

FROM ILLEGALITY TO ACCEPTED REALITY : ANALYSING THE IMPACT OF THE I.C.J.'S ADVISORY OPINION ON "THE WALL" IN PALESTINE

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In this article, the author examines the history, controversy and present status of the "Wall" or "Security fence" being built by Israel in the occupied territories of Palestine. The article analyses the judgments of the International Court of Justice, the Israeli High Court, as well as developments in various international arenas, to conclude that in spite of repeated declarations of the "illegality" of the Wall in international law, its construction continues unabated. Besides the lack of legal reasoning given by the I.C.J. in its advisory opinion which has contributed to this situation, the article concludes that the grave human rights violations caused by the Wall are not just being tolerated but perhaps even being acquiesced to by the international community today.

I. Introduction

The recent unilateral pull out from Gaza and four West Bank settlements by Israel has been hailed by many¹ as major turning point in the achievement of the "roadmap" peace process between Israel and Palestine.² However, even as crowds

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¹ See, e.g., Arye Mekel, *Why Israel will Pull out of Gaza*, August 15, 2005, available at, <http://www.nydailynews.com> ; Tim Butcher, *Israelis begin pull-out from Gaza*, September 16, 2005, available at, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/08/16/wmid16.xml>; *Rice Says Gaza Pullout Best Chance for Peace*, June 18, 2005, available at, <http://archives.tcm.ie/breakingnews/2005/06/18/story207755.asp>

² The roadmap is the latest in the peace making efforts, and is a performance based strategy to a permanent two state solution to the Israel-Palestine conflict, being undertaken by the United Nations, United States, Russia and the European Union. It consists of three stages. In Phase I, the aim is to end terror and violence, normalizing Palestinian life and building Palestinian institutions. In Phase II, which is termed as a transition phase, efforts would be focused on the option of the creation of an independent Palestinian state with provisional borders and attributes of sovereignty, based on a new constitution, as a way to a permanent status settlement. In the final

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in Gaza rejoice at the Israeli disengagement, there continues to be a major contentious issue between the two parties, which is a real threat to the viability and stability of any future Palestinian State: that of the "Security Wall" being built by Israel.³ This paper examines the history, conflict and present status of this "Wall" under International and Israeli domestic law, with a specific focus on the right to self defense and its ambit in International Law. Furthermore, it aims to show how despite the almost complete withdrawal from Gaza by Israel, the geographical location and economic consequences of the "Wall" continue to cause unparalleled hardship and deprivation to the people of the occupied Palestine territories.⁴

To this end, the initial part of this paper provides a brief background of the Israel-Palestine conflict as well as the developments that lead to the construction of the "security wall". Part III discusses the opinions of both the International Court of Justice ("I.C.J.") and the Israeli Supreme Court on the question of the legality of the "Wall". Rather than delving deep into issues of jurisdiction, the focus will be on analyzing the respective judicial opinions on the crucial point of the violation of human rights of the Palestine people versus the self-defense concerns of the Israelis. Subsequently, the paper will go on to examine the developments in the International arena, both within and outside the United Nations, which have resulted in the present situation of the continued violation of every possible norm of International and Human Rights Law, pointing out to the fact that the issue of the Wall today is being dictated by the demands of *realpolitik* rather than well established principles of international law.

stage, the aim is to arrive at a permanent status agreement, and taking into account actions of both parties and with monitoring by the quartet. The Security Council in Resolution 1515 in 2003 has endorsed this strategy. *The Roadmap: Full Text*, available at <http://www.bbc.co.uk> (last visited September 1, 2005).

- ³ The "Wall" has been called the "Security Fence" by the Israeli Government, the "Wall" by the International Court of Justice, and the "Separation Barrier" by the Secretary General to the United Nations. It consists of a smart fence designed to keep out all infiltration to the Israeli side. In this article the terms have been used interchangeably. See Alberta De Puy, *Bringing Down The Barrier: A Comparative Analysis of The I.C.J. Advisory Opinion And The High Court Of Justice Of Israel's Ruling On Israel's Construction Of A Barrier In The Occupied Territories*, 13 *TUL. J. INT'L & COMP. L.* 275, 278 (2004).
- ⁴ The term "occupied territories" includes the portions, which were occupied by Israel after the 6- day war in 1967 with Jordan, consisting of West Bank, Gaza and East Jerusalem, and included all territories which were included as being a part of Palestine under the British Mandate of 1949. As stated by the I.C.J., nothing since then has altered the position of Israel being the occupier of hostile territories. See Advisory Opinion No. 131, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 131, at ¶ 78. (Hereinafter *Advisory Opinion*).

II. A Brief Historical Overview of the Israel-Palestine Conflict and the Construction of the Wall.

In order to clarify the background and events which led to the decision by the Israeli cabinet to build this security wall, a brief overview of the conflict between Israel and Palestine would be imperative at this stage. At the end of the First World War, Palestine was entrusted to Great Britain under the Mandate system of the League of Nations, and in 1947 Britain announced that it would unilaterally withdraw from all the territories by May 1948. In the meantime, the General Assembly had through Resolution 181, recommended a plan of partition of the territories into a Jewish and an Arab state, and while the Arabs opposed the resolution, Israel proclaimed its independence as a state in May 1948. This led to the first armed conflict between Israel and the Arab states, due to which the Plan of Partition was not implemented. In 1949 through a series of U.N. mediations the so called "Green Line" was fixed between Israel and Jordan.⁵ However in 1967, in the Six-day War between the parties, Israel occupied all the territories which constituted a part of the British Mandate in 1947 and while the Security Council unanimously adopted a resolution confirming the illegality of the occupation, the same has continued unabated.⁶ As was emphasized by the International Court of Justice and will be elaborated upon later in the paper, nothing had altered since then, and Israel remains formally in "occupation" of the Palestinian territories in question.⁷

Coming to the events which directly led to the construction of the Security Wall, in 2002, in the aftermath of a fresh series of terrorist attacks on Israel, following the failure of the Camp David talks,⁸ the Israeli government began construction of a Wall that ran close to the 1949 Green Line, between Israel and the West Bank. According to Israel, the "sole purpose of the fence" was to prevent terrorist infiltration, especially suicide attacks, and the fence was termed as a temporary structure to be destroyed once this purpose was fulfilled.⁹ This "fence"

⁵ In 1949, a series of general armistice agreements were signed between Israel and the neighboring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April, 1949, between Israel and Jordan. Articles V and VI of this Agreement fixed the armistice demarcation line between Israeli and Arab forces, and this line is often referred to as the "Green Line" owing to the colours used for it on maps. *Advisory Opinion, supra* note 4, at ¶ 77.

⁶ *Advisory Opinion, supra* note 4, at ¶ 73, 78.

⁷ *Advisory Opinion, supra* note 4, at ¶ 78.

⁸ Alberta De Puy, *supra* note 3, at 279.

⁹ Israel Diplomatic Network, *Official Statement of Israeli Foreign Ministry (Mar. 17, 2004)*, available at <http://securityfence.mfa.gov.il/> (last visited September 1, 2005).

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was in the form of a barrier of an average width of 50 to 70 meters, consisting of not just concrete wall, but also ditches, boundary wires, and buffer zones.¹⁰ It involved the mass seizure of land and property of Palestinians for the construction of the fence¹¹ and while earlier the route for the fence was supposed to be adjacent to the Green Line, in 2003, controversially, the Israeli Cabinet voted for an expansion of the project wherein large parts of the fence would intrude up to 7.5 kilometers into the West Bank, surrounding around 16% of it totally.¹² As a result of this construction, around 3,90,000 Palestinians will eventually live in completely encircled territories, with a new administrative regime restricting movements of residents outside the enclaves in some places.¹³ For instance, in Qalqiliya, which is an enclave of around 40,000 residents and is already completely surrounded by the Wall, movement outside is regulated through a single gate which is open only between 7 a.m. and 7 p.m.¹⁴ Due to the portions already constructed, thousands of Palestinian farmers have been separated from their lands and source of irrigation waters, which has resulted in reduced agricultural

¹⁰ Furthermore, on the external side of the fence is an anti-vehicle obstacle used to prevent vehicles from slamming into the fence to break through. In addition to concrete or metal barriers in certain segments, there is an electric fence with a number of roads on the internal side, including, "a dirt road (for the purpose of discovering the tracks of those who pass the fence), a patrol road, and a road for armored vehicles." The average width of the fence is fifty to seventy metres. Where there are topographical constraints, a narrower separation fence, consisting of an electronic fence and components to support it, is used instead. De Puy, *supra* note 3, at 278.

¹¹ The case of *Beit Sourik Village Council v. Government of Israel*, H.C.J. 2056/04, as discussed in the next section of this paper, pertained to a group of complaints by villagers contending that the seizure of land from them to build the Wall was illegal. In this context the Israeli Supreme Court discussed the legality of the fence, and its route.

¹² The rationale for the same was that Israeli military advisors wanted a buffer zone between the Fence and the Green Line so that terrorists who crossed the fence could then be pursued without harming Israeli settlements. Further placing the fence close to Israeli settlements would not solve the problem of infiltration. See *Beit Sourik Village Council v. Government of Israel*, H.C.J. 2056/04. This area has also been referred to by the I.C.J. as the "closed area", as it lies between the Green Line and the Wall. See *Advisory Opinion*, *supra* note 4, at ¶ 85.

¹³ For Israeli settlements in these encircled areas, movement outside these gates is free without any permits. See *Advisory Opinion*, *supra* note 4, at ¶ 85. This system, combined with a vast network of "Jewish only" roads which have been established in these areas, right outside the walled areas, have led to Palestinian groups terming the fence as an "Apartheid Wall". See www.stopthewall.org (last visited November 3, 2005).

¹⁴ REPORT OF THE SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS, QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE ¶ 9, E/CN/2004/6.

production and massive food security problems in the region.¹⁵ In urban settlements, people have to walk miles to cross gates in the walls to be able to go to work, and are cut off from basic amenities like schools, hospitals and local markets.¹⁶ Furthermore the gates are open only between restricted hours. In the time since the Wall has been built, according to a World Bank report, a large number of shops, businesses and people have moved out of these regions,¹⁷ which has led to one of the worst economic recessions in recent years in any modern economy.¹⁸

The widespread anger against this move by Israel led to the Palestinian representative to the United Nations raising the issue in the General Assembly, where a resolution¹⁹ was passed asking for an advisory opinion from the I.C.J. regarding the legal consequences of the Wall, and whether the same constituted a violation of international law.²⁰ While there were predictable protests from Israel

¹⁵ See REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE ISRAELI PRACTISES AFFECTING HUMAN RIGHTS OF THE PALESTINIAN PEOPLE AND OTHER ARABS OF OCCUPIED TERRITORIES ¶ 26, A/58/311; REPORT BY THE SPECIAL RAPPORTEUR OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, THE RIGHT TO FOOD ¶ 49, 51, E/CN.4/2004/10/Add. 2.

¹⁶ According to the Report of the Secretary General of the United Nations as submitted to the I.C.J., in 2003 alone, 30 localities were already separated from health services, 22 from schools, 8 from primary water resources and 3 from electricity works. *Advisory Opinion, supra* note 4, at ¶ 133. See generally REPORT OF THE SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS, QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE ¶ 9, E/CN/2004/6.

¹⁷ Reports issued by the UN also indicate that a large number of people were leaving areas behind the Wall, and businesses were shutting down. See UNITED NATIONS REPORT ¶ 51, E/CN.4/2004/6; UNITED NATIONS REPORT, E/CN.4/2004/10/Add.2. See generally Human Rights Watch, *Israel's "Separation Barrier" in the Occupied West Bank*, available at <http://hrw.org/english/docs/2004/02/20/isrlpa7581.htm>. (last visited on September 1, 2005).

¹⁸ The Report discusses in detail the causes of widespread recession, one of the worst in recent years, blaming the same on the widespread system of "closures" in the economy inserted by Israel, and has proposed its solutions after consultations with both the Israel government, as well as Palestinian representatives. WORLD BANK REPORT, STAGNATION OR REVIVAL? ISRAELI DISENGAGEMENT AND THE PALESTINIAN ECONOMIC PROSPECTS, December 1, 2004, available at <http://siteresources.worldbank.org/INTWESTBANKGAZA/Data/20751555/EMR.pdf> (last visited on June 12, 2006)

¹⁹ G.A. Res. 10/14, U.N. G.A.O.R., 10th Sess., Supp. No. 1, U.N. Doc. A/RES/ES-10/14 (2003).

²⁰ The question was framed thus: "What are the legal consequences arising from the construction of the Wall built by Israel, the occupying power, in Occupied Palestinian Territory, including those in and around East Jerusalem, as described in the report of the Secretary General, considering the rules and principles of International Law,

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as to the resolution, and then the jurisdiction of the Court; as will be analysed in the next section, the Court in its opinion hinged the determination of the legality of the wall on the question of Israel's right to self defence, rather than on any formal requirements of jurisdiction.

III. The Wall as a Measure of Self Defence: Comparative Analysis of the Decisions of the International Court of Justice and the Israeli Supreme Court

A. *Opinion of the International Court of Justice.*

Despite protests by Israel and the United States, and the subsequent appearance by Israel only to contest the jurisdiction of the I.C.J.,²¹ the Court, in a long drawn discussion on whether it should exercise its jurisdiction, ruled that the General Assembly was competent to refer the matter to it, even though the Security Council was involved in the conflict at large.²² Significant however was the examination by the I.C.J. of whether the exercise of its jurisdiction was indeed

including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly Resolutions?" *Advisory Opinion, supra* note 4, at ¶ 66. It must therefore be remembered that the I.C.J. did not take upon itself the task of determining the status of those parts of the Wall that were being built inside Israeli territory. *Advisory Opinion, supra* note 4, at ¶ 67.

²¹ Israel made submissions to the I.C.J. only opposing the exercise of such jurisdiction, and not on merits. In fact, one of the arguments raised against exercising jurisdiction by the I.C.J. was that since the Wall was a part of a larger conflict, and Israel had not submitted to the jurisdiction of the I.C.J., this action would be bringing the state under its jurisdiction without its consent. This objection was dismissed by the I.C.J. on the ground that the opinion was asked for by the General Assembly, was not binding on any party and in any case state consent was not a prerequisite for exercise of advisory jurisdiction. *Advisory Opinion, supra* note 4, at ¶ 46-50.

²² The argument raised was that such a reference for an advisory opinion by the General Assembly contravened Article 12 of the United Nations Charter which provides that "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make recommendations with regard to that dispute or situation unless the Security Council so notes." The I.C.J. held that in recent years, the practice of the General Assembly has shown that the words "functions assigned to it" has been interpreted to mean "functions assigned to it at this moment", and in fact there were many instances of the General Assembly and the Security Council taking parallel action on conflicts. While the latter concentrates on matters of international peace and security, the former takes note of the broader humanitarian, economic and social considerations. *Advisory Opinion, supra* note 4, at ¶ 25-28.

judicially proper.²³ The question that arose was whether the issue referred to it by the General Assembly was a legal question,²⁴ because if not, there would exist “compelling reasons” for it to refuse to give its opinion.²⁵ The I.C.J. dismissed the contention that since the question referred to it was a part of longstanding conflict it could have political overtones, and thereby the Court should not exercise jurisdiction.²⁶ This was done on the grounds that the Israel-Palestine conflict was a responsibility of the General Assembly,²⁷ and hence the I.C.J. as a principal organ of the U.N. had the responsibility and duty to give the opinion asked for.²⁸ Furthermore, it refuted the contention that the question posed to it was abstract

²³ It must be remembered that there is a distinction between whether the I.C.J. has jurisdiction with respect to the Advisory Opinion, and whether it should in its discretion exercise the jurisdiction, as Advisory jurisdiction is essentially a discretionary jurisdiction of the Court, and according to Article 65 of the Statute of the I.C.J., “The Court *may* give an advisory opinion.” *Advisory Opinion, supra* note 4, at ¶ 43.

²⁴ As per Article 96, paragraph 1 of the United Nations Charter, and Article 65, paragraph 1, of the Statute of the International Court of Justice, an advisory opinion can be sought only on a “legal question”. *See also Advisory Opinion, supra* note 4, at ¶ 36-42.

²⁵ Even though the I.C.J. has the discretion to refuse to give an advisory opinion, as was stated in the case of *Legality of Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996(I) I.C.J., at ¶ 14, the I.C.J. is the principal judicial organ of the United Nations and an advisory opinion in principle presents an opportunity for it to participate in the functions of the organisation and should not be refused, unless there existed “compelling reasons” to do so. *Advisory Opinion, supra* note 4, at ¶ 43-45.

²⁶ Another related argument raised was that because of the political situation and the complex nature of facts involved, the Court did not have the necessary factual information to decide on the question, and hence should in judicial discretion decline to give the opinion. The I.C.J. dismissed this contention on the ground that it had lengthy submissions made by other States even though Israel had not participated at the stage of merits, and it had a dossier of information supplied to it by the Secretary General of the United Nations. *Advisory Opinion, supra* note 4, at ¶ 55-58. Judge Buergenthal dissented from this on the ground that there were just too many complex factual interpretations to be made by the I.C.J., which it was not competent to do because of lack of material. Separate Opinion of Judge Buergenthal, *Advisory Opinion, supra* note 4.

²⁷ However, it conceded that it was mindful that its determination might affect the political situation at large, and it would take that into account when rendering its decision. *Advisory Opinion, supra* note 4, at ¶ 53-54.

²⁸ It cited General Assembly Resolution 57/107 of December 2002, where the General Assembly had described its responsibility towards the conflict as a “permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy.” *Advisory Opinion, supra* note 4, at ¶ 49.

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in nature, requiring considerable interpretation by the Court to determine the scope of the question posed. It held that the question was clearly directed to the legal consequences arising from the given factual situation, considering the rules and principles of International Law. According to the I.C.J., the question was framed in terms of law, raised problems of international law, and was by its very nature susceptible to a reply based on law. It was therefore held to be a legal question. Further, lack of clarity would require interpretation by the Court, which the Court had faced on several occasions, and hence, it was not a reason by which the Court could be deprived of jurisdiction.²⁹

Coming to the decision of the I.C.J. on merits, the Court first clarified the nature of the territories in question by categorically holding that under Article 42 of the Fourth Hague Convention, a territory is considered an "occupied territory" when it is actually placed under the authority of a hostile army, and since in the present case the situation in the territories under scrutiny had not changed since 1967, these remained "occupied territories".³⁰ Hence it declared that international humanitarian law was applicable to these territories,³¹ and the construction of the Wall and its associated regime were violative of both the Geneva Convention³² as well as the Hague Regulations. The Court was especially critical of the covert Israeli policies of changing the demographic composition of these areas over the years, and in fact construed the Wall as the latest Israeli attempt to force Palestinians to move out of their settlements.³³ The Court went on to hold

²⁹ *Advisory Opinion, supra* note 4, at ¶ 37.

³⁰ *Advisory Opinion, supra* note 4, at ¶ 78.

³¹ *Advisory Opinion, supra* note 4, at ¶ 89-101. It also declared that the Israeli settlements in the Occupied Territories were against International Humanitarian Law. Israel's position on this point has always been that International Humanitarian Law is not *de jure* applicable to these territories as these territories, before the 6-day War in 1967, were under the control of Jordan which had not signed the Convention. However relying on extensive contrary state practice, as well as observing that International Humanitarian law could not be limited in such a way, the I.C.J. held that these territories also had the protection of the Hague rules.

³² The construction of the Wall led to the destruction of Palestinian property, which is contrary to the provisions of Article 46 and 52, Hague Regulations, 1907, and Article 53, Geneva Convention. It further cited other provisions of these Conventions, like the duty on the occupying state to restore as soon as possible, public order and life in the occupied territories, to show how Israel had violated the same. *Advisory Opinion, supra* note 4, at ¶ 132.

³³ Such transfer of population is in fact prohibited strictly by Article 49, paragraph 6, Fourth Geneva Convention. The I.C.J. also reaffirmed that such practices had already been condemned by two Security Council resolutions, namely Resolution 446 of 1979 and Resolution 465 of 1980. *Advisory Opinion, supra* note 4, at ¶ 134. For further comments on the judgment on the issues of International Humanitarian

that international human rights treaties³⁴ like the International Covenant on Civil and Political Rights (“I.C.C.P.R.”) and the International Covenant on Economic, Social and Cultural Rights³⁵ were applicable to the occupied territories, even if a territory was not under the sovereignty of a State, as long as the State exercised jurisdiction on the subjects in some way.³⁶ Accordingly, the Wall and its chosen route violated a number of provisions in these Conventions,³⁷ including the right

Law, see Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the I.C.J. Wall Advisory Opinion*, 99 AM. J. INT’L. L. 102 (2005); David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT’L. L. 88 (2005).

- ³⁴ The conflict was whether during times of conflict and military occupations, human rights treaties were applicable extra-territorially, and this raised a conflict between International Humanitarian Law and International Human Rights Law. The Court itself clarified that the protection of human rights treaties does not cease to exist during such periods, except so far as provided in Article 4, I.C.C.P.R. As regards the relationship between these two bodies of Law, the Court opined that some matters are exclusively of International Humanitarian Law, other exclusively of Human Rights Law, and yet others may be situations which are governed by both, see, *Advisory Opinion*, *supra* note 4, at ¶ 106. However this position has been criticized on the grounds of firstly being doctrinally confusing and secondly moving away from the real intention of human rights treaties which were never meant to apply in situations of armed conflict. See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119 (2005).
- ³⁵ The Court cited a number of provisions like the right to work (Article 6 and 7), protection accorded to family and to children and young persons (Article 10), right to adequate standard of living including the right to food, clothing and shelter (Article 11), right to health (Article 12) and the Right to education (Article 13 and 14) of the International Convention for Economic, Social and Cultural Rights. *Advisory Opinion*, *supra* note 4, at ¶ 112, 130.
- ³⁶ Article 2, I.C.C.P.R. states that “Each state party to the Convention undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction....” In this context, the Court observed that while the jurisdiction of a state was primarily territorial, it can be exercised outside the territory of a state, and considering the object and purpose of the I.C.C.P.R., the Court would construe it to apply to a state even if the actions take place outside its territory. *Advisory Opinion*, *supra* note 4, at ¶ 108. As regards the International Convention on Economic, Social and Cultural Rights, the Court held that a state could have control over a territory, yet not exercise sovereignty over it. Considering that Israel had for over 37 years, exercised control over these territories it was unwilling to accept its position that the Convention was not applicable to them. *Advisory Opinion*, *supra* note 4, at ¶ 112.
- ³⁷ Other rights included the right to freedom of movement, which is a part of Article 12, I.C.C.P.R. While reasonable and proportional restrictions can be imposed in public interest, the I.C.J. found that the restrictions imposed by the Wall were disproportionate in nature. *Advisory Opinion*, *supra* note 4, at ¶ 136.

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to self-determination of the Palestinian peoples,³⁸ and the right to equal access to places of religious significance.³⁹ Significantly, the Court pointed out that while Israel had assured it that the Wall was only a temporary security measure, it was influenced by fears that such a construction was a tool to further *de facto* annex land, which might convert it into a permanent feature.⁴⁰

However in its most controversial ruling, which was in essence the crux of the case, the I.C.J. denied Israel the right of self-defence against Palestine, under Article 51 of the U.N. Charter.⁴¹ It did so by limiting the right to self-defence only when there is a threat from one state to another, and argued that since Palestine was not a "state", the defense under Article 51 would not be applicable. It added a second qualification that since the attack in question did not come from a territory outside Israel, the recent Security Council Resolutions 1368 (2001) and 1373 (2001) passed in the aftermath of the 9/11 attacks would not be applicable in the instant case.⁴² Furthermore, since the Wall was not the only way in which terrorist threats could be reduced, and there were other options available to Israel, the I.C.J. opined that the plea of "necessity" would not excuse this violation of international law.⁴³

The I.C.J. therefore concluded that Israel was bound under international law to cease the construction of the Wall, as the same was a violation of international law.⁴⁴ Going a step further, the Court invoked the concept of an *erga*

³⁸ *Advisory Opinion, supra* note 4, at ¶ 88.

³⁹ The Court included this within the ambit of Article 12, I.C.C.P.R., and further historically traced the right to equal access to these Holy places from both the British Mandate for Palestine, as well as General Assembly Resolutions passed in this context. *Advisory Opinion, supra* note 4, at ¶ 129.

⁴⁰ *Advisory Opinion, supra* note 4, at ¶ 121.

⁴¹ Article 51, U.N. Charter states: "Nothing in the present Charter shall impair the inherent right of self-defense 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."

⁴² *Advisory Opinion, supra* note 4, at ¶ 139. The Court used the latter reasoning to deny Israel the protection offered by Security Council Resolutions 1368 (2001) and 1373 (2001), which relate to terrorism.

⁴³ *Advisory Opinion, supra* note 4, at ¶ 140. The Court relied on the conditions stated in Article 33 of the International Law Commission's Articles on State Responsibility, as well as the case of *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 40, at ¶ 51.

⁴⁴ The Court noted that Israel is obliged to fulfill all its international obligations with respect to the Wall, and therefore is bound to respect the right of self-determination of the Palestinian people, and its obligations under international human rights law

omnes obligation⁴⁵ and held that all states were under an obligation to not recognize this illegal situation, to not give any aid or assistance in maintaining the situation, and to ensure that this situation of illegality comes to an end.⁴⁶ It asked the U.N., especially the General Assembly and the Security Council, to consider what further action could be taken to put an end to the illegal situation resulting from the construction of the Wall.⁴⁷

B. Opinion of the Israeli Supreme Court

Contrasted against this approach, is that adopted by the Israeli High Court in the case of *Beit Sourik Village Council v. Government of Israel*,⁴⁸ where the High Court was petitioned by a group of villages whose land was being taken away

and International Humanitarian Law. It was also bound to ensure the freedom of access to holy places that came under its control after 1967. Israel had to thus stop the construction of the Wall, further dismantle all the parts of the Wall already built, and was also obliged to make reparations for all the damage caused by the construction of the Wall, restitute immovable property, and if that was not possible, provide adequate compensation. *Advisory Opinion, supra* note 4, at ¶ 149-153.

⁴⁵ As indicated by the I.C.J. in the *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, 1970 I.C.J. 32, at ¶ 33, *erga omne* obligations are obligations which are by their very nature concern all states and in view of the importance of the rights involved, all states can be held to have a legal interest in their protection. See N. RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (1997).

⁴⁶ *Advisory Opinion, supra* note 4, at ¶ 159. The Court evoked this principle based further on the fact that it had already declared that self-determination is an obligation *erga omnes*, in *East Timor Case*, 1995 I.C.J. 102, at ¶ 29. The Court also relied on the case of *Legality of Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996(I) I.C.J., at ¶ 14, where it had stated that obligations derived from International Humanitarian Law also constitute obligations *erga omnes*. It must be remembered that this was a point on which the decision was taken thirteen votes to two with Judges Kooijmans, and Buergenthal voting against the proposition. There have also been jurists who have criticized this particular portion of the opinion as taking the advisory jurisdiction of the I.C.J. into an activist stance. See Michla Pomerance, *The I.C.J.'s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT'L. L. 26, 39 (2005).

⁴⁷ *Advisory Opinion, supra* note 4, at ¶ 160. Further, the I.C.J. emphasized that the U.N. needed to double its efforts to resolve the disputes by implementing General Assembly and Security Council resolutions passed on the conflict, and it endorsed the "roadmap" effort which was the latest move in this direction. It concluded by adding that the opinion rendered in its advisory capacity must be placed in the larger context. *Advisory Opinion, supra* note 4, at ¶ 161-163.

⁴⁸ H.C.J. 2056/04, available at <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html> (last visited September 1, 2005).

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for constructing the Wall. Taking note of the judgment rendered by the I.C.J., the High Court for the first time admitted that international humanitarian law indeed applied to the Palestine territories. This was a significant departure from the standard Israeli position. However, the Court also pointed out that it was convinced that the "separation fence" as a whole was motivated by security, not political considerations.⁴⁹ It went on to test the route of the fence on the delicate balance between the "military necessity" of the occupier and "humanitarian concerns" of the occupied.⁵⁰ Deriving the concept of proportionality from both international as well as Israeli administrative law, the Court examined the route of the fence on the basis of first, whether it had a rationale connection with the objective of security sought to be achieved;⁵¹ second, whether it caused the least possible injury to the people affected;⁵² and lastly, whether such injury was disproportionate to the security benefits of the fence.⁵³ Finding that in seven out of the eight instances the choice of route of the Wall was such that it caused

⁴⁹ *Id.* at ¶ 28.

⁵⁰ *Id.* at ¶ 34. It must be remembered that this is significantly the first occasion that an Israeli Court had admitted that the Occupied Territories are governed by the Law of Belligerent Occupation, and since Israel was a party to the Fourth Geneva Conventions and the Hague Protocol of 1907, the case applied the same. This is a significant departure from the usual stance of the Israeli government, which has consistently sought to deny the people of the occupied territories the protection of International Humanitarian Law. *Id.* at ¶ 23.

⁵¹ The means that the administrative body uses must be constructed to achieve the precise objective that the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realization of the objective. This is the "appropriate means" or "rational means" test. *Id.* at ¶ 41.

⁵² According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means, which can be used to achieve the objective, the least injurious means must be used. This is the "least injurious means" test. *Id.* at ¶ 41.

⁵³ The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives, must be of proper proportion to the gain brought about by that means. That is the "proportionate means" test (or proportionality "in the narrow sense.") The test of proportionality "in the narrow sense" is commonly applied with "absolute values", by directly comparing the advantage of the administrative act with the damage that results from it. However, it is also possible to apply the test of proportionality in the narrow sense in a "relative manner." According to this approach, the administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act – by employing alternate means, for example – ensures a substantial reduction in the injury caused by the administrative act. It is the latter leg of the test that the Court placed great emphasis on. *Id.* at ¶ 41.

disproportionate violations of the human rights of the affected villagers, it ordered the changing of the route of the fence based on the above principles.⁵⁴ In fact, all future construction of the Wall and its routes were henceforth directed to be governed by this three pronged test laid down by the Israeli Supreme Court.

C. Comparative Analysis of the Two Opinions and the Balance of Self Defence

While legal scholars lauded the decision of the I.C.J. as a welcome activist stance by a usually restrained and politically correct Court,⁵⁵ its legal reasoning on self defence in the words of Judge Higgins words herself was “a formalism of an uneven handed sort.”⁵⁶ This is because, as she pointed out, the right of self defence under Article 51 is not exhaustive of the right, and even otherwise, the wordings of the Article do not contain any restriction that the attack must have come from another state.⁵⁷ In fact, the *Caroline Incident*,⁵⁸ which is the standard authority used by jurists while discussing self defence in customary international law, involved the use of force by non-state actors. This qualification was added by the Court in the *Nicaragua case*,⁵⁹ where it nevertheless recognized that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity “because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces.”⁶⁰ This explicit requirement for an attack by another state is therefore an even more restricted interpretation of the right of self defence, which, as has been argued by authors, is totally unsuited to the post 9/11 era.⁶¹

⁵⁴ Therefore, the Court did not at any stage examine the macro effects of the fence at large on the basis of its three-pronged test, but only the route of the fence as it affected the particular petitioners. It further must be mentioned that the High Court did not at any stage seek to substitute its own judgment for the military commander who had decided the routes of the fence, which would imply choosing between different military options. On the contrary, the decision was based on whether the same satisfied the test of proportionality between the injury caused and the objectives to be achieved. *Id.* at ¶ 48.

⁵⁵ Richard A. Falk, *Towards Authoritativeness: The I.C.J. Ruling on Israel's Security Wall*, 99 AM. J. INT'L. L. 42 (2005).

⁵⁶ Separate Opinion of Judge Higgins, *Advisory Opinion*, *supra* note 4, at ¶ 34.

⁵⁷ Separate Opinion of Judge Higgins, *Advisory Opinion*, *supra* note 4, at ¶ 35.

⁵⁸ Murphy, *infra* note 67, at 65.

⁵⁹ *Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua v. United States), 1986 I.C.J. 14.

⁶⁰ *Id.*

⁶¹ Murphy, *infra* note 67, at 67.

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It was in response to this question that the Court therefore dealt with Resolution 1368 (2001) and 1373 (2001) and dismissed the claim on the ground that in those conditions the attacks emanated from outside the territory of the state concerned.⁶² At a factual level this can be disputed since in these cases while the training and financing of the terrorists took place outside the United States, the actual attack took place within the boundaries of the U.S. Furthermore, the statements made in the Security Council in the aftermath of the attacks in no way limited the application of these Resolutions to any specific situation.⁶³ As Higgins pointed out in her dissent, just because the territories are in the occupation of Israel did not imply that Israel as an occupying power does not have the right to protect its civilians from attacks from within the occupied territory. In fact it has the duty to ensure "public order" under Article 43 of the Hague Regulations.⁶⁴ Significantly, Higgins also pointed out that it was patently unfair that the occupied territories were being considered as sufficient international entity to be invited to the proceedings, and benefit from the application of humanitarian law; but not a sufficient entity to be able to put forth an armed attack which required self defence.⁶⁵

This restricted interpretation and the terse analysis given to self defence has attracted criticism by many states as there was not even a mention of Palestinian terror attacks in the opinion. This criticism was even cited as a reason not to endorse the opinion by States in the General Assembly.⁶⁶ Hence, respectfully, even though the final conclusion reached by the I.C.J. in terms of declaring the Fence illegal is a recognition of the grave human rights situation caused by the Wall, its legal reasoning could have hinged on a more detailed factual and legal analysis of the proportionality and necessity of the means adopted by Israel, rather than carving out what many believe is an artificial limitation to the right to self defence.⁶⁷ This is especially significant due to the fact that since an

⁶² *Advisory Opinion*, *supra* note 4, at ¶ 139.

⁶³ Murphy, *infra* note 67, at 66-69.

⁶⁴ Separate Opinion of Judge Higgins, *Advisory Opinion*, *supra* note 4, at ¶ 36.

⁶⁵ Separate Opinion of Judge Higgins, *Advisory Opinion*, *supra* note 4, at ¶ 36.

⁶⁶ Even the final resolution passed by the General Assembly while endorsing the opinion rendered by the I.C.J., put qualifications by recognizing that Israel did in fact have a right to proportionally defend itself against attacks by terrorists. Fr. Robert J. Araujo SJ, *Implementation of the I.C.J. Advisory Opinion- Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory: Fences (Do not) Make Good Neighbors*, 22 B. U. INT'L L. J. 349 (2004).

⁶⁷ The view of the I.C.J. regarding self defence has been criticized by many jurists in international law on the basis that it gives a very narrow view of Article 51, bringing into it qualifications which the article does not contain and which are completely

advisory opinion is not binding on any party in international law,⁶⁸ its value in the development of international law, as well as its acceptance is dependent on the depth and cogency of the argument presented by the Court.

On the other hand, the stance taken by the Israeli Supreme Court is a comprehensive and sound legal strategy, as it held that actions taken to protect the security of a nation cannot be disproportionate to the injury caused to those affected by such actions, especially since the means adopted is not the only option available. Unfortunately, the Israeli Supreme Court applied this proportionality test to only the route of the Wall, that too in the specific instances of violation presented before it, and not the Wall as a whole. It thus failed to take into account the macro effects of the Wall on any future Palestinian State, as well as the combined effects of such physical restraints on the current state of the political and economic life of the Palestinian people. Hence, its effect was limited as this narrow perspective only led to the route of the Wall “being taken back to the drawing board”.⁶⁹ The concept and construction of the Wall as a whole continued unaltered, as long as the Government was able to satisfy the tests laid down by the Supreme Court.

against the present need to thwart terrorism around the world. *See generally* Ruth Wedgwood, *The I.C.J. Advisory Opinion on the Israeli Security Fence and the Limits of Self Defense*, 99 AM. J. INT’L. L. 52 (2005); Sean D. Murphy, *Self Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the I.C.J.*, 99 AM. J. INT’L. L. 62 (2005); Rebecca Kahan, *Building a Protective Wall Around Terrorists- How the International Court of Justice’s Ruling in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Made the World Safer For Terrorists and More Dangerous For Member States of the United Nations*, 28 FORDHAM INT’L L. J. 827 (2005). Another factor that has not been pointed out by authors is Article 51 of the UN Charter gives the right of self-defense only in till the time that “the Security Council has taken measures necessary to maintain international peace and security.” However, in its recent opinion on the armed intervention of Uganda in the Democratic Republic of Congo, the Court has further restricted its interpretation of Article 51 so as make the condition of “attack by one state against another state” as a precondition to the very question of self-defense arising in a case. Hence, going by its subsequent clarification, the very fact that in the instant case there was no attack from another state would preclude the Court from going into questions like till when did this right exist, was it necessary or proportional in the circumstances. *See Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, December 19th, 2005, General List No. 116, available at <http://www.icj-cij.org>, ¶ 145-147.

⁶⁸ KENNETH JAMES KEITH, *THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* 195 (1971); 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 499 (Leo Gross ed., 1976).

⁶⁹ *See* Geoffrey R. Watson, *The Wall Decision in Legal and Political Context*, 99 AM. J. INT’L. L. 6 (2005).

IV. From Illegality to Accepted Reality

Even though an advisory opinion is not binding in law on any party,⁷⁰ it constitutes an opportunity before the I.C.J. to interpret and further develop international law.⁷¹ The function of an advisory opinion is to help an organ of the U.N. perform its functions in a more purposeful manner.⁷² Even though the I.C.J. itself rejected the fear that its opinion would ultimately have no effect in practicality,⁷³ in reality the subsequent events after the Wall decision have proved those very fears true.⁷⁴

Soon after the I.C.J. decision, the General Assembly in its reconvened session took note of the opinion rendered by the Court, but made suitable modifications including calling upon Palestine to cease all terrorism against Israeli citizens.⁷⁵ The Resolution therefore termed the Wall as a violation of international law, and put an obligation on all states to consider measures to put an end to the illegal situation, specifically calling upon the Security Council to consider the matter urgently.⁷⁶ However, the positive action taken typically stopped here, as even though a resolution was moved in the Security Council to tear down the Wall, it was predictably stopped by the United States by using its veto power.⁷⁷

Thereafter, the construction of the Wall has continued unabated with almost 25% of the Wall already completed. Evidence of the attitude of treating the Wall as a *fait accompli* was that the Secretary General of the United Nations Mr. Kofi

⁷⁰ *Id.*

⁷¹ Michla Pomerance, *The Advisory Role of the International Court of Justice and its Judicial Character: Past and Future Prisms* in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 271 (A.S.Muller et al eds., 1997). An advisory opinion would also constitute a secondary source of law under the Article 38 of the Statute of the I.C.J., i.e. as opinions of eminent jurists. See, 3 SHABTAI ROSENNE, *THE LAW AND PRACTISE OF THE INTERNATIONAL COURT, 1920-1996* 1755 (1990).

⁷² ROSENNE, *Id.* at 1756.

⁷³ *Advisory Opinion, supra* note 4, at ¶ 62.

⁷⁴ In fact, according to many a jurists, this opinion would lead to the lowering of the prestige of the Court, and such strident activism goes against the very nature and function of the I.C.J. See Adam M. Smith, *Good Fences Make Good Neighbors?: The "Wall Decision" and the Troubling Rise of the I.C.J. as a Human Rights Court*, 18 *HARV. HUM. RTS. J.* 251 (2005).

⁷⁵ U.N. G.A.O.R., 10th Sess., U.N. Doc. A/ ES-10/ L.18/Rev 1 (2004).

⁷⁶ For further discussion about the proceedings of the session and the negotiations see, Robert J. Araujo, *supra* note 66.

⁷⁷ *Id.*

Annan on his recent visit to Israel declined to comment on issue of the Wall.⁷⁸ Glaring also, is a report issued by the World Bank on the state of the Palestinian economy and its drastic recession in December 2004. While the report rightly blamed the network of closures, significantly the security barrier erected by Israel, as a major cause of economic recession in the area, its proposed solutions for revival are based on the assumption that the Wall is indeed a *harsh reality* that has to be accepted.⁷⁹ It further calls upon international donors to finance the installation of high tech electronic gates in the Wall to facilitate movement across the security barrier, which is obviously in blatant violation of the I.C.J. judgment.⁸⁰ Thus, the Wall, which has been declared to be against international law by the I.C.J., and which continues to violate every possible human right of the Palestinian people, is today a harsh but accepted reality to be negotiated between the parties themselves.⁸¹

The events after the Gaza pullout, which was much applauded in the international community,⁸² further highlights this accepted illegality in international relations today. The question that naturally arises is why is the issue of the Wall still a glaring violation of international law even after the Israeli pullout from Gaza? The reason is that even though almost free from Israeli control, Gaza is today completely encircled by high walls. Permits are required by

⁷⁸ Available at www.stopthewall.org (last visited September 1, 2005). Please refer to this website for further discussions, reports and opposition to the Wall.

⁷⁹ WORLD BANK REPORT, *supra* note 18. See also Palestinian National Authority, Ministry of Planning Policy Research Unit, *The Annexation and Expansion Wall: Impacts and Mitigation Measures*, available at www.psgateway.org/download/1872/Wall_report.doc. However, another opinion has been expressed by jurists that the very positive obligation imposed by the I.C.J. on third states is by itself ambiguous and has in fact created this prickly situation for International donor agencies which do not know whether helping alleviating the misery caused by the Wall will in fact lead them to violate international law. The Palestinians contend so, as for them the need for such aid would not arise unless the situation created by the Wall itself did not exist. Thus, opinion points out that the I.C.J. should have created a distinction between “not rendering aid or assistance in maintaining the situation” and rendering humanitarian assistance which is needed by the Palestinians. Ardi Imesis, *supra* note 33, at 117.

⁸⁰ The only qualification added by the Bank is that since the legality after the I.C.J. opinion was in doubt, financiers should contributed only to those gates which are situated on the Green Line. WORLD BANK REPORT, *Id.*

⁸¹ For a clear example of treating the situation as a factor in the negotiations is found in discussions in Russell Korobkin & Jonathan Zasloff, *Roadblocks To The Road Map: A Negotiation Theory Perspective On The Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT'L. L. 1, 75 (2005).

⁸² For examples, see, *supra* note 1.

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Palestinians venturing outside even for daily labour. The local population is separated from social services like hospitals, schools. Farmers have been separated from lands that lie outside, as well as from access to water resources, resulting in a sharp drop in food production in this region. After the pullout, using the argument that the Palestinians were free to administer themselves in the region, the gates to the Walls surrounding Gaza have been closed most of the times, with movements even more restricted and unpredictable than before. This has ensured that in spite of little Israeli presence in Gaza after the pullout, the network of walls and barriers all around it have made it a virtual prison for a population of over 1.3 million.⁸³

As far as the West Bank is concerned, even after the rerouting by the Israeli Supreme Court, the Wall will lead to almost 47% of land being *de facto* annexed by Israel. Combined with rapid settlement activities by Israel in the area, this has caused wide spread apprehension that such a temporary security measure will soon turn into a permanent situation on the ground, significantly hampering Palestine's bargaining currency in any future negotiations between the two. Gaza and the West Bank are considered widely as the two integral parts of any future Palestinian nation, and as of today due to the network of concrete Walls, barriers and Jewish-only roads, there exist no communication links between the two areas.⁸⁴ Thus, the Wall with all its accompanying infrastructure and economic, social and political consequences, threatens the viability and stability of any future Palestinian state, making it dependent on Israel for its very survival.

IV. Concluding Remarks

The Wall has today become a "self-fulfilling prophecy", the more it succeeds in preventing terror, or is seen as doing so, the more likely the possibility of its permanent existence. The current administration in the closed areas, as well as the far reaching demographic changes have led many to fear than the most likely conclusion of this controversy will be the drawing of the final borders between Israel and Palestine as determined by the Wall today.⁸⁵ Above all, the continued construction of the Wall, its virtual acceptance by the U.N. as *fait accompli*, and international aid from institutions like the World Bank to make the Wall more "user friendly", are prime examples of the facile nature of international law and

⁸³ This information has been obtained from www.stopthewall.org (last visited November 3, 2005).

⁸⁴ *Id.*

⁸⁵ Watson, *supra* note 69, at 26.

institutions today. The controversy surrounding the Wall, the initial momentum in the international community to try to declare the construction as illegal, followed by the subsequent actions of the same countries to “manage” the illegality is a reflection that “self interest” rather than any moral ideology governs the domain of international relations.⁸⁶

⁸⁶ This is perhaps a practical illustration of the realist school of international relations as expounded by Morgenthau, who argued that the concept of self interest, defined in terms of power, is the only way of looking at international relations. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1997).