GIVE PEACE A CHANCE: HOW CONSIDERING PEACE PROCESS OBLIGATIONS WOULD HAVE IMPROVED THE RULINGS OF THE INTERNATIONAL COURT OF JUSTICE AND THE ISRAELI SUPREME COURT ON THE ISRAELI SECURITY BARRIER

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"The armed conflict has left many dead and wounded . . . .Bereavement and pain wash over us."

-Aharon Barak, President, Supreme Court of Israel,
from *Beit Sourik Village Council v. Government of Israel*[1]

"I agree with almost all of what the Court has written . . . .My regrets are rather about what it has chosen not to write."

-Judge Rosalyn Higgins, International Court of Justice,
from *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*[2]

INTRODUCTION

The remarks of President Barak and Judge Higgins reflect that much was at stake when the Supreme Court of Israel (Israeli Court) and International Court of Justice (ICJ) considered the Israeli

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1. HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807, *reprinted in* 43 I.L.M. 1099 (2004).

2. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 para. 20 (July 9) (separate opinion of Judge Higgins) [hereinafter Advisory Opinion].

separation barrier.[3] In *Beit Sourik Village Council v. Israel*, the Israeli Court gave qualified approval to barrier construction in the occupied West Bank, but ordered the government to reroute barrier segments that caused disproportionate harm to Palestinians.[4] The ICJ *Advisory Opinion* more broadly held that the entire West Bank barrier route violates international law.[5]

This Article proposes an alternative analysis based on Israeli-Palestinian peace process agreements. The thesis is that the agreements provide a more precise framework of legal obligations for analyzing the barrier, and would more effectively promote peace than the approach in either decision.

To paraphrase Judge Higgins, the agreements fill in what the courts "chose not to write."[6] The Israeli Court failed to consider the barrier as part of Israel's illegal settlement policy in occupied territory. As a result, *Beit Sourik* wrongly allows a route that perpetuates Israeli possession of occupied territory. The ICJ dismissed Israeli security, and failed to consider that Palestinian failure to stop illegal terrorism led to Israel's erection of the barrier. As a result, the *Advisory Opinion* wrongly ignores Palestinian legal responsibilities and imposes obligations only on Israel.

An agreement-based framework directly addresses these issues by properly treating the barrier as the result of illegalities on both sides. The analysis affirms Israel's right to defend its citizens, including settlers. However, barrier routes that perpetuate illegal Israeli possession of contested territory would be prohibited.

Part I describes the barrier and summarizes the decisions. Part II analyzes the decisions' impact, showing that while the law now factors in the barrier route, the decisions have not effectively addressed issues central to the barrier, and the larger conflict of which the barrier is part. Part III offers an agreement-based framework and critique of the decisions, comparing peace process obligations with

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3. Supporters of the structure call it a fence, and opponents call it a wall. While the barrier includes concrete walls up to twenty-five feet high, it is predominantly a combination of link and electric fences, trenches, patrol roads, and "no go zones" up to one hundred yards wide. U.N. Econ. & Soc. Council [ECOSOC], *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*, ¶ 6, U.N. Doc. E/CN.4/2004/6 (Sept. 8, 2003) (*prepared by* John Dugard) [hereinafter *Rapporteur's Report*]. This Article will use the term "barrier" because its functional accuracy lends itself to neutrality.

4. *Beit Sourik*, [2004] IsrSC 58(5) 807 para. 86.

5. *Advisory Opinion*, 2004 I.C.J. 131 paras. 137-38, 162.

6. *Id.* para. 20 (separate opinion of Judge Higgins).

sources of international law that impose similar responsibilities illustrating that the framework is legally correct and would better promote peace.[7]

A final introductory note is that the decisions reflect the courts' different roles.[8] The ICJ is an international court and responded to the request of the United Nations General Assembly for a non-binding advisory opinion on the entire barrier route.[9] By contrast, the Israeli Court bore the constraints of a domestic court, making a binding ruling with national security implications on a small section of the barrier.[10] It has been observed that the Israeli Court's restraint on security issues contributes to its important ongoing authority in Israeli society.[11] Some have concluded that the Israeli Court's decision on the barrier was a continuation of this and that *Beit Sourik* was a more pragmatic, effective ruling than the broader *Advisory Opinion*.[12] Ultimately, because pending Israeli Court cases call for reconsideration of the barrier's legality, the framework proposed here is offered not just as a critique of past decisions but as a suggestion for future ones.

I. BACKGROUND ON THE BARRIER AND SUMMARY OF THE DECISIONS

A. The Barrier

The Israeli government authorized the barrier in April 2002 after a sharp rise in terrorist attacks,[13] stating that the barrier was a

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7. The relevance of peace agreements to the barrier was suggested by Geoffrey R. Watson. *See* Geoffrey R. Watson, *The "Wall" Decisions in Legal and Political Context*, 99 AM. J. INT'L L. 6, 22-24 (2005).

8. *See* Yuval Shany, *Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 ISR. L. R. 230, 233 (2005).

9. *Id.* at 231.

10. *Id.* at 232.

11. *See generally* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 187-98 (2002). The Court is by far the most trusted political institution in Israel. Yuval Yoaz, *Public Rates Supreme Court as Most Trustworthy State Authority*, HAARETZ (Isr.), June 14, 2005.

12. *See* David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88, 90 n.22 (2005); Watson, *supra* note 7, at 25.

13. The Secretary-General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, ¶ 4, U.N. Doc. A/ES-10/248 (Nov. 24, 2003) [hereinafter *Secretary-General Report*]; Written Statement of the Government of Israel, Advisory Opinion, 2004 I.C.J. 131, at 7 (Jan. 30, 2004), *available at* http://www.icj-cij.org/docket/files/131/1579.pdf [hereinafter Israeli Statement].

temporary security measure, and not a political border.[14] In October 2003, the Israeli Cabinet approved a continuous 720-kilometer barrier route in and around the West Bank.[15] Portions of the route tracked the 1949 Armistice Line (or "Green Line") demarking Israel's pre-1967 border, but most of the barrier was in occupied territory. The route placed approximately 16.6 percent of the occupied West Bank, 237,000 Palestinians[16] and eighty percent of the 400,000 Israeli settlers in occupied territory on the Israeli side of the barrier.[17]

B. The Decisions

1. Beit Sourik. *Beit Sourik* was decided on June 30, 2004. The case concerned challenges to forty kilometers of the barrier, with the Israeli Court invalidating thirty kilometers and ordering the government to plan new routes less injurious to Palestinians affected by the barrier.[18]

The Israeli Court began by recognizing that Israel holds the West Bank in a state of belligerent occupation, and stating that the law of belligerent occupation applies to consideration of the barrier.[19] The Israeli Court then identified two questions which determined the barrier's legality: (1) whether West Bank barrier construction was illegal *per se*; and (2) if building the barrier in the West Bank was not illegal, whether the specific barrier segments challenged were illegal.[20]

The Israeli Court answered the first question with a qualified, carefully limited approval of West Bank barrier construction. The court described this as a "complex and multifaceted" issue that "did not receive full expression in the arguments," confined its ruling as "dealing only with the arguments raised by the parties," and preserved the question for reconsideration by deciding the issue "without exhausting it."[21]

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14. Israel took this position in both cases. Israeli Statement, *supra* note 13, at 5; HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807 paras. 4, 6, 28-29.

15. *Secretary-General Report*, *supra* note 13, ¶ 6.

16. *Id.* ¶ 8.

17. *See Rapporteur's Report*, *supra* note 3, ¶ 2; Advisory Opinion, 2004 I.C.J. 131 para. 122 (July 9).

18. *Beit Sourik*, [2004] IsrSC 58(5) 807 paras. 9, 60-62, 67, 70-72, 76, 80-86.

19. *Id.* para. 23.

20. *Id.* para. 25.

21. *Id.*

The approval of West Bank barrier construction was based on an acceptance of Israel's position that the barrier was exclusively a temporary security measure.[22] The court contrasted this with impermissible reasons for a West Bank route, including the desire "to 'annex' territories to the state of Israel," "to draw a political border" in order to create permanent, rather than temporary, arrangements, and other "reasons that are political."[23]

The Israeli Court then addressed the second question: the legality of the challenged barrier sections. The court used a segment-by-segment proportionality analysis with three parts, the third examining the proportionality of each segment by balancing its security benefits against the harm done to Palestinians.[24] The court found that most of the segments caused disproportionate injury to Palestinians, and ordered the government to reroute them.[25] The proportionality analysis included detailed consideration of the barrier's humanitarian impact, including damage to livelihood, land deprivation, road access restrictions, limited barrier passage, property damage, and isolation through barrier encirclement.[26]

2. The Advisory Opinion. On July 9, 2004, the ICJ issued the *Advisory Opinion* in response to the General Assembly's request for the ICJ's direction on the legality of the barrier.[27] After rejecting Israel's arguments that the court did not have jurisdiction or, alternatively, that the court should exercise its discretion not to render an opinion because the issue was a political matter, the court proceeded to the merits.[28] The ICJ identified four bodies of

22. *Id.* paras. 28-29, 32.

23. *Id.* para. 27.

24. *Id.* paras. 36-85.

25. *Id.*

26. *Id.* paras. 59, 63, 68, 71-73, 82, 84.

27. G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003).

28. Much of the ICJ opinion addressed the jurisdiction and discretion issues, which were the only issues formally contested by Israel. Advisory Opinion, 2004 I.C.J. 131 paras. 14-15, 25-42, 163(1) (jurisdiction) (July 9); *id.* paras. 44-65, 163(2) (discretion). Those issues are not addressed in detail in this article, which deals instead with the substantive rulings of the Israeli Court and the ICJ. However, it should be acknowledged that the jurisdiction and discretion issues are of great significance and have been the subject of considerable disagreement and academic commentary. One ICJ judge, Judge Buergenthal, voted against the majority's ruling that the ICJ properly exercised its discretion to issue an advisory opinion in the case. *Advisory Opinion*, 2004 I.C.J. 131 para. 1 (declaration of Judge Buergenthal). For examples of differing academic perspectives on the ICJ rulings on these issues, see Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT'L L. 26 (2005); Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's*

international law applicable to the barrier: (1) restrictions on using force; (2) principles of self-determination; (3) international humanitarian law; and (4) international human rights law.[29]

First, the ICJ considered implications of forcible acquisition of territory and self-determination.[30] On these issues the court held that Israeli settlements in occupied territory violate international law,[31] specifically the right to self-determination, Security Council Resolution 242 (calling for Israeli withdrawal from occupied territories), and Article 49(6) of the Fourth Geneva Convention (prohibiting deportation or transfer of occupant population into occupied territory).[32] The ICJ expressly linked the illegality of the barrier to the illegality of the settlements, holding that the barrier route was illegal because it "gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements."[33] The ICJ did not directly rule that the barrier's impact was permanent or constituted annexation, but noted that these were possibilities because the barrier and its regime "create a 'fait accompli' on the ground that could well become permanent, in which case . . . it would be tantamount to *de facto* annexation."[34]

Next, the ICJ cited a series of humanitarian law provisions, finding violations of four[35]: Articles 46 and 52 of the Hague Regulations (respectively prohibiting confiscation of private property and limiting requisitions),[36] and Articles 49(6) (see preceding paragraph) and 53 of the Fourth Geneva Convention (prohibiting destruction of private property).[37] While the ICJ stated that it considered the barrier an impediment to various human rights

Security Wall, 99 AM. J. INT'L L. 42 (2005); *see also* Julie Calidinio Schmid, *Advisory Opinions on Human Rights: Moving Beyond A Pyrrhic Victory*, 16 DUKE J. COMP. & INT'L L. 415 (2006).

29. *Advisory Opinion*, 2004 I.C.J. 131 paras. 87-113.

30. *Id.* paras. 115-22.

31. *Id.* para. 120.

32. *Id.* paras. 117-18, 120.

33. *Id.* para. 122.

34. *Id.* paras. 121-22.

35. *Id.* paras. 132, 134; *id*. paras. 24-25 (separate opinion of Judge Higgins).

36. Convention [IV] Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land arts. 46, 52, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Regulations].

37. Convention Relative to the Protection of Civilian Persons in Time of War arts. 49(6), 53, Aug.12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

provisions, it did not definitively find violations of any specific provision.[38]

The ICJ dismissed self-defense as a justification for the barrier, concluding that the right of self-defense under Article 51 of the U.N. Charter "has no relevance in this case."[39] There were two bases for this holding. First, the ICJ held that Article 51 limited self-defense to a response to state attacks, and claimed Israel did not impute terrorist attacks to another state.[40] Second, the ICJ held that U.N. Security Council resolutions 1368 and 1373, which recognize a right of self-defense against terrorism,[41] could not be invoked by Israel because the terrorist threat emanates from occupied territories controlled by Israel.[42]

From this the ICJ moved to consideration of the consequences of the barrier's illegality. The ICJ stated that Israel must (1) comply with self-determination principles, international humanitarian law, and international human rights law;[43] (2) stop West Bank barrier construction and dismantle completed West Bank barrier sections;[44] and (3) return property taken for the barrier or provide compensation.[45]

The ICJ ruling on consequences included responsibilities for third party states. Here, the ICJ instructed other states not to recognize, aid, or assist the illegal situation resulting from construction of the barrier.[46] The court added that states must end the barrier's impediments to Palestinian self-determination and that parties to the Fourth Geneva Convention must ensure Israeli compliance with the Convention.[47]

The question of Palestinian duties was mentioned once by the ICJ, when it acknowledged that both Israel and Palestine are obliged "to protect civilian life" and that both took illegal actions.[48] However, the ICJ did not issue specific findings or rulings in the *dispositif* on

38. *Advisory Opinion*, 2004 I.C.J. 131 paras. 133-34.

39. *Id.* para. 139.

40. *Id.*

41. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

42. *Advisory Opinion*, 2004 I.C.J. 131 para. 139.

43. *Id.* para. 149.

44. *Id.* para. 151.

45. *Id.* paras. 152-53.

46. *Id.* para. 159.

47. *Id.*

48. *Id.* para. 162.

Palestinian illegalities. Nor did the ICJ instruct third party states as to any responsibilities regarding support or assistance of illegal Palestinian conduct.

II. ANALYSIS OF THE DECISIONS' IMPACT

A. Initial Political and Legal Reaction

The Palestinian Authority criticized the *Beit Sourik* rerouting as "insufficient" and praised the *Advisory Opinion* as a victory.[49] The Israeli government pledged to follow *Beit Sourik* and claimed it confirmed the barrier's general legality, while denouncing the *Advisory Opinion* as a political decision which ignored Palestinian terrorism.[50]

Despite the Israeli government's rejection of the *Advisory Opinion*, the Israeli legal establishment called for consideration of the *Opinion*. In August 2004, Attorney General Menachem Mazuz warned that the *Opinion*'s "negative ramifications" would be "difficult to overstate" and created a "political reality" that could lead to sanctions.[51] President Ehud Barak stated that the *Opinion* required consideration and ordered the Israeli government to respond to it.[52]

The Palestinian Authority used the *Opinion* to liken Israeli occupation to the South African apartheid system that was sanctioned and boycotted following adverse court decisions.[53] Shortly after the ICJ's decision, a prominent Israeli-Arab opponent of occupation stated that there was "no overstating the importance of the ruling" and that "the language of law" in "an impartial legal decision" can

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49. *Qurei Plays Down Israeli Decision on the Wall around Jerusalem*, INT'L PRESS CTR. (Palestine), June 30, 2004, *available at* http://www.ipc.gov.ps/ipc_e/ipc_e-1/e_News/news2004/2004_06/191.html; Press Release, Palestinian National Authority Ministry of Foreign Affairs, PNA Hails ICJ's Ruling over "Apartheid Wall" (July 9, 2004).

50. *See* Press Release, Prime Minister of Israel, Prime Minister Orders Continued Construction of the Separation Fence As Directed by the High Court of Justice (July 11, 2004).

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

52. *Id.*

53. The barrier is often referred to as an "apartheid wall" by Palestinians and others opposed to it. *See, e.g.*, Palestinian National Authority Ministry of Foreign Affairs, *supra* note 49.

"serve to build an international consensus."[54] The U.N. General Assembly voted overwhelmingly to demand Israeli compliance with the *Advisory Opinion*.[55] The 115 nation Non-Aligned Movement adopted a resolution for boycotts and sanctions to enforce the *Advisory Opinion*, and various religious organizations also recommended such measures.[56]

Over sixty petitions have been filed with the Israeli Court challenging the barrier, some resulting in government agreements to change its route.[57] Israeli intra-governmental tension regarding the *Advisory Opinion*'s force continued when Attorney General Mazuz cited the *Opinion* as a reason for halting government use of absentee property laws to confiscate Palestinian property for East Jerusalem settlements. Mazuz stopped the confiscations in part because of "grave international ramifications regarding the separation fence" and "the various aspects for which Israel has been severely criticized by the International Court."[58] He added, "This is a clear-cut case of Israel's interests being to avoid opening new fronts in the international arena in general and in particular in the arena of international law."[59]

In February 2005, the Israeli government announced a new barrier route to comply with *Beit Sourik* and responded to the August 2004 Israeli Court order to address the *Advisory Opinion*.[60] The Israeli response stated the new route reduced West Bank territory on the Israeli side of the barrier by more than half.[61]

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54. Azmi Bishara, *Back to Context*, AL-AHRAM WEEKLY (Cairo), July 19, 2004, *available at* http://weekly.ahram.org.eg/2004/699/op2.htm.

55. G.A. Res. ES-10/15, U.N. Doc. A/RES/ES-10/15 (Aug. 2, 2004).

56. *Poor Nations Seek Ban on Firms Building Israeli Wall*, NEW ZEALAND HERALD, Aug. 21, 2004, http://www.nzherald.co.nz/index.cfm?ObjectID=3585663; s*ee, e.g.*, Chris McGreal, *Anglican Group Calls for Israel Sanctions: Campaigners Inspired by Boycott of Apartheid South Africa*, THE GUARDIAN (U.K.), Sept. 24, 2004, at Foreign Pages 18, *available at* http://www.guardian.co.uk/israel/Story/0,2763,1311571,00.html.

57. U.N. Office for Coordination of Humanitarian Affairs, *The Humanitarian Impact of the West Bank Barrier on Palestinian Communities*, Update No. 5, at 6, para. 34 (Mar. 2005), *available at* http://www.ochaopt.org/documents/OCHABarRprt05_Full.pdf.

58. Yuval Yoaz, *AG halts East Jerusalem Property Expropriation*, HAARETZ (Isr.), Feb. 2, 2005.

59. *Id.*

60. Press Release, Israel Ministry of Defense, Israel's Response to the ICJ *Advisory Opinion* on the Security Fence (Feb. 28, 2005) (English summary) (available at http://www.securityfence.mod.gov.il/Pages/ENG/news.htm#news27).

61. *Id.* para. 20.

The response criticized the ICJ for relying on outdated information and unbalanced facts, particularly on terrorism and security.[62] The government noted that the *Opinion* was nonbinding and contended that its substantive rulings were inappropriate because Israel did not consent to the proceedings.[63] For these reasons the government maintained that the *Advisory Opinion* was inapplicable to Israeli Court barrier cases.[64] Palestine criticized the new route, maintaining that the vast majority of the rerouted barrier remains in Palestinian territory, and that almost ninety percent of the settlers and ten percent of the West Bank are on the barrier's Israeli side.[65]

The barrier has been and continues to be the subject of further cases in the Israeli Court. In one case, the Association for Civil Rights in Israel (ACRI) petitioned the court to enforce the *Advisory Opinion* and invalidate the entire West Bank barrier route.[66] During a preliminary hearing in that case, President Barak stated that the *Advisory Opinion* is partly positive for Israel and predicted Israel would ultimately rely on the *Opinion*.[67] In other Israeli Court proceedings, the Israeli government contradicted its position taken in both *Beit Sourik* and the *Advisory Opinion* that the barrier is exclusively a temporary security measure. The court has admitted that parts of the barrier are too difficult to move and conceded that there are non-security reasons for the barrier route, including political motivations and retention of occupied territory for industrial development.[68]

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62. *Id.* paras. 16, 20.

63. *Id.* paras. 12, 13.

64. *Id.* para. 23.

65. Press Release, PLO Negotiations Affairs Dep't., Barrier to Peace: Assessment of Israel's "New" Wall Route (Mar. 2005) (available at http://www.nad-plo.org/inner.php?view=facts_wall_f19bp).

66. The Association for Civil Rights in Israel (ACRI), Separation Barrier Route Violates International Law, http://www.acri.org.il/english-acri/engine/story.asp?id=210 (last visited Mar. 22, 2007); ACRI, Route of Barrier Designed to Allow Settlement Expansion, http://www.acri.org.il/english-acri/engine/story.asp?id=212 (last visited Mar. 22, 2007).

67. Yuval Yoaz, *Justice Barak*: *Parts of Int'l Fence Ruling are 'Positive' for Israel*, HAARETZ (Isr.), May 9, 2005.

68. Yuval Yoaz, *State Prosecution Concedes Political Aim for the Jerusalem Fence*, HAARETZ (Isr.), June 21, 2005, *available at* http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=590557. Outside court, a government minister stated that the Jerusalem barrier was built to ensure a Jewish majority and not solely for security. Yuval Yoaz, *EU Solana Slams J'lem Fence: PA: It Makes Pullout Useless*, HAARETZ (Isr.), July 11, 2005.

B. Judicial Developments—The Israeli Court Upholds *Beit Sourik* and Distinguishes the *Advisory Opinion*

On September 15, 2005, the Israeli Court issued its first decision on the barrier after *Beit Sourik* and the *Advisory Opinion* in the case of *Mara'abe v. The Prime Minister of Israel*.[69] The case concerned a segment of the barrier constructed to protect the Israeli West Bank settlement of Alfei Menashe.[70] On the Israeli side of the barrier were the settlement, an Israeli access highway (connecting the settlement to Israel), and five Palestinian villages.[71]

The *Mara'abe* decision included extensive discussion of *Beit Sourik* and the *Advisory Opinion*.[72] The Israeli Court stated that it was appropriate to afford the ICJ *Opinion* "full appropriate weight to the norms of international law."[73] However, the Israeli Court declined to follow the ICJ ruling that all construction of the barrier in occupied territory was illegal.[74] The Israeli Court's rationale for distinguishing the *Advisory Opinion* was two-fold. First, the court noted that the ICJ *Opinion* was not binding *res judicata* that it was required to follow.[75] Second, the court stated that the *Advisory Opinion* was decided on a different factual basis than *Beit Sourik* and *Mara'abe*.[76]

The Israeli Court explained that in its view, there were two primary factual differences between its own consideration of the barrier and that of the ICJ in the *Advisory Opinion*. First, the Israeli Court stated that the ICJ analyzed only Palestinian injury and ignored the Israeli military-security reasons for building the barrier, identifying this as "the most important" factual difference between the two courts' analyses and describing the ICJ's failure to consider Israeli security concerns as a "severe oversight."[77] The second factual

69. HCJ 7957/04 Mara'abe v. The Prime Minister of Israel [2005] IsrSC 38(2) 393, *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

70. *Id.* paras. 8-9.

71. *Id.*

72. *Id.* paras. 33-74.

73. *Id.* para. 74.

74. *Id.*

75. *Id.*

76. *Id.* paras. 59-72.

77. *Id.* paras. 62-66. The Israeli Court was diplomatic in its treatment of the *Advisory Opinion*, noting that it was not assessing blame for what it clearly viewed to be inadequate factual consideration of the Israeli position. *Id.* para. 65. The Court also correctly pointed out that several ICJ judges criticized the *Advisory Opinion* as a one-sided analysis that ignored Israel's security rationale for the barrier. *Id.* paras. 46, 52-55, 63-64. The author agrees that the

difference claimed by the Israeli Court was that its procedures allowed for a balance of fully aired Palestinian and Israeli positions through an adversarial legal process; the Israeli Court contrasted this with ICJ proceedings, which the court maintained were limited to consideration of the Palestinian position untested by opposing parties or facts.[78]

After reaching its conclusion regarding the *Advisory Opinion*, the Israeli Court stated it would adopt the *Beit Sourik* normative approach—a segment-by-segment proportionality analysis, in which the court would balance military and security necessity against the injury done to the local population.[79] Application of the *Beit Sourik* approach led to a ruling quite similar to *Beit Sourik*. The Israeli Court again held that the government had the general authority to construct the barrier in occupied territory, but nonetheless ordered the government to reroute the specific segment of the barrier under consideration because the segment illegally violated Palestinian rights.[80]

As it had in *Beit Sourik*, the Israeli Court accepted without question the government's central factual contentions regarding the barrier's purpose and duration. The court agreed with the government that the motivation for the barrier was security rather than creation of a political border,[81] and that the barrier is "inherently temporary."[82]

The Israeli Court then proceeded to apply the three part proportionality analysis it formulated in *Beit Sourik*.[83] Here, the *Mara'abe* ruling differed somewhat from *Beit Sourik* in two ways that potentially make *Mara'abe* a more expansive invalidation of Israeli occupation tactics. First, in *Mara'abe*, the court held that the Alfei Menashe barrier segment was invalid because it failed to pass the second prong of the proportionality test—whether it was the least injurious means of providing the security protection sought.[84] The

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ICJ's failure to consider Israeli security and defense rights is a severe error of law with significant adverse legal and political consequences. *See infra* Part III.C-D.

78. *Mara'abe*, [2005] IsrSC 38(2) 393 para. 69. The Israeli Court did not address or criticize the ICJ rulings on jurisdiction and discretion.

79. *Id.* para. 74.

80. *Id.* paras. 98-99, 110-16.

81. *Id.* paras. 98-101.

82. *Id.* para. 100.

83. *Id.* paras. 110-16.

84. *Id.* paras. 112-14.

court suggested that a barrier which encircled the settlement but did not place the five Palestinian villages on the Israeli side would be an acceptable less injurious means of protecting the settlement.[85] The Israeli Court's tacit approval of the alternative of a "ringlet barrier" in *Mara'abe* goes farther than *Beit Sourik.* There, the court bypassed the issue of suggesting less injurious alternatives, instead invalidating segments based on the third prong of the test (a balance of interests) and leaving the rerouting up to the government.[86]

The second expansion from *Beit Sourik* was that, in *Mara'abe*, the Israeli Court ordered the government to consider building a new Israeli settlement access road, and thus its ruling was not limited to the barrier route.[87] The court required the rerouting of the road because the hardship imposed on Palestinians by the barrier route was exacerbated by the fact that the route protected the road. The court's connection of the barrier to other occupation infrastructure goes beyond its prior reluctance to view the facets of the occupation as integrated.[88]

C. Conclusions Regarding the Decisions' Impact

Several conclusions as to the decisions' impact can be drawn. First, the ICJ *Advisory Opinion* aids the Palestinian legal/political strategy of intensifying international pressure on Israel by casting it as an outlaw state meriting punitive isolation in the mold of apartheid South Africa. Second, the *Opinion*, though publicly disregarded by the Israeli government, nonetheless influences the barrier due to international pressure, supportive treatment from Israel's legal establishment, and ongoing court cases.[89]

Third, pressure from the ICJ *Opinion* weighs exclusively on Israel. All rulings of illegality in the *Opinion* were against Israel.[90] The ICJ's instructions on the consequences of its finding consisted exclusively of obligations for Israel and third party states supporting Israel.[91] The ICJ did not make any findings of Palestinian illegality, nor did it address whether Palestinian violations of law led to the

85. *Id.* para. 113.

86. HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807 paras. 59-62, 70-71, 76, 80, 82-86.

87. *Mara'abe*, [2005] IsrSC 38(2) 393 para. 116.

88. *See infra* Part III.B.

89. *See* Kretzmer, *supra* note 12, at 101.

90. *See supra* notes 31-37 and accompanying text.

91. *See supra* notes 43-47 and accompanying text.

Israeli decision to construct the barrier. There were no instructions from the ICJ to third party states not to support Palestinian illegality related to the barrier. Unsurprisingly, the ICJ *Opinion* has not led to legal or political pressure on Palestine (or its allies) to stop the illegal terrorism against which the barrier defends.

As to the impact of the Israeli Court's decision, the first and most obvious result is that the barrier was rerouted in response to *Beit Sourik* and other proceedings, but this change was insufficient to end legal and political controversy because *Beit Sourik* allows a barrier route that winds through occupied territory.[92] Second, the law is an ongoing constraint on the government's construction of the barrier because Israeli Court involvement continues as demonstrated by *Mara'abe* and other post-*Beit Sourik* petitions.

Third, Israeli Court orders and governmental statements, such as those of Attorney General Mazuz, have given some official support and vitality to the ICJ *Opinion* in Israel.[93] Although the Israeli Court declined to follow the ICJ *Opinion*, it has not rejected the ICJ's exercise of jurisdiction.[94] The court further indicated that the ICJ *Opinion* carries weight and afforded the *Opinion* careful consideration,[95] and, in its post-*Opinion* decision in *Mara'abe*, edged to a slightly more critical perspective of the barrier, including consideration of other components of the settlement infrastructure.[96] The Attorney General expressed concerns with the legal and political impact of the *Opinion* and linked those concerns to a substantive

92. *See supra* notes 21 (*Beit Sourik* approval of West Bank route), 57, 60 (Israeli government changes in barrier route in response to *Beit Sourik*), 49-50, 57, 60 (continuing legal and political disputes over West Bank barrier route) and accompanying text. The political contestation of the barrier in Israel and Palestine is reflected in continuing legal petitions to the Israeli Court. *See, e.g.*, ACRI, Jerusalem Envelope Imprisons Residents of Hirbat and al-Wata, http://www.acri.org.il/english-acri/engine/story.asp?id=264 (last visited Mar. 21, 2007). The fact that the continued presence of the barrier in the West Bank has international political consequences for Israel is demonstrated by the so-called "Quartet" that sponsors the "Road Map" peace plan (the United States, Russia, European Union, and United Nations). *See* Press Release, U.S. Dep't of State, Quartet Statement on Middle East Peace (Sept. 20, 2006) (available at http://www.state.gov/p/nea/rls/72900.htm) (Quartet expressing concern that the barrier route "appears to prejudge the borders of a Palestinian state").

93. *See supra* notes 66 (discussing Israeli Court involvement), 52, 58 (attorney general's positions) and accompanying text.

94. *See supra* notes 73-78 and accompanying text.

95. *See supra* notes 73-78 and accompanying text.

96. *See supra* notes 83-88 and accompanying text.

policy decision on another facet of the occupation—confiscation of Palestinian property.[97]

Fourth, Israeli Court proceedings precipitated concessions by the government that the motivations for the barrier include several identified as impermissible in *Beit Sourik*.[98] Israeli government admissions that motives include political and industrial considerations, and that barrier segments will be difficult to remove, contradict the government's previous representations that the barrier is solely a temporary security measure.[99] Because the now-contradicted governmental representations of an exclusive security rationale were the basis of the Israeli Court's ruling that barrier construction in the West Bank is not *per se* illegal in *Beit Sourik,* these developments leave open the possibility of broader Israeli Court rulings against the barrier. The *Mara'abe* decision shows that the court's course is likely to be a gradual expansion of its authority over barrier routing through a series of applications of the *Beit Sourik* segment-by-segment proportionality analysis, rather than an outright ban on West Bank barrier construction.[100]

While the decisions unquestionably have had significant consequences, they leave much unchanged. Peace talks languish, Israeli settlements in contested territories persist, and Palestinian terrorist attacks (while diminished) continue. The judicially rerouted barrier is still a source of conflict, because a large portion of contested occupied territory, hundreds of thousands of Palestinians, and most Israeli settlers remain on the Israeli side of the barrier.[101]

It would be naïve to expect judicial resolution of all this. Yet, even the flawed court rulings had real political results and led to physical changes in the barrier route. Part III of this Article presents an agreement-based framework as legally better reasoned and politically more constructive. Given that the judicial decisions on the

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97. *See supra* notes 51, 58-59 and accompanying text.

98. *Compare supra* note 68 (government admissions that barrier has non-security purposes) *with supra* notes 13-14 (prior government position that the barrier was a temporary measure intended exclusively for security).

99. *Compare supra* note 68 *with supra* notes 13-14.

100. The Israeli Court's treatment of the barrier includes injunctions, suggestive statements at hearings, and encouragement of out-of-court settlement, methods previously described by Professor Kretzmer as part of
the court's restraining or "shadow" influence on the government. KRETZMER, *supra* note 11, at 189-90. Perhaps the longest cast of the Israeli Court's shadow is the possibility that it will follow the ICJ by ruling more broadly against the barrier in the future.

101. *See supra* notes 65, 92 and accompanying text.

barrier have had a tangible impact, a better-reasoned analysis based on bilateral peace obligations could lead not just to more even-handed and legally sound decisions, but also to political responses that could help revive the peace process itself.[102]

III. ANALYSIS OF THE BARRIER AND DECISIONS UNDER PEACE PROCESS AGREEMENTS

A. The Peace Agreements and the Barrier

1. The Agreements Generally. There are two sources of Israeli-Palestinian peace process obligations pertinent to the barrier. The first is the 1993-99 series of agreements popularly referred to as the "Oslo Accords."[103] The second is "the Roadmap" proposed in 2003 by the United States, the Russian Federation, the European Union and the United Nations, (collectively referred to as "the Quartet"),[104] adopted by the U.N. Security Council.[105] The Roadmap was accepted by Israel (with fourteen reservations)[106] and Palestine.[107] Both the Oslo agreements and the Roadmap call for an immediate cessation of

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102. This Article's critique of the two decisions does not mean disagreement with them entirely. To the contrary, there are constructive rulings in both decisions that are consistent with my proposal that an agreement-based analysis be used. Those rulings include the humanitarian considerations of the Israeli Court in *Beit Sourik* as well as the court's laudable and detailed concern with the suffering of civilians. This Article also concurs with the ICJ's *Advisory Opinion* rulings on jurisdiction, discretion, legal status of the settlements, and applicability of humanitarian and human rights law. An agreement-based analysis could be applied with such rulings.

103. The relevant Oslo agreements are: (1) Declaration of Principles on Interim Self-Government Arrangements, Isr.-Palestine, Sept. 13, 1993, 32 I.L.M. 1525 (1993) [hereinafter 1993 Declaration of Principles]; (2) Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Isr.-Palestine, Sept. 28, 1995, 36 I.L.M. 558 (1997) [hereinafter 1995 Interim Agreement]; (3) Protocol Concerning the Redeployment in Hebron, Note for the Record, Isr.-Palestine, Jan. 15, 1997, 36 I.L.M. 665 (1997) [hereinafter Note for the Record]; (4) Wye River Memorandum, Isr.-Palestine, Oct. 23, 1998, 37 I.L.M. 1251 (1998) [hereinafter Wye River]; and (5) Sharm el-Sheikh Memorandum, Isr.-Palestine, Sept. 4, 1999, 38 I.L.M. 1465 (1999) [hereinafter Sharm el-Sheikh].

104. The Secretary-General, *Letter from the Secretary General to the President of the Security Council*, U.N. Doc. S/2003/529 (May 7, 2003) [hereinafter Roadmap].

105. S.C. Res. 1515, U.N. Doc. S/RES/1515 (Nov. 19, 2003).

106. *See* Press Release, Isr. Gov't Press Office, Statement from the Prime Minister's Bureau (May 25, 2003) (available at http://www.globalsecurity.org/military/library/news/2003/05/mil-030525-israel-pm01.htm); *Israel's Roadmap Reservations*, HAARETZ (Isr.), *available at* http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=297230 (last visited Mar. 23, 2007).

107. *See Peres: Abbas is "Best Man Available,"* CNN.COM, May 1, 2003, http://www.cnn.com/2003/WORLD/meast/05/01/cnna.peres/index.html.

violence ultimately followed by permanent status negotiations on territorial issues including Jerusalem, borders, and the settlements.[108] Disposition of the West Bank and Jerusalem is reserved for final negotiations.[109]

The agreements impose legal obligations relevant to three issues that go directly to the barrier's causes and consequences: (1) Israeli changes in the status of contested territory; (2) Palestinian responsibility for terrorism; and (3) Israeli self-defense.[110] The wisdom of using the agreements as an analytical framework for determining the legality of the barrier is best shown by this—there would be no barrier if Israel and Palestine complied with the agreements.

2. Obligations Relevant to the Barrier

a. Israeli Obligation Not to Change the Status of Occupied Territory. Peace agreement obligations to preserve the territorial *status quo* in the occupied territories are relevant to the legality of the barrier because much of the barrier is in occupied territories and protects Israeli settlers who live in the territories as well as Israeli settlement infrastructure located there. The 1995 Interim Agreement

108. 1995 Interim Agreement, *supra* note 103, pmbl., art. XXXI, § 5; Roadmap, *supra* note 104, at 2-8. The issue of whether the initiation of permanent status negotiations is conditioned on an end to violence has been contested and is not entirely clear from the language of the agreements. The 1995 Interim Agreement called for permanent status negotiations to begin after preliminary matters were resolved. 1995 Interim Agreement, *supra* note 103, art. XXXI, § 5; *see also* Note for the Record, *supra* note 103, at 665-66 (describing duties under agreements, including "fighting terror and preventing violence," and continuing interim agreement negotiations are to be dealt with "immediately and in parallel," with permanent status negotiations to resume subsequently to implementation of earlier agreements). Under the later Wye River and Sharm el-Sheikh agreements, ending violence and participating in permanent status negotiations were simultaneous and contemporaneous obligations. Wye River, *supra* note 103, art. II, §§ A-B (recognizing anti-terror obligations), art. IV (stating that "[t]he two sides will immediately resume permanent status negotiations on an accelerated basis"); Sharm el-Sheikh, *supra* note 103, para. 1 (calling for prompt resumption of permanent status negotiations within ten days of the Memorandum's creation). The Roadmap consists of a three-phase process, with Phase I including a bilateral end to violence and a freeze on Israeli settlement expansion, Phase II calling for a transitional Palestinian state, and Phase III requiring permanent status negotiations. Roadmap, *supra* note 104, at 2-8. Regardless of what the agreements say, it is politically impossible for a permanent territorial agreement to be negotiated and complied with as long as the two sides continue to attack and kill each other's citizens.

109. 1995 Interim Agreement, *supra* note 103, art. XXXI, § 5; Roadmap, *supra* note 104, at 7.

110. *See infra* Part III.A.2.a-d.

prohibits changes in the status of the territories until a final agreement is reached:

> The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period.
>
> . . . .
>
> 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 permanent status negotiations.[111]

This preservation obligation continued in the Wye River agreement provision barring "Unilateral Actions": "Recognizing the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank . . . in accordance with the Interim Agreement."[112] Sharm el-Sheikh contains materially identical language.[113] The Oslo agreements' status obligations are preserved in the Roadmap, which expressly sustains the Oslo territorial requirements by calling for "implementation of prior agreements, to enhance maximum territorial contiguity of the provisional Palestinian state."[114] The territorial preservation obligations freeze the territorial status quo until permanent negotiations conclude,[115] and thus prevent either party from unilaterally taking territory that is subject to permanent status negotiations.

b. Palestinian Obligation to Stop Terrorism. Peace agreement obligations requiring Palestine to end terrorism are relevant to the legality of the barrier because the barrier is intended to defend

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111. 1995 Interim Agreement, *supra* note 103, arts. XI § 1, XXXI § 7 (continuing a similar 1993 provision). The "interim period" is the time between the 1995 Interim Agreement and the permanent status negotiations. *Id.* pmbl.

112. Wye River, *supra* note 103, art. V.

113. Sharm el-Sheikh, *supra* note 103, para. 10.

114. Roadmap, *supra* note 104, at 7. The Israeli reservations to the Roadmap do not disclaim the obligation to leave the status of occupied territories unchanged or the reservation of territorial issues for permanent status negotiations. *See Israel's Roadmap Reservations*, *supra* note 106.

115. The 1995 Interim Agreement prohibited territorial status change not just *prior* to the permanent status negotiations, but also through the *outcome* of the negotiations. 1995 Interim Agreement, *supra* note 103, arts. XI, XXXI § 7. Later agreements also recognized that unilateral pre-negotiation territorial status changes would foil the purpose of permanent status talks: both the Wye River and Sharm el-Sheikh agreements recognize that because of "the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement." *See* Wye River, *supra* note 103; Sharm el-Sheikh, *supra* note 103.

against Palestinian terrorism.[116] The agreement of the Palestinian governmental entity to stop using terrorism has been a condition of the peace process from its beginning in 1993: "The PLO renounces the use of terrorism and other acts of violence and will assume responsibility over all PLO elements and personnel in order to assure their compliance, prevent violations and discipline violators."[117] In the 1995 Interim Agreement, Palestine moved beyond renunciation of using terrorism to a commitment to prevent all terrorism emanating from Palestine: "Both sides shall take all measures necessary to prevent acts of terrorism, crimes and hostilities directed against each other, *against individuals falling under the other's authority* . . . and shall take legal measures against offenders."[118] Anti-terror protections are not selective as they extend to all persons in Israel and the occupied territories. The 1995 Interim Agreement Annex requires both sides to "protect *all residents and other persons present*" in Gaza and the West Bank.[119] The italicized language extends anti-terror protections to settlers, who are "residents" and "persons present" "under Israel's authority" in the territories.

The subsequent Oslo agreements increased the specificity of Palestine's commitments to stop terrorism. Palestine agreed to more explicit anti-terrorism obligations in the 1997 Note for the Record, which listed among the "Palestinian Responsibilities" "fighting terror and preventing violence," "combating systematically and effectively terrorist organizations and infrastructure," and "[a]pprehension, prosecution and punishment of terrorists."[120] The 1998 Wye River Memorandum established that:

> [T]he struggle against terror and violence must be comprehensive in that it deals with terrorists, the terror support structure, and the environment conducive to the support of terror. It must be continuous and constant over a long-term, in that there can be no pauses in the work against terrorists and their structure.[121]

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116. *See supra* notes 13-14, 22. While the placement of the barrier in occupied territories and Israeli government statements show that some purposes for the barrier are not related to defense and are legally impermissible, *see supra* note 68, self-defense against terrorist attacks would be a legitimate reason for security measures, including a barrier, so long as such measures meets principles of proportionality. *See infra* Part III.D.

117. *See* Exchange of Letters between Yasser Arafat and Yitzhak Rabin (Sept. 9, 1993), *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israel-PLO+Recognition+-+Exchange+of+Letters+betwe.htm.

118. 1995 Interim Agreement, *supra* note 103, art. XV § 1(emphasis added).

119. *Id.* annex I, art. II § 3(a) (emphasis added).

120. Note for the Record, *supra* note 103, at 666.

121. Wye River, *supra* note 103, art. II.

Wye River included anti-terrorism duties identical to those of the 1995 Interim Agreement as well as the duty to "eliminate terrorist cells and the support structure that plans, finances, supplies and abets terror."[122] Wye River also established specific Palestinian obligations to prevent incitement and prohibit importation and use of illegal weapons.[123] In the 1999 Sharm el-Sheikh Memorandum, Palestine reaffirmed that it would "immediately and effectively respond to the occurrence or anticipated occurrence of an act of terrorism" and "take all necessary measures to prevent such an occurrence."[124]

Under the Roadmap, the Palestinian obligation of "Ending Terror" is part of Phase I, which requires that "Palestinians immediately undertake an unconditional cessation of violence" and that "Palestinians declare an unequivocal end to violence and terrorism and undertake visible efforts on the ground to arrest, disrupt and restrain individuals and groups conducting and planning violent attacks on Israelis anywhere."[125] The Roadmap, like the Oslo agreements, obliges Palestine to take all necessary preventive action against terrorism and protects settlers as well as residents of Israel because it covers "Israelis anywhere."[126] The Roadmap, like the Oslo agreements, prohibits incitement of violence and requires its prevention[127] and calls for third party anti-terrorism steps, requiring a "cut off [of] public and private funding and all other forms of support for groups supporting and engaging in violence and terror."[128] Thus, the Oslo agreements and the Roadmap establish a comprehensive Palestinian duty to prevent terrorism and its encouragement as well as to respond to terrorism immediately and effectively, with third-party states also prohibited from supporting terrorism.

c. Israel's Right to Self-Defense. The peace agreements' recognition of Israeli self-defense rights is relevant to the legality of the barrier because the barrier is a defensive measure built in

122. *Id.*

123. *Id.*

124. Sharm el-Sheikh, *supra* note 103, para. 8(a).

125. Roadmap, *supra* note 104, at 3. The Security Council Resolution adopting the Roadmap imposed similar duties. S.C. Res. 1515, *supra* note 105 (demanding "immediate cessation of violence, including all acts of terrorism").

126. Roadmap, *supra* note 104, at 3.

127. *Id*; S.C. Res. 1515, *supra* note 105; Wye River, *supra* note 103, art. II § A(3); Sharm el-Sheikh, *supra* note 103, para. 8(a).

128. Roadmap, *supra* note 104, at 4.

response to a surge in Palestinian terrorism.[129] Israel's right to defend against terrorism is expressly preserved in the 1995 Interim Agreement:

> Israel shall continue to carry the responsibility for defense against external threats . . . as well as the responsibility for overall security of Israelis and Settlements, for the purposes of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility.[130]

The right of self-defense is further acknowledged in the agreements' authorizations of all necessary measures for prevention and response to terrorism.[131]

d. The Agreements Create Binding Legal Obligations. The language in the Oslo agreements and their treatment by Israel and Palestine demonstrate that the agreements are legally binding.[132] The 1995 Interim Agreement identifies "recognizing . . . mutual legitimate and political rights" as one of its purposes.[133] The agreements refer to "rights," "obligations," and "responsibilities."[134] Later agreements preserve obligations from preceding agreements.[135]

The Roadmap commitments are also binding. The Roadmap includes language of obligation and was accepted by Israel and Palestine.[136] It is binding for the additional reason that it was adopted by the U.N. Security Council to promote peace and security.[137]

Although the goal of the Oslo agreements was a final peace agreement by May 1999, the obligations in the accords were not contingent on reaching a final agreement and the obligations have not

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129. *See supra* notes 13-14, 22 and accompanying text.

130. 1995 Interim Agreement, *supra* note 103, art. XII § 1. The Israeli right to defend citizens and settlements is in addition to, not limited to, response to external threats. *Id.*; *see also* 1993 Declaration of Principles, *supra* note 103, annex II (preserving Israeli responsibility for "external security, and for internal security and public order of settlements and Israelis" following military withdrawal from the occupied territories).

131. 1995 Interim Agreement, *supra* note 103, art. XV § 1, annex I, arts. I § 7, II; *see also* Wye River, *supra* note 103, art. II; Sharm el-Sheikh, *supra* note 103, para. 8(a).

132. *See* Watson, *supra* note 7, at 22.

133. 1995 Interim Agreement, *supra* note 103, pmbl.

134. *See, e.g.*, Note for the Record, *supra* note 103, at 665-66; Wye River, *supra* note 103, pmbl.; Sharm el-Sheikh, *supra* note 103, para. 8.

135. *E.g.*, Wye River, *supra* note 103, pmbl.; Sharm el-Sheik, *supra* note 103, pmbl.

136. *See* Roadmap, *supra* note 104, at 2 (referring to "obligations" of parties). *See also* S.C. Res. 1515, *supra* note 105 (same in Security Council resolution adopting Roadmap).

137. *See* S.C. Res. 1515, *supra* note 105; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, paras. 108-16 (June 21).

been terminated by Israel or Palestine.[138] Indeed, Oslo obligations as to terrorism and status change have been reaffirmed since May 1999 in Sharm el-Sheikh and the Roadmap.[139] Israel and Palestine contended in ICJ proceedings that the Oslo agreements and Roadmap were binding,[140] and both have since treated the Oslo agreements and Roadmap as having ongoing validity.[141]

e. Judicial Neglect of Peace Process Agreements. One would think the courts would have carefully reviewed the peace agreements in determining the legality of the barrier. The peace process obligations directly address the reasons for the barrier, because the barrier (1) is a self-defense measure built to defend against terrorist violence barred by the agreements; and (2) changes the status of occupied territory, in violation of the agreements, because that is where much of the barrier is. All of this involves violations of obligations expressly accepted by Israel and Palestine in the peace agreements. In fact, the obligations violated by the barrier—those which require an end to violence and preservation of territory to allow meaningful permanent status negotiation—are the very purpose of the peace agreements.

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138. *See* Watson, *supra* note 7, at 23-24.

139. *Id*.

140. *See* Israeli Statement, *supra* note 13, at 20-34; Written Statement submitted by Palestine, Advisory Opinion, 2004 I.C.J. 131, 169-71 (Jan. 29, 2004), *available at* http://www.icj-cij.org/docket/files/131/1555.pdf [hereinafter Palestinian Statement].

141. On their websites, the Israeli Ministry of Foreign Affairs and the Palestinian Authority have included detailed explanations of the Oslo agreements in discussing their respective commitments to peace. The Israeli government continues to take the position that the peace agreements had force. *See* Israel Ministry of Foreign Affairs Webpage, http://www.mfa.gov.il/mfa (last visited Mar. 25, 2007). At the time this article was submitted for publication in October 2006, it was unclear whether the Palestinian Authority continued to consider the peace agreements binding. Authority President Mahmoud Abbas stated that the Authority accepted the agreements and intended to comply with them, while Hamas, which controlled the Authority legislature, had not accepted the agreements. Nidal al-Mughrabi, *Hamas Gives Vision for Governing to Abbas*, REUTERS, Mar. 10, 2006, *available at* http://www.boston.com/news/world/middleeast/articles/2006/03/10/hamas_gives_vision_for_governing_to_abbas; *see also President Abbas for International Conference on Palestinian-Israeli Conflict*, ARABIC NEWS.COM, Apr. 26, 2006, http://arabicnews.com/ansub/Daily/Day/060426/2006042611.html (Abbas stated that Palestine remains committed to Oslo agreements and Roadmap and that Hamas election is not an obstacle to negotiation from the agreements). The Quartet that sponsored the Roadmap called for Hamas to accept the peace agreements. *At UN Meeting, Quartet Hopes New Palestinian Government Leads to Renewed Engagement*, U.N. NEWS CTR., Sept. 20, 2006, http://www.un.org/apps/news/story.asp?NewsID=19927&Cr=Middle&Cr1=Quartet.

Despite this, the two courts scarcely mentioned Oslo and the Roadmap and completely neglected to apply the agreements' key substantive obligations to their analyses of the barrier.[142] The Israeli Court referred to "a political process" that began in 1993 but made no further reference to it.[143] The ICJ vaguely acknowledged that the Oslo agreements imposed "various obligations on each party," included "various other commitments," and discussed Oslo mutual recognition provisions, but went no further.[144] The ICJ's references to the Roadmap did not address substantive requirements.[145] Neither the Israeli Court in *Beit Sourik*, nor the ICJ in the *Advisory Opinion* examined, or even mentioned, the status preservation, anti-terrorism, or self-defense provisions in the Oslo agreements and the Roadmap.[146]

The ICJ neglect of Oslo and Roadmap obligations is particularly perplexing for two reasons. First, the agreements were central to ICJ submissions of the General Assembly, Israel, and Palestine. The General Assembly request referred to "agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process."[147] Israel's written statement included extensive discussion of Palestinian anti-terrorism obligations in the Oslo agreements and the Roadmap.[148] Palestine cited Israeli Oslo agreement obligations in arguing the barrier was an

142. Watson, *supra* note 7, at 22-24.

143. HCJ 2056/04, Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807 para. 1. It has been suggested that the Israeli Court's reluctance to apply Israel's international agreements to the barrier is understandable. Watson, *supra* note 7, at 24. However, the court has considered such agreements on security matters, relying in part on international treaties to which Israel is a signatory, in holding that certain state anti-terror interrogation methods are illegal. *See, e.g.*, HCJ 5100/94 Public Committee against Torture in Israel v. Israel [1999] IsrSC 53(4) 817, *reprinted in* 38 I.L.M. 1471 (1999). Moreover, in *Mara'abe*, the Israeli Court recognized that at least one Oslo instrument, the 1995 Interim Agreement, has "legal status" in the occupied territories. HCJ 7957/04 Mara'abe v. Prime Minister of Israel [2005] IsrSC 38(2) 393 para. 20.

144. Advisory Opinion, 2004 I.C.J. 131 paras. 77, 118 (July 9).

145. *Id*. paras. 22, 51-53, 162.

146. In *Mara'abe*, the Israeli Court cited approvingly a single Oslo provision—Article XII(1) of the 1995 Interim Agreement, which preserved Israel's right to protect its citizens and the settlements. *Mara'abe* [2005] IsrSC 38(2) 393, para. 20. However, the Israeli Court entirely ignored the Oslo Agreements' repeated prohibitions of status change in the occupied territories and the obvious implications of the status change prohibitions on the barrier and the larger settlement program. This highly selective application of Oslo, limited as it is to Israeli rights, while excluding analysis of provisions recognizing Palestinian rights and Israeli obligations, is hard to square with the Israeli Court's criticism of the ICJ for a one-sided review biased toward the Palestinian position. *See supra* notes 77-78 and accompanying text.

147. G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 10, 2003).

148. Israeli Statement, *supra* note 13, at i-ii, 20-33, 40-54.

illegal change in status that prejudiced the outcome of peace negotiations.[149] None of this was addressed in the *Opinion*.

There is a second and more substantive reason that judicial neglect of Oslo and the Roadmap is a significant failing. As will be demonstrated in the next section, the three relevant obligations from the peace agreements—preserving the status of occupied territories, stopping terrorist violence, and allowing self-defense—conform to international law principles independent of the agreements. Either court could have applied the peace agreements and demonstrated that complying with the agreements, following international law, and promoting peace all require *both* parties to do what they promised to do in the peace agreements, and that had the parties done so, the barrier would never have been built.

Next, this Article will show how Israel's obligation not to change the status of occupied territories under the agreements is substantially identical to what is required under international law. It will then describe how the barrier is part of a continuing Israeli violation of that obligation.

B. Israeli Breach of Status Preservation Obligations

1. Legal Sources of the Obligation. There are two sources for Israel's obligation not to change the status of the territories: (1) the peace process agreements; and (2) the law of belligerent occupation.

a. Prohibition of Status Change under the Agreements. From the beginning of the Oslo process in 1993, Israel agreed not to change the status of the West Bank.[150] Status preservation provisions prevent changes prior to the outcome of permanent status negotiations.[151] The 1993 Declaration of Principles and 1995 Interim Agreement confirmed that the West Bank's integrity and status will be preserved during the interim period before final negotiations.[152] In Wye River and Sharm el-Sheikh, the parties reaffirmed that "neither side shall initiate or take any step that will change the status of the West Bank"

149. Palestinian Statement, *supra* note 140, paras. 143, 151, 154, 156, 376-81.

150. 1993 Declaration of Principles, *supra* note 103, art. IV; 1995 Interim Agreement, *supra* note 103, art. XI § 1; Wye River, *supra* note 103, art. V; Sharm el-Sheikh, *supra* note 103, para. 10.

151. *See supra* notes 111-115 and accompanying text.

152. *See* 1993 Declaration of Principles, *supra* note 103, art. IV; 1995 Interim Agreement, *supra* note 103, art. XI § 1.

and recognized that this promoted "the need to create a positive environment for the negotiations."[153] The Roadmap continued Oslo territorial status obligations, requiring "implementation of prior agreements, to enhance the maximum territorial contiguity, including further action on settlements in conjunction with establishment of a Palestinian state with provisional borders."[154]

b. Status Change under the Law of Belligerent Occupation. Both the ICJ and the Israeli Court recognized that Israel holds the West Bank in belligerent occupation.[155] One of the principles of the law of belligerent occupation is that the occupying power must preserve the status of the occupied territory so as to eventually return the territory to a legitimate sovereign government.[156] The primary bodies of law governing belligerent occupation are Section III of the Hague Regulations (Articles 42-56) and the Fourth Geneva Convention (Article 4, § III, and Articles 47-78). This body of law imposes restrictions on the authority of an occupying power while allowing (sometimes requiring) an occupier to benefit the occupied population and permitting the occupying power to protect the security of its military.[157] The provisions of belligerent occupation law restrain and prohibit occupying powers from taking a series of specific acts which would transform territorial and property rights in occupied territory.[158]

The central limiting principle underlying the whole of belligerent occupation law is that an occupier's authority is temporary.[159] Since belligerent occupation is temporary, the law prevents an occupier from unilateral measures preempting the disposition of occupied

153. Wye River, *supra* note 103, art. V; Sharm El-Sheikh, *supra* note 103, para. 10.

154. Roadmap, *supra* note 104, at 7.

155. HCJ 2056/04, Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807 paras. 1, 23; Advisory Opinion, 2004 I.C.J. 131, paras. 73-78 (July 9).

156. *See infra* notes 160-66 and accompanying text.

157. Hague Regulations, *supra* note 36, art. 43.

158. *Id.* art. 46 (confiscation of private property); Fourth Geneva Convention, *supra* note 37, art. 47 (annexation, changes in government or institutions which violate Geneva protections), art. 49(6) (deportation or transfer of civilian population into occupied territory), art. 53 (destruction of property). *See also* Hague Regulations, *supra* note 36, art. 55 (requiring safeguard of certain state property).

159. INT'L COMM. OF THE RED CROSS, COMMENTARY: FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN A TIME OF WAR 275 (Jean S. Pictet ed., 1958) (stating that "the temporary nature of the occupier's authority is what distinguishes occupation from annexation").

territory when occupation ends.[160] Changes in the status of occupied territory are valid only when agreed to by the legitimate representative of the occupied population.[161] Recent U.N. Security Council resolutions acknowledge that occupation authority is temporary and limited by the ultimate political, economic and territorial rights of occupied populations.[162]

The constraints resulting from the transience of occupation authority and the rights of occupied populations have been recognized by the Israeli Court. The court observed that an occupier may not initiate far-reaching and long-term material changes in occupied territory, except for "the welfare of the local population"[163] and that lasting changes cannot be made to serve the occupier.[164] In *Beit Sourik*, the court noted that its prior decisions "emphasized time and time again that the authority of the [occupier] is inherently temporary, as belligerent occupation is inherently temporary," adding that the law of belligerent occupation leaves "no room" for lasting changes based on "political considerations, the annexation of territory, or the establishment of permanent borders of the state."[165] Generalized national security interests are insufficient reason for long term changes.[166]

Perhaps the strongest application of these Israeli judicial restrictions on occupation authority, and one that should prohibit any significant West Bank barrier incursion came in *Dweikat v. Government of Israel* ("*Elon Moreh*").[167] In *Elon Moreh*, the Israeli Court invalidated confiscation of Palestinian private property for a

160. Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 241, 252 (Emma Playfair ed., 1972).

161. *See id.* at 244-45.

162. S.C. Res. 1483, para. 4, U.N. Doc. S/RES/1483 (May 22, 2003); S.C. Res. 1511, para. 1, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1546, paras. 2-3, U.N. Doc. S/RES/1546 (June 8, 2004).

163. HCJ 351/80 Elec. Co. for Jerusalem Dist. v. Minister of Energy and Infrastructure [1980] IsrSC 35(2) 673, *summarized in English in* 11 ISR. Y.B. HUM. RTS. 354, 357; HCJ 393/82 Jam'iyat Ascan v. IDF Commander in Judea and Samaria [1982] IsrSC 37(3) 785, 795, *quoted in* HCJ 2056/04, Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807 para. 27.

164. *Beit Sourik* [2004] IsrSC 58(5) 807 para. 27 (quoting *Jam'iyat Ascan* [1982] IsrSC 37(3) 785, at 795).

165. *Id.*

166. *Id.*

167. HCJ 390/79 Dweikat v. Gov't of Israel (*Elon Moreh*) [1980] IsrSC 34(1) 1, *reprinted in* 19 I.L.M. 148 (1979) (unofficial Israeli Foreign Ministry translation) (subsequent citations to I.L.M. translation).

settlement that was permanent and built partly for political and religious motives.[168] The court held that it was impermissible to build settlements in the territories for political reasons, religious reasons, or even general security reasons.[169]

The Israeli Court categorically prohibited the government from intentionally creating lasting changes in the status of occupied territories for these reasons as "an insuperable obstacle" to legality "because the military government cannot create in its area facts for its military needs which are designed *ab initio* to exist even after the termination of military rule in that area, when the fate of the area after the termination of military rule is still not known."[170] This language from *Elon Moreh* must render illegal the creation of an integrated settlement infrastructure in occupied territory, consisting as it does of dozens of towns and roads all behind a fortified barrier that extends deeply into Palestine and runs the length of the territory. It is hard to imagine how taking years to build an impenetrable 720 kilometer barrier around 300,000 people who consider themselves "settlers" and live in places called "settlements" is temporary enough to pass the *Elon Moreh* test.

2. Israel's Breach of Territorial Status Preservation Obligations. The following six points show that the barrier violates status preservation obligations because it is part of an ongoing comprehensive settlement program that illegally preserves Israeli possession of large portions of contested occupied territory. Israel has accelerated that program since Oslo began.

First, there has been a large increase in Israeli settlers and settlements in the West Bank since the Oslo agreements took effect in 1993. Since the Oslo process began, the number of Israeli settlers in the occupied territories has grown by forty percent.[171] Israeli West Bank housing units increased by over fifty percent since the Oslo process began.[172] The displacement of tens of thousands of civilians into occupied territories violates international law,[173] and this

168. *Id.* at 169, 171, 177.

169. *Id.*

170. *Id.* at 177; *accord Elec. Co.* [1980] IsrSC, 11 ISR. Y.B. HUM. RTS. at 357.

171. Palestinian Statement, *supra* note 140, at 54; B'TSELEM, LAND GRAB: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK 8 (2002), *available at* http://www.btselem.org/Download/200205_Land_Grab_Eng.pdf (noting an increase from 247,000 to 375,000 settlers) [hereinafter B'tselem 2002 Report].

172. B'tselem 2002 Report, *supra* note 171, at 16-17.

173. Fourth Geneva Convention, *supra* note 37, art. 49(6).

displacement, along with the significant expansion of the number of settlements, is a change of status in violation of the peace agreements' obligation to preserve the territorial status in the West Bank.[174]

Second, the government is incentivizing illegal civilian displacement into settlements by investing in subsidization of settlements and settlers. Israeli settler incentives include loans, discounted land, subsidized mortgages, free education, compensation incentives, business grants, and tax reductions.[175] Israeli government funding of the settlements since 1967 has been estimated at $10 billion.[176] The barrier has cost $800 million and is projected to cost twice that to complete.[177] Building the barrier on its West Bank route instead of the Green Line doubles its cost.[178]

Third, Israeli law and administrative process sustains the settlement program. Laws maintained after the Oslo process began curbing Palestinian development to preserve occupied territory for Israeli settlements; other laws have been interpreted to permit confiscation of land for settlements.[179] In addition to making and interpreting laws to promote the settlement program, the Israeli government has broken its own laws to extend the program, expanding West Bank presence through illicit support of outposts that violate Israeli law.[180]

Fourth, Israel expanded its West Bank bypass road network since the Oslo process began in 1993. Because the roads link settlements to each other and Israel, and are largely inaccessible to

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174. *See supra* notes 111-15 and accompanying text (status preservation obligations in agreements); 171-72 and accompanying text (expansion of settlements and displacement of civilians).

175. B'tselem 2002 Report, *supra* note 171, at 73-84; *see also* Press Release, Peace Now, Barak Renews Hi-Priority Status for Settlements (Dec. 30, 2000).

176. SHLOMO SWIRSKI, THE PRICE OF OCCUPATION: THE COST OF THE OCCUPATION TO ISRAELI SOCIETY, Executive Summary 7-8 (2004), *available at* http://www.adva.org/UserFiles/File/PRICEofOCCUPATION_exe.pdf.

177. *Id.* at 11; *see also Rapporteur's Report*, *supra* note 3, para. 12.

178. SWIRSKI, *supra* note 176, at 11.

179. RAJA SHEHADEH, FROM OCCUPATION TO THE INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES 83-84 (1997), *quoted in* Palestinian Statement,
supra note 140, para 155; *see also* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine* 18, U.N. Doc. E/CN.4/2001/121 (Mar. 16, 2001); B'tselem 2002 Report, *supra* note 171, at 59.

180. Israel Ministry of Foreign Affairs, *Summary of the Opinion Concerning Unauthorized Outposts*, Mar. 10, 2005, *available at* http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Summary+of+Opinion+Concerning+Unauthorized+Outposts+-+Talya+Sason+Adv.htm.

Palestinians, they facilitate Israeli transportation while blocking Palestinian movement.[181] Forty percent of the four hundred kilometer West Bank road network was built after the Oslo process began.[182] The road network itself is a change in the status of the territories, and it assists and sustains the displacement of civilians into occupied territories in violation of Article 49(6) of the Fourth Geneva Convention.

Fifth, the barrier entrenches Israeli possession of East Jerusalem.[183] The barrier, along with practices and laws reserving property for Israelis while reducing property available for Palestinians and residency requirements excluding Palestinians, is squeezing Palestinians out of Jerusalem.[184] The barrier impedes Jerusalemite Palestinians from leaving the city and West Bank Palestinians from entering. It encircles over 200,000 Palestinians in East Jerusalem, isolating them from the West Bank and Palestinians there.[185]

Sixth, Israeli government statements demonstrate that the barrier is meant to promote lasting Israeli possession of the settled territories. Ariel Sharon, the Prime Minister who authorized the barrier and who was in office when the ICJ and Israeli Court issued their decisions, stated before the two court decisions that "it is clear that in the West Bank, there are areas which will be part of the State

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181. B'tselem, *Forbidden Roads—Israel's Discriminatory Road Regime in the West Bank* 5-6, 36, Aug. 2004, *available at* http://www.btselem.org/download/200408_Forbidden_Roads_Eng.pdf.

182. *See* Palestinian Statement, *supra* note 140, para. 151.

183. Israel placed East Jerusalem under Israeli law and considers it part of Israel rather than occupied territory subject to belligerent occupation law. Basic Law: Jerusalem, Capital of Israel, 5740-1980, 34 LSI 209 (1980) (Isr.). However, the argument that Jerusalem is not subject to the law against status change stands on shaky legal ground. The Security Council does not recognize Israeli sovereignty over East Jerusalem, instead considering it occupied. S.C. Res. 476 (June 30, 1980); S.C. Res. 478 (Aug. 20, 1980). Even if belligerent occupation law is inapplicable, Jerusalem is reserved for permanent status negotiations under Oslo agreements and the Roadmap, *supra* note 104, at 7, and therefore unilateral action by Israel to take portions of Jerusalem violate a central purpose of the peace agreements, which is to resolve territorial disputes through negotiation rather than by force. Moreover, the agreements contemplate Palestinian sovereignty in parts of Jerusalem, calling for Palestinian voting in Jerusalem and reopening of Palestinian institutions in Jerusalem. 1995 Interim Agreement, *supra* note 103, art. II(3); Roadmap, *supra* note 104, at 4.

184. B'tselem 2002 Report, *supra* note 171, at 62, 87-88, 102-04.

185. Danny Rubenstein, *Battle for the Capital*, HAARETZ (Isr.), Mar. 31, 2005; Amira Hess, *Separating J'lem*

from the 'West Bank', HAARETZ (Isr.), Jan. 26, 2005; The Association for Civil Rights in Israel (ACRI), Separation Barrier Route Violates International Law, http://www.acri.org.il/english-acri/engine/story.asp?id=210 (last visited Mar. 22, 2007).

of Israel, including major Israeli population centers, cities, towns and villages, security areas and other places of special interest to Israel."[186] After the decisions Prime Minister Sharon reaffirmed Israel's intent to retain large amounts of settled territory by stating the settlement of Ariel, deep in the West Bank, "will forever be part of the State of Israel" and that Ariel and other settlements will remain an "inseparable part of the State of Israel, technically contiguous with the State of Israel."[187]

Israeli government statements link the barrier to intent to keep the settlements.[188] The government stated in post-*Beit Sourik* court proceedings that the barrier is in the West Bank to protect settlements and bypass roads,[189] conceded that the reasons for the barrier include non-security related political considerations and the desire to keep land for Israeli industrial expansion, and maintained that the barrier is too difficult to move.[190] A government minister acknowledged a demographic motivation, stating that the barrier is intended to insure a Jewish majority in Jerusalem.[191]

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186. Israel Ministry of Foreign Affairs, *The Cabinet Resolution Regarding the Disengagement Plan*, June 6, 2004, *available at* http://www.israel-mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm.

187. Aluf Benn, *PM: Ariel Will Forever be an Integral Part of Israel*, HAARETZ (Isr.), July 22, 2005. Prime Minister Sharon delayed providing requested outlines of settlement boundaries in order to allow the settlements to expand to the point where they would be difficult to uproot. He admitted that he delayed "in the hope that by the time the discussion of the settlement blocs comes . . . these blocs will contain a very large number of settlements and residents." Shahor Ilan, *Sharon Against the Haters from Tel Aviv*, HAARETZ (Isr.), Aug. 25, 2005. The current Israeli Prime Minister, Ehud Olmert, stated that if negotiations are unsuccessful or impossible, Israel will retain settlements in the occupied territories that are part of "major Israeli population centers" in what he described as "part of the State of Israel as part of a final status agreement." Prime Minister Ehud Olmert, Statement Following Meeting with President Bush, May 24, 2006, http://www.pmo.gov.il/PMOEng/Communication/PMSpeaks/Speechusapress240506.htm. Regardless of the legality of this position, it does violence to the plain meaning of the word "agreement." Taking land is not part of a bilateral agreement if it is done unilaterally because an agreement cannot be reached.

188. Post-decision statements are pertinent to future cases rather than to critiques of the two decisions. However, the position of the Israeli government that Israeli possession of large portions of the settlements is intended to last indefinitely, and that the barrier is intended in part to preserve Israeli possession of settled territory, invite reconsideration of the decisions to the extent the decisions were based on Israeli representations, now abandoned, that the barrier was solely a temporary security measure and not a territorial boundary.

189. *See* B'TSELEM, BEHIND THE BARRIER: HUMAN RIGHTS VIOLATIONS AS A RESULT OF ISRAEL'S SEPARATION BARRIER 29 (2003), *available at* http://www.btselem.org/Download/200304_Behind_The_Barrier_Eng.pdf [hereinafter B'tselem Barrier Report].

190. *See supra* note 68 and accompanying text.

191. *Id.*

The Israeli expansion of its settlement program, including its preservation by the barrier, violates the prohibition of territorial status change under the peace agreements and international law. Under the agreements, Israel cannot change the status of the territories so as to prejudge negotiations on their disposition.[192] The law of belligerent occupation imposes similar restrictions.[193] Israeli Court interpretations of belligerent occupation law prohibit non-temporary measures taken for reasons unrelated to the interests of Palestinians and disallow lasting changes that benefit Israel.[194] These Israeli precedents prohibit changes for Israeli political, economic, or territorial advantage.[195]

The Israeli West Bank settlement program since 1993 thoroughly violates these principles. The settlement program and the barrier preserving it constitute a deliberately comprehensive physical, institutional, and demographic change in the status of the West Bank intended to create a political reality too difficult to reverse: lasting Israeli possession of contested territory—subject by agreement to negotiation—to the exclusion of Palestinian rights, interests, and people.[196] Under the peace agreements and the law of belligerent occupation, this is illegal.

3. Judicial Neglect of Status Preservation Obligations. Neither court considered the implications of status preservation obligations under the peace agreements and the law of belligerent occupation. In fact, both courts entirely ignored what the agreements require.

The Israeli Court referred to belligerent occupation law restrictions, but did not follow them to their logical conclusion—a holding that the barrier is impermissible because it is part of an ongoing lasting change in status that illegally perpetuates Israeli possession over contested territory. Instead, the court accepted without meaningful factual examination the government's representation that the barrier is a temporary security measure, rather than a lasting political means to the permanent political end of controlling territory.[197] In so doing, the Israeli Court ignored

192. *See supra* Parts III.A.2.a., III.B.1.a.

193. *See supra* Part III.B.1.b.

194. *See supra* notes 163-70 and accompanying text.

195. *See supra* notes 163-70 and accompanying text.

196. *See supra* notes 68, 171-91 and accompanying text.

197. HCJ 2056/04 Beit Sourik Village Council v. Israel [2004] IsrSC 58(5) 807 paras. 28-30. In view of the court's uncritical acceptance of governmental claims that the barrier is a

overwhelming factual evidence that the barrier is part of a settlement policy which violates its principles on occupation authority.[198] In this regard, *Beit Sourik* continues the Israeli Court's longstanding failure to rule on the legality of the Israeli settlement policy, a failure which rests the court's settlement rulings on what has been rightly called a "dubious assumption of legality."[199]

The ICJ also neglected to fully consider status preservation obligations, although it did consider some provisions from the law of belligerent occupation and found violation of several.[200] While this is preferable to the Israeli Court's complete failure to consider these principles, the ICJ analysis is nonetheless legally and factually incomplete. The precision and reasoning of the *Advisory Opinion* would have been significantly sharpened had the court properly

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temporary security measure, praise of *Beit Sourik* as a more intricate and rigorous analysis than the *Advisory Opinion* seems undeserved. *See, e.g.*, Watson, *supra* note 7, at 24-25; Shany, *supra* note 8, at 233. The court's detailed concern with Palestinian suffering is noteworthy. However, the Israeli Court did not pursue the same sort of careful factual examination of the barrier's impact on the status of the territories that should have followed from the court's stated restrictions on occupation authority. While perhaps the Israeli Court was more detailed in what it *did* analyze, the problem is what it did *not* analyze. As recognized by a commentator generally supportive of *Beit Sourik* as the better reasoned decision, *Beit Sourik* was not a "[c]omprehensive legal analysis" because it did not address the illegality of West Bank settlements and ignored that the barrier route was primarily dictated by the settlements. Shany, *supra* note 8, at 233, 243-44. The Israeli Court's *Mara'abe* decision replicates the superficiality of its *Beit Sourik* treatment of the purpose and duration of the barrier, again accepting without meaningful analysis the government's position that the barrier was solely intended for security and that it was temporary. In fact, at one point the court supported its conclusion that the barrier was "inherently temporary" by stating that orders to seize land from Palestinians for the barrier were "limited to a definite period of a few years." HCJ 7957/04 Mara'abe v. Prime Minister of Israel [2005] IsrSC 38(2) 393 para. 100. Government confiscation of a person's land and property for "a few years" and destruction of homes on such property to build a security barrier are not "inherently temporary" measures. A few years is a long time, recovering property taken by the government is difficult, and rebuilding a home on that property—even if it could be recovered from the Israeli government—is arduous. It would be enormously time consuming for a Palestinian whose land is confiscated to get the land back and undo the destruction of his or her home. Further, the Israeli Court's assumption that confiscation for a "a few years" is "inherently temporary" is strikingly blithe in view of the fact that the confiscation is at the hands of the same government which, prior to the confiscation of Palestinian property individually, has already occupied Palestinian territory generally for almost forty years.

198. It has been noted by at least one experienced observer of the Israeli Court that the Court has selectively applied occupation law. *See* KRETZMER, *supra* note 11, at 99 (observing that *Elon Moreh*, which bars creation of facts which effect lasting changes in occupied territories, has not been more broadly applied to block expropriation of land for settlements or roads).

199. *Id.*; *see also* Shany, *supra* note 8, at 244.

200. Advisory Opinion, 2004 I.C.J. 131 paras. 115-22, 132, 134; *id.* paras. 24-25 (separate opinion of Judge Higgins).

found that the barrier violates the agreements' specific prohibitions of status change in contested territories and connected this to the broad prohibition of status change that stands at the center of belligerent occupation law.

To be sure, such an analysis would have led the ICJ to the same conclusion on the barrier's illegality. However, an agreement-based change of status analysis improves the reasoning in several respects, one being that it avoids the speculation in the ICJ findings. The ICJ discussion of annexation and self-determination in its treatment of the barrier's illegality was based on the possibility that the barrier *might* lead to annexation and that this in turn *could* impede Palestinian self-determination.[201] Annexation requires some demonstration of formality or permanence; absent such evidence the ICJ slipped into a speculative discussion of whether the barrier "could well become permanent, in which case . . . it would be tantamount to *de facto* annexation."[202] It is significant that the court ruled that a barrier intended as a security measure against *actual* lethal attacks is illegal because of *potential* annexation.

The ICJ's decision that the barrier is illegal because it impedes Palestinian self-determination is also problematically speculative. The existence of the right is clear under international law,[203] but its geographic scope as to Palestine is less certain as it is subject to negotiation under the agreements. Moreover, one of the greatest obstacles to Palestinian self-determination is Palestinian terrorism. For those reasons, two ICJ judges were doubtful of a causal nexus between the barrier and frustration of self-determination.[204] These difficulties of proof, along with limited evidence, led the ICJ to a murky, unsatisfactorily explained conclusion that the barrier impedes self-determination based on potential annexation. The weakness of the ICJ analysis on this and other issues has been cited by both supporters and critics of the *Opinion* who have observed that its credibility is undermined by shallow reasoning.[205]

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201. *Id.* paras. 121-22.

202. *Id.*

203. *Id.* para. 88; U.N. Charter art. 1, para. 2; International Covenant on Civil and Political Rights art. 1.1, Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1.1, Jan. 3, 1976, 993 U.N.T.S. 3.

204. *Advisory Opinion*, 2004 I.C.J. 131, paras. 28-31 (separate opinion of Judge Higgins); *id.* paras. 6, 32 (separate opinion of Judge Kooijmans).

205. *Id.* paras. 28-31 (separate opinion of Judge Higgins) (questioning the court's self-determination analysis). For other criticisms of the court's reasoning see *id.* paras. 3-5, 7 (declaration of Judge Buergenthal); Watson, *supra* note 7, at 25; Iain Scobbie, *Words My*

A change-of-status analysis under the agreements and belligerent occupation law provides greater clarity and more comprehensive consideration of law and facts. The existence of an Israeli status preservation obligation is clear from the peace agreements, international law, and the principles established by the Israeli Court.[206] In the agreements, Israel accepts that the general prohibition of status change applies specifically to contested West Bank territory,[207] and in its decisions, the Israeli Court does as well.[208]

Breach of the status preservation obligation is more easily proven than annexation or impediment to self-determination. Proving status change does not require evidence of official formalities of annexation. Nor is there need for speculation on whether there might be a status change in the future because there have already been enormous lasting physical changes in the status of the settled territories.[209] This would be a factual, evidentiary examination, not guesswork on the future scope of Palestinian self-determination, the reasons that right has not been realized, or the possibility of annexation. To the extent the analysis requires assessment of whether the changes will last, this again is a matter of fact not speculation. The changes will be lasting because they have lasted, and that is because they were intended and designed to be lasting, as demonstrated by the sheer physical scope of the settlement infrastructure and government statements regarding its purpose.[210] A holding that the barrier and settlements violate Israeli legal obligations not to change the status of the territories would be based on legal commitments that cannot be contested and factual evidence that cannot be controverted.

This discussion leads to another advantage of an agreement-based change-of-status analysis—it allows (indeed requires) more comprehensive consideration of facts pertinent to the barrier. The ICJ, though it considered population transfer and property issues, did not fully consider the barrier as part of a multifaceted settlement

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Mother Never Taught Me: In Defence of the International Court, 99 AM. J. INT'L L. 76, 80 (2005); Kretzmer, *supra* note 12, 88-89, 101-02; Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ "Wall" Advisory Opinion*, 99 AM. J. INT'L L. 102, 103-04, 109, 114 (2005); *but see* Falk, *supra* note 28, at 42, 49-50 (praising the *Opinion*'s persuasiveness and clarity).

206. *See supra* Part III.B.1.

207. *See supra* notes 152-53 and accompanying text.

208. *See supra* notes 163-70 and accompanying text.

209. *See supra* Part III.B.2.

210. *See supra* note 68 and accompanying text.

policy. The relation of the barrier to bypass roads, to the legal and administrative framework for the settlements, to possession of Jerusalem, to financial incentives, and to evidence of government intention to perpetuate the settlements was largely unexamined.

Also neglected was the question of timing. Specifically, there was no factual consideration of the fact that, after the Oslo process began in 1993, Israel expanded and perpetuated of the settlement program at the same time as it entered agreements that repeatedly and clearly required exactly the opposite—Israel agreed to leave the status of the occupied territories unchanged to permit negotiations as to their ultimate disposition, yet simultaneously made enormous physical and institutional changes in the territories which effectively predetermine the outcome of virtually all of the territorial issues which are reserved for final status talks. The status preservation provisions in the agreements are an independent source of Israeli legal obligation. The ICJ, by ignoring them, failed to cite a critical Israeli violation of law that is directly relevant to the barrier and also undermines the prospects of peaceful resolution of the entire Israeli/Palestinian conflict.

Failure to consider the relevant legal principles and engage in a full factual examination led both courts to give unwarranted credence to Israeli claims that the barrier is a temporary security measure, when the facts overwhelmingly demonstrate that it is part of a politically motivated settlement program that is meant to last. A proper analysis would have dispensed with the fiction that the settlements and the barrier are temporary. Such a finding is also a critical component in properly defining Israel's right to self-defense, as will be explained *infra* in Section D.

C. Palestinian Breach of Anti-Terrorism Obligations

Oslo and the Roadmap do not pave a one-way street to peace. Full review of the barrier requires examination of Palestinian noncompliance with anti-terrorism obligations. As was the case with Israeli territorial status preservation requirements, Palestine has breached the duty to end terrorism that it accepted in the agreements and that mirrors well-established international law.

1. Legal Sources of Palestinian Anti-Terrorism Obligations

a. Anti-Terrorism Obligations in the Agreements. In the Oslo agreements and the Roadmap, Palestine accepted comprehensive counterterrorism responsibilities that effectively require it to end all

terrorism against Israelis emanating from Palestinian sources.[211] The Palestinian government agreed not to use terror,[212] to prevent and respond to terrorism, to eliminate terror cells, and to stop financial and logistical support of terrorists.[213] The Palestinian Authority committed to law enforcement anti-terrorism measures, including arrest and prosecution of suspects and seizure of illegal weapons.[214] Palestine recognized that anti-terror protection extended to all Israeli civilians everywhere, including residents of the West Bank.[215] Palestine's anti-terror obligations include the prohibition of incitement to, or encouragement of, terror.[216]

b. Anti-Terrorism Obligations Under International Law. Terrorism violates the core principle of international humanitarian law—protection of civilians against violence. Geneva Convention Common Article 3 requires humane treatment of civilians and prohibits "violence to life," murder, and cruel treatment.[217] Common Article 3 applies to Israeli settlers because it protects civilians "at any time and in any place."[218]

Article 51(2) of Protocol I to the Geneva Conventions directly prohibits attacks and terror against civilians: "The civilian population as such, as well as individual civilians, shall not be the subject of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[219]

The ICJ described protection of civilians as an "intransgressible" rule of customary international law.[220]

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211. *See supra* notes 117-28 and accompanying text.

212. *See supra* notes 117 and accompanying text.

213. *See supra* notes 118, 120, 125, 128 and accompanying text.

214. *See supra* notes 120, 122-24 and accompanying text.

215. *See supra* notes 118-19, 125-26 and accompanying text.

216. *See supra* note 127 and accompanying text.

217. Fourth Geneva Convention, *supra* note 37, art. 3.

218. *Id.*

219. Protocol Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflicts art. 51(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; *see also id.* art. 52(1) ("[C]ivilian objects shall not be the object of attacks or reprisals."). Article 48 requires distinction between civilians and combatants. *Id.* art. 48. The principles of distinction and protection of civilians in Articles 48, 51, and 52 of Protocol I reflect customary international law. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 8, 25 (2005).

220. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) [hereinafter Nuclear Weapons].

These laws apply to Palestine. Common Article 3 applies to non-state actors and covers the Palestinian Authority and Palestinian terrorist organizations.[221] Similarly, the protection of civilians required by Protocol I apply to non-state parties in all armed conflicts. The provisions protect civilians regardless of the nature or origins of the conflict or the causes espoused by the parties, and expressly apply to those fighting against occupation or for self-determination.[222] Palestine agreed to adhere to the Geneva Conventions and Protocols in 1989.[223] Palestine reaffirmed this commitment in agreeing to follow "internationally-accepted norms and principles of human rights and the rule of law" in the 1995 Interim Agreement.[224]

Security Council resolutions reinforce Palestine's anti-terrorism duties. Resolution 1373 requires anti-terrorism measures similar to those in the agreements.[225] Subsequent resolutions confirm that resolution 1373 applies to non-state actors[226] and that civilians are protected regardless of location.[227]

Resolutions 1456 and 1566 make clear that the duty to prevent terrorism applies without exception for transnational status or motivation:

> [T]errorism in all its forms and manifestations constitutes one of the most serious threats to peace and security;
>
> [A]ny acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned,
>
> . . . .
>
> All states must take urgent action to prevent and suppress all active and passive support to terrorism . . . .[228]

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221. *See* Fourth Geneva Convention, *supra* note 37, art. 3; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U. S.), 1986 I.C.J. 14, 114 (June 27) [hereinafter Nicaragua].

222. Protocol I, *supra* note 218, art. 1(4).

223. Letter from Permanent Mission of Palestine to U.N. Office (June 21, 1989), *quoted in* DOCUMENTS ON THE LAWS OF WAR 362 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

224. 1995 Interim Agreement, *supra* note 103, art. XIX.

225. *See* S.C. Res. 1373, *supra* note 41, ¶¶ 1-3.

226. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (including non-state actors among those to whom resolution 1373 applies).

227. S.C. Res. 1566, ¶ 2, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (calling for counterterrorism cooperation with "states where or against whose citizens terrorist acts are committed").

228. S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1566, *supra* note 227 (restating the first two of the three quoted passages).

This language rules out argument that terrorism for certain purposes, or within certain geographic boundaries, escapes legal prohibition.

2. Palestinian Failure to Meet Anti-Terrorism Obligations. Just as Israel breached its obligation to preserve the status of the occupied territories, Palestine violated its duty to end terrorism during the period leading to the building of the barrier. There was a dramatic increase in Palestinian terrorist attacks against Israeli civilians from September 2000 through April 2002.[229] One human rights organization reported that during this time "armed Palestinian groups mounted the deadliest series of attacks against Israeli civilians in decades."[230] From September 2000-2002, more than 415 Israelis were killed and over two thousand were injured by Palestinian terrorists.[231] In March 2002, immediately before Israel approved the barrier, 37 terrorist attacks killed 135 Israeli civilians and injured 721.[232] The intensified campaign of Palestinian terrorism continued through the courts' consideration of the barrier's legality, as terrorists killed over nine hundred civilians and injured over five thousand from September 2000 through January 2004.[233] Four Palestinian groups—al Aqsa, Hamas, Islamic Jihad, and the Popular Front for the Liberation of Palestine—claimed responsibility for the attacks.[234]

The attacks constitute Palestinian non-compliance with anti-terrorism obligations, regardless of Palestinian Authority complicity, because Palestine was required to prevent terrorist attacks and agreed to their immediate and unconditional halt.[235] The frequency and consequences of the attacks demonstrate that the Authority was unable or unwilling to meet these obligations.[236]

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229. HUMAN RIGHTS WATCH, WORLD REPORT 2003, at 459 (2003), *available at* http://hrw.org/wr2k3/ [hereinafter HRW WORLD REPORT]; U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2002, at 56 (2003), *available at* http://www.state.gov/s/ct/rls/crt/2002/ [hereinafter STATE DEPARTMENT 2002]; *see* Israeli Statement, *supra* note 13, at 41.

230. HRW WORLD REPORT, *supra* note 229, at 465.

231. HUMAN RIGHTS WATCH, ERASED IN A MOMENT: SUICIDE BOMBING ATTACKS AGAINST
ISRAELI CITIZENS 1 (2002), *available at* http://www.hrw.org/reports/2002/isrl-pa/ [hereinafter HRW TERRORISM REPORT].

232. Israeli Statement, *supra* note 13, at 45.

233. *Id.* at i.

234. STATE DEPARTMENT 2002, *supra* note 229, at 56; HRW TERRORISM REPORT, *supra* note 231, at 1-2; HRW WORLD REPORT, *supra* note 229, at 465.

235. *See supra* notes 118, 120-21, 124-25 and accompanying text.

236. *See supra* notes 229-34 and accompanying text.

The evidence goes beyond Authority incapacity to prevent terrorism. The Authority, with approval of its president, paid al-Aqsa members, including those planning attacks.[237] This violates Palestinian duties to stop financial and logistical support for terrorist groups.

Palestinian Authority anti-terrorism efforts were minimal and ineffective from 2002-2004, the critical period during which Israel decided to build the barrier.[238] Human Rights Watch criticized the Authority's failure to move decisively against terrorism[239] and attributed responsibility for attacks to the Authority because of its deliberate, politically motivated, lax anti-terror action: "there are important steps . . . the [Palestinian Authority] could and should have taken to prevent or deter suicide bombings directed against civilians. The failure to take those steps implies a high degree of responsibility for what occurred."[240]

Palestine "routinely failed to investigate, arrest, and prosecute" those involved in terrorism (including Authority personnel) and released suspects without investigation.[241] While it has been observed that Israeli military action "degraded" Palestinian law enforcement capabilities,[242] Palestine failed to take effective action to prevent terrorism when its security capacity was intact.[243] Further, the Authority not only failed to seize illegal weapons that could be used by terrorists, as it agreed to do, but was actually caught importing illegal weapons in January 2002.[244] The Palestinian Authority also failed to prevent incitement. Through 2002, Authority and Fatah officials praised, promoted, and justified attacks, as did Authority-run media, without effective response.[245]

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237. STATE DEPARTMENT 2002, *supra* note 229, at 56; HRW TERRORISM REPORT, *supra* note 231, at 2-3, 125-26, 132.

238. STATE DEPARTMENT 2002, *supra* note 229, at 56; U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003 62 (2004), *available at* http://www.state.gov/documents/organization/31912.pdf; HRW TERRORISM REPORT, *supra* note 231, at 3.

239. HRW WORLD REPORT, *supra* note 229, at 465-66; HRW TERRORISM REPORT, *supra* note 231, at 2-3.

240. HRW TERRORISM REPORT, *supra* note 231, at 3; *see also id.* at 109 (political motivation for Authority inaction).

241. *Id.* at 3.

242. STATE DEPARTMENT 2002, *supra* note 229, at 56.

243. HRW TERRORISM REPORT, *supra* note 231, at 3 n.239.

244. STATE DEPARTMENT 2002, *supra* note 229, at 56.

245. *Id.*

The Palestinian Authority was cited by an independent human rights group with treating prevention of terrorism as "negotiable and contingent" rather than "the unconditional obligation that it was."[246] Human Rights Watch charged the Authority with creating a "culture of impunity" and considered the Authority politically responsible for terrorism.[247] Another humanitarian organization described "[g]rowing Palestinian [l]awlessness" and reported that the Authority "failed to defend civilians and to stop the violent actions of the extremist groups."[248] Palestinian failure to stop terrorism is as deliberate and comprehensive a violation of peace agreements and international law as the Israeli settlement policy and is obviously and tragically a cause for the barrier and continued conflict.

3. Judicial Neglect of Palestinian Anti-Terrorism Obligations. As one experienced Middle East negotiator observed, "in the absence of terror, there would be no need for a security barrier."[249] However, neither court analyzed the Palestinian duty to stop terrorism. Instead, both courts made passing reference to terrorism en route to dramatically different conclusions on Israeli defense rights.

As to *Beit Sourik*, this is less troublesome. Had the Israeli Court reached the result argued for here—that any West Bank barrier route is illegal—holdings on Palestinian obligation would be necessary for a legally complete, politically viable decision in which the barrier's illegality would be part of a ruling requiring reciprocal compliance with peace agreements. However, since *Beit Sourik* authorizes barrier routes in occupied Palestine, it is probably best that it did not include a potentially provocative examination of the Authority's legal responsibility for Palestinian terrorism. Israeli judicial approval of an Israeli barrier in the West Bank, coupled with a ruling that Palestinian terrorism violated peace agreements and international law, would have made for imbalanced law and volatile politics.

ICJ neglect of Palestinian anti-terrorism obligations is a different matter. Coupled with the court's dismissal of Israeli self-defense rights, this led to a gravely flawed legal analysis with serious political

246. HRW TERRORISM REPORT, *supra* note 231, at 3.

247. HRW WORLD REPORT, *supra* note 229, at 465.

248. OXFAM INTERNATIONAL BRIEFING PAPER, PROTECTING CIVILIANS: A CORNERSTONE OF MIDDLE EAST PEACE 2, 6 (May 2004), *available at* http://www.oxfam.org.uk/what_we_do/issues/conflict_disasters/bp62_prot_civil.htm [hereinafter OXFAM REPORT].

249. *See* Ruth Wedgewood, *The Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT'L L. 54 n.13 (2005).

consequences. The ICJ ignored the fact that terrorism is a cause for the barrier and ignored the law that terrorism is a breach of Palestinian legal obligation. As a result, the *Advisory Opinion* was a one-sided assessment of Israeli responsibility criticized by one ICJ judge as premised on a "huge imbalance."[250]

Again, neglect of the issue is perplexing because evidence and argument on terrorism were presented to the ICJ. Israel urged the ICJ to look beyond the General Assembly's request for an opinion, which made no mention of terrorism, to wider issues relevant to the barrier and stated it was "inconceivable" to ignore the implications of terrorism.[251] Though it declined to contest the merits, Israel presented the ICJ with detailed examination of Palestinian anti-terrorism obligations, and their breach.[252]

Moreover, the issue was surely considered in pre-decision deliberations. Four judges criticized the court's slight factual examination of terrorism and neglect of its legal implications,[253] including Judge Higgins, who critiqued the court's one-sided view of legal obligation: "[The barrier dispute] cannot be regarded as one in which one party alone [is] the legal wrongdoer; where it is for it alone to act to restore a situation of legality; and where from the perspective of legal obligation there is nothing remaining for the other "party" to do."[254] She criticized the court for not applying humanitarian law protecting civilians to Palestine:

> [T]he Court should also have taken the opportunity to say, in the clearest terms, what regrettably today apparently needs constant reaffirmation even among international lawyers, namely, that the protection of civilians remains an intransgressible obligation of humanitarian law, not only for the occupier but *equally for those seeking to liberate themselves from occupation*.[255]

Commentators have also criticized the *Advisory Opinion* for an imbalanced assessment of fact and legal obligation which neglects Palestinian responsibility for terrorism.[256]

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250. Advisory Opinion, 2004 I.C.J. 131 para. 18 (July 9) (separate opinion of Judge Higgins).

251. Israeli Statement, *supra* note 13, at 50.

252. *Id.* at i-ii, 20-33, 40-54.

253. *Advisory Opinion*, 2004 I.C.J. 131 para. 3 (declaration of Judge Buergenthal); *id.* paras. 5, 13 (separate opinion of Judge Kooijmans); *id.* paras. 22-23, 25-27, 30-31 (separate opinion of Judge Owada); *id.* paras. 3, 15-16, 18, 31 (separate opinion of Judge Higgins).

254. *Id.* para. 3 (separate opinion of Judge Higgins).

255. *Id.* para. 19 (separate opinion of Judge Higgins) (emphasis added).

256. *See* Wedgewood, *supra* note 249, at 52, 59, 61; Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An* Ipse Dixit *from the ICJ?*, 99 AM. J. INT'L L. 62, 71 (2005).

On the ICJ, Judges Kooijmans, Owada, and Higgins expressed concern with the political consequences of the *Opinion*'s slant and would have preferred a more balanced analysis.[257] Judges Owada and Higgins called for consideration of peace agreements, with Judge Owada observing that the "twin principles" of peace—Israeli military withdrawal from the territories and an end to belligerency—imposed obligations on both sides.[258] Judge Higgins thought that rulings on bilateral obligations should have been part of the *dispositif*, to inform "both parties not only of their substantive obligations under international law, but also of the procedural obligation to move forward simultaneously."[259]

The judges' admonitions were predictive. The imbalanced ICJ *Opinion* tipped politics away from enforcement of Palestinian responsibility. Palestinian and international reaction reflects the *Opinion*'s incorrect perspective that the law is on the Palestinian side, with resulting political pressure falling only upon Israel.[260] Also, as demonstrated by Israeli government statements and the *Mara'abe* decision, ICJ neglect of terrorism and dismissal of Israeli security gave the Israeli government a rationale for disregarding the *Advisory Opinion*.[261]

The legal and political benefits of considering Palestinian obligations in the peace agreements mirror those of considering Israeli obligations. Decisions neglecting Palestinian obligations are legally and factually incomplete because they ignore that illegal Palestinian terrorism is a reason for the barrier. An agreement-based analysis requiring Palestinian compliance with anti-terror duties would properly lay legal responsibility for the barrier (and for complying with agreements to end the larger conflict) on both sides of the barrier.

An agreement-based ruling would also more accurately recognize and appropriate third-party responsibilities for illegalities that led to the barrier. The ICJ issued a one-way holding on this issue, admonishing third-party states not to support or contribute to

257. *Advisory Opinion*, 2004 I.C.J. 131 para. 13 (separate opinion of Judge Kooijmans); *id.* paras. 3, 17-19 (separate opinion of Judge Higgins); *id.* paras. 28, 31 (separate opinion of Judge Owada).

258. *Id.* paras. 28, 31 (separate opinion of Judge Owada).

259. *Id.* para. 18 (separate opinion of Judge Higgins).

260. *See supra* notes 49, 53-56 and accompanying text.

261. *See* Israel Ministry of Defense, *supra* note 60; HCJ 7957/04 Mara'abe v. Prime Minister of Israel [2005] IsrSC 38(2) 393 paras. 59-74.

Israeli construction of the barrier (and by strong implication not to aid the larger settlement project of which the barrier is part).[262] Here again, the agreements impose more even-handed bilateral restrictions that are more politically realistic than the ICJ's, because they extend third-party responsibility to prohibit support of Palestinian terrorism. Specifically, the Roadmap demands an end to outside funding and support of terrorism and reflects similar requirements under existing international agreements.[263] Accordingly, a proper barrier decision would require that third parties not support Palestinian terrorism because such terrorism—along with outside support for it—is one cause for the barrier. Prohibiting third party support for the Israeli barrier *and* the Palestinian terror that led to it would reach all causes for the barrier because it would place political pressure from the decision on Israel, Palestine, and third-party supporters of both to stop conduct which has perpetuated the conflict, violated the peace agreements, and resulted in the barrier.

Attention to anti-terror duties would also have the benefit of confronting Palestine with the political reality that achieving and maintaining statehood requires ending terrorism. It is unimaginable that terrorism, and the distinctions relied on by the Authority to disclaim responsibility for violence, would be tolerated if carried out by an independent state. In fact, post-independence terrorism would provide opponents of Palestinian statehood with the strongest possible argument to curb or end Palestinian independence.[264]

Finally, appropriate consideration of illegal terrorism as a reason for the barrier is part of a proper analysis of Israel's right to self-defense. The Article will address that issue next.

D. The Israeli Right to Self-Defense

Each court erred on Israeli defense rights: the ICJ in dismissing them and the Israeli Court in extending them too far. International law and the agreements point to a more sensible conclusion—

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262. *See AdvisoryOpinon*, 2004 I.C.J. 131 paras. 139, 149, 151-53, 159, 162. The ICJ, in warning third parties against aiding the "situation" resulting from the barrier suggests a ban on third-party support of Israeli activities that extends well beyond prohibiting assistance to construction of the barrier.

263. *See* Roadmap, *supra* note 104, at 4; S.C. Res. 1373, *supra* note 41; Nicaragua, 1986 I.C.J. 14 at 114-15 (June 27) (state duty not to support or encourage violations of Common Article 3).

264. The Authority's self-distancing from responsibility for terrorist groups collides with reality for another reason. Now that Hamas has won control of the legislature and is part of the Palestinian Authority government, terrorism participated in, encouraged, or permitted by Hamas is directly attributable to the Authority.

recognition of an Israeli self-defense right, properly confined by the principle of proportionality, that does not perpetuate or exacerbate the illegal settlement program.

1. Self-Defense in the Decisions. The ICJ dispensed with Israeli self-defense in six sentences. The court provided two reasons for its holding.[265] First, after quoting Article 51 of the U.N. Charter, which does *not* limit the right of self-defense to state attacks,[266] the court concluded that Article 51 *does* limit self-defense to state attacks and wrongly added that "Israel does not claim that the attacks against it are imputable to a foreign State."[267] Second, the court held that the Security Council counterterrorism resolutions could not be invoked by Israel because the attacks come from within occupied territory under Israeli control.[268] This would wrongly disallow Israeli defense against non-state terrorism and attacks from occupied territory.

While *Beit Sourik* did not reference self-defense under international law, the Israeli Court applied self-defense limiting principles in examining whether the barrier was proportional.[269] However, the court's failure to consider implications of the illegality of the settlement program and its truncated segment-by-segment analysis of the barrier led to a flawed proportionality holding that wrongly allows a barrier preserving Israeli possession of contested territory.[270]

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265. *Advisory Opinion,* 2004 I.C.J. 131 para. 139.

266. Article 51 reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The plain language of Article 51 does not limit the right of self-defense to armed attacks by states. U.N. Charter art. 51.

267. *Advisory Opinion*, 2004 I.C.J. 131 para. 139. On the contrary, in its submission to the ICJ, Israel attributed terrorist complicity to Syria, Lebanon, and Iran. Israeli Statement, *supra* note 13, at 44. Non-governmental organizations have reached similar conclusions. HRW TERRORISM REPORT, *supra* note 231, at 99-100.

268. *Advisory Opinion*, 2004 I.C.J. 131 para. 139.

269. HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807 paras. 34-85.

270. *See infra* notes 309-15 and accompanying text.

2. A Proper Self-Defense Analysis and the Agreements

a. Israel's Right to Self-Defense

i. Self-Defense Under International Law. Although the peace agreements recognize and help define Israel's right to self-defense, its source is the inherent right of self-defense recognized in the U.N. Charter. The text of Article 51 of the Charter does not confine self-defense to attacks from states, and thus permits response to non-state terrorism.[271] Further, the inherent right adopted in the Charter preserves customary international law, which allows self-defense against non-state attacks.[272]

U.N. Security Council resolutions confirm this reading of the law. Resolutions 1368 and 1373 recognize the right to self-defense in response to non-state terrorist attacks.[273] Resolution 1540 expressly states that "non-state actors" are among "those to whom resolution 1373 applies."[274] The ICJ incorrectly dismissed Israel's right to defend against non-state attacks, as Article 51, U.N. Security Council resolutions, and customary international law all permit self-defense against armed attack from non-state entities.

The ICJ's rejection of self-defense against terrorist attacks from occupied or controlled territories is also contrary to international law.[275] There is no language in Article 51 or UN Security Council resolutions establishing this exclusion. To the contrary, the resolutions call for comprehensive counterterrorism measures to "prevent and suppress . . . any acts of terrorism" without exception.[276]

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271. *Supra* note 266 and accompanying text; *Advisory Opinion*, 2004 I.C.J. 131 para. 33 (separate opinion of Judge Higgins); *id.* para. 6 (declaration of Judge Buergenthal); Murphy, *supra* note 256, at 64; Wedgewood, *supra* note 249, at 58-59.

272. Murphy, *supra* note 256, at 64-65. A seminal expression of the right of self-defense came in the 1837 *Caroline* incident. *Caroline* concerned use of force in response to attacks from non-state entities, specifically the United Kingdom's defense against U.S. nationals who were supporting a rebellion against the United Kingdom's government in Canada. While the dispute concerned the legitimacy of anticipatory defense measures, the right of self-defense in response to non-state attacks was not contested. *Id.*; s*ee also* Christopher Greenwood, *War, Terrorism and International Law*, CURRENT LEGAL PROBS. 505, 517 (2003).

273. *Advisory Opinion*, 2004 I.C.J. 131 para. 6 (declaration of Judge Buergenthal).

274. S.C. Res. 1540, pmbl., U.N. Doc. S/RES/1540 (Apr. 28, 2004).

275. *Advisory Opinion*, 2004 I.C.J. 131 para. 6 (declaration of Judge Buergenthal); *id.* para. 34 (separate opinion of Judge Higgins); *see also* Wedgewood, *supra* note 249, at 58-59; Murphy, *supra* note 256, at 68. The ICJ did not support its conclusion with legal authority or explain why geopolitical status considerations eliminate the right of self-defense. Watson, *supra* note 7, at 24; Murphy, *supra* note 256, at 68.

276. S.C. Res. 1373, *supra* note 41, ¶¶ 1-2; S.C. Res. 1368, *supra* note 41, ¶ 4.

Subsequent U.N. anti-terror resolutions confirm that there are no geopolitical status exclusions from the right to defend against terrorism as the resolutions instead call for prevention of all terrorism.[277] Resolution 1456 states that "any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed" and calls for "the maximum extent possible" of "prevention ... of acts of terrorism, wherever they occur."[278] Resolution 1566 reaffirms "the imperative to combat terrorism in all its forms and manifestations by all means."[279] Prevention of all terrorism by all means, wherever and whenever it may occur, by whomever it may be committed, and for whatever motivation, must include a right to self-defense against terrorism regardless of the political status or geographic location of its source. The ICJ was wrong in excluding attacks by non-state actors emanating from territories under Israel's control from Israel's right of self-defense. By the same rationale, the United States would have had no right to self-defense to prevent the September 11 attacks because they were non-state actors striking from territory under U.S. control. The absurdity of this result demonstrates that the ICJ self-defense ruling cannot be right.

A more narrowly limited objection to Israeli self-defense against terrorism is the argument that Israel cannot defend settlers because the settlements are illegal. This position, while not express in the ICJ self-defense ruling, conforms to it[280] and is accepted by commentators supportive of the ruling.[281] The primary argument made for it is that Israel should not obtain legal benefits from its own illegal acts.[282]

There are several fatal flaws in this argument. One is that violations of law do not necessarily extinguish *jus ad bello* self-

277. S.C. Res. 1566, *supra* note 227, pmbl., ¶¶ 1-2; S.C. Res. 1540, *supra* note 226, pmbl.; S.C. Res. 1456, *supra* note 228, pmbl., ¶ 1.

278. S.C. Res. 1456, *supra* note 228, pmbl.

279. S.C. Res. 1566, *supra* note 227, pmbl. The Security Council's broad authorization of anti-terror measures is marked by imprecise draftsmanship. As "means" to combat terrorism must themselves comply with international law, "all means" to combat terrorism are not necessarily permissible.

280. Kretzmer, *supra* note 12, at 93. Ironically, the lone ICJ judge who expressly took the position that the illegality of the settlements prevents them from being defended was the dissenting Judge Buergenthal, who voted in Israel's favor on all substantive issues. Nonetheless he stated that a barrier protecting settlements was "*ipso facto* in violation of international humanitarian law" due to the settlements' illegality. *Advisory Opinion*, 2004 I.C.J. 131 para. 9 (declaration of Judge Buergenthal).

281. Scobbie, *supra* note 205, at 84; Imseis, *supra* note 205, at 112.

282. Scobbie, *supra* note 205, at 84; Imseis, *supra* note 205, at 112.

defense rights.[283] The right of self-defense exists throughout a conflict or occupation and is triggered when an armed attack takes place; the right is contingent on the nature of the attack and not the legal status of those attacked or the legality of acts precedent to the attack.[284] It is legally incorrect to view self-defense of settlers as a legal benefit created by Israeli illegality.[285] Rather, it is an inherent right triggered by Palestinian attack. The illegality of the settlements does not uniformly render all defense measures to protect settlers illegal.[286]

A practical problem with the "no defense of settlers" argument is that it literally leaves civilians defenseless. Denying several hundred thousand civilian settlers defense against an array of terrorist groups responsible for hundreds of attacks which have killed and wounded thousands is utterly irreconcilable with the protection of civilians as a principle of international law.[287] No state will comply with notions of self-defense that leave large numbers of civilians vulnerable to lethal attack,[288] which is the most compelling reason why the various rejections of Israeli defense rights are not sustainable. To be sure, what can be done to defend settlers is qualified by the obligation to limit the exacerbation of illegality of the settlements. However, this is not an argument that there is *no* right to defend settlers, but rather that there is a *limited* right. Recognition of Israel's right to take carefully tailored proportional protective measures is a sensible application of self-defense principles.

ii. Self-Defense Under the Agreements. The peace agreements recognize Israeli self-defense rights. The 1995 Interim Agreement preserves Israeli responsibility for "overall security of Israelis and Settlements" and affords Israel "all the powers to take the steps

283. Shany, *supra* note 8, at 243-44.

284. *See* Christopher Greenwood, *The Relationship Between* Ius ad Bellum *and* Ius in Bello, 9 REV. INT'L STUD. 221, 223, 233 (1983). While the legality of precedent acts does not eliminate the right of self-defense, it is a factor in determining the proportionality of self-defense measures. *See* Kretzmer, *supra* note 12, at 94.

285. The opposite is more accurate—denying Israel self-defense rights provides Palestinians with legal benefit from illegal acts. The *Opinion* self-defense ruling wrongly protects use of terrorism as a means of political contestation by preventing defense against it. *See* Wedgewood, *supra* note 249, at 59. Creating a class of Israeli civilians who are defenseless surely promotes violence to achieve political objectives reserved by legal obligation for negotiation.

286. Kretzmer, *supra* note 12 at 93 n.41.

287. *Id.* at 93; HRW TERRORISM REPORT, *supra* note 231, at 5; OXFAM REPORT, *supra* note 248, at 7.

288. *See* Murphy, *supra* note 256, at 66.

necessary to meet this responsibility."[289] In the Oslo agreements and the Roadmap, Israel and Palestine recognized that each was authorized to take all steps to prevent and respond to terrorism.[290] Like Article 51 of the U.N. Charter and the Security Council anti-terror resolutions, the agreements establish a right to defend against terrorism that does not exclude non-state attacks or attacks from occupied territory.[291] In fact, protection against non-state terrorist attacks from occupied territory is the exact purpose of Israeli defense rights and protections in the agreements, because they are intended to allow Israel to defend itself against attacks from Palestine. The peace process obligations unmistakably demonstrate Israeli-Palestinian agreement that Israel's right to self-defense includes protection against Palestinian terrorist attacks.[292]

The existence of an Israeli self-defense right is further supported by the identity between the agreements and U.N. Security Council anti-terror resolutions. The agreements and resolutions authorize all means necessary to prevent and respond to all terrorist activity. There are no exclusions in the agreements or the resolutions for non-state terrorism or terrorism from occupied territory. Further, the agreements and the resolutions authorize the same broad range of counterterrorism measures: prevention, law enforcement, arrest, prosecution, disruption of financing, and cessation of incitement.[293]

The agreements also recognize Israel's right to defend settlers. The 1995 Interim Agreement expressly preserved Israeli responsibility for security of the settlements.[294] The agreements' protection of all Israelis everywhere and all West Bank residents includes settlers. Moreover, because disposition of settlements is reserved for final negotiations, Israel should have a right to protect civilians in the settlements until their status is resolved.[295] The agreements' protection of settlers supports a humanitarian interpretation of self-defense that does not leave civilians in occupied territory vulnerable to attack. The peace accords leave no doubt that

289. 1995 Interim Agreement, *supra* note 103, art. XII(1).

290. *See supra* Parts III.A.2.b-c.

291. *See supra* notes 266, 274, 276-79 and accompanying text.

292. *See supra* Part III.A.2.c.

293. *See supra* notes 117-28; S.C. Res. 1373; *supra* note 41, ¶¶ 1-3.

294. 1995 Interim Agreement, *supra* note 103, art. XII § 1.

295. *See* Kretzmer, *supra* note 12, at 93 n.41; Wedgewood, *supra* note 249, at 61; Shany, *supra* note 8, at 15.

Israel and Palestine agreed that Israel has the right to defend all Israelis including settlers.

The agreements also remove an ICJ analytical stumbling block on self-defense—confusion on the implications of Palestine's transitional status. The ICJ was criticized for a double standard, treating Palestine as a state for participatory privileges but exempting it from anti-terrorism obligations.[296] The nascence of Palestinian statehood is relied on to excuse Palestine's failure to stop terrorist attacks and to prohibit Israel from stopping them.

The agreements set this confusion aside. They establish that Palestine is a governmental international actor with independent legal personality that accepted duties characteristic and constitutive of statehood, including comprehensive security and law enforcement obligations to prevent terrorism.[297] The Authority's achievement of statehood is ultimately conditioned on meeting these responsibilities.[298] Palestine's status does not relieve it from the anti-terror obligations it accepted. Nor does it eliminate Israel's right to self-defense, which, if anything, is more acutely and urgently necessary because of Palestinian non-compliance with anti-terrorism obligations.[299] Under the agreements, Palestine has a legal duty to prevent terror, and Israel has a legal right to defend against it, regardless of whether Palestine is a state.

The language of the agreements supports the language of international law in the U.N. Charter and U.N. Security Council resolutions. All recognize a right to self-defense that allows Israel to

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296. *E.g.*, Advisory Opinion, 2004 I.C.J. 131 para. 34 (July 9) (separate opinion of Judge Higgins); Murphy, *supra* note 256, at 63 n.10. Judge Higgins and an academic supportive of the ICJ ruling agreed that exempting Palestine from terrorism responsibilities because it is not a state is poorly reasoned formalism. Scobbie, *supra* note 205, at 81; *Advisory Opinion*, 2004 I.C.J. 131 para. 34 (separate opinion of Judge Higgins).

297. *See generally* the Oslo agreements referenced *supra* at note 103. In addition to the specific indices of statehood referred throughout this Article, the agreements, most particularly the 1993 Declaration of Principles and the 1995 Interim Agreement, contain extensive, detailed provisions establishing that the Palestinian Authority is empowered to carry out governmental and administrative functions related to its economy, educational, law enforcement, utilities, and capacity to negotiate and enter into agreements with Israel.

298. The Roadmap calls for an immediate unconditional cessation of violence and terrorism in Phase I, with a recognition of a transitional Palestinian state in Phase II and permanent status negotiations in Phase III conditioned on international conference findings that the requirements in preceding phases, including an end to terrorism, have been met. Roadmap, *supra* note 104, at 1, 3-7. Under the Oslo accords, the Palestinian counterterror obligations are immediate and precede statehood. *See supra* notes 117-24 and accompanying text.

299. Murphy, *supra* note 256, at 66-67; Wedgewood, *supra* note 249, at 59.

protect all civilians from terrorism.[300] This right does not exclude attacks from non-state actors, attacks from occupied territory, or attacks on settlers.[301] The ICJ holding and academic commentary dismissing Israeli self-defense rights are based on formalities and distinctions that do not appear in the Charter, resolutions, or agreements, and are irreconcilable with international law unconditionally condemning all terrorism and authorizing broad means to stop it.

b. Proportionality and The Barrier. Because the right of self-defense is limited by the principal of proportionality, the barrier is a permissible means of self-defense only if it is proportional.[302] Proportionality limits self-defense measures to the minimum necessary to repulse attack.[303] The proportionality of self-defense measures is assessed by flexible, case-by-case factual examination.[304] Considerations include the geographic and temporal scope of the measures, their selectivity, and the legality of acts leading to self-defense.[305] Proportionality also includes assessment of civilian and military injury.[306]

The barrier's proportionality determines its legality for many who have concluded that the barrier may be part of an Israeli right to self-defense. Thus, in *Beit Sourik*, the Israeli Court's analysis of barrier segments was based on proportionality. Commentators critical of the ICJ self-defense ruling likewise recommend a proportionality analysis.[307] Three ICJ judges who expressed disagreement with the majority's self-defense ruling would have preferred that the *Advisory Opinion* include a proportionality

300. *See supra* notes 130-31, 271, 273-74, 276-78 and accompanying text.

301. *See supra* notes 130-31, 271, 273-74, 276-78 and accompanying text.

302. Nicaragua, 1986 I.C.J. 14, 94 (June 27); Nuclear Weapons, 1996 I.C.J. 226, 245 (July 8).

303. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 317 (7th ed. 1997).

304. Greenwood, *supra* note 284, at 223.

305. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 168-69 (2d ed. 2004) (discussing selectivity and duration); Murphy, *supra* note 256, at 75 n.99 (stating that proportionality requires direction of self-defense measures at "threat and no other objective"); Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *in* INTERNATIONAL LAW IN A TIME OF PERPLEXITY 273, 275, 278 (Yoram Dinstein ed., 1989) (discussing geographic and temporal scope); Kretzmer, *supra* note 12, at 94 (discussing legality of precedent acts).

306. *Nuclear Weapons*, 1996 I.C.J. at 262.

307. *See* Watson, *supra* note 7, at 24-25; Murphy, *supra* note 256, at 72-73, 75 n.99; Kretzmer, *supra* note 12, at 94.

analysis.[308] Many proportionality proponents advocate the *Beit Sourik* approach: a segment-by-segment balance of security benefits against humanitarian injury.[309]

However, the assumption that proportionality requires a limited segment-by-segment analysis is factually and legally wrong. It is factually wrong because it literally fails to include all the facts and to judge the barrier for what it really is. The analysis examines the barrier as if it were a group of physically disconnected barriers, each with an exclusively localized impact limited strictly to security and humanitarian consequences in its discreet, isolated location. Of course the barrier has such impact, but it has additional consequences because it is not a group of segregated obstacles.

Rather, it is a single, continuous barrier intended not just for isolated local impact, but to create a continuous zone of impenetrability that runs the entire length of Israel and Palestine. The barrier places on its Israeli side a large, contiguous block of occupied territory subject to permanent status negotiations under peace agreements, preserves heavily populated Israeli settlements in that territory, and effectively excludes non-resident Palestinians from such territory. The factual inquiry required for proportionality analysis cannot take place under a segment-by-segment approach because it disregards the factual reality of the barrier's entirety and the totality of its impact.

The analysis is legally wrong in part because its crimped, localized, and segment-based factual examination prevents review of two legal issues which require consideration of the entire barrier: (1) the legality of the settlements; and (2) the barrier's impact as a whole on the settlements and the legal status of contested territory.[310] The implications of the barrier in relation to illegal precedent acts—specifically, whether the barrier promotes, perpetuates, or worsens the illegal settlement program—is a proportionality factor. If the settlement program is illegal and the barrier will ensure that the program will continue indefinitely and that its consequences will

308. Advisory Opinion, 2004 I.C.J. 131 para. 34 (July 9) (separate opinion of Judge Higgins); *id.* para. 3 (separate opinion of Judge Kooijmans); *id.* para. 9 (declaration of Judge Buergenthal).

309. *Id.* paras. 3, 9 (declaration of Judge Buergenthal); Watson, *supra* note 7, at 25; Murphy, *supra* note 256, at 75; Kretzmer, *supra* note 12, at 94.

310. An advocate of segmentized analysis recognized these as legitimate proportionality factors. Kretzmer, *supra* note 12, at 94.

worsen, this must be weighed significantly against the legality of the barrier under a proportionality analysis.

However, the impact of the barrier in its totality cannot be properly considered under a segment-by-segment review. A correct proportionality analysis requires consideration of the barrier and its impact in full rather than a dissected analysis of isolated segments and localized impacts. Considering the proportionality of the barrier on a segment-by-segment basis alone makes as little sense as considering the impact of a nuclear bomb exclusively on a neighborhood-by-neighborhood basis. That is not how a nuclear bomb works. Nor is the barrier's impact so narrowly isolated by segment.

The peace agreements are critical to proportionality consideration because, along with the law of belligerent occupation, they establish legal obligations that prohibit changes in the status of the territories. Defense measures that illegally change the status of the territories—or worsen and solidify ongoing illegal status changes—are not proportionate. Under a proper proportionality analysis, the barrier route in the West Bank and Jerusalem is disproportionate *in total* (not just in parts) because its route *in its entirety* promotes, perpetuates, and is part of a lasting Israeli change in the status of territories that violates status preservation obligations under the Oslo agreements, the Roadmap, and the law of belligerent occupation.

Consideration of the whole barrier demonstrates that it fails to meet other proportionality considerations. It is not limited in geographic scope because it is not targeted to terrorist infiltration sites or Israeli civilian population areas. The barrier is more like a territorial boundary than a self-defense measure because it extends continuously along the whole length of Israel and Palestine through unpopulated territories. Nor is the barrier selectively targeted to potential attackers. To the contrary it is both over-selective, because it excludes (or entraps) innocent Palestinians, and under-selective, because it allows terrorists on the Israeli side of the barrier to stay. The barrier is not limited in duration. It has taken years to build and the Israeli government concedes that parts will be difficult to remove. The barrier cannot be rapidly deployed and promptly withdrawn in response to changes in the nature of the threat. The barrier is not linked to the duration of the threat because it will remain for some time whether there is a threat or not.

In all these respects, the barrier is disproportionate because its innate lack of distinction extends it beyond the scope necessary (in

place, persons, or time) to defend against terrorism. What the barrier does with precision is block off contested territory for Israel, which is an illegal change of status.

Proportionality should include consideration of alternative protective measures, which would block terrorists without impermissibly creating or promoting lasting change in the status of contested territory, and would meet other proportionality criteria.[311] A barrier along the Green Line is one such measure. If, as the Israeli government maintains, a barrier is necessary to prevent terrorism and in fact helps do so, a barrier on the border should suffice. Strengthening checkpoints is another legal protective measure.[312] Increased Israeli military deployment in and around settlements or areas of suspected terrorist activity, while surely a politically controversial measure with risks, is another option that would be temporary, geographically targeted, and would not entail a lasting territorial change of hands.

A final measure is a series of unconnected ringlet barriers around settlements.[313] This is somewhat problematic because it would constitute a physical change in contested territory. Moreover, East Jerusalem and other settlements adjacent to Israel (or to settlements connecting with Israel) would almost certainly not be encircled, so ringlet barriers might not differ much from the present barrier. Still, a ringlet system would be less of a status change, as it would leave a smaller contiguous zone of contested territory on the Israeli side of barriers and allow Palestinian access to more of the territory.

CONCLUSION

Political consequences flow through the legal holes in *Beit Sourik* and the *Advisory Opinion*. *Beit Sourik* permits a barrier in occupied territory that aids an illegal change of status in the territory by preserving Israel's illegal settlements.[314] The *Advisory Opinion* ignores Palestinian terrorism and Israeli self-defense, prompting one-sided pressure on Israel.[315] Moreover, the reasoning and credibility of

311. B'tselem Barrier Report, *supra* note 189, at 26 (attributing most terrorist infiltrations into Israel to poor checkpoint scrutiny).

312. *Id.*

313. The Israeli Court suggested such encirclements would be legal in *Mara'abe*. HCJ 7957/04 Mara'abe v. Prime Minister of Israel [2005] IsrSC 38(2) 393 paras. 113-16; *see also* Shany, *supra* note 8, at 9-10.

314. *See supra* notes 21-22, 92, 171-91 and accompanying text.

315. *See supra* notes 31-36, 54-55, 90, 229-68, 296-99 and accompanying text.

the *Opinion* were weakened by neglect of Israel's status preservation obligations.[316]

An agreement-based analysis corrects these failings. The analysis would include rulings that the barrier results from Palestinian and Israeli non-compliance with reciprocal legal obligations central to the peace agreements. Palestinian failure to stop terrorism violates the agreements along with international humanitarian law and forces Israel to take security measures. Israeli expansion and perpetuation of the settlements violates the agreements as well as belligerent occupation law, and leaves Israeli citizens in occupied territories exposed to violence. A proper ruling would recognize there would be no need for a barrier if both parties complied with the agreements.

The agreements define an appropriate Israeli self-defense right because they acknowledge the right while providing a sound legal basis for its limitation. The continuous barrier in occupied territory reserved for negotiation is a disproportionate self-defense measure because it perpetuates Israeli violation of status change prohibitions in the agreements and under the law of belligerent occupation. Israeli self-defense measures in occupied territory that do not exacerbate impermissible status changes (and otherwise comply with legal restrictions) are legal. Third parties would be barred from supporting Israeli status changes in the occupied territories (including an illegal barrier) *and* Palestinian terrorism.

This analysis is legally correct. It is based on legal obligations that Israel and Palestine accepted in agreements that conform to independent obligations under international law.[317] It allows Israel to protect civilians, but prohibits a barrier in occupied territory that would almost surely serve as a durable physical border.[318] It requires fuller, more even-handed legal and factual consideration that recognizes that Palestinian as well as Israeli illegalities caused the barrier. It calls for a fairer international preventive response directed to both parties and all causes for the barrier.

The agreement-based analysis also makes the law a tool in puncturing Israeli and Palestinian fictions regarding their obstructions of the peace process. A holding that the barrier is part of an illegal status change bursts the Israeli fiction that the settlements and barrier are reversible measures that do not preempt negotiations on

316. *See supra* notes 200-10 and accompanying text.

317. *See supra* Parts III.B.1, III.C.1., III.D.2.

318. *See supra* Part III.D.

territorial disposition. A holding requiring an end to Palestinian terrorism ruptures the Palestinian fiction that ineffective denunciation of a continued, unrestrained terrorist campaign is sufficient for negotiation and statehood. There is much to be said for replacing fiction with fact, by ruling that Israel's barrier-preserved territorial carve-out and Palestine's all-but-official terrorism are both prohibited by agreement and are both illegal obstacles to peace.

The agreements are a constructive framework for legal analysis for the same reason they are the route to peace. They call for compliance with a series of interdependent obligations and provide a legal basis for the comprehensive, simultaneous action necessary for peace.[319] As a result, examination of the barrier through the framework of obligations in the agreements is more inclusive and even-handed legally and factually than the fragmented analyses of *Beit Sourik* and the *Advisory Opinion.*

Put simply, if Israel and Palestine did what they agreed to do in the peace agreements, there would be a Palestinian state instead of occupation, security instead of terrorism, and peace instead of a barrier. To close with reference to the judges' remarks the Article began with, perhaps if judges "choose to write" to enforce the peace agreements, the tragic tide of bereavement and pain that washes over Israel and Palestine would yield at last to the stillness of peace.

319. For a similar perspective without specific reference to or analysis of the agreements, see Advisory Opinion, 2004 I.C.J. 131 para. 18 (July 9) (separate opinion of Judge Higgins) (regretting that the ICJ did not remind the parties of their mutual obligations, requirements to reach agreement and "the procedural obligation to move forward simultaneously").