *Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination*, 27 N.Y.U. J. INT'L L. & POL. 159 (1994). *See also* Christa Meindersma, *Population Exchanges: International Law and State Practice- Part 1*, 9 INT'L J. REFUGEE L. 335 (1997) (examining the human rights implications of population exchange agreements); Christa Meindersma, *Legal Issues Surrounding Population Transfer in Conflict Situations*, 41 NETH. INT'L L. REV. 31 (1994) (providing an overview of existing and emerging legal standards relevant to ongoing situations of population transfer).

86. *See generally* Settler Violence, B'Tselem, Israeli Information Center for Human Rights in the Occupied Territories, http://www.btselem.org/english/Settler_Violence/ (last visited Oct. 19, 2007) (documenting settler violence against Palestinians).

87. Ron Pundak, Director-General of Israel's Peres Peace Centre in Tel Aviv who was a key player in the 1993 Oslo negotiations, attributes its failures to the Netanyahu years of government (1996–1999), as well as to the "patronizing Israeli attitude towards the Palestinians—one of occupier to occupied—[which] continued unabated." Ron Pundak, *From Oslo to Taba: What Went Wrong?*, 43 SURVIVAL 31, 33 (2001).

encouraging one's nationals to emigrate to the occupied territory might, according to Israeli lawyer Eyal Benvenisti, "impinge on the local 'public order and civil life' and therefore be proscribed by international law, particularly by Article 43."[88]

B. *The Settlers, the Settlements, and Human-Rights Law*

It is submitted that Israeli settlers may not invoke human rights law to justify their living in the OPTs for the following four reasons: (1) IHL prohibits establishing settlements in occupied territories and is the *lex specialis* in situations of belligerent occupation; (2) human rights law does not give the settlers the right to live wherever they like; (3) the provisions of the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip[89] regarding the settlements are irrelevant to the matter at hand, and cannot derogate from Geneva Convention IV; and (4) the law of self-determination as a norm of customary international law, as the primordial human right and as a *jus cogens* norm, trumps any rights the settlers may have under general human rights law.

The ICJ has held, in accordance with the long-established position of the U.N. Commission of Human Rights and the practice of the European Court of Human Rights (as reflected in a series of cases concerning Turkey's occupation of northern Cyprus), that international humanitarian and human rights law applies where the occupying power has effective control of the occupied territory.[90] As a result, the indigenous Palestinian population of the West Bank is also entitled to the protection of human rights law.[91] It is therefore clear that Palestinians inhabiting the OPTs are covered by both international humanitarian and human rights law.[92] However, in cases of conflict between these two branches of law, it has been

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88. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 21 (1993) (emphasis added).

89. Israel-Palestinian Interim Agreement on the West Bank and Gaza Strip, Isr.-Palestine, Sept. 28, 1995, 36 I.L.M. 557 (1997).

90. *See* Loizidou v. Turkey, Eur. Ct. H.R. App. No. 40/1993/435/514, ¶ 56 (1996) ("Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus."); *see also* Decision as to the Admissibility of *Banković v. Belgium*, Application No. 52207/99, 41 I.L.M. 517, paras. 70–71 (2002) (finding an obligation to secure an area outside its national territory under its effective control). Turkey has occupied northern Cyprus since July 20, 1974.

91. *See* HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶ 27 (2006) (stating that the HCJ "shall assume—without deciding the matter—that the international conventions on human rights apply in the area").

92. *See* ICJ Wall Advisory Opinion, *supra* note 2, at 1040, paras. 111, 113 (discussing the applicability of human rights law to the OPTs). Israel ratified the Covenants on Human Rights on January 3, 1992.

suggested that the latter should be interpreted in light of the former as the law specific to belligerent occupation.[93]

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ held that the protection of the International Covenant of Civil and Political Rights[94] (ICCPR) does not cease in times of war unless a state has derogated from certain of its provisions in a time of national emergency.[95] The Advisory Opinion notes, however, that respect for the right to life is not a provision that can be derogated from, and that the right not to be arbitrarily deprived of one's life applies also in hostilities.[96] The ICJ then held: "The test of what is an arbitrary deprivation of life . . . *then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.*"[97] In its Advisory Opinion in *Wall*, the ICJ cited its opinion in *Nuclear Weapons*, stipulating that there are three possible situations with regard to the relationship between international humanitarian and human rights law:

> Some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[98]

In other words, both of these branches of law may, depending on the circumstances, be applicable to situations of belligerent occupation, which the ICJ recently affirmed in its decision in *Armed activity in the Congo*.[99] However, where there is a clash between human rights

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93. *See* ECOSOC, Sub-Comm. on the Promotion & Prot. of Human Rights, Comm'n on Human Rights, *Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law*, para. 76, U.N. Doc. E/CN.4/Sub.2/2005/14 (Jun. 21, 2005) (*prepared by* Françoise Hampson & Ibrahim Salama) (noting that the case law strongly suggests that human rights bodies should interpret the norms of human rights law in light of international humanitarian law). See also *id.* paras. 57, 69, where the authors conclude that *lex specialis* was not being used by the ICJ in its Wall Advisory Opinion to displace human rights law and that whether IHL/human rights law is applicable is not a question of "either . . . or." They conclude that the case law of the European Court of Human Rights and Inter-American Commission and Court of Human Rights strongly suggests that in situations of conflict, human rights bodies should interpret the norms of human rights law in light of the law of armed conflict and IHL, as the *lex specialis*.

94. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

95. Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 25, 35 (July 8).

96. *Id.*

97. *Id.* (emphasis added).

98. ICJ Wall Advisory Opinion, *supra* note 2, at 1038–39, para. 106.

99. Armed Activities on the Territory of the Congo (Congo v. Uganda), 2005 I.C.J. 215 (Dec. 19).

and humanitarian law, it would seem that IHL would prevail in situations of armed conflict.[100] Although the ICJ in its *Nuclear Weapons* Advisory Opinion was discussing the test of what is an arbitrary deprivation of life, its finding that IHL is the *lex specialis* in the course of armed conflict would in principle apply to all conflict situations.[101] It would therefore seem that in case of dispute, international humanitarian law as embodied in The Hague Regulations, Geneva Convention IV, and the Additional Protocols—insofar as they reflect customary international law[102]—would prevail over human rights law. Thus, even though Israeli settlers are protected by the law of human rights, this cannot preclude the wrongfulness of breaching specific rules of international humanitarian law such as Article 49(6) of Geneva Convention IV.

The conclusion to be drawn from this is that while Israelis are entitled to have their human rights respected, the settlements in which they live are unlawful. The government of Israel must therefore cease construction of the settlements and refrain from encouraging its nationals to settle in them.[103] The fact that the settlers have human rights under international law should also not prevent them from being relocated from occupied territory.[104] The settlers cannot invoke human rights law to reside wherever they like, as Article 12 of the ICCPR provides: "Everyone *lawfully* within the

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100. In other words, human rights law remains applicable in situations of armed conflict, except when it is in direct conflict with the law of armed conflict. *See generally* CHARLES GARRAWAY, CHATHAM HOUSE, THE "WAR ON TERROR": DO THE RULES NEED CHANGING? (2006), *available at* http://www.chathamhouse.org.uk/publications/papers/download/-/id/384/file/4019_bpwaronterror.pdf (last visited Sept. 8, 2006) (analyzing the relationship between human rights law in the "War on Terror").

101. *See, e.g.*, Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (*finalized by* Martti Koskenniemi) (discussing *lex specialis* generally).

102. *See* HENCKAERTS, *supra* note 67 (clarifying and elucidating this reflection of customary international law in this recent ICRC study).

103. Various financial incentives are used to encourage people to move into settlements. *See generally* B'TSELEM, LAND GRAB: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK (2002), http://www.btselem.org/Download/200205_Land_Grab_Eng.pdf [hereinafter LAND GRAB] (discussing a number of methods the Israeli government used). Although during Israel's Gaza disengagement plan in September 2005, 8500 Israeli settlers were forced to evacuate Gaza, 14,000 Israeli settlers moved into settlements in the West Bank. Chris McGreal, *Israel Redraws the Roadmap, Building Quietly and Quickly*, GUARDIAN (London), Oct. 18, 2005, at 17.

104. *See* HCJ 1661/05 Regional Council of Gaza Beach v. Knesset (not translated); *see also* Chatham House, *Disengagement From Gaza—Legal Issues*, *available at* http://www.chathamhouse.org.uk/publications/papers/download/-/id/286/file/3922_ilp200605.pdf (last visited Oct. 19, 2007) (providing a summary of highlights from the case in English). In this case, Israel's High Court of Justice rejected the claims advanced by the Gaza settlers that their human rights would be breached if they were forced to relocate from the Gaza Strip. Paradoxically, many of these settlers moved to the West Bank, as noted in McGreal, *supra* note 103, at 17.

territory of a *State* shall, *within that territory*, have the right to liberty of movement and freedom to choose his residence."[105] Palestine, as long as it remains OPT, is clearly not a state.[106] Secondly, the settlements are not situated in the State of Israel, but in the occupied territories.[107] Moreover, their presence in those territories is unlawful, and Article 12 is consequently inapplicable.[108] Israel may therefore not invoke human rights law to defend the settlers and the settlements in which they live.[109]

Nor may Israel invoke the security provisions of the Interim Agreement it concluded with the PLO, as Judge Barak did in *Mara'abe*.[110] Although Article XII (1) of the Interim Agreement provides Israel with the responsibility for "overall security of Israelis and settlements," this article does not necessarily make the settlements lawful, as it is only concerned with security and public order. Even if one were to interpret these provisions as "legalizing" the settlements, such legalization would be prohibited by Article 47 of Geneva Convention IV, which provides:

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, *nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by an annexation by the latter of the whole or part of the occupied territory*."[111]

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105. International Covenant on Civil and Political Rights, *supra* note 94, at 176 (emphasis added).

106. *See* Efrat Ungar v. Palestine Liberation Org., 402 F.3d 274, 292 (1st Cir. 2005) ("We recognize that the status of the Palestinian territories is in many ways sui generis. Here, however, the defendants have not carried their burden of showing that Palestine satisfied the requirements for statehood under the applicable principles of international law at any point in time."). For articles on the question of Palestinian statehood, see Francis A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT'L L. 301 (1990); James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT'L L. 307 (1990); and Jean Salmon, *Declaration of the State of Palestine*, 5 PALESTINE Y.B. INT'L L. 48 (1989), *translated in* 33 ANNUAIRE FRANÇAIS DE DROIT INT'L 37–62 (1988).

107. LAND GRAB, *supra* note 103, at 7.

108. *Id.*

109. Nor may Israel benefit from its own wrongdoing. This derives from the principle of *ex injuria non jus oritur*. As Judge Elaraby noted in his separate opinion in *Wall*: "The general principle that an illegal act cannot produce legal rights—*ex injuria jus non oritur*—is well recognized in international law." ICJ Wall Advisory Opinion, *supra* note 2, at 1087, para. 3.1 (declaration of Judge Elaraby). *See generally* R.Y. Jennings, *Nullity and Effectiveness in International Law*, *in* CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 64, 72–74 (1965) (discussing the principle of *ex injuria non oritur jus*).

110. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶ 14 (2006).

111. Geneva Convention IV, *supra* note 20, art. 47 (emphasis added).

Pictet notes that "[a]greements concluded with the authorities of the occupied territory represent a more subtle means by which the Occupying Power may try to free itself from the obligations incumbent on it under occupation law."[112] In this regard, it is important to note that Article XXXI (7) of the Interim Agreement on Final Clauses provides, "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations."[113] This article clearly prohibits any new settlement activity as such activity would affect the status of the West Bank before the outcome of the permanent status negotiations as well as any measures taken to incorporate them within Israel itself. Effectively, Israel is prohibited by Geneva Convention IV from any settlement activity per se, while the Interim Agreement prohibits the creation of any new settlements and the expansion of existing settlements. Thus two separate treaties (Geneva Convention IV and the Interim Agreement) prohibit Israeli civilian settlement activity in the OPTs, as does Israeli municipal law where the settlements are built on private Palestinian property.[114] It could therefore be argued that any measures undertaken by Israel to protect the settlements, which are in themselves unlawful, are contrary to international law.[115]

Finally, common Article 1 to both the ICCPR and the International Covenant on Economic, Social, and Cultural Rights[116] (ICESCR) provides: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[117] Evidently, this is the preeminent human right from which all other human rights flow. It is also widely regarded to be a peremptory norm of international law, as reflected in both custom and treaty law, and is therefore presumably binding under Israeli law.[118] Therefore, even if general human rights law is applicable to the settlers, the Palestinian people's right of self-determination takes precedence, especially as the Israeli settlements established after 1967 directly

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112. COMMENTARY ON THE GENEVA CONVENTIONS, *supra* note 43, at 274.

113. Israel-Palestinian Interim Agreement, *supra* note 89.

114. *See generally* Sasson Report, *supra* note 45 (discussing the settlements and Israeli municipal law).

115. This was indeed argued by counsel for Jordan and it seems to have been accepted by the ICJ. *See* Request for Wall Advisory Opinion, *supra* note 15, para. 9 (pleading by Sir Arthur Watts, Senior Legal Advisor to Jordan).

116. International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

117. *See infra* Part IV (addressing in detail what underlies the Palestinian right of self-determination).

118. Customary law as opposed to treaty law is binding upon domestic courts in Israel. *See* Lapidoth, *supra* note 65, at 452 (noting that "[a]s in most states, in Israel, too, international custom is automatically part of municipal law, with no need for an act of transformation" from the legislature to make the law binding on the courts).

conflict with their right of self-determination. The Palestinian people cannot pursue this internationally recognized right when the settlers, the soldiers, and the Israeli government are interfering with their economic, social, and cultural development.[119]

C. *The Settlements as De Facto Annexation*

Despite claims to the contrary,[120] Israel's construction of the wall in the West Bank (in and around East Jerusalem) and its enclosure of the large settlement blocs located there are acts that in their very essence amount to de facto annexation. Indeed, Judge Barak's repetition in his judgment in *Mara'abe* of the assertion he had made in *Beit Sourik*, that "the military commander is not authorized to order the construction of a separation fence if the reason behind the fence is a political goal of 'annexing' territories of the area to the State of Israel and to determine Israel's political border," is undoubtedly correct.[121] However, after making this statement, Judge Barak went on to conclude that the wall's route was not politically motivated, and that it is therefore not tantamount to de facto annexation.[122] This conclusion is, however, a very odd one to reach, especially since state representatives from the government of Israel had previously admitted, in a public session concerning the wall in another case, that "political considerations" did dictate to a certain extent the wall's route.[123] Surely, therefore, the only logical conclusion is that those sections of the wall that incorporate the large Israeli settlement blocs into Israel are acts tantamount to de facto annexation, according to Judge Barak's statement in *Beit Sourik*.

It may be true that Israel has not in fact annexed the territories de jure because it did not purport to annex East Jerusalem through

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119. For example, one major issue is the utilization of natural resources in the West Bank by the settlers and private Israeli companies. *See, e.g.*, G.A. Res. 3171 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9400 (Dec. 17, 1973); G.A. Res. 1803 (XVII), ¶ 5, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962) (General Assembly resolutions on Permanent Sovereignty over Natural Resources). In the context of natural resources in Palestine and the Golan Heights, see G.A. Res. 57/269, U.N. Doc. A/RES/57/269 (Mar. 5, 2003). *See also* NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES 152–56 (1997) (discussing permanent sovereignty over the OPTs).

120. *See* HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶ 14 (2006) (arguing that the areas have not been "annexed" and thus are not governed by Israeli law, but instead by public international law regarding belligerent occupation).

121. *Id.* ¶ 15.

122. *Id.* ¶ 98.

123. *See* Yuval Yoaz, *State Prosecution Concedes Political Aim for Jerusalem Fence*, HA'ARETZ (Jerusalem), June 21, 2005, *available at* http://www.christusrex.org/www1/news/haaretz-6-21-05a.html (concerning construction of a separation fence in northern Jerusalem).

the act of its legislature until 1980.[124] But for all intents and purposes, Israel effectively annexed that city soon after its capture in 1967, an action that was condemned by the U.N. Security Council on several occasions.[125] This condemnation was even acknowledged by the HCJ in a number of decisions from the late 1960s and early 1970s.[126] Israel may, in fact, refrain from any de jure act of annexation precisely to avoid condemnation from the U.N. Security Council. But is it not annexation in all but name for Israel to incorporate the settlement blocs by widening the municipal boundaries[127] of Jerusalem, to expand already existing settlements so that they protrude further into occupied territory (such as the proposed E-1 settlement abutting *Ma'aleh Adumim,* see map 3 in Appendix), and to administer these territories as a part of the state of Israel? This logic must have swayed the ICJ, which found that it could not "remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access."[128] It then held:

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124. Basic Law: Jerusalem, Capital of Israel, 5740-1980, 34 LSI 209 (1979–1980) (Isr.). *See* S.C. Res. 478, ¶ 5(b), U.N. Doc. S/RES/478 (Aug. 20, 1980) (calling on "those States that ha[d] established diplomatic missions in Jerusalem to withdraw" them); *see also* S.C Res. 476, U.N. Doc. S/RES/476 (June 30, 1980) (holding an emergency session to discuss the legal consequences of building the wall). At present, Jerusalem is not recognized as Israel's capital by any country in the world. *See* Israel Science and Technology, Embassies and Consulates in Israel, http://www.science.co.il/Embassies.asp (last visited Oct. 19, 2007) (showing all foreign embassies in Israel are located in Tel Aviv, not Jerusalem). Costa Rica and El Salvador, the only countries to have had embassies in Jerusalem, moved them to Tel Aviv in August 2006. *See* Gil Hoffman, *Costa Rica to Relocate Embassy to TA*, JERUSALEM POST, Aug. 17, 2006, *available at* http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1154525889070; *El Salvador To Move Embassy From Jerusalem*, YNETNEWS.COM, Aug. 25, 2006, http://www.ynetnews.com/articles/0,7340,L-3295745,00.html.

125. *See* S.C. Res. 298, U.N. Doc. S/RES/298 (Sept. 25, 1971); S.C. Res. 271, U.N. Doc. S/RES/271 (Sept. 15, 1969); S.C. Res. 267, U.N. Doc. S/RES/267 (July 3, 1969); S.C. Res. 252, U.N. Doc. S/RES/252 (May 21, 1968); G.A. Res. 2254 (ES-V), U.N. GAOR, 5th Emer. Spec. Sess., Supp. No. 1, U.N. Doc. A/6798 (July 14, 1967); G.A. Res. 2253 (ES-V), U.N. GAOR, 5th Emer. Spec. Sess., Supp. No. 1, U.N. Doc. A/6798 (July 4, 1967).

126. *See* Muhammad Abdullah Iwad & Zeev Shimshon Maches v. Military Court, Hebron District, *supra* note 49; Golan Heights Law, 5742-1981, 36 LSI 7 (1981) (Isr.); Jurisdiction and Administration Order (No.1), 5727-1967 (1967) (Isr.). The HCJ has stated that from the date of the 1967 Order, "united Jerusalem became an inseparable part of Israel." HCJ 171/68 Hanzalis v. Greek Orthodox Patriarchal Church [1968] (Isr.), *translated in* 48 INT'L L. REP. 93 (1970).

127. For an article examining the various measures Israel has used to expand its control over East Jerusalem by expropriating Palestinian land, constructing Jewish settlements, zoning Palestinian lands as "green areas," developing town planning schemes, demolishing Palestinian homes, and revoking Palestinian residency permits, see Ardi Imseis, *Facts on the Ground: An Examination of Israeli Municipal Policy in East Jerusalem*, 15 AM. U. INT'L L. REV. 1039 (2000).

128. ICJ Wall Advisory Opinion, *supra* note 2, at 1042, para. 121.

> The Court considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, *and notwithstanding the formal characterization of the wall by Israel*, it would be tantamount to *de facto* annexation.[129]

Indeed, the prognosis of the ICJ, as well as that of the U.N. Special Rapporteur (who—in his periodic reports to the Human Rights Commission—had defined as de facto annexation Israel's actions in constructing the wall around East Jerusalem), proved to be correct.[130] In February 2006, *B'Tselem*—the Israeli Information Center for Human Rights in the Occupied Territories—reported that Israel had effectively annexed the Jordan Valley by barring almost all Palestinians from entering the region.[131] The Jordan Valley accounts for a third of the West Bank.[132] The result of this annexation is that Palestinians in the West Bank are hemmed in on all sides: by the wall in the north, west, and south, and by the "security corridor" in the Jordan Valley to the east (see map 2 in Appendix).[133]

Ehud Olmert, Israel's acting Prime Minister, told the Knesset (Israel's Parliament) on February 12, 2006, that "the first objective of the next Knesset will be to fix the permanent borders of Israel."[134] Prior to this statement, Condoleezza Rice, the U.S. Secretary of State, had been quoted by *Agence France-Presse* as saying, "[U]nder no circumstances should anyone try and do that [set borders] in a preemptive or predetermined way, because these are issues for negotiation at final status."[135] And even before Secretary Rice's statement, Tzipi Livni, who was then Israel's Minister of Justice, was quoted by an Israeli newspaper as saying that the wall would serve

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129. *Id.* (emphasis added).

130. *See, e.g.*, ECOSOC, Comm'n on Human Rights, *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967*, ¶ 14, U.N. Doc. E/CN.4/2004/6 (Sept. 8, 2003). In April 2006, the Human Rights Commission was replaced by a new Human Rights Council. *See* G.A. Res. 60/251, U.N. A/RES/60/251 (Apr. 3, 2006) (establishing the new Human Rights Council to be based in Geneva).

131. *Israel Has De Facto Annexed the Jordan Valley*, B'TSELEM, Feb. 13, 2006, *available at* http://www.btselem.org/English/Settlements/20060213_Annexation_of_the_Jordan_Valley.asp. According to a report, Ehud Olmert, Israel's acting Prime Minister, said that Israel intends to keep control of the Valley, even after it pulls out of other parts of the West Bank and draws new borders—as a defensive move. Chris McGreal, *Israel Excludes Palestinians from Fertile Valley*, GUARDIAN (London), Feb. 14, 2006, at 22 ("It is impossible to abandon control of the eastern border of Israel." (quoting Olmert)).

132. McGreal, *supra* note 131, at 22.

133. For a recent and in-depth study of the effect of the Wall in combination with Israel's prolonged 40-year occupation, see AMNESTY INT'L, ENDURING OCCUPATION: PALESTINIANS UNDER SIEGE IN THE WEST BANK, (2007), *available at* http://www.amnesty.org/resources/pdf/Israelreport.pdf.

134. Marius Schattner, *Fixing borders is Israel's top priority: Olmert*, LEBANONWIRE, Feb. 13, 2006.

135. *Id.*

as "the future border of the State of Israel" and that the HCJ in its rulings "is drawing the country's borders."[136]

Even if Israel does at some future date incorporate the West Bank settlements into Israel by passing a law in the Knesset, the ICJ in its Advisory Opinion made it clear that all territory to the east of the 1949 Israel-Jordan armistice line is occupied territory in which Israel only has the status of an occupying power.[137] This, of course, includes East Jerusalem and the settlements surrounding it. The laws of occupation therefore remain applicable to that territory, regardless of what Israel's municipal laws may say.

IV. THE WALL AND SELF-DETERMINATION

The cumulative impact of the wall (its route, scale, and composition), its associated régime (checkpoints, military laws, and closed military zones), the "security corridor" in the Jordan Valley (a no-go area for Palestinians), and the discriminatory road system[138] linking Israeli civilian settlements in the West Bank to each other and to nearby military bases, substantially reduces the territorial sphere in which the Palestinian people seek to exercise their right of self-determination.[139] In its discussion of the wall's route and the regime associated with the wall in both the *Beit Sourik* and *Mara'abe* cases, the HCJ hardly mentioned these so-called "facts on the ground" or the recognition that the Palestinian people have a right of self-determination as a matter of international law.[140] It was also

136. Yuval Yoaz, *Justice Minister: West Bank Fence Is Israel's Future Border*, HA'ARETZ (Jerusalem), Dec. 1, 2005.

137. ICJ Wall Advisory Opinion, *supra* note 2, at 1031, para. 78.

138. *See* B'TSELEM, INFORMATION SHEET, FORBIDDEN ROADS: THE DISCRIMINATORY WEST BANK ROAD REGIME (2004), *available at* http://www.btselem.org/Download/200408_Forbidden_Roads_Eng.pdf (analyzing the forbidden roads regime from an international law perspective). *See also* Samira Shah, *On the Road to Apartheid: The Bypass Road Network in the West Bank*, 29 COLUM. HUM. RTS. L. REV 221 (1997–8).

139. According to the *Report of the Special Rapporteur of the Commission on Human Rights*, *supra* note 130, ¶ 15, the right of self-determination is closely linked to the notion of territorial sovereignty. A people can only exercise the right of self-determination within a territory. *Id.* The amputation of Palestinian territory by the Wall seriously interferes with the right of self-determination of the Palestinian people as it substantially reduces the size of the self-determination unit (already small) within which that right is to be exercised." *Id. See also* Written Statement Submitted by Palestine, paras. 548–549, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Req. for Advisory Op.) *available* at http://www.icj-cij.org/docket/files/131/1555.pdf (last visited Oct. 19, 2007) (naming several ways in which the Palestinians claimed the wall interfered with the people's self-determination).

140. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶¶ 48–49 (2006); HCJ 2056/04 Beit Sourik Village Council v. Israel [2004] (Isr.), *translated in* 43 I.L.M. 1099 (2004).

inadequately addressed by the ICJ in its Advisory Opinion.[141] For instance, the ICJ's historical résumé in paragraphs 70 through 78, which touches upon the origins of the question of self-determination, was not faultless—as Judge Kooijmans noted.[142] Therefore, a much more rigorous assessment of how the construction of the wall adversely affects the right of self-determination would have been appropriate, especially as the ICJ accepted that the wall "severely impedes the exercise by the Palestinian people of [their] right of self-determination."[143] The question of self-determination lies at the heart of the Israel-Palestine conflict and is linked to the controversy concerning Israel's right of self-defense from attacks emanating from occupied territory, which will be addressed in Part V.

It is submitted that the manner in which the ICJ dealt with the question of self-determination was rather formulaic. The Court first

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141. ICJ Wall Advisory Opinion, *supra* note 2, at 1034–53, paras. 88, 115, 118, 122, 155, 159. Judge Higgins also chastised the court for implicitly adopting a "post-colonial view of self-determination" without any particular legal analysis. Whilst she "approves of the principle invoked," she is "puzzled as to its application in the present case." *Id.* at 1062–63, paras. 29–30 (separate opinion of Judge Higgins). So is the author of this Article. For further criticism, see *id.* at 1071–72, paras. 31–33 (separate opinion of Judge Kooijmans).

142. *Id.* at 1067, para. 7 (separate opinion of Judge Kooijmans). For example, in paragraph 71, the ICJ recalls that the Arab population of Palestine and the Arab States rejected the partition plan, contending that it was unbalanced, and that on May 14, 1948, Israel declared its independence whereupon armed conflict broke out between Israel and a number of Arab States. However, the court does not point out that armed conflict broke out between the Zionists and the Palestine Arabs immediately after the adoption of the partition plan on November 29, 1947, whereupon the Zionists conquered territory in excess of the limits established in the partition resolution before it declared its independence at midnight on May 15, 1948. Nor does the court refer to the mass exodus of the Palestinian population between November 1947 and May 1948 (when some of the biggest expulsions took place), or to the fact that British troops remained in effective control of Palestine until June 29, 1948, when they completed their evacuation. *See Progress Report of the United Nations Mediator on Palestine, submitted to the Secretary-General for Transmission to the Members of the United Nations*, U.N. Doc. A/648 (Sept. 16, 1948) (*prepared by* Count Folke Bernadotte) (discussing the mass Palestinian exodus of over 300,000 Arabs and the termination of the Mandate of partition on May 15, 1948). For historical analysis, see Benny Morris, *Revisiting the Palestinian Exodus of 1948*, *in* THE WAR FOR PALESTINE: REWRITING THE HISTORY OF 1948, at 37–59 (Eugene L. Rogan & Avi Shlaim eds., 2002).

143. As the ICJ noted,

> the route chosen for the Wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council . . . . There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the Wall inasmuch as it is contributing . . . to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, *thus severely impedes the exercise by the Palestinian people of [their] right of self-determination*, and is therefore a breach of Israel's obligation to respect that right

ICJ Wall Advisory Opinion, *supra* note 2, at 1042–43, para. 122 (emphasis added).

mentions self-determination in paragraph 88 of its Advisory Opinion, noting that self-determination is "enshrined in the U.N. Charter and reaffirmed by the General Assembly in Resolution 2625 (XXV)."[144] It then cites Article 1 common to the ICCPR and the ICESCR, as well as its jurisprudence in *Namibia* and *East Timor*.[145] In paragraph 118, the ICJ observed that "as regards the principle of the right of peoples to self-determination . . . the existence of a 'Palestinian people' is no longer in issue."[146] Actually, the existence of "a Palestinian people" has never really been an issue, for Palestinians had been recognized as "a people" during the time of the League of Nations.[147] Already in 1922, the British government had recognized "the people of Palestine," who were specifically mentioned no fewer than six times in an exchange of correspondence between the Palestine Arab Delegation and J.E. Shuckburgh, who was instructed to write on behalf of Winston Churchill, then Secretary of State for the Colonies.[148] Moreover, Britain was prepared to create an Arab agency to occupy a position exactly analogous to that accorded to the Jewish agency under Article 4 of the Mandate. That is, it was to be recognized as a public body for the purpose of advising and cooperating with the administration in such economic, social, and other matters as may affect the interests of the non-Jewish population, and, subject to the control of the administration, of assisting and taking part in the development of the country. Upon the establishment of the Arab Agency, Britain, as the Mandatory Power, intended to approach the League of Nations to seek its approval and place these changes upon "a formal footing."[149] However, this offer was unanimously declined by the Arab leaders of the day on the ground that "it would not satisfy the aspirations of the Arab people."[150] Evidently, the leaders of Palestine's Arab

144. *Id.* at 1034, para. 88.

145. *Id.*

146. *Id.* at 1041–42, para. 118.

147. *Palestine: Correspondence with the Palestine Arab Delegation and the Zionist Organisation*, Presented to Parliament by Command of His Majesty, June, 1922 (His Majesty's Stationary Office 1922).

148. *See id.* at No. 2, para. 2 ("It is the object of providing *the people of Palestine* with a constitutional channel for the expression of their opinions and wishes that the draft constitution has been framed." (emphasis added)); *id.* at No. 2, para. 4 ("There is no question of treating *the people of Palestine* as less advanced than their neighbours in Iraq and Syria." (emphasis added)); *id.* at No. 2, para. 5 ("His Majesty's Government are ready and willing to grant to *the people of Palestine* the greatest measure of independence consistent with the pledges referred to." (emphasis added)). Thus, the Palestinian people were recognized as a people from 1922 onwards.

149. *Report of the Palestine Royal Commission Presented by the Secretary of State for the Colonies to the United Kingdom Parliament*, League of Nations Doc. C.495.M.336.1937.VI, ch. VI (1937).

150. Musa Kazem Pasha, on behalf of a group of Arab notables which included Ragheb Bey Nashashibi, Haj Amin al Husseini and Khalil Effendi Sakakini, added that the Arabs, "having never recognized the status of the Jewish Agency, have no

community therefore had legal and political rights that were recognized and acknowledged by Great Britain.[151] It would therefore have been prudent for the ICJ to have, at the very least, noted that the right of the Palestinian people to self-determination had its genesis in the Covenant of the League of Nations and in the period in which Palestine was placed under the tutelage of Britain during the Mandate.[152] "Although decolonization [wa]s not explicitly referred to, the overall concept behind Article 22 of the Covenant may be regarded as the first manifestation of the ultimate goal to abrogate . . . colonial system[s], [a goal] that was still being pursued by many European states" at the time.[153] After all, the Mandate system—like the U.N. Charter system—did not explicitly promote continued or new colonial power.[154] And it was the idea underlying the concept of the Mandate and its "sacred trust" that would

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desire for the establishment of an Arab Agency on the same basis." *See Palestine: Proposed Formation of an Arab Agency, Correspondence with the High Commissioner for Palestine*, Presented to Parliament by Command of His Majesty, Nov. 1923 (His Majesty's Stationary Office 1923). *See also* U.N. Special Comm. on Palestine, *Report to the General Assembly*, ¶ 101, U.N. Doc. A/364 (Sept. 3, 1947) (noting a past comparison of a proposal to establish an Arab Agency with analogous position to that of the Jewish Agency).

151. See, for example, the paper annexed to a "Top Secret" memorandum by Ernest Bevin, Britain's Secretary of State for Foreign Affairs dated January 13, 1947. The Legal Advisers of the Foreign Office and the Colonial Office prepared a paper "on the legal position of His Majesty's Government, in relation to the United Nations, in the event of their deciding either to partition Palestine or to introduce a system of provisional autonomy." In the annexed paper, the Legal Advisers contended that the word "position" in Article 6 of the Mandate included the political position of the Arabs in Palestine. The "Top Secret" seven page memorandum is entitled "Palestine: Reference to the United Nations," dated January 13, 1947. File no. C.P. (47) 28. This document is available in the National Archives in Kew. *See* FOREIGN OFFICE LIST AND DIPLOMATIC AND CONSULAR YEARBOOK 11 (Godfrey E.P. Hertslet ed., 1947) (stating that at the time William Eric Beckett, Gerald Gray Fitzmaurice, Richard Samuel Berrington Best, James Edmund Fawcett and Francis Aime Vallat were legal advisers at the Foreign Office in London and in Britain's Washington Embassy).

152. *See* ICJ Wall Advisory Opinion, *supra* note 2, at 1026–54, paras. 49, 71, 129, 162 (referring briefly to the 1947 partition plan and British Mandate, although these references were not in the context of self-determination). For further discussion on the question of self-determination, see League of Nations Covenant art. 22, and British Mandate for Palestine, Annex 391, 3 LEAGUE OF NATIONS—OFFICIAL J. 1007 (1922). Although in 1920 there was no general right of self-determination in international law, that principle was applied by way of exception to mandated territories at the Versailles Conference. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 428–29 (2006).

153. Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of Trusteeship*, 9 MAX PLANCK Y.B. U.N. 47, 55 (2005).

154. *Id.* For further discussion of mandates, see Norman Bentwich, *Le Systèm Des Mandats*, 29(IV) RACUEIL DES COURS 115–86 (1968); NORMAN BENTWICH, THE MANDATES SYSTEM (Arnold D. McNair ed., 1930); and JACOB STOYANOVSKY, THE MANDATE FOR PALESTINE: A CONTRIBUTION TO THE THEORY AND PRACTICE OF INTERNATIONAL MANDATES (1928); QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS (1930); R.N. CHOWDURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS: A COMPARATIVE STUDY (1955).

eventually work its way into the Trusteeship System of the United Nations.[155]

The ICJ then went on to note that the 1995 Israel-Palestinian Interim Agreement refers a number of times to the Palestinian people and their "legitimate rights" (citing the preamble; paragraphs 4, 7, and 8; Article II, paragraph 2; Article III, paragraphs 1 and 2; and Article XXXII, paragraph 2).[156] It therefore considered that these legitimate rights "include the right of self-determination."[157] However, it should be noted that although the Palestinian people's right of self-determination is not dependent upon its recognition by Israel, the occupying power, Israel implicitly recognized this by being party to the Interim Agreement. Moreover, the British Mandate provided both Jews and Arabs with the right of self-determination in Palestine, which was given recognition by the 1947 U.N. partition plan[158] and the effort to establish a U.N. Trusteeship.[159] Their right of self-determination was also confirmed by state practice in the period preceding the adoption of the U.N. Charter as provided for by Article 22 of the Covenant of the League of Nations. In this regard it is telling that all "A-class" Mandates would become independent states, the exception being Palestine.[160] It would therefore be nonsensical for Israel to deny de jure recognition of the right of the Palestinian people to self-determination when the basis for its own right has its origins with that of the very people with whom it is

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155. In fact, the principle of the "sacred trust," which was enshrined in the Covenant, had its origins in the 1885 Conference of Berlin and was intimately connected with "the duty of civilisation." Charles H. Alexandrowicz, Notes and Commentary, *The Juridical Expression of the Sacred Trust of Civilisation*, 65 AM. J. INT'L L. 149, 154 (1971).

156. ICJ Wall Advisory Opinion, *supra* note 2, at 1041–42, para. 118.

157. *Id.*

158. G.A. Res. 181 (II), U.N. GAOR, 1st Spec. Sess., Supp. No. 1, U.N. Doc. A/310 (Nov. 29, 1947). For the voting record, see U.N. GAOR, 1st Sess., 128th plen. mtg., U.N. Doc. A/PV.128 (Nov. 29, 1947).

159. U.S. Delegation to the U.N., *Draft Trusteeship Agreement for Palestine: Working Paper Circulated by the U.S. Delegation*, art. 4, U.N. Doc. A/C.1/277 (Apr. 20, 1948). For the political debate surrounding the trusteeship decision see MICHAEL J. COHEN, PALESTINE AND THE GREAT POWERS 1945–1948 345 (1982). It is noteworthy that Article 5 of the Draft Trusteeship, which was proposed by the US, provided that the territorial integrity of Palestine would be assured by the U.N. For further reading, see PHILIP JESSUP, THE BIRTH OF NATIONS 255–303 (1974). Jessup was the author of the draft trusteeship agreement for Palestine, which he discusses in this memoir.

160. Although the other Arab countries achieved independence during the time of the League, Trans-Jordan became an independent state *after* the dissolution of the League of Nations in 1946. *See* Treaty of London, U.K.–Trans-Jordan, Mar. 22, 1946, 6 U.N.T.S. 143 (giving Trans-Jordan its independence). This is further precedent indicating, perhaps, that Palestine could have, and should have, become an independent unitary state, encompassing a Jewish national home within its borders. *See* Mary C. Wilson, *King Abdullah and Palestine*, 14 BRIT. SOC'Y MIDDLE E. STUD. 37, 40 (1987) (discussing the independence of Trans-Jordan in 1946 and the reigning ideology of Arab nationalism).

destined to share that land. Thus, when the ICJ affirmed the right of self-determination as an obligation *erga omnes*, this would apply to both Jews and Arabs. However, in this particular instance, it is Israel who is depriving the Palestinians of the exercise of this right, by building a wall through territory in which they aspire to create their state. As the ICJ observed:

> [T]he obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "[i]n 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, I.C.J. Reports 1970*, p. 32, para. 33.) The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination. . . .
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> [I]n the *East Timor* case, [the Court] described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV). . . .
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> 'Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle. . . .'[161]

The HCJ only mentioned the right of self-determination in passing in the *Mara'abe* case.[162] It merely noted that Judges Higgins and Kooijmans criticized in their separate opinions certain aspects of the ICJ's finding that the wall impinges upon the Palestinian people's right of self-determination.[163] In fact, only six ICJ judges (in five separate opinions and one declaration) referred to the question of the impact of the wall on Palestinian self-determination.[164] Judge Koroma cited the U.N. partition resolution and noted that the construction of the wall would prevent the Palestinian people from creating a state.[165] Judge Al-Khasawneh was of the opinion that it was Israel's prolonged military occupation and its policy of creating fait accomplis on the ground (which presumably also includes the construction of the wall) that prevented the Palestinian people from

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161. ICJ Wall Advisory Opinion, *supra* note 2, at 1053, paras. 155–156.

162. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶¶ 48–49 (2006).

163. *Id.* ¶ 49.

164. Judges Koroma, Higgins, Kooijmans, Al-Khasawneh, Elaraby, and Owada issued separate opinions. Judge Buergenthal issued a declaration. ICJ Wall Advisory Opinion, *supra* note 2, at 1054–56, para. 163.

165. *Id.* at 1056, para. 5 (separate opinion of Judge Koroma).

exercising their right of self-determination.[166] Judge Elaraby simply repeated some of the relevant passages from the ICJ's Advisory Opinion on self-determination.[167] Judge Kooijmans thought that it would have been better if the Court had left the issue of self-determination to the political process.[168] However, he admitted that "the mere existence of a structure that separates the Palestinians from each other makes the realization of their right to self-determination far more difficult."[169] In his Declaration, Judge Buergenthal also agreed with the court's findings that the wall severely impedes the Palestinian people's exercise of their right of self-determination and that Israel was breaching this right.[170] However, he did not necessarily believe that the issue was relevant "to the case before us" and thought that Israel's right of self-defense could have precluded any wrongfulness in this regard (which is discussed more in Part V).[171] Judge Higgins considered the ICJ's finding that the construction of the wall "severely impedes the exercise by the Palestinian people of its right of self-determination, and is therefore a breach of Israel's obligation to respect that right" a non sequitur. She then elaborated upon this point:

> The real impediment is the apparent inability and/or unwillingness of both Israel and Palestine to move in parallel to secure the necessary conditions—that is, at one and the same time, for Israel to withdraw from Arab occupied territory and *for Palestine to provide the conditions to allow Israel to feel secure in so doing. The simple point is underscored by the fact that if the wall had never been built, the Palestinians would still not yet have exercised their right of self-determination.* It seems to me both unrealistic and unbalanced for the Court to find that the wall (rather than "the larger problem," which is beyond the question put to the Court for an opinion) is a serious obstacle to self-determination.[172]

This passage is illuminating. Judge Higgins is correct to note that the actual exercise of the right of self-determination is usually accomplished through a political process, although it has been accomplished through the use of force, such as in Bosnia, Croatia, Bangladesh, Slovenia, southern Sudan, and elsewhere.[173] The

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166. *Id.* at 1075–76, para. 9 (separate opinion of Judge Al-Khasawneh).

167. *Id.* at 1089–90, para. 3.4 (separate opinion of Judge Elaraby).

168. *Id.* at 1071, para. 31 (separate opinion Judge Kooijmans).

169. *Id.* The current trajectory of the wall loops around the settlement *Ariel*, which is located deep inside occupied territory. It may also loop around the projected E-1 extension to *Ma'ale Adumim*. This would effectively segregate and dissect the West Bank into cantons. See the Map in the Annex.

170. *Id.* at 1078–79, para 4 (declaration of Judge Buergenthal).

171. *Id.*

172. *Id.* at 1063, para. 30 (emphasis added) (separate opinion of Judge Higgins).

173. *See* LAURA SILBER & ALLAN LITTLE, THE DEATH OF YUGOSLAVIA (1996) (discussing Yugoslavia); Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321 (1972) (discussing Bangladesh); Machakos Protocol, § B(2.5), July

Zionists also implicitly invoked this right when they created Israel in 1948.[174] One may therefore question whether it is necessary for the Palestinian people—subject to almost four decades of military occupation—to provide the conditions that allow the occupying power to feel secure in withdrawing from Occupied Arab Territory. Whenever attempts have been made to establish a U.N. observer force to maintain law and order between Israelis and Palestinians, which could provide Israel with the conditions necessary to enable it to feel secure in withdrawing from the territories, those attempts have been vetoed at the U.N. Security Council.[175] The reality is that many in Israel oppose a withdrawal because they consider that territory as belonging to Israel (for ideological and other reasons) regardless of its status under international law, and some Israeli lawyers have even advanced technical legal arguments to justify Israel's retention of those territories.[176] This is also the situation with respect to the Syrian Golan Heights, where there has been "peace and quiet" for the last four decades. Yet despite this, Israel

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20, 2002, *reprinted in* 10 Y.B. ISLAMIC & MIDDLE E. L. 303 (2003–2004) (referring to the possible secession of southern Sudan); *see also* James Crawford, *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT'L L. 85 (1998) (noting that states are extremely reluctant to recognize or accept unilateral secession outside the colonial context; and John Dugard, *A Legal Basis for Secession: Relevant Principles and Rules, in* SECESSION AND INTERNATIONAL LAW 89–96 (Julie Dahltiz ed., 2003) (discussing secession generally).

174. *See* Declaration of the Establishment of the State of Israel, 1948–5708, 1 LSI 3–5 (1948) (Isr.) (declaring that the right to a sovereign nation state is a natural right to the Jewish people to be masters of their own fate); *see generally* John A. Collins, Note, *Self-Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137 (1980) (discussing Israel, Palestine, and self-determination). *See also*, Evan M. Wilson, DECISION ON PALESTINE: HOW THE U.S. CAME TO RECOGNIZE ISRAEL (1979) (discussing in great detail the politics behind the Truman's decision to recognize Israel and how this left the State Department and the US Department of Defense in the cold).

175. *See* S.C. Draft Res., ¶ 5, UN. Doc. S/2001/1199 (Dec. 14, 2001) (co-sponsored by Egypt and Tunisia) (would have encouraged "all concerned to establish a monitoring mechanism to help the parties implement the recommendations of the Report of the Sharm El-Sheikh Fact-Finding Committee (Mitchell Report) and to help create a better situation in the occupied Palestinian territories"); S.C. Draft Res., ¶ 8, U.N. Doc. S/2001/270 (Mar. 26, 2001) (drafted by Bangladesh, Colombia, Jamaica, Mali, Mauritius, Singapore and Tunisia). The latter would have requested

> the Secretary-General to consult the parties on immediate and substantive steps to implement this resolution and to report to the Council within one month of the adoption of this resolution and expresses the readiness of the Council to act upon receipt of the report to set up an appropriate mechanism to protect Palestinian civilians, including through the establishment of a United Nations observer force.

Id.

176. *See* Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968); Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262 (1971).

has still to withdraw from that territory.[177] Instead, Israel has annexed the territory and established several settlements there.[178] All attempts by the Syrian government to make peace with Israel based upon a full withdrawal from all occupied Arab territory, an approach that was endorsed by the Arab League twice in Beirut in 2002 and in Algiers in 2005 and has been reiterated several times since, have fallen on deaf ears.[179] Moreover, Israel unilaterally withdrew from the Gaza Strip in a matter of days during September 2005, even though the conditions in the strip were, from an Israeli security perspective, probably worse than they had been at any time in its history.[180] Israel's unilateral withdrawal had little to do with whether the Palestinians had provided the necessary conditions for Israel to feel secure in doing this. Rather, it had everything to do with power, territory and demography.[181] As Judge Elaraby opined:

> [N]otwithstanding the general prohibition against annexing occupied territories . . . on 14 April 2004, the Prime Minister of Israel addressed a letter to the President of the United States. Attached to the letter is a Disengagement Plan which one has to interpret as authoritatively reflecting Israel's intention to annex Palestinian territories. The Disengagement Plan provides that

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177. *See* S.C. Res. 497, U.N. Doc. S/RES/497 (Dec. 17, 1981) (rejecting Israel's decision to impose its laws in Syrian Golan Heights); S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973) (calling for a cease-fire in the Middle East); S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967) (reaffirming the need for peace in the Middle East).

178. Golan Heights Law, 5742-1981, 36 LSI 7 (1981) (Isr.); *see also Golan Settlement Plan Under Fire*, BBC NEWS, Dec. 31, 2003, *available at* http://news.bbc.co.uk/1/hi/world/middle_east/3360085.stm (discussing Israel's settlement activity plans). The Security Council condemned Israel for its decision to impose its laws, jurisdiction, and administration in the occupied Syrian Golan Heights which it considered "null and void and without international legal effect." S.C. Res. 497, *supra* note 177, ¶ 1.

179. *See Letter Dated 24 April 2002 from the Chargé d'Affaires a.i. of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General, Annex II*, U.N. Doc. S/2002/932, A/56/1026 (Aug. 15, 2002) (relaying to the U.N. the resolutions of the Arab Peace Initiative at the Summit-level Council of the League of Arab States in Beirut). According to a 2006 Ha'aretz report, the Arab initiative proposes a new mechanism for furthering talks between Israel, the Palestinians, Lebanon, and Syria. Akiva Eldar, *Arab League Floats New Initiative for Resuming the Peace Process*, HA'ARETZ (Jerusalem), Aug. 31 2006. This report proposes that the Security Council manage and oversee the negotiations, and that the results of these talks be brought before the U.N. in a year. *Id.* The proposal suggests that during the period of negotiations, all hostilities cease and the U.N. is permitted to impose sanctions on cease-fire violators. Israeli PM Tzipi Livni told Annan that Israel intends to oppose the new Arab initiative. *Id.* Prime Minister Ehud Olmert has publicly described the Heights as "an integral part of the State of Israel," saying that he would never hand it back to Syria. AGENCE FRANCE-PRESSE, Sept. 26, 2006.

180. *See* Disengagement Plan of Prime Minister Ariel Sharon, *supra* note 48 (detailing the disengagement of Israel from the Gaza Strip).

181. On the impact of Israel's withdrawal from the Gaza Strip in its immediate aftermath, see *Special Report: Palestinians in Gaza, Will They Sink or Swim?*, ECONOMIST, Sept. 22, 2005, at 29–31. "Israel's withdrawal has left Gaza seething, lawless, poor, cut off from the outside world." *Id.*

> 'it is clear that in the West Bank, there are areas which will be part of the State of Israel, including cities, towns and villages, security areas and installations, and other places of special interest to Israel.'
>
> The clear undertakings to withdraw and to respect the integrity and status of the West Bank and Gaza legally debar Israel from infringing upon or altering the international legal status of the Palestinian territory.[182]

The Oslo Accords viewed the West Bank and Gaza as one territorial unit which is to be preserved for the final-status negotiations.[183] Judge Elaraby was of the view that it would have been appropriate "to refer to the implications of the letter of the Prime Minister of Israel and its attachments [regarding the Gaza Disengagement Plan] and to underline that what it purports to declare is a breach of Israel's obligations and contrary to international law."[184] When Israel invaded and occupied the Gaza Strip in the 1956 Suez War, it refused to withdraw from that territory and was called upon to do so by the General Assembly.[185] Israel insisted on firm guarantees from the international community before it would agree to a withdrawal. In response, U.S. President Dwight Eisenhower said:

> This raises a basic question of principle. Should a nation which attacks and occupies foreign territory in the face of United Nations disapproval be allowed to impose conditions on its own withdrawal?
>
> If we agree that armed attack can properly achieve the purposes of the assailant, then I fear we will have turned back the clock of international order. We will, in effect, have countenanced the use of force as a means of settling international differences and through this gaining national advantages.[186]

Judge Higgins is correct to note that if the wall had never been built, the Palestinians would still not have exercised their right of self-determination. But this is precisely because Israel refuses to withdraw (or make a *commitment* to withdraw) from the territories it

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182. ICJ Wall Advisory Opinion, *supra* note 2, at 1086, para. 2.5 (separate opinion of Judge Elaraby).

183. *See* Israel-Palestinian Interim Agreement, *supra* note 89, art. XXXI.7; *see also* Iain Scobbie, *An Intimate Disengagement: Israel's Withdrawal From Gaza, the Law of Occupation and of Self-Determination*, 11 Y.B. ISLAMIC & MIDDLE E. L. 3 (2004–2005) (arguing that Israel's Gaza disengagement plan was inconsistent with the Oslo Accords and international law).

184. ICJ Wall Advisory Opinion, *supra* note 2, at 1086, para. 2.5 (separate opinion of Judge Elaraby).

185. A draft U.N. Security Council was vetoed by the UK and France. *But see* G.A. Res. 1120 (XI), ¶ 1, U.N. GAOR, 1st Emer. Spec. Sess., U.N. Doc. A/Res/1120 (Nov. 24, 1956) ("not[ing] with regret that . . . no Israel forces have been withdrawn behind the armistice line although a considerable time has elapsed since the adoption of the relevant General Assembly resolutions." (omission of emphasis)).

186. *Address by President Eisenhower on the Situation in the Middle East, Feb. 20, 1957*, 36 DEP'T ST. BULL. 387 (1957), *reprinted in* THE ARAB-ISRAELI CONFLICT VOLUME III: DOCUMENTS 643, 647 (John Norton Moore ed., 1974).

occupied in June 1967.[187] Israel's refusal stands even though the Arab world has made it clear that it would be prepared to terminate its state of belligerency with Israel and to recognize Israel's sovereignty, territorial integrity, and political independence—as Egypt did in 1979 and Jordan did in 1994—if Israel were to withdraw.[188] Moreover, according to U.N. Security Council Resolution 242, Israel is obliged to negotiate a withdrawal from the territories it captured in the June 1967 War.[189] The onus to secure the necessary conditions for negotiations is upon Israel, not upon the Palestinian people (who are not even mentioned in that resolution).[190]

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187. *See, e.g., Israel Hints at Jerusalem Talks*, BBC NEWS, Oct. 8, 2007, *available at* http://news.bbc.co.uk/2/hi/middle_east/7033450.stm (noting that since its occupation in 1967 Israel has claimed the entire city of Jerusalem as an "eternal, indivisible capital").

188. *See* Treaty of Peace, Egypt-Isr., art. III(1), Mar. 26, 1979, *reprinted in* 18 I.L,M. 362 (1979) [hereinafter Egypt-Israel Treaty of Peace] (declaring that the parties will "recognize and . . . respect each other's sovereignty, territorial integrity and political independence"); Treaty of Peace, Isr.-Jordan, art. 2.1, Oct. 26, 1994, *reprinted in* 34 I.L.M. 46 (1995) (also declaring that the parties will "recognize and . . . respect each other's sovereignty, territorial integrity and political independence").

189. *See* S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967) (calling for the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict"); *see also* G.A. Res. 2799 (XXVI) (Dec. 13, 1971) (reaffirming the same call for withdrawal); G.A. Res. 2628 (XXV) (Nov. 4, 1970) (reaffirming the same call for withdrawal); *see also* G.A. Res. 3414 (XXX) (Dec. 5, 1975) ("request[ing] the Security Council . . . to take all necessary measures for the speedy implementation . . . of all relevant resolutions of the General Assembly and the Security Council . . . which ensures complete Israeli withdrawal from all the occupied Arab territories"); *see also* G.A. Res. 36/226, U.N. Doc. A/RES/36/226 (Dec. 17, 1981) (condemning Israel's continued occupation); G.A. Res. 35/169, U.N. Doc. A/RES/35/169 (Dec. 15, 1980) (same); G.A. Res. 34/70, U.N. Doc. A/RES/34/70 (Dec. 6, 1979) (same); G.A. Res. 32/20, U.N. Doc. A/RES/32/20 (Nov. 25, 1977) (same); G.A. Res. 31/61, U.N. Doc. A/RES/31/61 (Dec. 9, 1976) (same).

190. U.N. Security Council Resolution 242 only calls upon Israel (not the Arab States) to withdraw its forces from those territories. S.C. Res. 242, *supra* note 189, ¶ 1. The withdrawal phrase of resolution 242 provides for "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict." *Id.* Arthur J. Goldberg, the U.S. Ambassador to the U.N. said this "refers, and was always intended to refer, to the armed forces of Israel." U.N. SCOR, ¶ 63, UN Doc. S/PV.1377 (Nov. 15, 1967). According to the "right-wing," Israeli interpretation of that phrase, Israel is not obliged to withdraw from all territories it captured in 1967 because the English text of resolution 242 does not include the definitive article "the" or the adjective "all" before the phrase "territories occupied in the recent conflict," as it does in the French text which is equally authoritative. *See* Michla Pomerance, *A Court of 'UN Law,'* 38 ISR. L.R. 134, 149 (2005) (citing with approval Eugene V. Rostow's, *Legal Aspects of the Search for Peace in the Middle East*, 64 AM. SOC'Y INT'L L. PROC 64, 68–69 (1970)). Rostow, interestingly, does not provide any authority for this logic, which is clearly incorrect. *See* John McHugo, *Resolution 242: A Legal Reappraisal of the Right-Wing Israeli Interpretation of the Withdrawal Phrase with Reference to the Conflict Between Israel and the Palestinians*, 51 INT'L & COMP. L. Q. 851 (2002). For an Arab view, which it is submitted is correct in this instance, see the late Musa E. Mazzawi's thorough analysis in MUSA E MAZZAWI, PALESTINE AND THE LAW: GUIDELINES FOR THE RESOLUTION OF THE ARAB-ISRAEL CONFLICT 199–238 (1997). However, the plain meaning of the withdrawal phrase is clear. The text refers *specifically* to "Israel armed

This principle was subsequently reaffirmed in Resolution 338, which was passed after Israel managed to keep hold of those territories in the October 1973 War.[191] Israel is thus obliged to *negotiate* an end to its occupation of Arab territories, including Palestine, meaning that it cannot postpone negotiations indefinitely by refusing to negotiate, creating obstacles on the ground that would hinder a full withdrawal, or by claiming that it has nobody with whom to negotiate.[192] The

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forces" and to no one else. S.C. Res. 242, *supra* note 189, ¶ 1. It then refers to "territories occupied in the recent conflict." *Id.* This obviously refers to territories Israel captured in June 1967, and not to territories the pre-1948 *Yishuv* (the Jewish settler community then living in Palestine) and their militias captured in 1947–1949. *See* McHugo, *supra* note 189, at 880. Indeed, this interpretation was how Abba Eban, Israel's Ambassador to the U.N., understood it at the time. In a diplomatic note, Eban wrote: "The words 'in the recent conflict' convert the principle of eliminating occupation into a mathematically precise formula for restoring the June 4 Map." *See id.* at 875 n.62 (citing 'Comment by Foreign Minister of Israel' and Telegram 3164, UK Mission in New York to Foreign Office, 12 Nov 1967. FO 961/24). The ICJ noted in its 1950 Advisory Opinion on South-West Africa that interpretations placed upon legal instruments by the parties to them have considerable probative value when they contain recognition by a party of its own obligations under an instrument. *See* International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 135 (July 11); *see also* SYDNEY D. BAILEY, THE MAKING OF RESOLUTION 242, at 155 (1985) (arguing that resolution 242 requires a full withdrawal).

191. S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973).

192. U.N. Security Council Resolution 338 calls upon all the parties concerned "to start immediately after the cease-fire the *implementation* of Security Council resolution 242 (of 1967) in all of its parts." *Id.* ¶ 2 (emphasis added). Although this Resolution does not expressly refer to any of the provisions of Chapter VII of the U.N. Charter (such as Article 39), it was evident that the situation in the Middle East amounted to a threat to international peace and security, and the situation was referred to as such throughout the debates both preceding the adoption of Resolution 338 and afterwards. *See* U.N. SCOR, 28th Sess., 1747th mtg., U.N. Doc. S/PV.1747 (Oct. 22, 1973) (including statements made by Mr. Scali (United States) and Mr. Malik (U.S.S.R.)). Although Resolution 338 does not invoke Chapter VII, it "*decides* that, immediately and concurrently with the cease-fire, *negotiations* shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East." S.C. Res. 338, *supra* note 191, ¶ 3 (emphasis added). In its 1971 Advisory Opinion on *Namibia*, the ICJ said that it is for member states to comply with *decisions* adopted under Article 25, which would include even those members of the Security Council who voted against them and those members of the United Nations who are not members of the Council. *See* U.N. Charter art. 5; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 52 (June 21) [hereinafter Namibia Advisory Opinion] (discussing S.C. Res. 276, U.N. Doc. S/RES/2706 (Jan. 30, 1970)). Many of the delegates participating in the Security Council debate in October 1973, including those ambassadors representing France, the United States, and the U.S.S.R., expressly referred to Resolution 338 as a "decision" as opposed to a "recommendation." U.N. SCOR, U.N. Doc. S/PV.1747, *supra* note 192. In explaining his country's vote in favor of Resolution 338, Mr. Perez de Cuellar said that it was "binding," and that Peru would fully cooperate in the Council "so that it can discharge its duty in *enforcing* its resolutions." *Id.* ¶¶ 136–37. The representative of Yugoslavia thought that the Council had an "obligation" and a "duty" under the Charter to make Israel stop its firing and to immediately implement Resolution 242. *Id.* ¶ 89. The U.S.S.R. warned Israel of "very serious consequences" if it continued with its

point is that even as Israel prepares for a partial withdrawal, it is preemptively building a wall which it knows will hinder the exercise of that right. Even if Israel withdraws from parts of the West Bank—and it is still unclear whether it will actually do so—the Palestinian people would still not be able to exercise their right of self-determination (which, in this case, would be to create a sovereign, viable, and independent state in East Jerusalem, the West Bank, and the Gaza Strip) because what will remain will be *less* than a state (see the maps in the Appendix). Although what remains of the West Bank and the Gaza Strip may amount to a self-determination unit, it is highly unlikely that it will amount to a state that would be truly independent of Israel, viable, or contiguous.[193] As Prime Minister Yitzhak Rabin told the Knesset upon ratification of the Israeli-Palestinian Interim Agreement on October 5, 1995:

> We view the permanent solution in the framework of State of Israel [*sic*] which will include most of the area of the Land of Israel as it was under the rule of the British Mandate and alongside it a Palestinian *entity* which will be a home to most of the Palestinian residents living in the Gaza Strip and the West Bank.
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> We would like this to be an entity *which is less than a State* and which will independently run the lives of the Palestinians under its authority. The borders of the State of Israel, during the permanent solution, will be *beyond* the lines which existed before the Six Day War. *We will not return to the 4 June 1967 lines.*[194]

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campaigns against the Egyptian and Syrian Arab Republics. *Id.* ¶ 108 (statement of Mr. Malik). Subsequently, the U.S.S.R. expressed its satisfaction that the Council had taken "effective measures" for the "immediate dispatch" of observers to the cease-fire line, "so as to *compel* Israel" to respect its decisions. *Id.* Several African countries immediately severed their diplomatic relations with Israel. In Resolution 339, the Security Council confirmed its *decision* "on an immediate cessation of all kinds of firing and of all military action . . . ." S.C. Res. 339, ¶ 1, U.N. Doc. S/RES/ 339 (Oct. 23, 1973) (emphasis added). In referring to U.N. resolutions on the Namibia question, Rosalyn Higgins observes: "The binding or non-binding nature of those resolutions turns not upon whether they are to be regarded as 'Chapter VI' or 'Chapter VII' resolutions . . . but upon whether the parties intended them to be 'decisions' or 'recommendations.'" Rosalyn Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?*, 21 INT'L & COMP. L.Q. 270, 281–82 (1972). In this regard, reference must also be made to the European Court of First Instance, which recently ruled that "Article 39 of the Charter of the United Nations draws a distinction between 'recommendations,' which are not 'binding,' and 'decisions,' which are." Case T-253/02 Chafiq Ayadi v. Council of the European Union, para. 156, (Jul. 12, 2006), para. 156, *available at* Westlaw UK.

193. For further reading on the question of Palestinian statehood, see James Crawford, *Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States*, *in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 95 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999); Omar M. Dajani, Note, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27 (1997).

194. Yitzhak Rabin, Prime Minister of Israel, Address to the Knesset on the Israel-Palestinian Interim Agreement, Oct. 5, 1995, *reprinted in* 15 ISRAEL'S FOREIGN

Likewise, Prime Minister Ehud Barak was quoted as saying something along the same lines on May 18, 1999, the night of his election victory:

> We will move quickly toward separation from the Palestinians within four security red lines: a *united Jerusalem under our sovereignty* as the capital of Israel for eternity, period; under *no conditions will we return to the 1967 borders*; no foreign army west of the Jordan River; and *most of the settlers in Judaea and Samaria will be in settlement blocs under our sovereignty*. As I undertook, any permanent arrangement will be put to a national referendum. In the long run, you, the people of Israel, will decide.[195]

With regard to Israel's Gaza Disengagement Plan, which, as Judge Elaraby points out, must be seen in the context of the wall and settler expansionism in the West Bank, the question of control over the territory is measured by the extent to which the occupying power is limiting the right of self-determination of the occupied population.[196] In other words, it is the wall *and its associated régime* that is hindering the exercise, by the Palestinian people, of their right of self-determination. Indeed, the combined effect of the wall, the checkpoints, the settlements and the settlement roads, the permit system, and the economic stranglehold Israel has over the territories has a direct impact upon the right of the Palestinian people to pursue their economic, social, and cultural development. This is because the Palestinian Authority (PA) is unable to function as an independent political entity when it is completely dependent on the international community and Israel to accomplish the basic tasks associated with statehood, and when almost every aspect of the daily lives of the Palestinian people from whom the PA derives its legitimacy is affected by the occupation. The Palestinians cannot be free and independent or pursue their right of self-determination culturally, economically, and socially when they are ruled by another people.

RELATIONS: SELECTED DOCUMENTS 1995–1996, at 322, 323 (Meron Medzini ed., Isr. Ministry of Foreign Affairs 1995–1996) (emphasis added).

195. *See Barak's Victory Speech*, May 18, 1999, BBC NEWS, *available at* http://news.bbc.co.uk/1/hi/world/monitoring/346507.stm (including excerpts of the victory speech of Ehud Barak, Prime Minister of Israel, given at the Dan Hotel in Tel Aviv).

196. As a Policy Brief on the Gaza Disengagement Plan, prepared by the Harvard Program on Humanitarian Policy and Conflict Research notes: "The test is not per se the military presence of the occupying forces in all areas of the territory, but the extent to which the Occupying Power, through its military presence, is exerting effective control over the territory and limiting the right of self-determination of the occupied population." CLAUDE BRUDERLEIN, LEGAL ASPECTS OF ISRAEL'S DISENGAGEMENT PLAN UNDER INTERNATIONAL HUMANITARIAN LAW 8 (2004), *available at* http://www.ihlresearch.org/opt/pdfs/briefing3466.pdf. This paper was initially issued in, and is dated, November 2004, but at some later point it was revised, modifying the original analysis of "effective military control." The paper does not indicate that it has been amended and, moreover, it retains its original date. *See* Iain Scobbie, *supra* note 183.

Had Israel simply withdrawn from the occupied territories to the 1949 armistice lines without constructing the wall along its current route and relocated the settlers as it has done in Gaza, there would have been no obstacle to the exercise of that right.

It is important to note that the "Performance-Based Roadmap to a Permanent Two-State Solution to the Israel-Palestine Conflict," which was mentioned by the ICJ in the final paragraph of its Advisory Opinion, does speak of an "independent, democratic, and *viable*" Palestinian state.[197] And yet when Israel accepted the Roadmap, it submitted fourteen separate reservations that rendered the Roadmap practically devoid of its object and purpose.[198] Of the fourteen reservations Israel submitted when it accepted the Road Map, the fifth reservation is of particular relevance:

> The character of the *provisional* Palestinian State will be determined through negotiations between the Palestinian Authority and Israel. The provisional state will have *provisional borders* and *certain aspects of sovereignty*, be *fully demilitarized with no military forces*, but only with police and internal security forces of limited scope and armaments, be *without the authority* to undertake defense alliances or military cooperation, and *Israeli control over the entry and exit of all persons and cargo, as well as of its air space and electromagnetic spectrum*.[199]

Under these conditions, it is difficult to see how a "provisional Palestinian state" can really be a state at all when it will have no sovereignty, security, or control over its borders, airspace, or electromagnetic spectrum. Surely the real impediment to peace and stability in the Middle East is Israel's apparent unwillingness to move in parallel with those countries in the Arab world that have repeatedly stated they are prepared to recognize it in exchange for a full Israeli withdrawal from Arab occupied territory.

Judge Kooijmans agreed with his colleagues in his separate opinion "that the wall and its associated régime impede[d] the exercise by the Palestinian people of its right of self-determination" because it "establishes a physical separation of the people entitled to enjoy this right."[200] But the wall and its associated régime not only separate Israelis from Palestinians, but also Palestinians from each

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197. ICJ Wall Advisory Opinion, *supra* note 2, at 1054, para. 162 (emphasis added); *see also Letter Dated 7 May 2003 From the Secretary-General Addressed to the President of the Security Council*, U.N. Doc. S/2003/529/Annex (May 7, 2003) (containing the same language).

198. *See* Israel's Response to the Road Map, ¶¶ 5–6, 9–10 (May 25, 2003), http://www.knesset.gov.il/process/docs/roadmap_response_eng.htm (setting forth all 14 reservations).

199. *Id.* ¶ 5 (emphasis added).

200. ICJ Wall Advisory Opinion, *supra* note 2, at 1071–72, para. 32 (separate opinion of Judge Kooijmans).

other.[201] The wall segregates their land and the natural resources below that land and repartitions the territory into cantons for the benefit of the settlers.[202] The Palestinian people cannot freely pursue their economic, social, and cultural development if they are dependent on Israel for tax rebates, trade, water, security, and the movement of people, among other things.[203] As Catriona Drew observed in relation to the Israeli settlements (writing before Israel began constructing a wall around those settlements):

> Once the right of self-determination has been conceptually stripped of its core entitlements to territory and resources, it becomes possible—for states, institutions and commentators alike [and it should also be added judges]—to assert both the *inalienable, jus cogens* character of the Palestinian right to self-determination, *and* declare the future of Israeli settlements as a matter for political negotiation; to affirm the primacy of the right of self-determination, including the option of a state, and envisage a future for Israeli settlements on the West Bank.[204]

If self-determination is viewed not just as a one-off right of a people to participate in a political process, but is viewed as a *substantive* right—to territory, resources, and demography—it becomes immediately apparent why a wall that prevents, among other things, farmers from accessing their land, doctors from visiting their patients, children from going to school, and the faithful from reaching their places of worship (as well as a future Palestinian government from having access to its own natural resources and control over its economy, borders, sea, and airspace) is problematic.[205] Judge

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201. Not only are Gazans and West Bankers separated physically from each other (by Israel), but West Bankers are also separated (by the *Ma'ale Adumim* settlement bloc which will effectively partition the West Bank into two separate parts) and East Jerusalemites are separated from their kindred in the West Bank.

202. *See, e.g.*, B'TSELEM, GROUND TO A HALT: DENIAL OF PALESTINIANS' FREEDOM OF MOVEMENT IN THE WEST BANK 26–57 (2007), *available at* http://www.btselem.org/Download/20070805_Ground_to_a_Halt_Eng.pdf.

203. For an interesting book looking at the economics of state formation in Palestine during the Oslo period in the mid to late 1990s, see STATE FORMATION IN PALESTINE: VIABILITY AND GOVERNANCE DURING A SOCIAL TRANSFORMATION (Mushtaq H. Khan, George Giacaman & Inge Amundsen eds., 2004); *see also* Victor Kattan, *State Formation in Palestine*, 4 BORDERLANDS E-J. (2005), http://www.borderlandsejournal.adelaide.edu.au/vol4no1_2005/kattan_stateformation.htm.

204. Catriona Drew, *The East Timor Story: International Law on Trial*, 12 EUR. J. INT'L L. 651, 666–67 (2001) (footnotes omitted).

205. On the impact of Israeli settlements on the Palestinian people's right of self-determination more generally, see Catriona Drew, *Self-Determination, Population Transfer and the Middle East Peace Accords*, *in* HUMAN RIGHTS, SELF-DETERMINATION AND POLITICAL CHANGE IN THE OCCUPIED PALESTINIAN TERRITORIES 119 (Stephen Bowen ed., 1997). That self-determination is also mentioned in common Article 1 to the International Covenant on Economic, Social, and Cultural Rights could be construed as granting an economic as well as a political right of self-determination. MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 24–25 (1998).

Kooijmans seemed to suggest that it is the "terror" attacks that are impeding the Palestinian people's right of self-determination rather than the wall and the regime associated with it.[206] In other words, if the Palestinian Authority stops the "terror," then Palestinians will be able to exercise their right of self-determination (presumably because Israel will agree to withdraw its armed forces from the occupied territories). However, there is simply no evidence to support this proposition. As Alexander Orakhelashvili aptly highlights:

> Judge Kooijmans failed to distinguish between acts that harm the cause of self-determination and the specific and purposive action by the state, in this case the occupying power, that impedes the exercise of the right of self-determination. With regard to the latter category, it can be safely affirmed that every kind of impediment towards the exercise of self-determination amounts to the breach of this principle.[207]

Ultimately, the ICJ should have dealt with the question of Palestinian self-determination in a more forthright fashion, especially as it found that the wall directly interferes with the exercise of that right.[208] It is, perhaps, understandable that the HCJ would not want to deal with this issue in any great detail. However, self-determination can provide a useful tool through which a common narrative can be forged, as both peoples—Israelis and Palestinians—are destined to share that land together in one way or another.

V. THE WALL AND SELF-DEFENSE

Of all the issues that arose in the ICJ's *Wall* Advisory Opinion, none attracted more attention and criticism than the tersely worded three-paragraph statement on the question concerning Israel's right of self-defense under Article 51 of the U.N. Charter. Judges Buergenthal, Higgins, and Kooijmans all expressed serious reservations regarding the way in which their colleagues had dealt with the matter.[209] Nevertheless, it should be said that, with the exception of Judge Buergenthal, the judges ultimately agreed with

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206. Judge Kooijmans writes: "As was said by the Quartet in its statement of 16 July 2002, the terrorist attacks (and the failure of the Palestinian Authority to prevent them) cause also great harm to the legitimate aspirations of the Palestinian people and thus seriously impede the realization of the right of self-determination." ICJ Wall Advisory Opinion, *supra* note 2, at 1071, para. 32 (separate opinion of Judge Koojimans).

207. Alexander Orakhelashvili, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction*, 11 J. CONFLICT & SEC. L. 119, 122–23 (2006).

208. ICJ Wall Advisory Opinion, *supra* note 2, at 1042–43, para. 122.

209. *Id.* at 1079, paras. 5–6 (declaration of Judge Buergenthal); *id.* at 1063, paras. 33–34 (separate opinion of Judge Higgins); *id.* at 1072, para. 35 (separate opinion of Judge Kooijmans).

the rest of their colleagues in finding that Israel could not rely on Article 51 to construct the wall in the West Bank.[210] If any further criticism is warranted, it is in the way the ICJ refrained from elaborating upon *why* it considered Article 51 irrelevant to the matter at hand.[211] In the following pages, the question of self-defense and the construction of the wall will be examined in more depth, and an attempt will be made to explain why the ICJ was ultimately correct in concluding that Article 51 was, in fact, irrelevant.

It will be recalled that Israel did not argue the case on the merits, and therefore the ICJ had to deduce Israel's justifications from its statement before the U.N. Security Council and from the dossier prepared for the Court by the U.N.[212] Thus far, the debate has concerned four issues: (1) whether Article 51 has no relevance to the present situation because it only applies to armed attacks emanating from states, (2) whether the ICJ was correct to conclude that Israel does not have a right of self-defense from attacks originating from occupied territory according to Article 51 of the U.N. Charter, (3) whether Palestinian attacks can be characterized as international in terms of the U.N. resolutions cited, and (4) whether the law of state responsibility precludes any wrongfulness on the part of Israel in building a wall in a territory over which it has no sovereignty.

Of course, Israel, like all states, has a right to defend itself in accordance with international law by referring to Article 51 of the U.N. Charter. No one has ever questioned this right—neither the judges at the ICJ nor counsel for the Palestinians.[213] However, there are good grounds for questioning the extent and the scope of that right and its applicability to the century-long conflict between Israel and those Palestinians inhabiting East Jerusalem, the West Bank, and the Gaza Strip. In a situation of prolonged belligerent occupation, the answer to Israel's security concerns vis-à-vis those *people* (as opposed to a conflict with another state) lies in the law of belligerent occupation and not in the law of self-defense.[214]

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210. *Id.* at 1063, para. 35 (separate opinion of Judge Higgins); *id.* at 1072, para. 36 (separate opinion of Judge Kooijmans).

211. *Id.* at 1049–50, para. 139.

212. *See* U.N. GAOR, 58th Sess., 21st mtg., at 6, U.N. Doc. A/ES-10/PV.21 (Oct. 20, 2003); The Secretary-General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, ¶ 6, *delivered to the Security Council and the General Assembly*, UN Doc. A/ES-10/248/Annex I (Nov. 24, 2003).

213. The following lawyers acted as counsel for Palestine and made oral submission before the ICJ: Professors James Crawford, Georges Abi-Saab, Vaughan Lowe, and Jean Salmon.

214. *See* Jean Cohen, *The Role of International Law in Post Conflict Constitution Making: Toward a* Jus Post Bellum *for "Interim Occupations,"* 51 N.Y.L. SCH. L. REV. 497, 504 (2006) (discussing the law of belligerent occupation).

One should also bear in mind that Israel frequently resorts to justifying its actions as defensive, even when they are, by all objective accounts, punitive.[215] It was therefore, perhaps, hardly surprising that it chose to justify constructing the wall in occupied territory by claiming that the construction was consistent with Article 51 of the U.N. Charter, its inherent right of self-defense, and Security Council Resolutions 1368 (2001) and 1373 (2001).[216] Israel did so without providing any explanation as to why those provisions were relevant to a situation in which it exercised effective control over the territory from which the terrorist attacks it complained of came.[217]

Article 51 of the U.N. Charter provides in part:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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.[218]

Article 2 (4) of the U.N. Charter provides:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any *State*, or in any other manner inconsistent with the Purposes of the United Nations.[219]

Article 4 (1) provides:

> Membership in the United Nations is open to all . . . peace-loving *States* which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.[220]

In order to make a legitimate claim of self-defense according to a strictly textual analysis of Article 51, three conditions must be satisfied: (1) the state must be actually acting in self-defense, meaning that its territorial integrity or political independence is under threat; (2) it must have been the subject of an armed attack (i.e. "if an armed attack *occurs*");[221] and (3) an armed attack[222] must

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215. On Israel's claims of self-defense and their rejection by the Security Council, see STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 172–79 (1996).

216. ICJ Wall Advisory Opinion, *supra* note 2, at 1021, para. 35.

217. *Id.*

218. U.N. Charter art. 51 (emphasis added).

219. *Id.* art. 2, para. 4.

220. *Id.* art. 4, para. 1.

221. Yoram Dinstein writes that such a restrictive reading of Article 51 is required (i.e., that it permits self-defense solely when an armed attack occurs), as in his opinion any other interpretation would be "counter-textual, counter-factual and counter-logical." YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 182–87 (2005). In his view, the most that can be said is that if a state knows—on the basis of hard intelligence available at the time—that an attack is in the process of being mounted, it may "intercept the armed attack with a view to blunting its edge." *Id. Cf.*

occur against a member of the U.N. (in other words, it must be an attack on a state). Resorting to Article 51 to defend Israeli settlements can therefore be dismissed. Under international law, Israel has no sovereignty over East Jerusalem and the West Bank settlements, and they are thus not considered Israeli "territory" by the international community.[223] Even assuming that the terrorist attacks against the settlements meet the threshold of an "armed attack" for the purposes of Article 51, as opposed to a frontier incident,[224] they cannot be considered armed attacks against a member of the U.N.[225] The Israeli civilian settlements, which are in any event illegal, cannot be assimilated to a foreign embassy, for example, or a state's armed forces.[226] In any event, the Israeli

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The Secretary-General's High-level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility* (2004) (reporting a somewhat different view of the high-level panel on threats, challenges, and change). The report concluded that "a threatened State . . . can take military action [in self-defense] as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate." *Id.* ¶ 188. For criticisms of the report of the high-level panel on threats, challenges, and change on self-defense, see Christine Gray, *A Crisis of Legitimacy for the UN Collective Security System?*, 56 INT'L COMP. L. Q. 157, 160–64 (2007).

222. *See* Norman Menachem Feder, *Reading the UN Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT'L L. & POL. 395 (1987) (discussing the problems associated with the term "armed attack" and the accumulation of events or *Nadelstichtaktik* theories).

223. *See* S.C. Res. 471, U.N. Doc. S/RES/471 (June 5, 1980) (stating that under the Geneva Convention, the occupied territories have no legal validity); S.C. Res. 465, U.N. Doc. S/RES/465 (Mar. 1, 1980) (same); S.C. Res. 452, U.N. Doc. S/RES/452 (July 20, 1979) (same); S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979) (same); S.C. Res. 298, U.N. Doc. S/RES/298 (Sept. 25, 1971) (same); S.C. Res. 267, U.N. Doc. S/RES/267 (July 3, 1969) (same); S.C. Res. 252, ¶ 2, U.N. Doc. S/RES/252 (May 21, 1968) (same) .

224. Although many academic commentators have criticized the distinction between armed attacks and frontier incidents, Christine Gray notes that the reason behind this distinction concerned collective self-defense, as the ICJ in *Nicaragua* wanted to limit third-state involvement. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 148 (2004) ("Its insistence on a high threshold for armed attack would serve to limit third party involvement. If there was no armed attack, there could be no collective self-defence. The use of necessity and proportionality alone would not exclude third party involvement, merely limit the scope of their permissible response.").

225. For pre-Charter authority that small border incidents cannot give rise to a claim of self-defense because there is no unequivocal intention to commit an armed attack, see *Arbitrage entre Le Portugal et L'Allemagne, Sentence arbitrale du 31 juillet 1928 concernant la responsabilité de L'Allemagne à raison des dommages causés dans les colonies portuguaises du Sud de L'Afrique* (*Naulilaa Case*), (*Germany v. Portugal*), July 31, 1928, *reprinted in* 2 R. INT'L ARBITRAL AWARDS 1011, 1026–28 (1949).

226. The Definition of Aggression annexed to the General Assembly Resolution 3314 (XXIX) on December 14, 1974, mentions in Article 3(d) that an attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state is as an act of aggression. G.A. Res. 3314 (XXIX) Annex, 2319th Sess., U.N. Doc A/3314 (Dec. 14, 1974) [hereinafter Definition of Aggression]. With regard to embassies, it could be argued that they are an emanation of statehood as they represent the capacity of a state to enter into international relations. *See* 1933 Montevideo Convention on Rights and Duties of States art.1(d), Dec. 26, 1933, 165

settlements in the OPT are populated by civilians as opposed to military personnel; it is therefore difficult to see how they could be considered a representation of statehood or a component of the Israeli armed forces.[227] To do so would conflict with Article 2(4) of the Charter and Article 49(6) of Geneva Convention IV. Israel, therefore, cannot justify defending its settlements on the basis of Article 51, which may explain why Judge Barak relied on Article 43 of the Hague Regulations.[228] Consequently, building a wall to defend the settlements must *a fortiori* be illegal.

Moreover, even if Israel had invoked a right of self-defense or a right of "humanitarian intervention" to protect its *nationals* in the West Bank settlements, Israel would have been required to *repatriate* them *into* Israel (i.e., behind the 1949 ceasefire lines in territory internationally recognized as belonging to Israel).[229] It could not

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L.N.T.S. 19. It is, however, not entirely clear whether an armed attack against an embassy can be assimilated to an armed attack upon a state. Although the ICJ in the *Tehran Hostages* case used the terminology "armed attack" twice to describe the actions by Iranian militants in seizing the U.S. Embassy and staff in Tehran, it did not address the legality of the failed American military rescue operation, which was justified as an act of self-defense. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, paras. 32, 57, 64, 93–94 (May 24). Nor, for that matter, did the Security Council characterize the attacks upon the U.S. Embassies in Nairobi, Kenya and Dar-es-Salaam as "armed attacks." S.C. Res. 118, U.N. Doc. S/RES/1189 (Aug. 13, 1998). It would seem that today the doctrine of extraterritoriality does not apply to embassies. *See* EILEEN DENZA, DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 113–14 (1998) (citing a number of cases including *Tietz et al. v. People's Republic of Bulgaria*, in which the Supreme Restitution Court for Berlin held that the doctrine is "an artificial legal fiction which does not appear to be accepted as sound law anywhere in the world today"). However, Ruth Wedgewood considers the bombings of the U.S. embassies in Africa an "armed attack," although she does not address the issue as to whether an embassy can be considered extra-territorial. Ruth Wedgewood, *Responding to Terrorism: The Strikes against Bin Laden*, 24 YALE J. INT'L L. 559, 564 (1999). Instead, she writes that "Article 51 recognises the inherent right of self-defense in the face of an armed attack, and declares that a *victimized nation* is entitled to engage in unilateral or collective self-defense until and unless the Security Council has addressed the issue." *Id.* (emphasis added). Article 51 of the U.N. Charter actually refers to "Members of the United Nations" and not to "victimized nations." In other words, the attack has to be against a state. This is an objective factor and not a subjective factor. It is irrelevant whether a state does or does not consider itself a victim.

227. *See Israel Hints at Jerusalem Talks*, *supra* note 187 (reporting that Israel has settled hundreds of thousands of citizens in Jerusalem since its 1967 victory in the Arab-Israeli war).

228. *See* Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 18, at 247 (arguing that that the Occupying Power is free to take such measures are as necessary for the protection of its armed forces, but that this license would not necessarily apply to civilian settlers).

229. Examples of this controversial doctrine include the U.S.-Belgian Stanleyville Rescue Operation in the Congo on November 24, 1964 and Israel's rescue mission in Entebbe, Uganda on July 4, 1976. In both instances, the rescued nationals were repatriated to their countries of origin. In the case of the Congo, Belgium and the United States acted with the permission of the Congolese government, whereas

claim a right to protect its nationals by sending its military to remain in the occupied territory indefinitely or by building a semi-permanent structure around the settlements. Addressing Israel's security justifications, the ICJ abruptly concluded:

> Article 51 of the Charter thus recognises the inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. . . .
>
> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defense. . . .
>
> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.[230]

Although this paragraph has been subject to criticism, it will be recalled that Israel did not enter a plea on the merits of the case in its written statement.[231] Nor did Israel participate in the oral pleadings before the Court.[232] Moreover, none of the states that submitted written statements or made oral pleadings before the Court "supported Israel's claim that the construction of the wall was justified as a measure of self-defense under Article 51 of the U.N. Charter."[233] In fact, many argued that it was inapplicable. Perhaps the reason why the ICJ's interpretation of Article 51 was so brief was because self-defense was not pleaded before it as an exculpatory justification for building the wall, although this would not have prevented the Court from engaging with this issue in more depth.

A. *Self-Defense, Self-Determination, and State Attacks*

In the *Mara'abe* case, the HCJ expressed its bewilderment that Article 51 of the U.N. Charter only applies when one state militarily attacks another state.[234] As Judge Higgins duly noted, "There is . . .

Uganda assisted the hijackers in Entebbe. *See* LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 195–211 (1973) (discussing the situation in the Congo and U.S. and Belgian intervention); Leslie C. Green, *Rescue at Entebbe: Legal Aspects*, 6 ISR. Y.B. HUM. RTS. 312 (1976) (discussing the situation in Uganda).

230. ICJ Wall Advisory Opinion, *supra* note 2, at 1049–50, para. 139.

231. *Id.* at 1028, para. 57.

232. *Id.* at 1015–16, para. 12.

233. Iain Scobbie, *Words My Mother Never Taught Me—"In Defense of the International Court,"* 99 AM. J. INT'L L. 76, 77 (2005).

234. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, 213, ¶ 23 (2006).

nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State."[235] Rather, this qualification is a result of the ICJ so determining in *Nicaragua*, which based this finding of law upon the consensus interpretation placed upon the *Definition of Aggression* annexed to General Assembly resolution 3314. Article 3 of the *Definition* stipulates that an act of aggression must originate from another state, which stipulation the ICJ assimilated to an armed attack for the purposes of its discussion of Article 3(g).[236] That an armed attack must originate from a State is also, according to one study, a reflection of the majority interpretation advanced by international lawyers.[237] As the ICJ held in its *Nicaragua* ruling:

> The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending *by a State* of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.[238]

The ICJ's opinion on this point of law has been subject to intense criticism because, some argue, the practice of states since the late 1990s allows them to invoke the right of self-defense under Article 51 in the event of an attack by a non-state actor.[239] There may also be difficulties in ascertaining how much force is necessary before an attack amounts to an *armed* attack as opposed to "a mere frontier incident."[240] Taking its cue from a number of critical commentaries in the *American Journal of International Law*, the HCJ in *Mara'abe*

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235. ICJ Wall Advisory Opinion, *supra* note 2, at 1063, para. 33 (separate opinion of Judge Higgins); *see also* HCJ 7957/04 Mara'abe, ¶ 23 ("[Article] 51 of the Charter of the United Nations recognizes the right of self-defense, when one state military attacks another state.").

236. Definition of Aggression, *supra* note 226. *See also*, Military and Paramilitary Activities (Nicar. v. U.S.), *supra* note 41, para. 195.

237. The issue is succinctly discussed by Jörg Kammerhofer, *Uncertainties of the Law of Self-Defence in the United Nations Charter*, 35 NETH. Y.B. INT'L L. 143, 178–87 (2004).

238. Military and Paramilitary Activities (Nicar. v. U.S.), *supra* note 41, para. 195 (emphasis added).

239. For support for this view, see Matthew Scott King, *The Legality of the United States War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover-Up International War Crimes?*, 9 ILSA J. INT'L & COMP. L. 457 (2002–2003); and Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter*, 43 HARV. INT'L L.J. 41 (2002). *See also* Carsten Stahn, *Terrorist Acts as 'Armed Attack': The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 35–54 (2003) (generally discussing U.S. intervention in Iraq following September 11, 2001).

240. *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 251 (1994) (examining the difficulties with ascertaining how much force is necessary for an attack to amount to an "armed attack").

found the ICJ's reasoning regarding Article 51 of the U.N. Charter "hard to come to terms with," and doubted whether it "fits the needs of democracy in the struggle against terrorism."[241] Without entering into a debate over definitions of democracy and terrorism, since the definitions of both are rather controversial in the Middle East,[242] it is fair to say that the reasoning of the ICJ on the scope of Article 51 leaves something to be desired.[243] But it is arguable that the ICJ summarily dismissed Israel's plea, because when Article 51 is looked at in its entirety (meaning when one considers it in the context of the U.N. Charter as a whole), it is evidently inapplicable to the facts at hand; the U.N. Charter only applies to its members, with membership of the organization restricted to "peace-loving States."[244] Furthermore, Article 51 is an exception to the prohibition of aggression contained in Article 2(4), which only applies to states, and which, when coupled with Article 2(3), requires them to settle their disputes peacefully with one another.[245] This also tallies with the principles of sovereign equality mentioned in Article 2(1) and the doctrine of non-intervention.[246] The law on the threat or use of force

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241. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, 213, ¶ 23 (2006).

242. It is highly questionable whether all forms of Palestinian resistance can be labeled "terrorism." Certainly, Palestinian groups do engage in "acts of terror," as does the Israeli military on occasion. Therefore, if this term is to be used at all, it should be used to describe both Israeli and Palestinian actions. *See* Jörg Friederichs, *Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism*, 19 LEIDEN J. INT'L L. 69 (2006) (discussing terrorism and international law generally); BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW (2006) (studying terrorism and international law).

243. For a critique of the ICJ's determinations of the scope of Article 51, see Sean D. Murphy, *Self-defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?*, 99 AM. J. INT'L L. 62 (2005), and Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT'L L. 52, 57–61 (2005).

244. The traditional view is probably best expressed by Josef Kunz: "Art. 51 must be interpreted with regard to the doctrine of non-intervention and Art. 2, par. 7, of the Charter. 'Armed attack' gives the right of self-defense if directed against a member of the U.N.; how it is done, on land, by sea, in the air, by invasion of territory by armed forces, or by long-range guided missiles, and so on, is legally irrelevant." Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947) (footnote omitted).

245. This also addresses the fear that an expansive interpretation of Article 51 could create a loophole enabling states to rationalize military adventurism. *See* U.N. Charter art. 2, para. 3 ("This provides: 'All Members shall settle their international disputes by peaceful means in such a manner that international security, and justice, are not endangered.'").

246. Article 2(7) of the U.N. Charter provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." U.N. Charter art. 2, para. 7. In other words, self-defense under the Charter is only

in the Charter is state-orientated. Whether the law has changed in the aftermath of the September 11 attacks on the United States so that it can apply to armed attacks carried out by non-state actors is still open to debate[247] and will depend somewhat on the nature of the non-state actor (as not all non-state actors are considered terrorist organizations).[248] Moreover, the practices of states such as Israel and the United States (and even the United Kingdom) in the "global war on terror" are not universally accepted as representing the current state of international law on the use of force and self-defense.[249] In order to determine whether the law has indeed changed, one would have to consider the Charter provisions as interpreted through both state practice and *opinio juris*.[250] Although there has been a definite trend since September 11, with most members of the Security Council (as well as NATO) invoking the right of self-defense against non-state actors,[251] this is not necessarily universally accepted as reflecting the

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concerned with conflict between states and not within states or in those areas where it exercises domestic jurisdiction as it may do in occupied territories.

247. *See* Gray, *supra* note 221, at 160–64 (setting forth and analyzing the debate about armed attack against non-state actors after 9/11); Said Mahmoudi, *Self-Defence and International Terrorism*, 48 SCANDINAVIAN STUD. L. 203 (2005) (arguing that the right to self-defense against international terrorism cannot be challenged after the September 11 attacks).

248. The current debate over whether to keep the *Mujahideen al-Khalq* (commonly known as the People's Mujahadeen Organisation of Iran) on the proscribed list of terrorist organizations in the EU is of interest. *See, e.g.*, Constant Brand, *European Court Overturns EU Decision to Add Iranian Resistance Movement to Terror List*, ASSOCIATED PRESS, Dec. 12, 2006 (reporting on the EU ruling).

249. In order to assess state practice, one must look beyond American, British, and Israeli practice. *See generally* Mary Ellen O'Connell, *Taking* Opinio Juris *Seriously: A Classical Approach to International Law and the Use of Force*, *in* CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE: A METHODOLOGICAL APPROACH 9, 30 (Enzo Cannizzaro & Paolo Palchetti eds., 2005) (proposing that it is not enough to just look at state practice on issues of customary law formation and treaty interpretation, the scholar must also "pay careful attention to the legal opinion of international actors in connection with that practice").

250. Ruys and Verhoeven at the University of Leuven have undertaken one recent study. Tom Ruys & Sten Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10 J. CONFLICT & SEC. L. 89 (2005). They write:

> In the end, the present authors are of the opinion that this extreme position [that attacks by private actors always trigger the right of self-defense] must be rejected, not only because legal literature traditionally confirms the need for state involvement in private attacks, but mostly because state practice has consistently upheld the need for a certain link with a state.

Id. at 312.

251. For instance, Wood cites a statement made by the Russian Defense Minister in the context of its struggle with Chechnya to the effect that Article 51 does not stipulate that an armed attack must emanate from a state. Michael C. Wood, *Towards New Circumstances in Which the Use of Force May be Authorized? The Cases of Humanitarian Intervention, Counter-Terrorism, and Weapons of Mass Destruction*, *in* THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY—A NEED FOR CHANGE? 87 (Niels Blokker & Nico Schrijver eds., 2005).

law in parts of Africa and the Islamic world (or amongst the non-aligned movement).[252] For instance, while there may be agreement that attacks by terrorist organizations fall within the scope of Article 51, depending on the severity of the attack, there may be disagreement as to whether a state can use force in "self-defense" against a people struggling to exercise their right of self-determination (such as in Kashmir, Western Sahara, and elsewhere).[253] From the statements made in various international forums,[254] it is evident that many states do not view Israeli attacks against Palestinians in the OPTs as legitimate acts of "self-defense," and they do not view Palestinian attacks against Israel as "terrorism," although many such actions could be described as such.[255] For example, the Charter of the Organization of the Islamic Conference provides that its objectives include, among other things, "to co-ordinate efforts for the safeguard of the Holy Places and support of the struggle of the people of Palestine, to help them regain their rights and liberate their land," as well as "to strengthen the struggle of all Moslem peoples with a view to safeguarding their dignity, independence and national rights."[256] One should therefore be careful in assessing state practice, especially because some sixty states in the world today (which is almost a third of the entire

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252. For a discussion about Islamic 'perceptions' of the use of force, see Said Mahmoudi, *The Islamic Perception of the Use of Force in the Contemporary World*, 7 J. HIST. INT'L L. 55 (2005). Mahmoudi concludes that the recent practice of Islamic States with respect to the use of force seems not to have been influenced by their character as Islamic countries. However, condemnation of Israel's occupation of Palestine is a permanent issue in the statements of all Arab countries in the debates of the General Assembly. *Id.*

253. For example, when the Islamic Republic of Iran acceded to the International Convention Against the Taking of Hostages on November 20, 2006, it issued an interpretative declaration to the effect that fighting terrorism should not affect the legitimate struggle of peoples under foreign occupation in the exercise of their right of self-determination. International Convention Against the Taking of Hostages, Accession: Iran, Nov. 20, 2006, C.N.1105.2006.TREATIES-5 (Depositary Notification).

254. For example, in the Security Council debate over Israel's assassination of Salah Shehahdeh in Gaza City, which resulted in the deaths of fifteen other Palestinians, including several children, terms like "extra-judicial execution," "terrorism," and "state terrorism" were all used by a number of delegates to describe Israeli and Palestinian actions. *See* U.N. SCOR, 57th Sess., 4588th mtg., U.N. Doc S/PV.4588 (July 24, 2002) (including these terms by several of the delegates).

255. Richard Falk aptly made the point when he expressed his view that "[i]t is profoundly misleading to criminalize Palestinian terrorism while simultaneously treating state terrorism associated with Israeli military operations as 'security' or as 'anti-terrorism.'" Richard Falk, *International Law and Palestinian Resistance*, *in* THE STRUGGLE FOR SOVEREIGNTY: PALESTINE AND ISRAEL, 1993–2005, at 315, 323 (Joel Beinin & Rebecca L. Stein eds., 2006).

256. Charter of the Organization of the Islamic Conference art. 2, paras. 5–6, Mar. 4, 1972, 914 U.N.T.S. 103, 104–110.

membership of the General Assembly) have majority Muslim populations.[257] As Christine Gray writes:

> [T]he natural focus of writers on controversial cases where states invoke self-defence in protection of nationals, anticipatory or pre-emptive self-defence, and response to terrorism inevitably gives an unbalanced picture or distorts our perception of state practice; it helps to give the impression that the far-reaching claims of states like the USA and Israel are normal rather than exceptional.[258]

Critics[259] of the paragraph on the inapplicability of self-defense in the ICJ's *Wall* Advisory Opinion have also cited the *Caroline* precedent[260] as a case in which a state used force against a non-state actor. However, the *Caroline* precedent should be used with the utmost caution, for it emanates from an era when there was no prohibition on the use of force by states.[261] If it is at all relevant today, it is regarding the question of *necessity* and not self-defense. Moreover, the *Caroline* case can hardly be compared to the present conflict between Israel and the Palestinians. The U.S. was not an occupied territory but a sovereign state when the *Caroline* incident occurred.[262] Moreover, at the time, both Upper and Lower Canada were British colonies (hence the protest by Great Britain over the

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257. There are currently fifty-six member states of the Organization of the Islamic Conference (OIC), including Palestine, though it is not technically a state. Other countries with significant Muslim populations (35-50% of the population) who do not have membership in the OIC include Bosnia-Herzegovina, Eritrea, Ethiopia, and Tanzania (Zanzibar is 99% Muslim). Ghana, India, Kenya, the Philippines, Singapore, and Sri Lanka also have relatively large Muslim minorities (ranging from 5-15% of the population). *See* U.S. CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/index.html (last visited Oct. 19, 2007).

258. Gray, *supra* note 221, at 97.

259. *See, e.g.*, Murphy, *supra* note 239, at 43–44 (criticizing the conclusions of governments, scholars, and the ICJ about the issue of self-defense in this context).

260. *See* Letter from Daniel Webster, U.S. Sec'y of State, to Henry Fox, British Minister in Washington, D.C. (Apr. 24, 1841), *in* 29 BRIT. & FOREIGN ST. PAPERS 1129 (1840–1841) (discussing the *Caroline* decision); *see also* Werner Ming, *The Caroline*, 1 ENCYCLOPEDIA PUB. INT'L L. 537–38 (1992) (including a very brief synopsis of the facts in the *Caroline*); R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938) (including commentary on the *Caroline*).

261. This is because back then the concept of self-defense did not exist. Rather, it was used interchangeably with terms like "self-preservation" and "self-help," which are no longer recognized as lawful justifications for using force. *See* Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT'L L. 183, 241 (1961).

> [T]o regard any form of action formerly held to be self-defence, at a time when self-defence was a phrase regarded as interchangeable with 'self-preservation' and 'necessity,' as within a surviving 'customary right,' is a very arbitrary process. To go further, and assert that the Charter obligations are qualified by this vague customary right, is indefensible.

Id.

262. The United States declared independence on July 4, 1776. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

arrest of Alexander McLeod, as it claimed that the destruction of the *Caroline* was the public act of persons on Her Majesty's service and that, as a consequence, individuals acting under such authority were not personally responsible for executing the orders of their government).[263] The same certainly could not be said about Israel's relationship with the Palestinians, which could hardly be described as peaceful (or as a relationship between equals).[264] Of course, this also took place before the U.N. Charter was drafted and before self-determination was established as a legal right and an obligation *erga omnes*.[265] Citing the *Caroline* as a precedent for acting in self-defense—as opposed to its continuing relevancy to the question of necessity—also ignores the development of customary international law prior to the adoption of the U.N. Charter and afterwards.[266] Moreover, the *Caroline* criterion can be abused all too easily if it is not used with caution.[267] Although it has been suggested that Article 51 of the U.N. Charter can apply to non-state actors because the threat in the *Caroline* came from a non-state entity,[268] this surely would not make any difference today because, at the time, the legal status of the entity that carried out that attack was irrelevant. Rather, the dispute between Great Britain and the United States during the *Caroline* debacle arose on an *interpretation* of the law: the circumstances and conditions under which the concept of what they understood at the time to be "self-defense" could serve as a proper justification for the use of force by one nation against another.[269] In

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263. *See* Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493 (1990).

264. It should be added that the rebels took refuge in the territory of the United States and not in occupied territory. Israel controls the occupied territories, and therefore the situation is not analogous to the case of the *Caroline*, which involved a violation of U.S. territory.

265. The U.N. Charter was officially adopted on June 26, 1945. U.N. Charter art.111, para. 3.

266. *See* Ian Brownlie, *International Law and the Use of Force by States Revisited*, 1 CHINESE J. INT'L L. 1, 4–8 (2002) (making this point forcefully).

267. For example, Saddam Hussein's government relied on it in order to justify their invasion of Iran in September 1980. *See* R.K. Ramazani, *Who Started the Iraq-Iran War?: A Commentary*, 33 VA. J. INT'L L. 69, 78 (1992) (noting the comparison Saddam Hussein and his Foreign Ministry made between the preventative strikes against Iran and the *Caroline* case); Erik B. Wang, *The Iran-Iraq War Revisited: Some Reflections on the Role of International Law*, 32 CAN. Y.B. INT'L L. 83, 88 (1994) (discussing Iraq's justifications in light of the *Caroline* case).

268. *See* CHRISTOPHER GREENWOOD, *War, Terrorism and International Law*, *in* ESSAYS ON WAR IN INTERNATIONAL LAW 409, 420 (2006).

> The threat in the *Caroline* came from a non-state group of the kind most would probably call terrorist today . . . . [N]owhere in the correspondence . . . is it suggested that this fact might make a difference and that the Webster formula might not apply to armed attacks that did not emanate from a State.

Id.

269. *See supra* notes 260, 263 and accompanying text.

1840, the question as to whether a state could only act in self-defense against another state was not an issue; it only became relevant after the adoption of the U.N. Charter in San Francisco in 1945, which only applies to its constituent states.[270] Furthermore, it is even doubtful whether Israel could justify building the wall as a legitimate act of self-defense along its present trajectory according to the *Caroline* criteria because the Israeli government would have to show a "*necessity* of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation."[271] In other words, Israel would have to prove that it was absolutely *necessary* to build the wall in occupied territory as opposed to building it within its own territory or along the 1949-ceasefire lines. To date, Israel has provided no valid justification for building the wall where it is.[272]

Admittedly, this may be a conservative analysis of Article 51 and the customary international law rules on the recourse to armed force. It is also true that the world is a very different place today than it was when the Charter was drafted in 1945.[273] Yet one must not forget that the struggles in the Middle East are not new. Any difficulties that have arisen with the Charter's interpretation in light of the Israeli-Palestinian conflict are not the fault of the draftsmen. In this particular instance, it is the result of Israel's refusal to withdraw from the territories it occupied in 1967. In so doing, it is forcibly depriving the Palestinian people of their right to exercise self-determination and stretching the limits of self-defense into uncharted waters—for belligerent occupation is supposed to be a relatively temporary phenomenon.[274] Forcibly depriving a people of their right

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270. Edward Stettinius, the U.S. Secretary of State in 1945 and one of the chief architects of the U.N. Charter, opposed the British Foreign Secretary Anthony Eden's request for an expansionist interpretation of the term "armed attack" that would appear in Article 51 of the U.N. Charter. Eden wanted a phrase that would have permitted action against every sort of aggression, direct or indirect. However, Stettinius refused to budge, contending that a broader phraseology would allow states too great a leeway, including the right of preventative actions, which could legally wreck the organization. He said that World Wars I and II, after all, had begun with preventative attacks. The British backed down. *See* STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 184–85 (2003).

271. Letter from Daniel Webster, *supra* note 260, at 1138 (emphasis added).

272. *See generally* Press Release, United Nations Information Service, International Meeting on Impact of Wall Built by Israel in Occupied Palestinian Territory Enters Second Day, U.N. Doc. GA/PAL/952 (Apr. 19, 2004) (discussing the Wall's location).

273. Nevertheless, it is submitted that the rules are robust enough to withstand the times even if it seems as though states behave with little regard for the law. For instance, see Oscar Schacter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

274. *See* Andrew Roberts, *Prolonged Military Occupations: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990) (discussing prolonged occupations); Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AM. J. INT'L L. 102, 105–09 (2005) (criticizing the ICJ's Advisory Opinion on Article 6 of Geneva Convention IV).

to exercise self-determination is considered a breach of an obligation *erga omnes* by the ICJ, and is in itself a violation of international law.[275] In such circumstances, resistance is inevitable. The United Nation's *Definition of Aggression* provides:

> Nothing in this Definition, and in particular article 3, could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right . . . particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.[276]

It is well known that all peoples subjected to colonial and racist regimes or other forms of alien domination have resisted such injustices at one time or another.[277] In his separate opinion in the *Namibia* case, Judge Ammoun considered that "the struggle of peoples in general has been one, if not indeed the primary, factor in the formation of the customary rule whereby the right of peoples to self-determination is recognized."[278] Although positive international law provides no explicit basis for a people struggling for freedom and independence to achieve this, no rule of international law prohibits this either (it only proscribes the conduct of those struggling for this right). In fact, such resistance need not necessarily be violent. For instance, non-violent resistance is reflected in the terminology employed by the *Definition of Aggression* ("struggle" as opposed to "armed struggle") and exemplified by Mahatma Gandhi's revolt against the British in India, the struggle of black South Africans against the minority white apartheid government in Pretoria, and even the Palestinian people's struggle for freedom against Israeli occupation from 1987 until 1993.[279] Of course, any quasi-military

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275. *See* HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 91–103 (1988).

276. Definition of Aggression, *supra* note 226.

277. An example is the struggle against Nazi Germany by the Dutch, French, Polish, and Yugoslav partisans. *See* W. J. Ford, *Resistance Movements and International Law*, 7 INT'L REV. RED CROSS 579 (1967) (providing a useful survey of resistance during the Boer War, the Russo-Japanese War, World War I, and World War II). Yasser Arafat in his famous "gun and olive branch" speech before the General Assembly in 1974 recalled that there are just causes where people fight for the freedom and liberation of their land "from the invaders, the settlers and the colonialists." Yasser Arafat, Question of Palestine, U.N. GAOR, at 48, 29th Sess., 2282d mtg., UN Doc. A/PV. 2282 (Nov. 13, 1974).

278. Namibia Advisory Opinion, *supra* note 192, at 70 (separate opinion of Vice-President Ammoun).

279. In fact, contrary to popular belief, most Palestinian resistance to Israeli occupation remains non-violent. This can take the form of ignoring curfews (which can sometimes last for weeks) at great risk to one's personal well-being, or throwing stones and Molotov cocktails. *See* Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defence*

actions taken by Palestinian organizations against Israel would be subject to the customary rules of IHL, and in particular Article 48 of Additional Protocol 1, which provides as a basic rule that the belligerents "shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[280] Islamic international law also proscribes the conduct of belligerents: "Those non-combatants who are unable to participate in hostilities are classed as protected persons and cannot be attacked, killed or otherwise molested."[281] It should be added that as the Charter's provisions on self-defense only apply to its members, and as there is no Palestinian state at present with membership in that organization, it is arguable that they are not bound by its constraints—such as a prior armed attack—but only by the customary law principles of proportionality and necessity. Consequently, the Palestinians could claim that they have an "inherent" right to protect themselves from Israeli aggression.[282] Since the occupation of foreign territory, even if it resulted from an act of justifiable self-defense, could constitute by itself an act of armed aggression,[283] the Palestinians could always argue that they have a right to respond and to *anticipate* future Israeli attacks. In this respect, those in Israel who advocate an expansive interpretation of self-defense should be aware that such arguments could be used against them.[284] However, it is submitted that the conflict between

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of the Intifada, 32 HARV. INT'L L.J. 129 (1991) (discussing the first Palestinian and mostly non-violent *intifada*). According to one recent study, it is only violent actions such as suicide bombings that make the headlines in the West. Most forms of non-violent resistance are not deemed newsworthy. GREG PHILO & MIKE BERRY, BAD NEWS FROM ISRAEL (2004).

280. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict art. 48, June 8, 1977, 1125 U.N.T.S. 609; *see also* Pocar, *supra* note 83, at 153 (discussing the status of Article 48 as a customary rule of international law).

281. *See* Shaheen Sardar Ali & Javaid Rehman, *The Concept of Jihad in Islamic International Law*, 10 J. CONFLICT & SEC. L. 321, 338 (2005).

282. *See, e.g.*, E.C. UDECHUKU, LIBERATION OF DEPENDENT PEOPLES IN INTERNATIONAL LAW 22 (2d ed. 1978).

> That the Charter did not purport to abolish the inherent right of self-defence of all peoples and confer it only on U.N. Members can be seen from the fact that during the Korean War in 1950 several U.N. Members took the position that the action taken under U.N. auspices against North Korea was in pursuance of the right of collective self-defence of South Korea, even though South Korea was not a Member of the United Nations.

Id.

283. *See* AHMED M. RIFAAT, INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT: ITS DEVELOPMENT AND DEFINITION IN INTERNATIONAL LAW 127 (1979) (arguing that occupation of foreign territory constitutes an act of armed aggression).

284. *See, e.g.*, Yehuda Z. Blum, *State Response to Acts of Terrorism*, 19 GERMAN Y.B. INT'L L. 223, 235 (1976) ("In fact, it would appear that it is extremely difficult—to

Israel and the Palestinian people within the occupied territories is not a question to be determined according to the *jus ad bellum*, but rather by the *jus in bello*, and that consequently the question of self-defense is not really relevant to this debate.[285] Widening the scope of self-defense so that it can be invoked by both Israelis and Palestinians is likely to lead to further conflict contrary to the spirit of the U.N. Charter, which is "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."

But perhaps the debate on the nature of the attacker is all really "beside the point" as Judge Kooijmans noted, since Israel was not claiming that the terrorist attacks against its civilian population emanated from another state.[286] Even if it is accepted that state practice has changed since September 11 and Article 51 can apply to non-state actors,[287] Israel would still be precluded from invoking Article 51 because it exercises effective control in the OPT as the occupying power, and therefore the situation, as the ICJ noted, is different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), which speak of international terrorism.[288]

B. *Self-Defense and Occupied Territory*

An occupying power may not invoke self-defense under Article 51 of the U.N. Charter to respond to attacks coming from occupied territory because it has effective control there.[289] In this regard, it would be nonsensical for a state to claim such a right, as attacks that come from a territory and a population over which it exercises effective control is equivalent to an attack emanating from its own territory and population. In this respect, a state would not invoke self-defense to attack itself. Furthermore, jurisprudence from World War II provides support for the view that occupying powers cannot claim a right of self-defense to attack rebels situated in a territory under its effective control. This is because self-defense does not

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the point of being almost impossible—to apply the traditional concept of proportionality to acts of terrorism.").

285. "*Jus in Bello*" (justice in war) is a theory identifying a moral framework during the conduction of war, while "*Jus ad Bellum*," (just war theory) identifies the concept that some wars are "morally and legally justifiable, such as those against a totalitarian (or) aggressive regime." BLACK'S LAW DICTIONARY (8th ed. 2004).

286. ICJ Wall Advisory Opinion, *supra* note 2, at 1072, para. 35 (separate opinion of Judge Kooijmans).

287. This argument was offered forcibly by Greenwood before the ICJ rendered its Advisory Opinion on the Wall. *See* CHRISTOPHER GREENWOOD, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida and Iraq, in* ESSAYS ON WAR IN INTERNATIONAL LAW, *supra* note 268, at 667-700.

288. S.C. Res 1368, U.N. Doc. S/RES/1368 (Dec. 21, 2001); S.C. Res 1373, U.N. Doc S/RES/1373 (Sept. 28, 2001).

289. U.N. Charter art. 51.

belong to the rules regarding the conduct of hostilities (the *jus in bello*) but instead to the rules governing the recourse to armed force (the *jus ad bellum*). The only possible justification for using force against an occupied people is provided by the rules regulating the conduct of belligerent reprisals, not the law of self-defense.[290]

The fact that Israel is an occupying power in the West Bank (which includes East Jerusalem) is significant precisely because Israel, as the ICJ noted, exercises effective control there.[291] Israel is consequently caught in a legal limbo: on the one hand it has no sovereignty over the territory, but on the other hand it exercises effective control as the occupying power with the concomitant responsibilities set out in the Geneva Conventions. The simple fact is that Israel cannot have it both ways. Either, it must withdraw from the territories and give the Palestinians the opportunity to create a viable and independent state, or it must accept its responsibilities as the occupying power and abide by the rules of belligerent occupation. Israel evidently desires the territory but not the people who inhabit it, which is precisely why it has never annexed the West Bank or Gaza, an act that would trigger its obligation to grant citizenship rights to the native population.[292] The whole question of the Israel-Palestine conflict, the use of force, and self-defense are inextricably tied up with the question of self-determination. Until this is resolved in a satisfactory manner in accordance with international law, these problems will remain.

It should be recalled that Israel was not created in a territorial vacuum.[293] The Palestinian Arabs have every right to be there as the

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290. The Geneva Convention codified the current law of belligerent reprisals. Convention Relative to the Protection Civilian Persons in Time of War art. 33, para. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

291. *See* HCJ 593/82 Leah Tsemel, Att'y v. Minister of Def. and Commander of the Ansar Camp [1983] IsrSC 37(3) 365, *translated in* 1 PALESTINE Y.B. INT'L L. 164 (1984) (concerning Israel's occupation of southern Lebanon, in which the HCJ accepted that Geneva Convention IV was applicable). Presumably if Geneva Convention IV was applicable there—where Israel exercised effective control—then it should also be applicable to the OPTs.

292. *See* Geneva Convention IV, *supra* note 20, art. 67.

> The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. *They shall take into consideration the fact the accused is not a national of the Occupying Power.* (emphasis added)

Hague Regulations, *supra* note 50, art. 45 ("It is forbidden to compel the inhabitants of *occupied territory* to swear allegiance to the hostile Power.").

293. The Palestinian Arabs already lived in Palestine at the time that it was promised by a third party, the British, to another third party, the Zionists, in November 1917. Had the land been empty, there would have been little opposition or conflict today. *See generally* GEORGE ANTONIUS, THE ARAB AWAKENING: THE STORY OF

indigenous population of any territory. They are not "foreign" to Israel. Therefore, one cannot invoke their "foreign nationality" as an external link or basis for invoking the right of self-defense.[294] Rather, their statelessness, meaning their lack of nationality, is a direct consequence of actions taken by the Israeli legislature, which unlawfully denationalized them (that is, stripped them of their prior nationality status) in 1952.[295] The passage of time does not cure that illegality.[296] Therefore, it is arguable that Palestinian attacks against Israel come very close to domestic forms of violence, and that Article 51 is therefore inapplicable.[297] However, the situation is more complex. The Palestinians have stated that they want to establish an independent Palestinian state in the OPTs, from which Israel refuses to withdraw.[298] As with most self-determination disputes, the conflict has both international and domestic characteristics.[299] The ICJ is therefore not being inconsistent when it ruled that Article 51 is inapplicable because Palestine is not a state;[300] this is a matter of fact. The rules of belligerent occupation continue to apply because

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THE ARAB NATIONAL MOVEMENT (1938) (discussing the rise of Arab nationalism in Palestine).

294. *See* Iris Canor, *When* Jus ad Bellum *Meet* Jus in Bello*: The Occupier's Right of Self-Defence Against Terrorism Stemming From Occupied Territories*, 19 LEIDEN J. INT'L L. 129, 137 (2006) (discussing the "foreign national" issue).

295. Nationality Law, 5712–1952, 11 LSI 50 (1952) (Isr.), *reprinted in* FUNDAMENTAL LAWS OF THE STATE OF ISRAEL 254 (Joseph Badi ed., 1961).

296. *See* Victor Kattan, *The Nationality of Denationalized Palestinians*, 74 NORDIC J. INT'L L. 67, 90–93 (2005).

297. This would, of course, not preclude an individual defending himself in case of attack, but this would not, strictly speaking, be a question of international law but of a state's criminal laws and, possibly, human rights law. The only exception to this may be in the case of self-defense in relation to war crimes. *See* Timothy L.H. McCormack, *Self-Defence in International Criminal Law*, *in* THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY 231, 232–39 (Hirad Abtahi & Gideon Boas eds., 2006).

298. *See* ECOSOC, Comm'n on Human Rights, *Statement Submitted by the Palestinian Center for Human Rights*, U.N. DOC. E/CN.4/2002/NGO/161 (2002) ("The internationally recognised right of the Palestinian people to self-determination includes the establishment of a viable and independent state on territories occupied by Israel in 1967. Yet under the Oslo accords, 82% of the OPT remains under direct Israeli military control.").

299. Article 1(4) of Additional Protocol 1 to the Geneva Conventions which deals with international armed conflicts includes

> armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Protocol Additional to the Geneva Conventions, *supra* note 280, art. 1, para. 4.

300. *See* ICJ Wall Advisory Opinion, *supra* note 2, at 1050, para. 139 (concluding that Article 51 is irrelevant in the case).

when that territory was captured in 1967, it was Jordanian territory (even though its annexation was only recognized by three states), and the inhabitants of the West Bank had Jordanian nationality (though many lost it in 1988, when Jordan gave up its territorial claims).[301] The conflict has therefore evolved *politically* from one between Israel and Jordan to one between Israelis and Palestinians. Geneva Convention IV remains applicable, however. That Jordan claimed sovereignty over the West Bank until 1988 "only strengthens the argument in favour of the applicability of the Fourth Geneva Convention right from the moment of its occupation by Israel in June 1967."[302] In fact, Jordan was, at the time of the June 1967 war, a "High Contracting Party" within the meaning of Article 2 of Geneva Convention IV.[303] To claim that certain Palestinian organizations are somehow alien to the territory and part of a "shadowy network of foreign fighters" is a fallacy unsupported by the facts.[304] Any analogy with the United States' "global war on terror" is simply inappropriate to the question of Palestine, which has been on the U.N. agenda longer than the existence of the Jewish state.[305]

As long as Israel exercises effective control over the OPTs, it remains (for the purposes of legal responsibility) equivalent to its own territory. Therefore, Israel's claim of a right of self-defense to respond to attacks that come from the OPTs (over which it exercises effective control) is equivalent to Israel claiming a right of self-defense from an attack emanating from its own territory and population. In other words, there is no right of self-defense against a civilian population under belligerent occupation; there is only the right to enforce the law in accordance with the laws of belligerent occupation.[306] The question is not one of allegiance, as an occupied people owe no allegiance to an occupying power other than to obey

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301. *See* His Majesty King Hussein of Jordan, Statement Concerning Disengagement from the West Bank and Palestinian Self-Determination, Address to the Nation (July 31, 1988), *reprinted in* 27 I.L.M. 1637 (1988).

302. ICJ Wall Advisory Opinion, *supra* note 2, at 1067, para. 9 (separate opinion of Judge Kooijmans).

303. Convention Relative to the Protection Civilian Persons in Time of War, *supra* note 290, art. 2.

304. *But see* Rebecca Kahan, *Building a Protective Wall Around Terrorists—How the International Court of Justice's Ruling in the* Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory *Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 FORDHAM INT'L L.J. 827 (2005) (arguing the contrary).

305. *See Question of Palestine, Letter from the United Kingdom Delegation at the United Nations to the Acting Secretary-General of the United Nations*, UN Doc. A/286 (Apr. 2, 1947) (requesting the question of Palestine be put on the Agenda of the General Assembly annual session).

306. *See* HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel [2005] (Isr.) para. 4., *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (noting that petitioners made this same argument, although in this case it was not specifically addressed by the court).

legitimate orders issued by it.[307] However, according to Article 43 of the Hague Regulations, just because a population under belligerent occupation owes no allegiance to the occupying power does not mean that it has no responsibility for ensuring public order and life in the occupied territory.[308] Nor can the Palestinian civilian population be compelled to accept living under the yoke of Israeli occupation indefinitely. Indeed, due to the length of the Israeli occupation and the extent of the settlement enterprise, some Israeli lawyers are now openly referring to the situation in the OPTs as an "illegal occupation."[309]

During World War II, Danish, Dutch, Greek, Italian, Swedish, and Yugoslavian partisans fought the Nazis by concealing their weapons, mingling with the local population, and killing and torturing members of the occupying power.[310] Indeed, many of their actions, grotesque as they were, were not too dissimilar to many of

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307. *See* Convention Relative to the Protection Civilian Persons in Time of War, *supra* note 290, art. 68(3) ("The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that, since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance."); *see also* COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 43, at 346.

> [t]he accused is not a national of the Occupying Power, but on the contrary the inhabitant of a country which is suffering as a result of its invasion and occupation by its enemies . . . . The words 'duty of allegiance' constitute an acknowledgment of the fundamental principle according to which the occupation does not sever the bond existing between the inhabitants and the conquered State.

Maj. Richard R. Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. Y.B. INT'L L. 235 (1950) (discussing the complexities of duties of inhabitants of occupied territories).

308. 1907 Hague Regulations, *supra* note 50, art. 43.

309. *See, e.g.*, Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551 (2005) (exploring the question of whether the continued Israeli occupation of Palestinian territory conquered in 1967 is legal or illegal).

310. *See In re* List and Others (Hostages Trial), [1948] 15 A.D.I.L. 632, 638–39 (Nuremberg Trib.) (describing these facts in detail); *see also* Varrone v. S.U.R.C.I.S., Trib., 14 Jan. 1950, 75 Foro It. 1950, I, 946 (holding that partisans are to be regarded as lawful belligerents for the purpose of international law as well as of Italian municipal law); Baffico v. Calleri, Corte app., 5 Jan. 1948, 70 Foro It. 1947, I, 1016 (discussing this same issue of whether to regard partisans as lawful belligerents); *see also In re* Weizsaecker and Others (Ministries Trial), [1949] 16 A.D.I.L. 354, 354–56 (Nuremberg Trib.) (discussing the role played by Norwegian, Finnish, Danish and Swedish guerrillas); *In re* Kniest, [1949] 16 A.D.I.L. 507, 507–08 (Den.) (setting forth the fact that the accused, the German police, occupying that country tried to justify their ill treatment of the Danish resistance as an act of "self-defense," and holding in response that the treatment could be not justified on this basis and was contrary to international law and the customs of war); *In re* Hoffman, [1949] 16 A.D.I.L. 508 (Den. E. Provincial Ct.) (coming to the same conclusion that the German armed forces could not justify their acts as self-defense even if their actions were undertaken to protect their own soldiers).

the disturbances in the OPTs today.[311] Although the partisans were not generally considered lawful combatants[312] because they concealed their identities and their weapons, the actions of the German Armed Forces were not considered as lawful measures of self-defense either.[313] Self-defense is not available to an occupying power when it has already subdued its enemy and taken control of its territory; it is only available at the start of hostilities, not when they come to an end.[314] Once the occupied territory is under the effective control of the occupying power, the right of self-defense is no longer applicable. An occupying power also does not have the right to determine for itself whether its actions amount to self-defense; only an authorized tribunal or a competent body, such as the Security Council, can validly make the determination.[315] For example, at Nuremberg, the Tribunal found that the question as to whether Germany's actions could be justified as self-defense or whether the manner in which it acquired those territories was legal was ultimately irrelevant, as it could not make that determination for itself.[316] In Tokyo, the International Military Tribunal for the Far East held: "Under the most liberal interpretation of the Kellog-Briand pact, the right of self-defence does not confer upon the State resorting to war the authority to make a final determination upon the justification of its action."[317]

Jurisprudence from World War II also provides support for the view that self-defense does not belong to the rules regarding the conduct of hostilities (the *jus in bello*) but to the rules governing the recourse to armed force (the *jus ad bellum*).[318] This distinction was made at Nuremberg in *In re List and others*,[319] when it pointed out that there is no reciprocal connection between the manner of the military occupation of territory (i.e., whether this entailed a violation

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311. *See* Joseph Massad, *Palestinians and Jewish History*, 30 J. PALESTINIAN STUD. 1, 56–59 (2000) (describing disturbances in the occupied territories throughout recent history). For extensive accounts of Palestinian "terrorist" acts, see Israeli Ministry of Foreign Affairs, *Terrorism since 2000*, *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000.

312. Though there were exceptions. *See, e.g.*, *Varrone*, 75 Foro It. at 946; *Baffico*, 70 Foro It. at 1016 (both providing examples where the Italian Courts concluded that the partisans were not unlawful under international law or Italian municipal law).

313. *See, e.g.*, In re *Weizsaecker*, 16 A.D.I.L. at 349 (concluding that "the doctrine of self-defence and military necessity was never available to Germany as a matter of international law, in view of its prior violation of that law").

314. U.N. Charter art. 51.

315. *Id.* art. 39.

316. In re *Weizsaecker*, 16 A.D.I.L. at 349.

317. *In re* Hirota, [1948] 15 A.D.I.L 356, 364 (Int'l Military Trib. for the Far East, Tokyo).

318. *See* BLACK'S LAW DICTIONARY, *supra* note 285 and accompanying text (defining and comparing *jus in bello* and *jus ad bellum*).

319. *See In re* List and Others (Hostages Trial), [1948] 15 A.D.I.L. 632 (Nuremberg Trib.).

of the *jus ad bellum*) and the rights and duties of the occupant and population to each other after the relationship has in fact been established (the *jus in bello*).[320] In other words, a distinction is made between the *jus ad bellum* and the *jus in bello*, so that a violation of the former does not affect the applicability of the latter.[321] It is a cardinal principle of humanitarian law that *jus ad bellum* applies to all conflict situations irrespective of the justifications advanced in support of military action.[322] In fact, this principle was considered so important that it was subsequently drafted in the preamble to AP1 and is regarded as one of the foundations of the law of armed conflict.[323] Consequently, one must conclude that the law of self-defense has no relevancy to the law of occupation.[324] As Georges Abi-Saab elucidated in his oral pleading before the ICJ on behalf of Palestine regarding the question of self-defense and the laws which regulate the conduct of hostilities in occupied territories:

> One of the justifications, self-defence, does not belong to international humanitarian law or the *jus in bello*, but to the *jus ad bellum*. Israel makes here an impermissible confusion between the two branches of the law of war that have to be kept radically apart. Once an armed conflict is brought into being, the *jus in bello* (or international

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320. *Id.* at 637.

321. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 306 (Routledge, 7th ed. 1997) (1970) ("It is reasonable to treat both areas separately [i.e. the *ius in bello* and the *ius ad bellum*], because of the recognized principle that *ius in bello* is applicable in cases of armed conflict whether the conflict is lawful or unlawful under *ius ad bellum*.").

322. *See* MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR: CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 84 (1999).

> [F]rom a humanitarian point of view, the victims of the conflict on both sides need the same protection, and they are not necessarily responsible for the violation of the *ius ad bellum* committed by 'their' party. IHL has therefore to be respected independently of any argument of *ius ad bellum* and has to be completely distinguished from *ius ad bellum*.

Id.

323. *See* Protocol Additional to the Geneva Conventions, *supra* note 280, pmbl.

> Further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

Id.

324. *See* DOCUMENTS ON THE LAWS OF WAR 1 n.1 (Adam Roberts & Richard Guelff eds., 2d ed. 1989) (noting conflicts in the past between Israel and its neighbors where the uses of force may have constituted self-defense).

> humanitarian law) comes into play, as the *lex specialis* governing the ensuing situation regardless of the rules of the jus ad bellum.[325]

Consequently, occupying powers cannot rely on Article 51, which belongs to the *jus ad bellum*, once major combat operations end.[326] Rather, the law is to be governed by the rules of belligerent occupation, the *jus in bello*.[327] For an occupying power, the issue is one of maintaining law and order in the occupied territory, which is not, strictly speaking, a question of self-defense. As one prominent international lawyer has noted, it would be odd to conclude that Israel could rely on self-defense to justify its response to acts that denote a breakdown of the same law and order for which it bears responsibility under international law.[328]

It would therefore seem that Israel is using the concept of "self-defense" as a subterfuge for undertaking belligerent reprisals, which is permitted in the law of armed conflict but only in exceptional circumstances.[329] It is noteworthy that Israel has not signed or acceded to AP1, which severely curtails the targets a state may attack in response to a prior violation of international law by those it perceives to be its "enemies."[330] However, even then, the reprisal must be directed at those persons responsible for the prior violation, and it must be undertaken for the purpose of putting an end to that violation or preventing further violations, rather than for revenge.[331] Reprisals must also be proportionate and necessary, in the sense that their purpose is to prevent future unlawful conduct and to seek

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325. Georges Abi-Saab, Oral Pleading, Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory 44 (Feb. 23, 2004), *available at* http://www.icj-cij.org/docket/files/131/1503.pdf.

326. *See* Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the* Wall *Case*, 16 EUR. J. INT'L L. 963, 970 (2005) (noting that the law of belligerent occupation essentially derogates from the right of self-defense in Article 51 of the U.N. Charter).

327. *See* L. C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 320 (1993) (stating that Article 51 "relates to the *jus ad bellum*, the right to resort to war, and has nothing to do with the *jus in bello*, what may be done during a war undertaken by way of self-defence").

328. Scobbie, *supra* note 233 at 83.

329. *See* Shane Darcy, *What Future for the Doctrine of Belligerent Reprisals?*, 5 Y.B. INT'L HUMANITARIAN L. 107 (2002) (critiquing of the concept of "belligerent reprisals").

330. *See* C. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 20 NETH. Y.B. INT'L L. 35, 51–54 (1989) (discussing the impact of API on the law of belligerent reprisals).

331. *See* Darcy, *supra* note 329, at 112.

> Belligerent reprisals by their very nature rely on a principle of collective responsibility, whereby an enemy's military, government and civilian population are treated as a single group, and measures directed at certain members of that collective will, in theory, coerce the actual guilty members of the group to cease in their unlawful conduct.

Id.

redress rather than to exact retribution.[332] However, as one commentator notes: "The notion of collective responsibility upon which the taking of reprisals is based [i.e., that an enemy's military, government, and civilian population may be targeted] has become increasingly at odds with the rules and spirit of contemporary international humanitarian law."[333]

C. *Self-Defense and International Terrorism*

The ICJ was correct to conclude that Security Council Resolutions 1368 (2001) and 1373 (2001) do not apply to Israel's struggle with "Palestine" because Palestine is not a state, and the Resolutions refer to "*international* terrorism."[334] The Resolutions thus require some form of *trans-boundary* violence to trigger the right of self-defense under Article 51. It is not by accident that official Israeli maps do not include the 1949 armistice line between Israel and Jordan or the 1967 cease-fire line (known as the "Green Line").[335] For example, the map produced by Israel's Ministry of Defense to show the route of the wall does not include the Green Line, which is usually portrayed on international maps.[336] The line is omitted because the 1949 cease-fire lines are not political boundaries.[337] Border crossings for Israelis between the West Bank and Israel also do not exist (the new crossings currently being constructed along the

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332. For the classic 1971 text on belligerent reprisals by Frits Kalshoven, which recently has been republished, see FRITS KALSHOVEN, BELLIGERENT REPRISALS (Brill 2005) (1971).

333. Darcy, *supra* note 329, at 113.

334. *See* ICJ Wall Advisory Opinion, *supra* note 2, at 1050, para. 139 (determining that the situation is different from that contemplated in the Security Council resolutions); *see generally* S.C. Res 1368, *supra* note 288; S.C. Res 1373, *supra* note 288.

335. *See* Israel's Security Fence, Israel Ministry of Defence, http://www.securityfence.mod.gov.il/Pages/ENG/route.htm (displaying a map of Israel's revised route of the security fence as of April 30, 2006).

336. *Id.*

337. *See* The Acting Mediator to the Secretary General, *Text of the Egyptian-Israeli General Armistice Agreement*, art. XI, *delivered to the Security Council*, U.N. Doc. S/1264/Corr.1 (Mar. 11, 1949) (noting that no provision of the agreement prejudices the rights and claims of the parties); The Acting Mediator to the Secretary General, *Text of the Jordan-Israel General Armistice Agreement*, art. II(2), *delivered to the Security Council*, U.N. Doc. S/1302/Rev.1 (Apr. 3, 1949) (recognizing that the agreement is "dictated exclusively by military and not by political considerations"); The Acting Mediator to the Secretary General, *Text of the Lebanese-Israeli General Armistice Agreement*, art. II(2), *delivered to the Security Council*, U.N. Doc. S/1296 (Mar. 23, 1949) (recognizing that the agreement is "dictated exclusively by military considerations"); The Acting Mediator on Palestine to the Acting Secretary General, *Text of the Israeli-Syrian General Armistice Agreement*, art. II(2), *delivered to the Security Council*, U.N. Doc. S/1353 (July 20, 1949) (recognizing that the agreement is "dictated exclusively by military and not by political considerations").

route of the wall are for Palestinians only).[338] It would therefore seem that the legal significance of the armistice line is simply to delineate the starting point of Israel's occupation of non-Israeli territory.[339] There is consequently nothing international about the acts of terror committed by Israelis against Palestinians and vice-versa; they are endemic to a self-determination dispute. As Professor Yoram Dinstein of Tel Aviv University writes (while specifically referring to the *Wall* Advisory Opinion):

> Of course, when non-State actors attack a State from within—and no other State is involved—this is a case of an internal armed conflict or domestic terrorism. In neither instance does Article 51 come into play at all. An armed attack against a State, in the meaning of Article 51, posits some element external to the victim State. Non-State actors must strike at a State from the outside.[340]

Similarly, the Chatham House Principles of International Law on the Use of Force in Self-Defence provide that

> [a]n armed attack is an attack directed from outside the territory controlled by the State. In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ's observations may be read as reflecting the obvious point that unless an attack is directed from outside territory under the control of the defending State, the question of self-defence in the sense of Article 51 does not normally arise.[341]

By characterizing the September 11 attacks as "terrorist," the Security Council's intent seemed to have been to subject the perpetrators to the ordinary criminal law and process, as the relevant international conventions on terrorism—referred to in Resolutions 1368 and 1373—require.[342] This would, therefore, not give Israel carte blanche to go after the Palestinians in the name of the "global

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338. Moreover, maps in Israeli schoolbooks make no reference to the 1949 armistice lines. Currently, schoolbooks in Israel show its territorial conquests in the 1967 war—the West Bank, Gaza, East Jerusalem and the Golan Heights—as part of Israel. *But see Row Erupts Over Israeli Textbooks*, BBC NEWS, Dec. 5, 2006, *available at* http://news.bbc.co.uk/1/hi/world/middle_east/6210144.stm (reporting that Israel's new Education Minister, Yuli Tamir, has vowed to change this, which prompted sharp criticism from the settler movement).

339. ICJ Wall Advisory Opinion, *supra* note 2, at 1077, para. 11 (separate opinion of Judge Al-Khasawneh). For an interesting commentary on the significance of the 1949 line from an Israeli perspective, see Robbie Sabel, *The International Court of Justice Decision on the Separation Barrier and the Green Line*, 38 ISR. L. REV. 316 (2005).

340. *See* DINSTEIN, *supra* note 221, at 204–05.

341. *See The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L.Q. 963 (2006) (noting participants Sir Franklin Berman QC, James Gow, Christopher Greenwood QC, Vaughan Lowe, Sir Adam Roberts, Phillipe Sands QC, Malcolm Shaw QC, Gerry Simpson, Colin Warbrick, Nicholas Wheeler, Elizabeth Wilmhurst and Sir Michael Wood).

342. *See generally*, PHILLIP SANDS, LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES 155 (2005).

war on terror" and to act as though there is no military occupation in the OPT by freeing itself from the constraints imposed by the relevant rules of IHL.[343] As Judge Buergenthal acknowledged in his separate opinion, "I agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits."[344]

It will be recalled that the Israeli-Palestinian conflict is no longer solely international in character (the P.L.O. having abandoned such methods as hijackings, kidnappings, and holding foreign governments to ransom), and has not been so since the mid-1980s.[345] The conflict between Israelis and Palestinians in the OPTs is therefore not an international armed conflict between two states, but one between an occupying power and an occupied people (although this could change rapidly, and will to a certain extent depend on outside factors). This was essentially the finding of the March 2001 Report of the U.N. Human Rights Inquiry Commission into violations of Human Rights in the Occupied Arab Territories, including Palestine. The Commission found that

> there is no international armed conflict in the region, as Palestine, despite widespread recognition, still falls short of the accepted criteria of statehood. The question then arises as to whether there is a *non-international armed conflict*, defined by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case, as "protracted armed violence between governmental authorities and organized armed groups.[346]

As this Commission stressed, Palestine is not a state for international law purposes and it is therefore not a member of the U.N.; instead, it has observer status.[347] Israel has no sovereignty over the West Bank

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343. *See* Chris McGreal, *Sacred Right to Fight Terror Overrides Court, Says Sharon*, GUARDIAN (London), July 12, 2004 (reporting Sharon having said, "On Friday, the sacred right of the war on terrorism received a slap in the face by the ICJ after it decided that the terrorism-prevention fence is illegal and that Israel must dismantle it.").

344. ICJ Advisory Opinion, *supra* note 2, at 1078, para. 2 (separate opinion of Judge Buergenthal).

345. This is when the last major international act of terrorism by a P.L.O. faction took place, on the cruise ship Achille Lauro. Gregory V. Gooding, *Fighting Terrorism in the 1980s: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L L. 158 (1987).

346. ECOSOC, Comm'n on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, ¶ 39, UN Doc. E/CN.4/2001/121 (Mar. 16, 2001) (emphasis added).

347. *See* G.A. Res. 52/250, U.N. Doc. A/RES/52/250 (July 13, 1998) (recalling Palestine's "[o]bserver status"); G.A. Res. 43/177, U.N. Doc. 43/177 (Dec. 15, 1988) (recalling the P.L.O.'s "observer status"); G.A. Res. 43/160, U.N. Doc. A/RES/43/160 (Dec. 9, 1988) (recalling the P.L.O.'s "observer status"); G.A. Res. 3237, ¶ 2, U.N. Doc.

(or over East and West Jerusalem, the Gaza Strip, and Syria's Golan Heights). Resolutions 1368 and 1373 do not apply in circumstances where attacks on the territory of the occupant emanate from the territory of the occupied—as there is no international dimension to it (although wars of national liberation are considered international conflicts for the purposes of Geneva Convention IV).[348] And it was this consideration, as Judge Kooijmans noted in his separate opinion, that proved decisive in determining those resolutions irrelevant:

> The right of self-defence as contained in the Charter is a rule of international law and thus relates to international phenomena. Resolutions 1368 and 1373 refer to acts of *international* terrorism as constituting a threat to *international* peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 and 1373 and that consequently Article 51 of the Charter cannot be invoked by Israel.[349]

It may even be questioned whether the Charter's rules on the use of force and self-defense have any application to this situation at all. Judge Higgins, for instance, was unconvinced that non-forcible measures such as building a wall would fall within the scope of Article 51 (although it would seem that the violence accompanying the wall's construction, such as demolishing houses and firing on demonstrators with rubber-coated-metal bullets, is a use of force).[350] Furthermore, it is plainly evident from reading the Charter that these rules are state-oriented.[351] One is therefore not dealing with the *jus ad bellum*, since major combat operations ended in the West Bank after Israel captured it in 1967.[352] Instead, the rules of

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A/RES/3237 (Nov. 22, 1974) (noting that the U.N. the P.L.O. had been invited to participate as an observer in various conferences).

348. Protocol Additional to the Geneva Conventions, *supra* note 280, art. 1, para. 4.

349. ICJ Wall Advisory Opinion, *supra* note 2, at 1072, para. 36 (separate opinion of Judge Kooijmans).

350. ICJ Wall Advisory Opinion, *supra* note 2, at 1063, para. 35 (separate opinion of Judge Higgins). However, in a recent lecture, Kooijmans (who recently retired from the bench) made the point that non-forcible measures are covered by resolutions 1368 and 1373 (although not by Article 51). Judge Pieter H. Kooijmans, Annual Grotius Lecture, British Institute of International and Comparative Law, London House, Mecklenburgh Square (Dec. 11, 2006). Israel has resorted to the use of force on numerous occasions when clearing land for the wall's construction. For examples of this use of force, see *Security Forces Fired Live Ammo at Anti-fence Protest*, HA'ARETZ (Jerusalem), Nov. 6, 2006, *available at* http://www.haaretz.com/hasen/spages/783632.html; and *6 Protestors, Officer Injured in Fence Protest*, YNETNEWS.COM, June 6, 2006, *available at* http://www.ynetnews.com/articles/0,7340,L-3258049,00.html.

351. *See* U.N. Charter art. 2, para. 1 (stating that the basis for the U.N. itself is the sovereign control each member has over its territory due to its status as a state).

352. The Six Days War ended with a cease fire on June 11, 1967, enforced by the United Nations. S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967).

international humanitarian law, those governing the conduct of hostilities known as the *jus in bello*, are more appropriate, as discussed above.[353]

D. *Circumstances Precluding Wrongfulness*

Article 21 of the International Law Commission's Draft Articles on State Responsibility provides: "The wrongfulness of an act of a State is precluded if the act constitutes a *lawful* measure of self-defence taken in conformity with the Charter of the United Nations."[354] According to the Commentary, "the term 'lawful' implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defense."[355] Moreover, the action in self-defense must be taken in conformity with the principles and purposes of the U.N. Charter.[356]

It would be difficult to describe Israel's actions in constructing the wall in OPT as in conformity with the Charter, especially because the ICJ has accepted that Israel's actions amount to de facto annexation.[357] The wall interferes with the Palestinian people's right of self-determination mentioned in Articles 1(2) and 55 of the Charter, and elaborated upon in the *Friendly Relations Declaration*.[358] Its construction would also seem to be contrary to the maintenance of international peace and security, which is mentioned in the first article and paragraph of the Charter.[359] Nor could it be said that Israel is settling its dispute with the Palestinian people through "peaceful means" or "in such a manner that international

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353. *Id.*

354. G.A. Res. 56/83, art. 21, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) (emphasis added). The Articles were approved, without vote, by the General Assembly in Resolution 56/83, 12 December 2001. *Id.*

355. CRAWFORD, *supra* note 64, at 167.

356. *Id.*

357. *See* U.N. Charter art. 2, para. 4 (setting forth provisions that directly conflict with Israel's actions).

358. *See* G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc A/8018 (Oct. 24, 1970) (explaining that States have a duty to co-operate with one another as stipulated by the U.N. Charter).

359. *See* U.N. Charter art. 1, para. 1.

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Id.

peace and security, and justice, are not endangered."[360] Rather, it would seem as though it is the Palestinians who are attempting, in this instance, to settle their dispute peacefully with Israel.

On the question of necessity and proportionality, the ICJ, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, recalled its ruling in *Nicaragua*, in which it held: "'there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.'"[361] The Court then ruled: "This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[362] On the question of proportionality and Article 51 of the Charter, it is worth quoting the opinions of a number of judges from the ICJ in the *Wall* opinion. None of them accepted that building a wall through the OPT was a necessary or proportionate measure to respond to the terrorist attacks emanating from there.[363] Judge Higgins acknowledged, "[E]ven if it were an act of self-defence, properly so called, it would need to be justified as necessary and proportionate."[364] She continued, "While the wall does seem to have resulted in a diminution of attacks on Israeli civilians, the necessity and proportionality for the *particular route selected*, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained."[365] This may indeed be the case, but surely the point is that Israel could have ensured its security by withdrawing from the OPT and building a wall on what is internationally recognized as its territory (i.e., within the 1949 armistice lines).[366] Judge Buergenthal stated that,

> given the demonstrable great hardship to which the affected Palestinian population is being subjected *in and around the enclaves* created by those segments of the wall, I seriously doubt that the wall

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360. *Id.* art. 2, para. 3.

361. Legality of the Threat of Use of Nuclear Weapons, ICJ Advisory Opinion, *supra* note 95, ¶ 41.

362. *Id.*

363. *See id.* (explaining that building wall was not a necessary and proportionate measure).

364. ICJ Wall Advisory Opinion, *supra* note 2, at 1063, para. 35 (separate opinion of Judge Higgins).

365. *Id.* (emphasis added).

366. It would seem that if one builds a series of eight-meter-high concrete walls and fences with electronic sensors, accompanied by dirt tracks, trenches and armed watch-towers, accompanied by regular military incursions into the OPT with the attendant extra-judicial assassinations, there will inevitably be a diminution on attacks on Israeli civilians from there simply because its inhabitants have effectively been "imprisoned," making it all but impossible to escape into Israel. For a description of the situation in the occupied West Bank along the route of the Wall, see ECOSOC, Comm'n on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, U.N. Doc. E/CN.4/2004/6/Add.1 (Feb. 27, 2004) (*prepared by* John Dugard).

> would *here* satisfy the proportionality requirement to qualify as a legitimate measure of self-defence.[367]

Judge Kooijmans opined:

> [I]n my view it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test. The *route chosen* for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect, as seems to be recognized also in recent decisions of the Israeli Supreme Court.[368]

The Court as whole ruled that it was not convinced

> that the construction of the wall *along the route chosen* was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction . . . Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall.[369]

It is evident from these quotations that the learned judges cited above only considered the wall disproportionate and unnecessary because of the particular route chosen. As the late Sir Arthur Watts observed in his oral pleading before the ICJ on behalf of Jordan:

> Had Israel built a wall wholly within its own territory, we would not all be here today. And I would just observe that the Court has been given no cogent reasons why it was *necessary* to build this Wall in Occupied Territory, and why a wall built within Israel's own territory would not have met the security concerns which are alleged to have provoked it.[370]

What is of particular interest is whether a wall of the kind Israel is constructing in the OPT could be considered necessary or proportionate if it was constructed solely within Israeli territory.[371] It is evident that such a wall would not be contrary to the U.N. Charter, as it would not amount to acquiring territory by force or in violation of IHL or the law of self-determination if it was *accompanied* by a full-Israeli withdrawal.[372] But could a 721

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367. ICJ Wall Advisory Opinion, *supra* note 2, at 1081, para. 9 (separate opinion of Judge Buergenthal) (emphasis added).

368. *Id.* at 1072, para. 34 (separate opinion of Judge Kooijmans) (emphasis added).

369. *Id.* at 1050, paras. 140, 142 (emphasis added).

370. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory (Req. for Advisory Op.) (Order of Feb. 24, 2004), *available at* http://www.icj-cij.org/docket/files/131/1511.pdf at 57 (last visited Sept. 25, 2007).

371. *See* THE BERLIN WALL: A DEFIANCE OF HUMAN RIGHTS (Int'l Comm'n of Jurists 1962) (finding that the Berlin Wall violated several provisions in the Universal Declaration of Human Rights on free movement and the right of residency).

372. U.N. Charter art. 2, para. 3.

kilometer (448 mile) wall[373] be considered proportionate to Palestinian terrorist attacks if Israel maintained the occupation? How would one determine proportionality in such a situation?

It is submitted that if Israel was serious about pursuing peace with the Palestinians in the wider Middle East, it could start by entering into negotiations with a view to concluding peace treaties with Iraq, Lebanon, and Syria—countries from the 1948 conflict with which it has still not made peace—while implementing Resolutions 242 and 338.[374] This would, of course, require a full Israeli withdrawal from the occupied territories, which could lead to full peace and normalization with the entire Muslim world (assuming that these countries are acting in good faith when they say they are prepared to make peace with Israel).[375] In order to ensure the mutual security of both Israelis and Palestinians, security arrangements could be created between Israel and the West Bank (including East Jerusalem), Gaza, and the Golan Heights that are similar to those provided for in Article 4 of the Israel-Egypt and the Israel-Jordan Peace Treaties.[376] These security arrangements would

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373. On April 30, 2006, the Israeli cabinet approved a revised route of the wall and published a map on the Ministry of Defence website. The previous map was released on February 20, 2005. Based on this revised map, the total length of the wall's route will be 703 kilometers long, compared to 670 kilometers of length envisioned in the previous route. *See* U.N. Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, *Preliminary Analysis of the Humanitarian Implications of the April 2006 Barrier Projections* (July 2006), http://www.ochaopt.org/documents/OCHABarrierProj_6jul06.pdf. *But see* U.N. Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, *Three Years Later: The Humanitarian Impact of the Barrier Since the International Court of Justice Opinion* (July 9, 2007), http://www.ochaopt.org/documents/ICJ3_Special_Focus_July2007.pdf (according to the most recent assessment, Israel's barrier will be 721 kilometers long).

374. For further reading on the 1948 conflict between Israel and the Arab world, see AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD (2000). For its consequences and further insights, see BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED (2004); ILAN PAPPÉ, THE ETHNIC CLEANSING OF PALESTINE (2006); HENRY CATTAN, PALESTINE, THE ARABS AND ISRAEL: THE SEARCH FOR JUSTICE (1969); MICHAEL PALUMBO, THE PALESTINIAN CATASTROPHE: THE 1948 EXPULSION OF A PEOPLE FROM THEIR HOMELAND (1987); LT. COLONEL NETANEL LORCH, THE EDGE OF THE SWORD: ISRAEL'S WAR OF INDEPENDENCE, 1947–1949 (1961); WALID KHALIDI, WHY DID THE PALESTINIANS LEAVE? AN EXAMINATION OF THE ZIONIST VERSION OF THE EXODUS OF 1948 (1963); WALID KHALIDI, ALL THE REMAINS: THE PALESTINIAN VILLAGES OCCUPIED AND DEPOPULATED BY ISRAEL IN 1948 (1993); and NORMAN G. FINKELSTEIN, IMAGE AND REALITY OF THE ISRAEL-PALESTINE CONFLICT (2003).

375. Relevant Muslim countries include Bangladesh, Indonesia, Malaysia, Pakistan, and others that have not yet established diplomatic relations with Israel. When Israel withdrew its armed forces from southern Lebanon after its 34-day war with Hezbollah in the summer of 2006, it complained about the presence of peacekeepers in that country with whom it did not have diplomatic relations. *Israel Puts Demands on Peacekeepers*, ASSOCIATED PRESS, Aug. 21, 2006.

376. Egypt-Israel Treaty of Peace, *supra* note 187, art. 4. For discussion of the Israel-Egypt treaty, see generally Michael Akehurst, *The Peace Treaty Between Egypt and Israel*, 7 INT'L RELATIONS 1035 (1981).

be without prejudice to the parties' inherent right of self-defense in accordance with the U.N. Charter. In the event that a Palestinian state is created, there would be no question concerning Israel's right recognized by Article 51 of the Charter to defend itself.[377] A Palestinian government would also be obliged to prevent hostile attacks emanating from territories over which it has effective control.[378]

VI. THE LEGAL SIGNIFICANCE OF THE ADVISORY OPINION

Since the ICJ rendered its opinion on the legal consequences of the construction of the wall in the OPTs on July 9, 2004, Israel has adopted a posture of defiance by ignoring the opinion and continuing with the construction process.[379] Although the U.N. has established a register of damage for all natural and legal persons affected by the wall's route, little has been done to urge compliance by Israel with international law. The Arab group did not attempt to lobby the U.N. Security Council for a resolution imposing countermeasures against Israel, nor did it get the U.N. General Assembly to pass a series of non-binding resolutions[380] in the Emergency Special Session[381] calling on third states to undertake countermeasures.[382] In fact, a draft resolution demanding that all U.N. members comply with their legal obligations as identified in the opinion was defeated.[383] The EU, for its part, still allows Israeli companies to benefit from preferential trade with it, even though this is conditional upon respect for human

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377. U.N. Charter art. 51.

378. *But see* The Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 1, at 22 (Apr. 9) (determining that the international responsibility of a state will only be engaged if it *knowingly* allows its territory to be used to attack another state).

379. *See Sharon Defies Court Over Barrier*, BBC NEWS ONLINE, July 11, 2004, http://news.bbc.co.uk/1/hi/world/middle_east/3884887.stm (reporting that the Israeli government continued to build barrier in the West Bank after World Court held that such a barrier is illegal).

380. Francis Aimé Vallat, *The Competence of the United Nations General Assembly*, 97 RECUEIL DES COURS 207 (1959). However, the view of Francis Aimé Vallat, a former Legal Adviser to the British Foreign Office, who in his lecture before the Hague Academy of International Law said that the legal effect of a U.N. General Assembly resolution would be of the "greatest significance" in the context of the maintenance of peace and security, if the Security Council fails to take any action to deal with a breach of the peace, and the Assembly recommends measures, for the purpose of restoring the peace, to be taken by member states against one and in support of the other party to a conflict.

381. *See* G.A. Res. 377(V), 5th Sess. (Nov. 3, 1950) (adopting a "uniting for peace" resolution).

382. *See* G.A. Res. ES-10/L.18/Rev.1, U.N. Doc. A/ES-10/L.18/Rev.1 (July 20, 2004) (demanding merely that Israel, the occupying power, comply with its legal obligations as mentioned in the advisory opinion).

383. *Id.*

rights, democracy, and the rule of law.[384] Looking at the way in which the Advisory Opinion has been received by the international community in the three years since it was rendered, one might therefore conclude that the opinion has little, if any, legal significance. However, to hold this position would be imprudent. Although a number of countries expressed reservations with the Advisory Opinion's paragraph on the question of self-defense, they did not question the court's findings of law in the other 162 paragraphs.[385] In the present political climate, there are many reasons that may explain why the international community has failed to enforce international law on the rules regarding the recourse to force, from the invasion of Iraq without prior U.N. Security Council authorization to Israel's invasion of Lebanon in July 2006.[386] However, just because some states get away with breaching their international legal obligations does not mean that those legal obligations are not binding upon them in the first place.

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384. Victor Kattan, *The Wall, Obligations* Erga Omnes *and Human Rights: The Case for Withdrawing the European Community's Terms of Preferential Trade With Israel*, 13 PALESTINE Y.B. INT'L L. 71, 87 (2004–2005). It is noteworthy in this respect that in the case of Zimbabwe, the European Council implemented a series of targeted sanctions. *See* 2002 O.J. (L 50) 1, 4.

385. *See, e.g.*, U.N. GAOR, Emer. Spec. Sess., 25th mtg., U.N. Doc. A/ES-10/PV.25 (July, 16 2004) (including the statement made by Mr. Danforth (United States) in the debate on the General Assembly resolution following the rendering of the Advisory Opinion:

> The judicial process is not the political process, and the International Court of Justice was not the appropriate forum to resolve this conflict. . . . So the Court opinion . . . seems to say that the right of a State to defend itself exists only when it is attacked by another State, and that the right of self-defense does not exist against non-State actors. It does not exist when terrorists hijack planes and fly them into buildings, or bomb train stations or bus stops, or put poison gas into subways. . . . I would suggest that, if this were the meaning of Article 51, then the United Nations Charter could be irrelevant at a time when the major threats to peace are not from States but from terrorists.

Id.

386. *See generally* Lord Alexander of Weedon QC, *Iraq: The Pax Americana and the Law*, 9 Y.B. ISLAMIC & MIDDLE E. L. 3 (2002–2003) (discussing the legality of the invasion of Iraq); *see also* Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2003–2004) (arguing that the invasion of Iraq in 2003 was illegal); Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590 (2003) (providing an argument that the war was contrary to international law); Christopher Greenwood, *Britain's War on Saddam Had the Law on Its Side*, 9 Y.B. ISLAMIC & MIDDLE E. L. 3 (2002–2003) (arguing that the invasion of Iraq in 2003 was legal). For an examination of the legality of Israel's invasion of Lebanon in 2006, see Victor Kattan, *The Use and Abuse of Self-Defense in International Law: The Israel-Hezbollah Conflict as a Case Study*, 12 Y.B. ISLAMIC & MIDDLE E. L. (2005–2006). *See also Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defense?*, 14 HUM. RTS. BRIEF 26 (2006), *available at* http://www.wcl.american.edu/hrbrief/14/1kattan.pdf?rd=1 (providing a shorter version of the Kattan article). *See also* Georgina Redsell, *Illegitimate, Unnecessary and Disproportionate: Israel's Use of Force in Lebanon*, 3 CAMBRIDGE STUDENT L. REV. 70 (2007).

Of course, this will also depend on what one means by "binding." In this respect, it is submitted that a distinction should be made between what is "binding" in the sense that a state, a group of states, or an international organization is obliged to comply with a particular rule, and what is enforceable (i.e., what is politically acceptable to the permanent five countries in the Security Council in the sense that one of them will not exercise its right to veto a resolution imposing countermeasures against a delinquent state). It would, therefore, be advisable for international lawyers, including judges before municipal courts, to make a distinction between politics, the law, and its enforcement.

For instance, after citing a passage from the ICJ's Advisory Opinion concerning the proprietary of giving its advice to the U.N. General Assembly on the legal consequences of constructing the *Wall*, the HCJ in *Mara'abe* ruled that the ICJ's opinion is not binding upon states.[387] However, this statement, which was based upon an erroneous citation,[388] misses the point. No state that submitted a written statement or made an oral submission before the Court claimed that the opinion was binding upon them.[389] Indeed, it was the members of the U.N. General Assembly acting collectively who requested the opinion and not its individual member states.[390] In other words, the ICJ's advice is rendered to the U.N. General Assembly, and the Assembly ultimately decides whether to accept the ICJ's advice.[391] It is not up to states A, B, or C to ignore the collective will of the international community.[392] No state can prevent the ICJ

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387. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶ 56 (2006) ("As the ICJ itself noted in its opinion (paragraph 31), it does not bind the States.").

388. *See* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30) (recalling its jurisprudence); Western Sahara, Advisory Opinion, 1975 I.C.J. 12, at 24 (Oct. 16) (quoting 1950 I.C.J. 71).

389. *See* HCJ 7957/04 *Mara'abe*, *translated in* 45 I.L.M. 202 (listing petitioners bringing the case, which includes no nation-states).

390. This is because the U.N. is a separate legal person from its members. It has international personality, and is a subject of international law. Its constituent members have clothed it with the competence required to enable it to effectively discharge its functions, duties, and responsibilities. As the ICJ ruled,

> [t]he functions of the Organization are of such a character that they could not be effectively discharged if they involved concurrent action, on the international plane of fifty-eight or more Foreign Offices, and the court concludes that the Members have endowed the organization with the capacity to bring international claims when necessitated by the discharge of its functions.

Reparation of Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 178, 180 (Apr. 11).

391. And indeed, it did precisely this, acknowledging the opinion in G.A. Res. ES-10/L.18/Rev.1, *supra* note 382.

392. The principle of "persistent objection" only applies to the creation of new rules of international law. However, the ICJ was not dealing with any new rules of

from giving an Advisory Opinion, and no state can declare that the ICJ's findings of law are without legal effect.[393] A state that seeks to argue that a considered opinion of the Court does not represent the correct state of the law (particularly where the Court's findings, as in the *Wall* opinion, verge on unanimity) will be in a weak position.[394] The HCJ in *Mara'abe* seemed to be confusing three separate issues: the nature of Advisory Opinions, the role of the U.N. General Assembly, and the irrelevance of res judicata, which only applies when there are parties to a case.[395]

The purpose of Advisory Opinions is to provide authoritative guidance on points of law arising from the functions of organs and specialized agencies of the U.N. But one cannot simply assume that because of the word "advisory" the ICJ's advice is without legal significance altogether. As ICJ noted itself in its Advisory Opinions concerning the *Peace Treaties in Bulgaria, Hungary and Romania* and on the status of *Western Sahara*, "The Court's reply is only of an advisory character: *as such*, it has no binding force."[396] Thus, there may be situations and circumstances under which its opinions will have legal consequences. For instance, in the *Wall* opinion, the ICJ ruled: "The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law."[397] *Erga omnes* obligations are, by their very definition, binding.[398] They are concerned with the enforcement of international law, the violation of which is deemed to be an offense not only against the state or entity in question, but against all members of the international community.[399] Whether these norms

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international law in its Advisory Opinion on the wall. *See generally* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) (discussing this principle in depth).

393. *See* ADAM BASAK, DECISIONS OF THE UNITED NATIONS ORGANS IN THE JUDGMENTS AND OPINIONS OF THE INTERNATIONAL COURT OF JUSTICE 35 (1969) ("[N]o State can cancel the legal effects of a decisions [sic] in which an organ of the UN has decided to ask for an opinion. One must then acknowledge that in the opinion of the Court such a decision is in this sense indirectly binding on all member States.").

394. Hugh Thirlway, *The International Court of Justice*, *in* INTERNATIONAL LAW 561, 582–83 (Malcolm Evans ed., 2003).

395. *See* Scobbie, *supra* note 4, at 269, 289–91 (discussing the fact that *res judicata* does not attach to an advisory opinion if there are no parties).

396. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, *supra* note 388, at 71 (emphasis added).

397. ICJ Wall Advisory Opinion, *supra* note 2, at 1053, para. 155.

398. *See* Peter D. Coffman, *Obligations Erga Omnes and the Absent Third State*, 39 GERMAN Y.B. INT'L L. 285, 285 (1996) (discussing the binding nature of *erga omnes* obligations).

399. For discussion on obligations *erga omnes*, see Coffman, *supra* note 398, at 285–333; Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT'L L. 211, 211–39 (1997); and Karl Zemanek, *New*

are actually *enforced* or not is an entirely different matter and has little to do, strictly speaking, with the law. This is the difference between domestic and international law: the latter is not self-executing (if the law ever is). But this is not the same as saying that the law is not binding. As Sir Gerald Fitzmaurice once wrote:

> The law is not binding because it is enforced: it is enforced because it is already binding. Enforcement presupposes the existence of a legal obligation incumbent on those concerned. The prospect of enforcement is in fact little more than a factor or motive inclining people to obey rules that they are in any case under an obligation to obey: but it is not itself the source of the obligation.[400]

Even before the ascendancy of so-called peremptory norms of international law and obligations *erga omnes*, it was argued by some international lawyers that the difference between Advisory Opinions and contentious decisions of the ICJ was minimal.[401] In fact, some went so far as to write that there was, in reality, no fundamental difference between a "non-binding" Advisory Opinion and a "binding" judgment.[402] For instance, Blaine Sloane, a former director of the U.N. General Legal Division, made the point in an article he wrote in 1950: "While in a formal sense it may be true that an opinion does not have the binding force of a judgement, practically, it does, as an authoritative statement of law, have almost the same legal effect."[403] In other words, the ICJ states what the law is in both its advisory capacity and when there is a contentious case between states. André Gros, formerly a French judge at the ICJ, took a similar view:

> The distinction habitually drawn between Advisory Opinions and judgments, whereby the former do not have the binding character of the latter, is not an absolute one. In the first place, it is only the operative part of a judgment that is distinct from an Advisory Opinion as to its obligatory force. As regards the reasoning, this, in both cases, represents the Court's legal conclusions concerning the situation which is being dealt with, and its weight is the same in both cases: there are no two ways of declaring the law. Second, even advisory proceedings

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Trends in the Enforcement of Erga Omnes Obligations, 4 MAX PLANCK Y.B. UN L. 1, 1–52 (2000).

400. Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 2 (1956).

401. F. Blaine Sloan, *Advisory Jurisdiction of the International Court of Justice*, 38 CAL. L. REV. 830, 855 (1950) (discussing the fact that advisory opinions and decisions of the ICJ have the same legal effect).

402. *Id.*

403. *Id.*; *see also* Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 BRIT. Y.B. INT'L L. 39 (1988) (looking back at the more than 6,000 General Assembly resolutions over the past forty years and discussing the unresolved legal status of such resolutions); F. Blaine Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1 (1948) (discussing whether U.N. resolutions possess any binding force on Member states).

> may involve acts that operate with finality both for the Court itself and for the participating states or organizations.[404]

It could be argued that even if this had been a contentious case between Israel and "Palestine," or between a third state such as Jordan (doing what Ethiopia and Liberia tried to do regarding South-West Africa in the 1960s), the result would have been the same—although in a contentious case, Israel would probably have put in full evidence and arguments on the merits.[405] However, in the present circumstances, this would probably not be possible because Israel has withdrawn its consent to the compulsory jurisdiction of the ICJ.[406] Although Assembly resolutions are only recommendatory according to Articles 10-14 of the Charter, this does not affect the legal quality of an Advisory Opinion; it is still a contemporary statement of the law

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404. André Gros, *Concerning the Advisory Role of the International Court of Justice*, *in* TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 313, 315 (Wolfgang Friedmann et al. eds., 1972).

405. Of course, in a contentious case, the losing State would be in violation of the U.N. Charter if it did not comply. From 1949 to 1971, the case of South-West Africa (now Namibia) engaged the International Court of Justice's attention. This resulted in four Advisory Opinions (1950, 1955, 1956 and 1971) and two judgments (1962 and 1966). From 1949 to 1962, South Africa did its best to thwart the supervisory role assigned to the U.N. General Assembly, and just like Israel, it ignored the ICJ's advisory opinions. But by the 1960s, with many new African states as members of the U.N., a new idea took root: to explore the possibility of contentious litigation through a judgment from the ICJ. However, South-West Africa was not a State in the 1960s (it did not attain independence as the state of Namibia until 1990), and it had to rely on Ethiopia and Liberia (who were both members of the League of Nations) to bring the case to the ICJ on its behalf. In 1966, "the white man's court" held that Ethiopia and Liberia were not entitled to receive judgment on the merits of the case, because they had not "established any legal right or interest appertaining to them in the subject matter" of the claims. This judgment came as a surprise to many, and it is generally thought that were it not for the death of Judge Badawi, the illness of Judge Bustamante, and the withdrawal of Judge Zafrullah Khan, the outcome might have been very different. For a commentary by one of the lawyers who participated in that case, see Richard A. Falk, *The South West Africa Cases: An Appraisal*, *in* RICHARD A. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 378–402 (1970). Today, the matter seems to be settled as Article 42 of the International Law Commission's Draft Articles on State Responsibility (2001) allows an injured state to invoke the responsibility of another state if the obligation breached is owed to that state, a group of states, or to the international community as a whole. INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY art. 42 (2001).

406. Israel followed the US in withdrawing its consent from the compulsory jurisdiction of the ICJ in the aftermath of the *Nicaragua* judgment. The notification of termination of the declaration of 17 October 1956, received from the Government of Israel on 21 November 1985 reads as follows: "On behalf of the Government of Israel, I have the honour to inform you that the Government of Israel has decided to terminate, with effect as of today, its declaration of 17 October 1956 as amended, concerning the acceptance of the compulsory jurisdiction of the International Court of Justice." This statement was signed by Benjamin Netanyahu. *See Declarations Recognizing Jurisdiction*, 38-40 I.C.J. Y.B. 79, 79–80 (1983–1986) (including the statement signed by Golda Meir showing Israel's acceptance of the compulsory jurisdiction of the ICJ in the years before 1985).

by the principal judicial organ of the U.N. Judge Elias went so far as to advance his view that:

> If there is unanimity in the Assembly during the vote, all are bound. . . . If the vote is divided, then those states that vote for a particular resolution by the requisite majority are bound on the grounds of consent and of estoppel. Those that abstain are also bound on the ground of acquiescence and tacit consent, since an abstention is not a negative vote; while those that vote against the resolutions should be regarded as bound by the democratic principles that the majority view should always prevail when the vote has been truly free and fair and the requisite majority has been secured.[407]

Resolution ES-10/L.18/Rev.1, passed in the Advisory Opinion's aftermath, demanded that Israel comply with its legal obligations in the Advisory Opinion.[408] This Resolution differs substantially from resolution ES-10/13.[409] The latter was adopted on October 27, 2003 (i.e., before the Assembly petitioned the ICJ), and demanded that "Israel stop and reverse the construction of the Wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law."[410] Not only is Israel now obliged to stop and reverse construction of the wall, but according to resolution ES-10/L.18/Rev.1, the Secretary-General is to establish a register of damage caused to all natural or legal persons.[411]

It should not be forgotten that there is no higher judicial authority that can rule on the legal issues involved in this case. The issues addressed in the ICJ's opinion on the *Wall* formed the corpus of law that *guides* the U.N. on the question of Palestine. After all, by analogizing to the ICJ's Advisory Opinions in the South-West Africa cases, one could argue that the U.N., as a successor to the League of Nations, has assumed a supervisory role over the Palestinian territories, which Israel has been effectively administering since June 1967. The "sacred trust" as encapsulated in Article 22 of the Covenant of the League of Nations, as preserved by Article 80 of the U.N. Charter,[412] would render relevant Judge Sir Hersch

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407. T. Olawale Elias, *Modern Sources of International Law*, *in* TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP, *supra* note 404, at 34, 51.

408. G.A. Res. ES-10/L.18/Rev.1, *supra* note 382.

409. *See* G.A. Res. ES-10/13, U.N. Doc. A/RES/ES-10/13 (Oct. 27, 2003) (discussing illegal Israeli actions in Occupied East Jerusalem and the rest of the OPTs).

410. *Id.*

411. *See* The Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution ES-10/15*, para. 4, *delivered to the General Assembly*, U.N. Doc. A/ES-10/361 (Oct. 17, 2006) (discussing the purpose and legal nature of the register of damage).

412. U.N. Charter art. 80, para. 1.

Lauterpacht's classic statement in the *Voting Procedure Case*.[413] As he noted in his separate opinion while commenting upon the legal effect of Assembly resolutions on South-West Africa:

> Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which members of the United Nations are under a duty to treat with a degree of respect appropriate to a resolution of the General Assembly . . . Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the 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.[414]

Resolution ES-10/L.18/Rev.1 was adopted on the basis of an Advisory Opinion and is thus distinct from political rhetoric. Linguistically, this Resolution is of a legal and not of a moral quality.[415] Certain mechanisms have been established to monitor compliance by Israel.

> Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

Id.

413. Voting Procedures on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67 (June 7).

414. *Id.* at 120 (separate opinion of Judge Lauterpacht).

415. Richard A. Falk, Comment, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 787 (1966).

> If the resolution enters a political process that looks toward implementation, then the legislative nature of the claim is more clear-cut, that is, there seems to be some explicit connection between the status of the claim as legislative and the prospects for *effective* implementation: the better the prospects, the more appropriate the label 'legislative.'

Id.

Operative paragraph 6 "calls upon both the Government of Israel and the Palestinian Authority to immediately implement their obligations under the Roadmap, in cooperation with the Quartet, as endorsed by Security Council Resolution 1515 (2003), to achieve the vision of two states living side by side in peace and security, and emphasizes that both Israel and the Palestinian Authority are under an obligation scrupulously to observe the rules of international humanitarian law."[416] Operative paragraph 7 "calls upon all States parties to the Fourth Geneva Convention of 1949 *to ensure respect* by Israel for the Convention, and invites Switzerland, in its capacity as the depositary of the Geneva Conventions, to conduct consultations and to report to the General Assembly on the matter, including with regard to the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention."[417] The Assembly has clearly taken steps towards ensuring the effective implementation of this Resolution, emphasizing that the political process should lead to a vision of two states living in peace and security.

It is important to distinguish between the ICJ, the U.N.'s principal judicial organ, and the U.N. General Assembly and U.N. Security Council, which are political bodies. According to the U.N. Charter, only the Council can take legally binding decisions under Article 25 of the Charter, directing member states to impose economic sanctions or use force to maintain international peace.[418] But this is a political decision made by a political body subject to the possibility of a veto by one of its permanent members. Politics and law, though closely intertwined in international relations, are fundamentally different. Interestingly, Judge Higgins wrote in her separate opinion that the Court's finding that an act or situation is illegal is the same as a binding decision of a U.N. organ (such as the Security Council) acting under Chapter VI and VII of the Charter.[419] She wrote:

> Although in the present case it is the Court, rather than a United Nations organ acting under Articles 24 and 25, that has found the illegality; and although it is found in the context of an Advisory Opinion rather than in a contentious case, the Court's position as the principal judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal *is the same*.[420]

It may therefore be concluded that the obligations that the ICJ outlined are binding upon the U.N., which is estopped from undertaking measures that would conflict with the Advisory Opinion. As Judge Gros stated in *Western Sahara*:

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416. G.A. Res. ES-10/L.18/Rev.1, *supra* note 382, para 6.
417. *Id.* para. 7 (emphasis added).
418. U.N. Charter art. 25.
419. ICJ Wall Advisory Opinion, *supra* note 2, at 1064, para. 38.
420. *Id.* (emphasis added).

> The advisory opinion determines the law applicable to the question put; it is possible for the body which sought the opinion not to follow it in its action, but that body is aware that no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere.[421]

Whether or not the Palestinians are successful in persuading the international community to urge compliance by Israel with its legal obligations at some future point in time will depend upon geopolitical considerations.[422] Of course this is not, technically speaking, a legal issue, but a question of politics. After all, states can always ignore international law, or dismiss it when it is politically inconvenient.[423]

VII. CONCLUDING REMARKS

It is evident from comparing the ICJ's Advisory Opinion on *Wall* to the HCJ's decisions in the *Beit Sourik* and *Mara'abe* cases that there was little agreement on the substantive issues relating to Israeli civilian settlement activity, self-determination, and self-defense. On the legality of the wall, the Courts were at complete loggerheads: the HCJ ruled that the wall was a *lawful* measure to defend the Israeli civilian settlements established inside the West Bank including in and around East Jerusalem without actually

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421. Voting Procedures, Advisory Opinion, 1955 I.C.J., *supra* note 413, at 73, para. 6.

422. In this respect, the PLO might want to consider lobbying friendly states in the General Assembly to petition the ICJ for a further Advisory Opinion, as suggested by the U.N. Special Rapporteur. For a discussion, see U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* U.N. Doc. A/HRC/4/17 (Jan. 29, 2007) (*prepared by* John Dugard). Indeed, further recourse to the ICJ for Advisory Opinions on legal questions connected to the question of Palestine, and in particular on the legal consequences of prolonged occupations more generally, will be of particular use for third states who may refrain from taking coercive measures against Israel without an explicit legal mandate to do so. In this respect, it could be argued that the Advisory Opinion on the wall already provides a legal mandate to call for countermeasures (such as imposing a comprehensive arms embargo) against Israel, as was done against apartheid South Africa. *See* S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977) (condemning the South African government for its massive violence and further recognizing the arms embargo against the nation to prevent further aggravation of the situation). Of course, that Resolution explicitly referred to Chapter VII of the U.N. Charter, which is unlikely to be accomplished in the case of Israel. In this regard, it would have been preferable if the ICJ could have explicitly enumerated the consequences for states, either in the opinion itself or in the separate opinions of the judges participating in the case, as was done, for example, by Vice-President Ammoun. Namibia Advisory Opinion, *supra* note 192, at 70 (separate opinion of Vice-President Ammoun).

423. *See* Oliver Burkeman & Julian Borger, *War Critic Astonished as US Hawk Admits Invasion was Illegal*, GUARDIAN (London), Nov. 20, 2003, *available at* http://www.guardian.co.uk/Iraq/Story/0,2763,1089158,00.html (noting that when asked about the legality of the invasion of Iraq, Richard Perle said, "I think in this case international law stood in the way of doing the right thing.").

addressing their illegality, whereas the ICJ found that the wall was *unlawful* precisely because it encloses those settlements, which already breach Article 49(6) of Geneva Convention IV.[424] As examined in Section IV, the way in which both Courts dealt with the question of Palestinian self-determination was at best peripheral and ultimately unsatisfactory, although the ICJ did at least address the issue in some depth.[425] However, the ICJ should have established more clearly what states should do to ensure Israel's compliance with international law. It also should have elaborated further upon the question of self-defense, particularly as to whether the law has changed in the aftermath of September 11, although its reluctance to engage in a discussion of this issue was probably because the parties did not adequately argue self-defense before the court.[426]

In its Advisory Opinion, the ICJ considered the wall's route as a whole, whereas the HCJ only dealt with certain sections of it in a piecemeal fashion.[427] This has allowed the HCJ to obfuscate the fact that the wall's route is in fact segmenting the already miniscule territorial area in which the Palestinian people desire to create a contiguous, sovereign, and viable state as envisaged by the "Performance-Based Road Map to a Two-State Solution to the Israeli-Palestinian Conflict."[428] The wall's route has a direct impact upon the question of self-determination for the Palestinians, as it affects their economic, social and cultural development. As is clearly evident

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424. Daphne Barak-Erez, *Israel: The Security Barrier–Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT'L J. CON. L. 540, 547–48 (2006) ("Paradoxically, the two courts have something in common—namely, a narrow view of the motivations behind the construction of the barrier. The ICJ held that the barrier was a political move and, therefore, refused to acknowledge its security purposes. By contrast, the Israeli Supreme Court firmly held that the barrier was not politically motivated, and that its sole concern was security. The two courts were not open to the possibility that, in fact, both motivations were inseparably linked in the considerations inspiring the barrier's construction.").

425. *See* U.N. GAOR, *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, U.N. Doc. A/ES-10/273 (July 13, 2004) (discussing the International Court of Justice opinion regarding the wall).

426. *Id.*

427. *Id.*

428. *See* Press Release, USDOS, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003), http://www.state.gov/r/pa/prs/ps/2003/20062.htm (stating that "[a] settlement, negotiated between the parties, will result in the emergence of an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors"); ICJ Wall Advisory Opinion, *supra* note 2, at 1054, para. 162 ("Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end.").

from examining the various maps of the wall's route (the latest route is shown in map 4 in the Appendix), the adjustments made to the wall's route after the HCJ's rulings in *Beit Sourik* and *Mara'abe* are cosmetic only.[429] In this respect, it should not be forgotten that there are still hundreds of checkpoints scattered throughout the West Bank as well as so-called "flying checkpoints."[430] Not all of these checkpoints—which are more akin to military barricades—separate Israelis from Palestinians. Some of them separate Palestinians from each other, and in these cases, it is difficult to see what the security rationale for their existence is.[431] Moreover, many parts of the West Bank—an area that is itself designated for a future Palestinian state—are off limits for Palestinians and are accessible to the settlers only.[432] Palestinians are also prohibited from traveling on many of the roads within the West Bank (different types of number plates distinguish Palestinian vehicles from those driven by the settlers and the military), and they need security permits to visit relatives inhabiting other Palestinian cities, towns, and villages in East Jerusalem, the West Bank, and Gaza, as well as in Israel.[433] By analyzing only a small section of the wall's route in *Beit Sourik* and *Mara'abe*, the HCJ was able to ignore the "bigger picture," whereas the ICJ at least took some of these factors into account (although inadequately in the opinion of the author). In this respect, the "bigger picture" is that after Israel has carved out its most valuable land and resources through constructing the wall, all that remains of the West Bank is a rump entity that will not satisfy Palestinian aspirations for independence and statehood. As a result, Palestinians are likely to remain in a state of permanent dependence upon Israel, unable to pursue their right of self-determination through their economic, social, and cultural development. And the sad thing is that all this has the stamp of approval of the highest Court of law in Israel (the Supreme Court, which was acting as a HCJ in this case). Having said this, as legal precedents, there is little doubt that despite some of the criticisms leveled at the ICJ in academic writings (it should be said, mostly in the United States), the ICJ's Advisory Opinion, outside Israel, has been a persuasive authority.[434] It has, for

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429. *See* Appendix 4.

430. *See* U.N. Office for the Coordination of Human Affairs [OCHA], *OCHA Closure Update occupied Palestinian Territory* (Apr. 2007), http://www.ochaopt.org/documents/Closure%20Apr07_2.pdf (discussing flying checkpoint positions and limits on Palestinian access to different parts of Israel).

431. *Id.*

432. *Id.*

433. *Id.*

434. *See, e.g.*, Orakhelashvili, *supra* note 207, at 134–39 (favoring the ICJ's Advisory Opinion over that of the HCJ).

instance, galvanised the international NGO community and Palestinian civil society.[435]

In the *Mara'abe* case, Vice-President M. Cheshin said he found the ICJ's decision "objectionable."[436] He criticized the factual basis upon which the ICJ built its opinion, which he termed a "ramshackle one."[437] He failed to mention that whatever "defects" there were concerning the facts, Israel did not furnish the Court with any additional information for what he claims would have affected the legal outcome (and it is noteworthy that in the three years since the Advisory Opinion was rendered on July 9, 2004, over 80 percent of the wall continues to pass through occupied territory).[438] Although Israel has alleged that the wall it is building in the West Bank is *solely* a protective measure, it still has not accounted for its route in a satisfactory manner or explained why the wall "just happens" to loop around all the major Israeli civilian settlement blocs established in the West Bank. Presumably Israel is not building the wall in a haphazard manner, but deliberately and carefully. According to Judge Barak,

> [t]he only reason for the route beyond the Green Line is a professional reason related to topography, the ability to control the immediate surroundings, and other similar military reasons. Upon which rules of international law can it be said that such a route violates international law?[439]

The ICJ, in its 163-paragraph opinion, has already examined the rules of international law that Israel is violating in constructing the wall in the OPT, and this will not be elaborated upon here.[440] It is interesting to note that a "professional reason related to topography," presumably determined by the Israeli military, just happens to coincide with the Israeli civilian settlements scattered on practically every major hill top around East Jerusalem. Surely, this cannot be a matter of sheer coincidence? A journalist writing for the Israeli newspaper *Ha'aretz* has since written that the wall's route in the

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435. *See, e.g.*, Palestinian Civil Soc'y, *Calls for Boycott, Divestment and Sanction against Israel Until It Complies with International Law and Universal Principles of Human Rights*, July 9, 2005, *available at* http://www.stopthewall.org/downloads/pdf/BDSEnglish.pdf (calling on civil organizations and people around the world to impose sanctions against Israel similar to those imposed upon South Africa during Apartheid); BADIL, The Electronic Intifada, *Palestinians Attend World Social Forum*, Jan. 20, 2007, http://wsf2007.org/info/media-articles-online/palestinians-attend-world-social-forum (reporting that a Palestinian delegation supporting this initiative attended the World Social Forum in Nairobi in January 2007).

436. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, 244 (2006).

437. *Id.* at 245, para. 4.

438. *Id.*

439. *Id.* at 231, para. 70.

440. ICJ Wall Advisory Opinion, *supra* note 2, at 1054–55, para. 163.

Jerusalem area is "suspiciously congruent" with the master plan of the adjacent settlements:

> When Shaul Arieli of the Council for Peace and Security examined the Defense Ministry's route close to the northernmost neighbourhood of the capital, Neveh Yaakov [an Israeli settlement located in northeast Jerusalem], he could not understand why, contrary to the basic rules of planning a security fence, the fence wound along at the foot of the ridge. Why and for what purpose did the planner decide to deviate at that particular place nearly a kilometre and a half from the eastern border of the neighborhood and go out of the municipal area of Jerusalem into the territories of the West Bank? The riddle was solved when Arieli obtained Master Plan number 240.3 for the establishment of a new neighbourhood/Jewish settlement, by the name of Geva. According to the plan, Geva is to link up via a bridge with the settlement of Geva Binyamin (Adam) to the east.[441]

The HCJ has since castigated the Israeli government for misleading it as to the reasons underlying its route.[442] In a recent decision, the HCJ ruled that "a complete picture was not presented" after what the Court referred to as a "grave phenomenon" was revealed (i.e., that the route of the wall is linked to Israeli civilian settlement activity).[443] Nevertheless, Judge Barak ruled that "our words are not intended to express a position as to the lawfulness of the new route now being considered by the Respondents, nor to express a position as regards other petitions concerning the route of the fence in the Northern and Southern sections."[444] With respect, it is still submitted that, for the HCJ to have even suggested that that the factual basis had changed since July 2004 (as Judge Barak implicitly did in paragraphs 59-72 of his decision in *Mara'abe*, where he cited statements by the State's counsel that called the findings in a number of U.N. reports "far from precise," "exaggerated," and "completely baseless"), and that ICJ's opinion was consequently outdated and irrelevant, was disingenuous.[445] The HCJ should not have accepted the government's contentions so uncritically in the first place, when it

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441. Eldar Akiva, *Pulling Out Phase Two of the Road Map*, HA'ARETZ (Jerusalem), June 14, 2006, *available at* http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=726062.

442. I would like to thank John Dugard and Aeyal Gross for drawing this to my attention. Ha'aretz reported that Justices Aharon Barak, Dorit Beinisch, and Ayala Procaccia severely criticized the government for concealing in earlier High Court hearings that the existing route was determined partly by a master plan for expanding the settlements, and not solely for security considerations. *See* Yuval Yoaz, *Court Orders Section of Separation Fence Torn Down*, HA'ARETZ (Jerusalem), June 16, 2006, *available at* http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=727626.

443. HCJ 2732/05 Hassin and Radwan v. Israel [2005] (Isr.), translation provided courtesy of Michael Sfard, Adv. (on file with author).

444. *Id.*

445. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, 230, para. 67 (2006).

was evident to all and sundry that something was amiss. As James Crawford pleaded in his oral statement before the ICJ:

> Israel cannot plead lack of facts as a ground to have the Court refuse to decide, when any deficiency in the facts could have been corrected by Israel itself. . . . Anyway the basic facts are perfectly clear. The dominant fact is the US$2billion fact of the Wall, growing daily and dividing Palestinian communities from each other and from their lands and water. That is the essential fact, this US$2billion so-called "temporary" edifice. So much is now known about the Wall, and what is not known can be deduced from its route, its size, its cost, its régime, its effects, and the avowed intentions of those who are building it to impose a unilateral settlement.[446]

Although Crawford was speaking *before* the ICJ rendered its Advisory Opinion, events since that time have only strengthened this argument.[447] Israel is still building the wall in direct contravention of international law as determined by the ICJ, its cost has increased, Palestinians have been displaced, the settlements continue to grow unabated, Israel imposes a unilateral settlement in Gaza, and the conflict continues.[448] Many people can confirm the deterioration of the situation; there are no shortages of NGOs, journalists and U.N. personnel on the ground in Israel and the surrounding areas who are able to travel there and examine the situation for themselves (although things have become more difficult in recent years, particularly in the OPTs). There is also an abundance of information from international, Israeli, and Palestinian human-rights organizations.[449] Judge Owada thought it reasonable to conclude "that the political, social, economic, and humanitarian impacts of the construction of the wall, as substantiated by ample evidence supplied and documented in the course of the present proceedings, is such that the construction of the wall would constitute a violation of international obligations under various international instruments to which Israel is a party."[450] It will be recalled that in *Nicaragua*, the ICJ ruled that it could consider factual material "in the public

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446. Legal Consequence of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 36, paras. 28–29 (Feb. 23).

447. ICJ Wall Advisory Opinion, *supra* note 2, at 1028, paras. 55–58 (stating the facts and events).

448. For monthly reports on the situation in the OPT, see the Reports From the Palestinian Monitoring Group (2006), http://www.nad-plo.org/main.php?view=pmg_pmg. *See also* UNDER THE GUISE OF SECURITY: ROUTING THE SEPARATION BARRIER TO ENABLE THE EXPANSION OF ISRAELI SETTLEMENTS IN THE WEST BANK (2005), *available at* http://www.btselem.org/Download/200512_Under_the_Guise_of_Security_Eng.pdf (examining the connection between the settlements and the separation barrier's route).

449. *See* Amnesty Int'l, Links to Israeli and Palestinian (Human Rights) Organizations, http://web.amnesty.org/pages/isr-links-eng (providing a list of 45 organizations that are dedicated to human rights work in Israel and Palestine).

450. ICJ Wall Advisory Opinion, *supra* note 2, at 1097, para. 24 (separate opinion of Judge Owada).

domain," whether or not the parties refer to them.[451] After citing the *Brazilian Loans* case by the Permanent Court of International Justice and its own jurisprudence in the *Nuclear Test* cases, it ruled: "As to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties."[452] Evidently, the ICJ may therefore take other material into consideration. Although, according to the ICJ's Practice Direction XII, information submitted by international NGOs are not considered to be part of the case file, "[s]uch statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements."[453] Because the ICJ's judgments and Advisory Opinions are not known for their comprehensive references to the sources relied upon for its legal conclusions, it could consider NGO *amicus* briefs without explicitly saying it has done so.[454] The HCJ therefore cannot assume that the ICJ did not take Israel's security justifications into consideration. The ICJ did recognize that "Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population" and it ruled that it has "the right, and indeed the duty, to respond in order to protect the life of its citizens."[455] However, it said, "[t]he measures taken are bound nonetheless to remain in conformity with applicable international law."[456] Several judges also made reference to this in their separate opinions.[457] Therefore, to attack the ICJ's Advisory Opinion on the ground that the facts have changed is perhaps a demonstration of the desperation on the part of the HCJ. It cannot attack the opinion on the law, which is clear, so it goes for the facts—which only Israel could have "corrected" had it taken part in the oral pleadings or submitted a written statement addressing the merits of the case.

Vice-President M. Cheshin also claimed that "the opinion was colored by a political hue" and that it almost completely ignored "the horrible terrorism and security problems which have plagued Israel" without mentioning any of the terrible atrocities committed by the Israeli army in the OPT since 1967 (which were also hardly

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451. *See* Military and Paramilitary Activities (Nicar. v. U.S.), *supra* note 41, paras. 29–31 (explaining that I.C.J. is not bound to confine its consideration just to the facts that have been submitted).

452. *Id.* para. 30.

453. ICJ, *Practice Directions* (Dec. 6, 2006), http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0.

454. For this view, see Lance Bartholomeusz, *The Amicus Curiae before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT'L L. 209, 223–24 (2005).

455. ICJ Wall Advisory Opinion, *supra* note 2, at 1050, para. 141.

456. *Id.*

457. *See id.* at 1066, paras. 4–5 (separate opinion of Judge Kooijmans); *id.* at 1079, para. 5 (declaration of Judge Beurgenthal); *id.* at 1097–98, paras. 30–31 (separate opinion of Judge Owada).

addressed by the HCJ in either the *Beit Sourik* or *Mara'abe* cases).[458] He called the "silence" over the terrorist attacks on Israel "foreign and strange" before emotionally concluding, "I am sorry, but the decision of the ICJ cannot light my path. Its light is too dim for me to guide myself by it to law, truth and justice in the way a judge does."[459]

There is no doubt that Palestinian attacks against Israeli civilians (or civilians anywhere for that matter) contravene international humanitarian and human rights law as well as domestic criminal law. It would be both hypocritical and ultimately self-defeating for the Palestinian leadership to invoke international law in support of their claims to self-determination and statehood and then breach it by deliberately attacking civilians.[460] But for Israel to react by imprisoning an entire nation for the actions of a minority will not solve its security dilemma either. As Vaughan Lowe declared in his oral pleading before the ICJ on behalf of Palestine:

> The Palestinian Authority has consistently condemned terrorist attacks on Israeli civilians; and it is as absurd as it is offensive to imply that all Palestinians are engaged in a murderous conspiracy to attack Israel. To impose the Wall, and all the consequent restrictions on movement and access to property, jobs, welfare, education and families, as a punishment on the whole Palestinian population is unfair, unprincipled, and illegal.[461]

No one is questioning the legitimacy of a people's right to resist occupation, particularly if it is prolonged and protracted, but there are rules and boundaries that should not be crossed. In this respect, it is worth heeding the words of wisdom of Justice Albie Sachs from a very moving and thought-provoking lecture he gave on terrorism and the African National Congress's struggle against apartheid South Africa on 26 April 2006.[462] Simply put, terrorism, whether committed

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458. *See id.* at 1050, para. 141 (addressing the terrorist attacks on Israel). Interestingly, neither the *Beit Sourik* court nor the *Mara'abe* court addressed the question of Israeli attacks on Palestinians.

459. HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, 245, para. 4 (2006).

460. *See* ICJ Wall Advisory Opinion, *supra* note 2, at 1035, para. 91 (ICJ acknowledging the P.L.O.'s request to unilaterally accede to the Geneva Conventions in 1982). *But see Application to Accede to the Geneva Convention*, 5 PALESTINE Y.B. INT'L L. 318, 319 (1989) (ICJ failing to mention that this effort to accede was opposed by both the United States and Israel).

461. *See* Geneva Convention IV, *supra* note 20, art. 147 (prohibiting collective punishments under Article 147 of Geneva Convention IV and Article 75 of Additional Protocol I); Legal Consequence of Construction, ICJ Advisory Opinion, *supra* note 446, at 51, para. 23 (oral pleadings of Vaughan Lowe).

462. Albie Sachs, Justice of the S. Afr. Constitutional Court, Talk at Logan Hall, Institute of Education: Tales of Terrorism: I Was Thirty-Nine Years Old and Quietly Teaching at Southampton University When I Discovered I Was a Terrorist (Apr. 26, 2006) (author attended). This talk was organized and sponsored by the Sir Joseph Hotung Programme in Law, Human Rights and Peace Building in the Middle East at

by states or non-state actors, is immoral, self-defeating, and ultimately harms the legitimacy of the cause in whose names such acts are undertaken.[463]

The HCJ in both *Beit Sourik* and *Mara'abe* looked at the legality of the wall from a very narrow perspective related to Israeli administrative law, military law, and proportionality as defined and determined by Israel.[464] The HCJ thus completely ignored crucial issues such as the legality of the vast settlement enterprise, possibly the biggest obstacle to peace in the Middle East, and the nature of a prolonged occupation which has approached its fourth decade (it is worth bearing in mind that most Palestinians currently living in the OPT, born after 1967, have never experienced freedom). The question of self-determination, which is integral to the Israel-Palestine conflict, was completely marginalized, and the role of the U.N., which has a continuing responsibility towards the Palestinian people until a permanent solution is found, was hardly considered by the HCJ apart from when it addressed the ICJ's Advisory Opinion and the reports of the U.N. Special Rapporteurs.[465] The ICJ could have addressed the question of self-defense and prolonged occupations in far more detail, as the law is not entirely clear in this area. Grappling with this issue, probably one of the most controversial areas in international law, may have given the opinion more credibility. The ICJ could have also provided more of an analysis as to why the construction of the

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the School of Oriental and African Studies, University of London. Sachs was severely injured in a terrorist attack (a bomb was placed under his car) and carried out by a secret agent working for the apartheid government in the late 1980s.

463. *See* EQBAL AHMAD, *PLO and ANC: Painful Contrasts, in* THE SELECTED WRITINGS OF EQBAL AHMAD 76 (Carollee Bengelsdorf, Margaret Cerullo, & Yogesh Chandrani eds., 2006) (discussing the difference in tactics between the PLO and the ANC).

464. HCJ 2056/04 Beit Sourik Village Council v. Israel [2004] (Isr.), *translated in* 43 I.L.M. 1099 (2004); HCJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005] (Isr.), *translated in* 45 I.L.M. 202, ¶ 14 (2006).

465. Having said this, the ICJ's cursory treatment of Palestinian self-determination was dealt with in a similar fashion in the East Timor and Western Sahara cases. For instance, in its decision on East Timor, the ICJ merely repeated the relevant U.N. resolutions recognising that the East Timorese have a right of self-determination. It did not actually elaborate on the norm in much detail in the context of the specific circumstances in East Timor. Instead, it simply discussed the issue in a very general manner. *See* Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30) (failing to, as Judge Weeramantry noted in his dissent, "examine such seminal issues as the duties flowing to Australia from the right to self-determination of the people of East Timor or from their right to permanent sovereignty over their natural resources"). The fact is that the ICJ could probably have spent more time examining the issue since Australia's objections as to the admissibility of Portugal's application "were inextricably linked to the merits and should therefore be determined within the framework of the merits." *Id.* at 98, para. 19. For commentaries on East Timor, see generally Iain G.M. Scobbie & Catriona Drew, *Self-determination Undetermined: The Case of East Timor*, 9 LEIDEN J. INT'L L. 185 (1996); and Drew, *supra* note 204.

wall along its current route is unreasonable, justifying its decisions by legal argument.

Although Israel has said that it will not abide by the ICJ's Advisory Opinion (nor for that matter most of the U.N. resolutions adopted during the course of the conflict), the Palestinians have embraced it, including the Hamas and Fatah hardliners in the so-called "prisoners document."[466] This must surely be a positive development. Rather than acting unilaterally and aggressively, the Palestinians have attempted to solve their international dispute with Israel peacefully, through non-violent means.[467] Whether Israel will reciprocate is another matter. In challenging the authority of the ICJ in reaching a decision that blatantly ignores the settlement issue and by sidelining the Geneva Conventions yet again, it is difficult to see how it can be said that the HCJ is acting independently from the Israeli government when it comes to policy in the OPT. The questions of self-defense, the wall, and the settlements would have been better discussed in the paradigm of self-determination had more attention been paid to this issue as one of the "legal consequences of the construction of the wall in the Occupied Palestinian Territory," as ultimately this conflict is about much more than just wire and concrete.[468] It is apparent that the ICJ did itself no favors in refraining from elaborating upon why it found Israel's self-defense arguments based on Article 51 of the Charter irrelevant to the matter at hand; this has given ample ammunition to those persons who are not inclined in favor of international law to attack the court.[469] Having said this, the ICJ was able to produce a concise and coherent

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466. *See Full text: The Palestinian Two-State Blueprint*, TIMES ONLINE, May 25, 2006, para. 18, http://www.timesonline.co.uk/article/0251-2196956.html.

> To work on expanding the role and presence of the international solidarity committees and the peace loving groups that support our people in their just struggle against the occupation, settlements, the apartheid Wall politically and locally and to work towards the implementation of the International Court of Justice decision at The Hague pertaining to the removal of the Wall and settlements and their illegitimate presence.

Id.

467. Recourse to conciliatory methods of dispute resolution is something the Palestinians have tried before. In 1947, they lobbied Egypt and Syria to muster support in the General Assembly to petition the ICJ for an Advisory Opinion which ultimately failed. *See* U.N. Ad Hoc Committee on the Palestinian Question, 32d Sess., U.N. Doc. A/AC.14/SR.32 (Nov. 25, 1947) (*prepared by* Thor Thors).

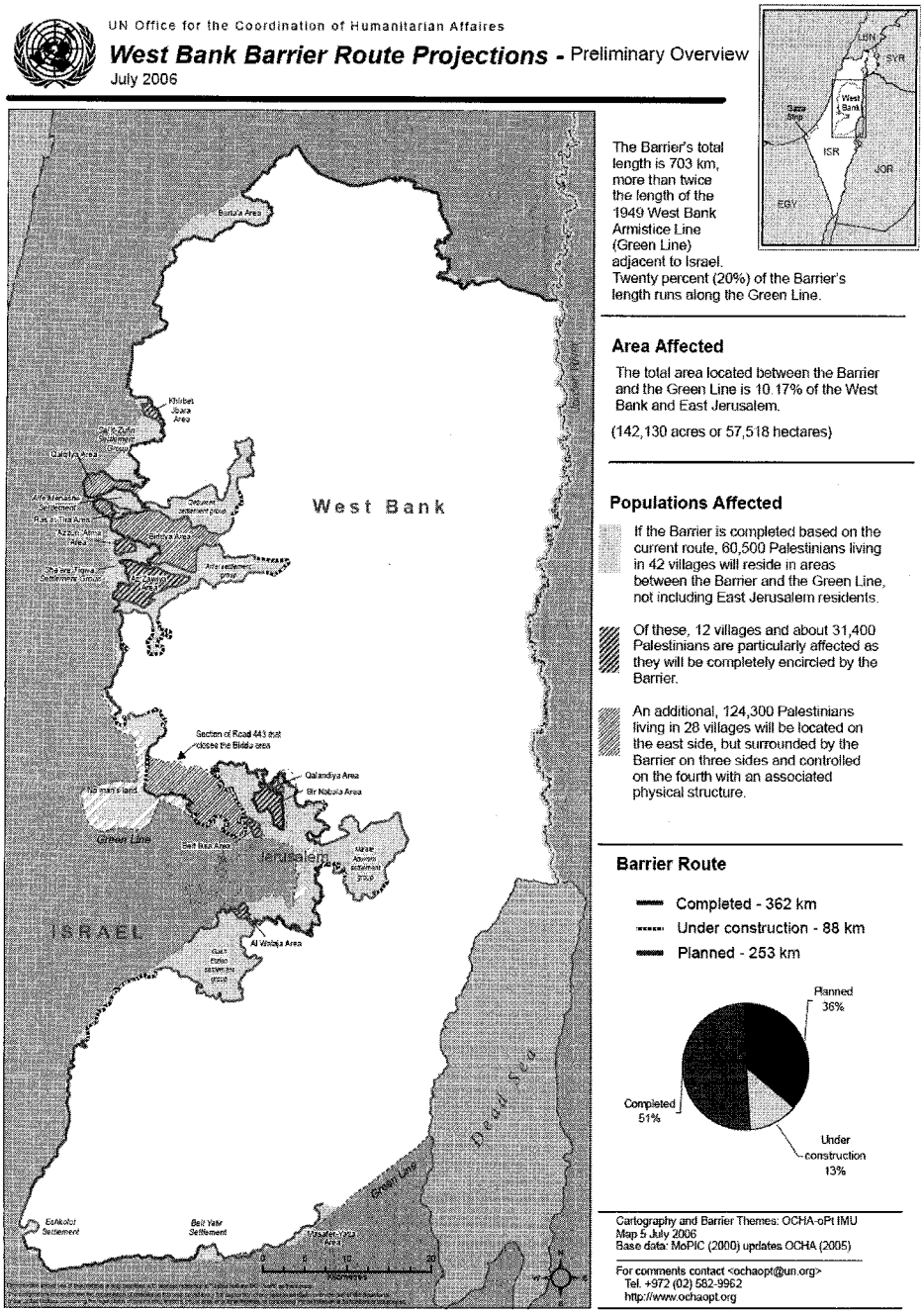
468. *See generally* Pertile, *supra* note 2 (discussing the legal consequences of constructing the wall).

469. *See, e.g.*, Charles Krauthammer, *Travesty at The Hague*, WASH. POST, July 16, 2004, at A21 (describing the ICJ as a "kangaroo court"); Alan Dershowitz, *Israel Follows Its Own Law, Not Bigoted Hague Decision*, JERUSALEM POST, July 11, 2004, at 1 (reporting an unfavorable view of the ICJ as of "questionable status" and deserving of no deference from Israel).

opinion in a relatively short period of time that could provide a framework for negotiations between Israelis and Palestinians when a more enlightened leadership is in a position to assert itself.

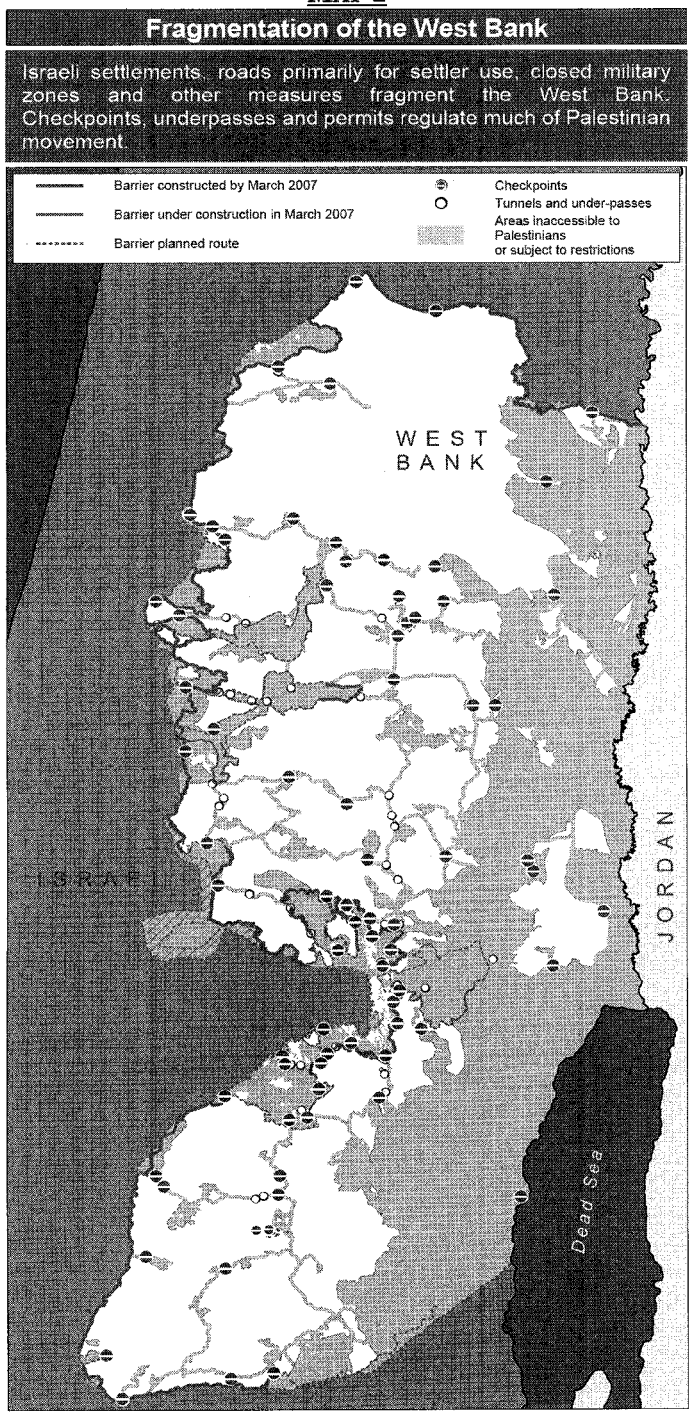
VIII. APPENDIX[470]

MAP 1

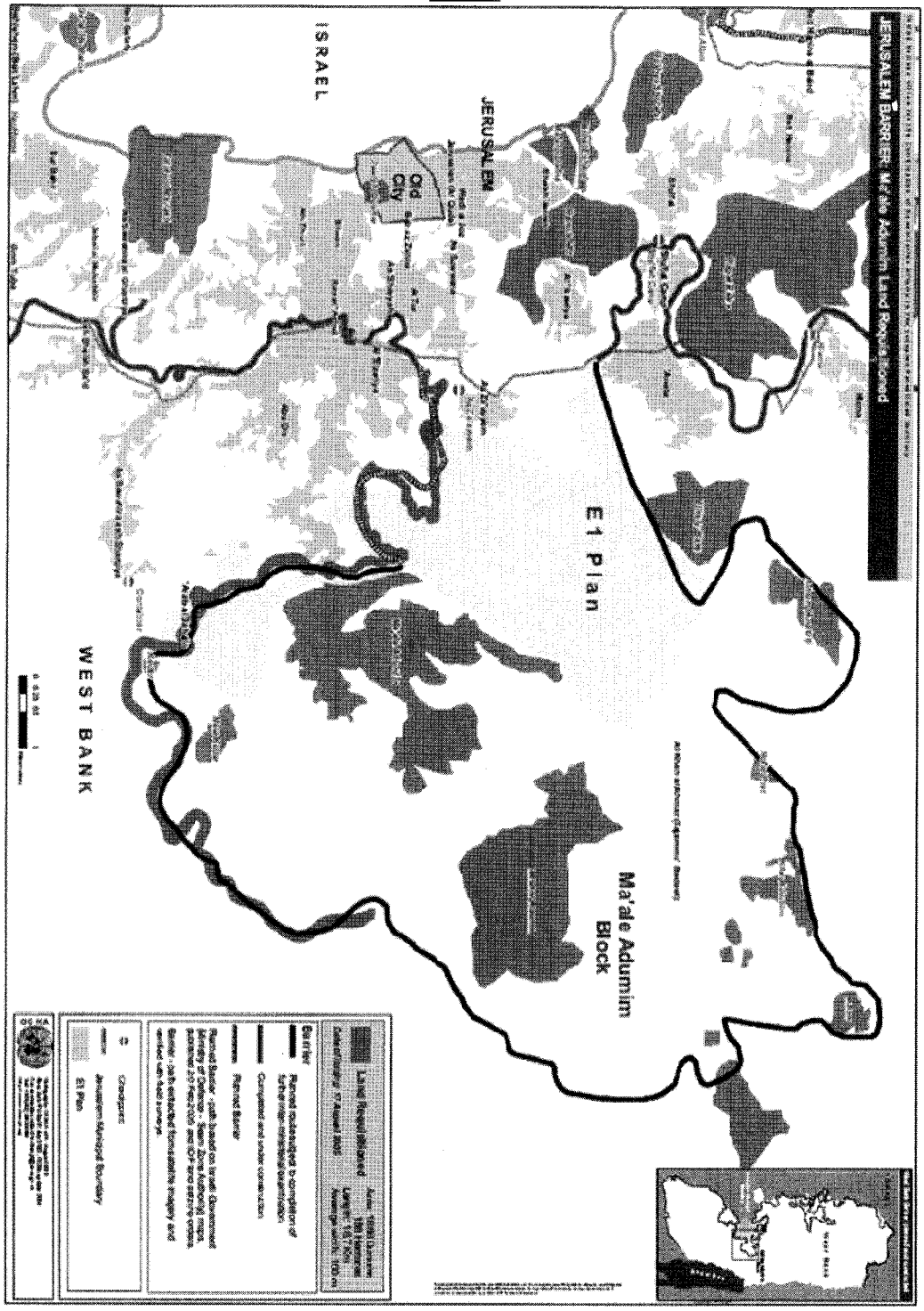


470. All maps obtained from the Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, Map Center, http://www.ochaopt.org/.

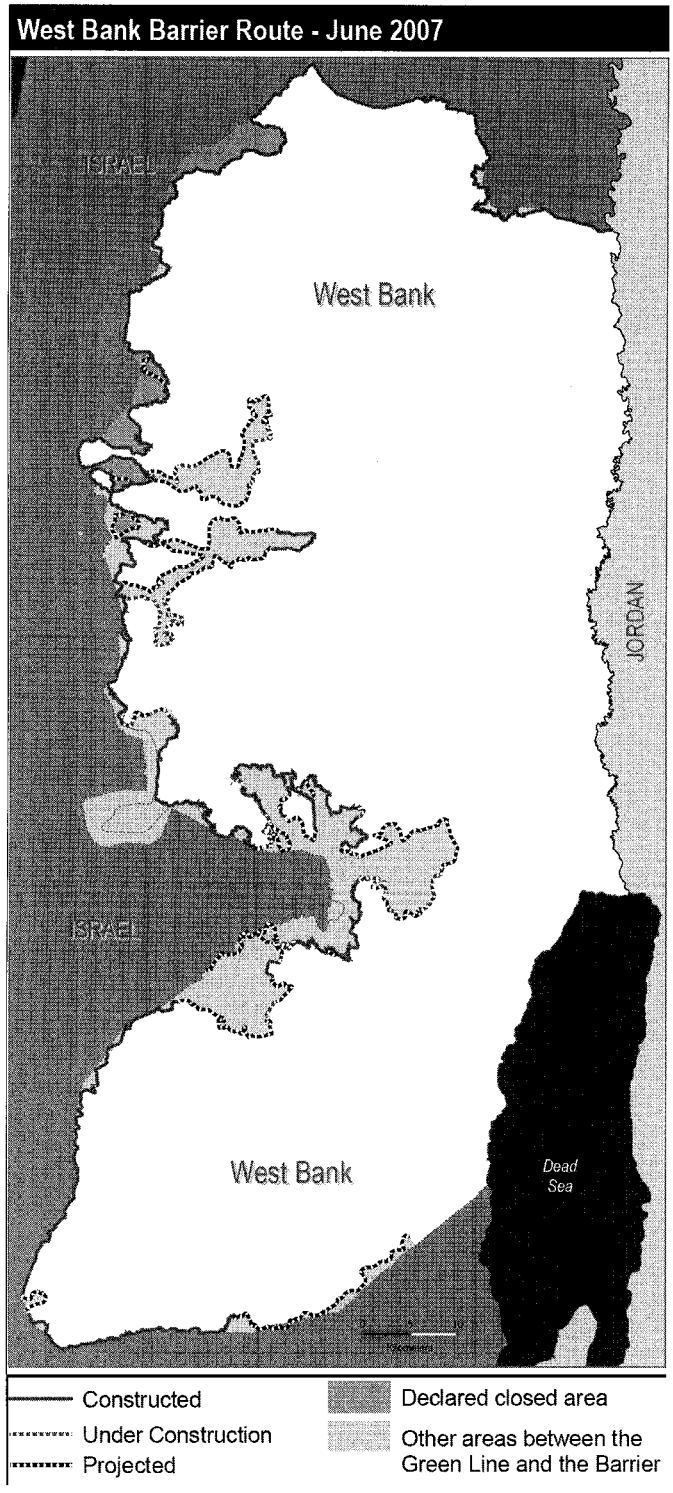
MAP 2


Fragmentation of the West Bank
Israeli settlements, roads primarily for settler use, closed military zones and other measures fragment the West Bank. Checkpoints, underpasses and permits regulate much of Palestinian movement.
Barrier constructed by March 2007
Barrier under construction in March 2007
Barrier planned route
Checkpoints
Tunnels and under-passes
Areas inaccessible to Palestinians or subject to restrictions
WEST BANK
ISRAEL
JORDAN
Dead Sea

MAP 3


JERUSALEM BARRIER: Ma'ale Adumim Land Requisitioned
ISRAEL
JERUSALEM
Old City
E1 Plan
Ma'ale Adumim Block
WEST BANK
Land Requisitioned
Barrier
Planned Barrier
Completed and under construction
Checkpoint
Jerusalem Municipal Boundary
E1 Plan

MAP 4


West Bank Barrier Route - June 2007
ISRAEL
West Bank
JORDAN
ISRAEL
West Bank
Dead Sea
Constructed
Under Construction
Projected
Declared closed area
Other areas between the Green Line and the Barrier

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