



# THE CASE ON THE LEGALITY OF ISRAEL'S WALL AT THE INTERNATIONAL COURT OF JUSTICE

## *A LEGAL ANALYSIS*

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## I. INTRODUCTION

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

This was the question posed by the UN General Assembly to the International Court of Justice (ICJ) at The Hague, in a request for an Advisory Opinion, on December 8, 2003.<sup>1</sup> The United Nations General Assembly made the request after United Nations (UN) bodies and officials had sought unsuccessfully to obtain agreement from Israel to halt construction on the wall. On October 14, 2003, the UN Security Council had voted on a draft resolution urging Israel to cease construction, but the resolution did not pass the United States' veto.<sup>2</sup> When the UN Security Council failed to pass a resolution, the UN General Assembly adopted Resolution ES 10/13, which included the demand:

[T]hat Israel stop and reverse the construction of the wall in the Palestinian Occupied Territory, including in and around E. Jerusalem, which is in departure of the Armistice Line of 1949, and is in contradiction to relevant provisions of international law.<sup>3</sup>

The UN General Assembly also instructed the Secretary General to report on Israel's compliance with this Resolution, and on November 24, 2003, he reported that Israel was not in compliance.<sup>4</sup> By its Resolution ES-10/13, the UN General Assembly had come to the conclusion that construction of the wall was a breach of international law.

This paper addresses the parameters of a decision by the ICJ on the legality of Israel's wall, in the exercise of the ICJ's advisory jurisdiction.<sup>5</sup> The range of options available to the ICJ in rendering such a decision include the most narrow reading of its jurisdiction in such a case, to a full review of the major issues underlying the Palestinian-Israeli conflict: the status of the Palestinian people, their right to self-determination, and the applicability of international human rights law and humanitarian law to the Israeli occupation. These questions will be addressed here, as they have been argued by the participants to the ICJ

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<sup>1</sup> G.A. Res. 10/14, UN GAOR, 10<sup>th</sup> Special Sess., Supp. No. 1, UN Doc. A/RES/ES-10/14 (2003).

<sup>2</sup> *Guinea, Malaysia, Pakistan and Syrian Arab Republic: Draft Resolution*, UN SCOR, UN Doc. S/2003/980 (2003).

<sup>3</sup> G.A. Res. 10/13, UN GAOR, 10<sup>th</sup> Special Sess., Supp. No. 1, UN Doc. A/RES/ES-10/13 (2003).

<sup>4</sup> *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, UN GAOR, UN Doc. No. A/ES-10/248 (2003).

<sup>5</sup> ICJ advisory jurisdiction is based on UN Charter art. 96, *infra* at note 23, (authorizing the UN General Assembly or the UN Security Council to request the "International Court of Justice to give an advisory opinion on any legal question") and ICJ Statute, *infra* at note 24, art. 65 (giving the ICJ jurisdiction to render "an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the UN to make such a request"). *See* Sec. III, *infra*.

proceedings, in order to examine how the ICJ might view the legal consequences flowing from the General Assembly's expressed opinion that the wall construction is unlawful.

## II. THE CONSTRUCTION OF THE WALL AND ITS IMMEDIATE CONSEQUENCES

In June of 2002, the Israeli army began building a wall running within West Bank territory on all sides, and around Jerusalem.<sup>6</sup> In October of 2003 the United Nations Special Rapporteur on the Right to Food, Jan Ziegler, completed a mission to the Occupied Palestinian Territories. His report from the mission states: "the security fence/apartheid wall is a huge, guarded electrified barrier, sometimes a fence and sometimes a Wall over 8 m. high...."<sup>7</sup>

The wall has been justified by the Israeli government as a "defensive measure, designed to block the passage of terrorists, weapons and explosives into the State of Israel."<sup>8</sup> Almost 90% of the wall is being constructed well within the Green Line, in part to encompass some 60 illegal Israeli settlements on Palestinian territory.<sup>9</sup> When he visited the wall, the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories said that at no point did the physical features of the land justify placing the wall within Palestinian territory.<sup>10</sup> According to the UN Office for the Coordination of Humanitarian Affairs in the Occupied Palestinian Territories, when the wall is complete, it will cut off 13.5% (191,000 acres) of the West Bank, the most fertile land in Palestinian territory, yielding on average \$900,000 per square kilometer.<sup>11</sup> According to UNRWA (the UN Relief and Works Agency for Palestine Refugees in the Near East), 33 communities (69,019 people) will be separated from their farms and wells that lie west of

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<sup>6</sup> The Palestinians refer to the structure as a "separation wall;" the Israelis refer to it as a "Security Fence;" the UN Secretary General has referred to it as a "barrier." Human rights advocacy organizations have termed it an "Apartheid Wall." The authors refer to it here as a "wall," using the terminology of the UN General Assembly itself in the Request for Advisory Opinion to the ICJ. See *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, *supra* note 4.

<sup>7</sup> *Report by the Special Rapporteur, Jean Ziegler, Addendum, Mission to the Occupied Palestinian Territory*, UN ESCOR, 60<sup>th</sup> Sess., at 3, UN Doc. E/CN.4/2004/10/Add.2 (2003) [Ziegler Report].

<sup>8</sup> Israeli Ministry of Defense on 31 July 2003. *The Israel Ministry of Defense and the Israel Defense Forces (IDF) have completed the first stage of the Security Fence project, Israel's Security Fence, on time*, (released, July 31, 2003) at <<http://www.seamzone.mod.gov.il/Pages/ENG/news.htm#news5>>.

<sup>9</sup> B'Tselem, The Israeli Center for Human Rights Violations [B'Tselem], *Map of the Separation Barrier*, at <[http://www.btselem.org/English/Separation\\_Barrier/Map.asp](http://www.btselem.org/English/Separation_Barrier/Map.asp)>. The UN High Commissioner for Human Rights declared illegal the Israeli settlements in the occupied Arab territories, as they were violations of the Geneva Convention relative to the Protection of Civilian Persons in Time of War. E.S.C. Res. 2002/7, UN ESCOR, *Israeli Settlements in the Occupied Arab Territories*, UN Doc. E/CN.4/2002/200 (2002) see ch. VIII. See also G.A. Res. 58/98, UN GAOR, 58th Sess., UN Doc. A/RES/58/98 (2003).

<sup>10</sup> UN Press Release, excerpt from *Report of High Commissioner on Human Rights Presented; Focuses on Education, Role of Courts, Trafficking in Women*, Special Rapporteurs on Mercenaries, Situation in Occupied Palestine Speak; Report on Conditions in Liberia Presented (released Mar. 19, 2004), available at <<http://domino.un.org/unispal.nsf/22f431edb91c6f548525678a0051be1d/43d8bd3314d77f8b85256e5c007509f7!OpenDocument>>.

<sup>11</sup> United Nations Office for the Coordination of Humanitarian Affairs ("OCHA"), *New Wall Projections*, (released Nov. 6, 2003), available at <<http://www.reliefweb.int/w/rwb.nsf/069fd6a1ac64ae63c125671c002f7289/17f0d2fa4a21bcf9c1256dda0046a5a9?OpenDocument>>.

the barrier. Fifteen communities (138,593 people), will be almost completely imprisoned by the winding route of the wall, including 40,000 people who will be trapped in Qalqilya, surrounded on all sides by an 8-meter high wall with only one road out, controlled by an Israeli checkpoint. Fourteen communities (13,636 people) will be trapped in the land defined as a 'closed military zone' between the Wall and the Green Line, cut off from the Palestinian territories but forbidden to enter Israel.<sup>12</sup> UNRWA estimates that of those affected, 76,455 people are refugees.<sup>13</sup> The Office for the Coordination of Humanitarian Affairs estimates that the wall will trap some 189,000 Palestinians living in these areas between the wall and the Green Line, or in enclaves encircled by the wall.<sup>14</sup> More than 400,000 Palestinians live immediately east of the Wall and will inevitably "need to cross it to access farmland, jobs or health services."<sup>15</sup> The only educational and health facilities available to these isolated Palestinian communities are those provided by UNWRA, which are limited.<sup>16</sup> The Israeli human rights organization, B'Tselem, documents that some 200,000 Palestinians who live in East Jerusalem will be separated from the rest of the West Bank.<sup>17</sup>

Ostensibly to provide for movement between the different areas that the wall separates, a limited number of gates have been built into the wall structure. Israeli authorities control the gates and monitor movement through the gates with a heavily restricted permit system. In order to gain access through one of the gates, a so-called 'special permit' is required. A permit is only valid for one specific gate. The permit requirements apply to the majority of Palestinians, but are not applicable to Israeli citizens, tourists with valid visas, or Jews, among others.<sup>18</sup> Thus, Palestinian farmers need a permit to access their land, students require permits to go to school, business owners to their offices, medical staff to assist the sick or wounded, etc. As of this writing, there are 46 constructed gates; only 19 of these are, however, open to permit holders, and these only during restricted hours. The remaining 27 gates are closed. Palestinian civilian deaths mount daily at the gates and other checkpoints, as well as elsewhere across the West Bank and Gaza at the hands of the Israeli military.<sup>19</sup> Numerous authoritative organizations, including UN agencies, continue to report that the wall is causing gross violations of Palestinians'

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<sup>12</sup> United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA"), *The Impact of the First Phase of Barrier on UNRWA-Registered Refugees*, available at <<http://www.un.org/unrwa/emergency/barrier/f-phase.html>>.

<sup>13</sup> *See id.*

<sup>14</sup> *See* OCHA, *UPDATE – Humanitarian Implication of the New Barrier Projections* (released Jan. 2004), available at <<http://www.reliefweb.int/hic-opt/>>, at 4.

<sup>15</sup> *See id.* at 2.

<sup>16</sup> UNRWA, *The Impact of the First Phase of Barrier on UNRWA-Registered Refugees*, at <<http://www.un.org/unrwa/emergency/barrier/f-phase.html>>.

<sup>17</sup> *See* B'Tselem, *supra* at note 9.

<sup>18</sup> Palestinians under the age of 12, 'green' permit holders or Palestinians with valid Israeli work permits are exempt from the permit system. *See* the Humanitarian and Emergency Policy Group ("HEPG"), "The Impact of Israel's Separation Barrier on Affected West Bank Communities," at 10 (Mar. 2004), available at <<http://www.reliefweb.int/hic.opt/docs/HEPG/Wallreport.pdf>>.

<sup>19</sup> *See generally*, OCHA, *Weekly Briefing Notes*, available at <<http://www.reliefweb.int/w/rwb.nsf/ByCountry/Occupied+Palestinian+territory?OpenDocument&StartKey=Occupied+Palestinian+territory&Expandview>>.

human rights, including rights to self-determination, control over natural resources, family, freedom of movement, and access to work, medical treatment, and education.<sup>20</sup>

### III. SUMMARY AND ANALYSIS OF THE ARGUMENTS ON JURISDICTION

The ICJ will need to address the scope of its authority to render an opinion on the matter referred to it, as Israel devoted the bulk of its written statement to challenging the Court's jurisdiction over the issues raised in the request.<sup>21</sup> The jurisdictional arguments challenge the manner in which the GA brought the request to the ICJ, the language of the request, and the propriety of the ICJ to hear the issue.<sup>22</sup> A brief background to the advisory request is necessary in order to understand these challenges.

The UN General Assembly requested the Advisory Opinion during its 10th Emergency Session. The legal basis for the Emergency session was the Uniting for Peace Resolution, discussed further below. The Resolution provides that in a situation where the Security Council cannot agree on a situation constituting a threat to international peace and security, the General Assembly shall meet immediately to deal with the matter. The request for an advisory opinion from the ICJ is one possible action the General Assembly can take in such a situation. The ICJ is the formal court of the United Nations.<sup>23</sup> Only states or recognized entities may either be parties or make appearances before the Court,<sup>24</sup> and states must consent to the Court's jurisdiction in contentious cases—that is, cases concerning actual disputes brought to the Court by one or more of the states-parties.<sup>25</sup> Under Article 65 of the ICJ Statute the Court also has jurisdiction to give advisory opinions in non-contentious cases to recognized bodies of the UN. An

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<sup>20</sup> See especially Ziegler, *supra* note 7; *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*, UN ESCOR, 60<sup>th</sup> Sess., UN Doc E/CN.4/2004/6 (2003) [Dugard Report]; *Ms. Catherine Bertini, Personal Humanitarian Envoy of the Secretary-General, Mission Report*, available at <[http://domino.un.org/bertini\\_rpt.htm](http://domino.un.org/bertini_rpt.htm)> (2002) [Bertini Report]; See also Written Statement submitted by Palestine, available at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> (Jan. 30, 2004), [Palestine's Written Statement]; Dossier No. 56 accompanying UNSG's submission to the ICJ, available at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>.

<sup>21</sup> See Written Statement of the Government of Israel on Jurisdiction and Propriety, available at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>, at 55-88 (Jan. 30, 2004) [Israel's Written Statement]. The first section of Israel's written statement details Palestinian terrorist acts against Israel. See *id.* at 1-54. The Palestine written and oral statements give both Israeli and Palestinian casualty figures, and point out that Israeli state or settler violence resulted in six times as many Palestinian deaths as Israelis over the same time period. Palestine claims that close to 3,000 Palestinian civilians have been killed by Israeli military or settlers between September 2000 and February 2004, citing figures from human rights reports. See Palestine Oral Statement, *Verbatim Record of Proceedings*, CR 2004/1, *Public sitting held on Monday 23 February 2004, at 10 a.m., at the Peace Palace, President Shi presiding (2004)*, available at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>, at 23.

<sup>22</sup> See *id.* at 57-87.

<sup>23</sup> Charter of the United Nations, with the Statute of the International Court of Justice annexed thereto, Jun. 26, 1945, 59 Stat. 1031, T.S. 993 [UN Charter], art. 92.

<sup>24</sup> Statute of the International Court of Justice annexed to U. N. Charter, Jun. 26, 1945, 59 Stat. 1055, T.S. No. 993 [ICJ Statute], art. 34.

<sup>25</sup> ICJ Statute, *id.*, art. 36.

advisory opinion must regard a ‘legal question’ and be requested from a body “authorized by or in accordance with” the UN Charter to make such a request.<sup>26</sup> States cannot request advisory opinions.

Article 96 of the UN Charter gives broad authority to the UN General Assembly to seek advisory opinions from the ICJ:

“The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”<sup>27</sup>

Article 65 of the ICJ Statute further provides:

“The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”<sup>28</sup>

The ICJ accepted the request for an advisory opinion and initiated proceedings. Over a period of two months, States were allowed to submit written statements to the Court in response to the request. Among others Israel, Palestine, the United States, the Arab League, Russia and the European Union filed written statements.<sup>29</sup>

States were also given the opportunity to present an oral statement to the Court in February 2004.<sup>30</sup> Israel declined to present an oral statement, and did not send an official representative to the hearings. Palestine, having the special status of observer, and as co-sponsor of the draft resolution requesting the Advisory Opinion, was given special permission to file a written statement and participate in the oral hearings. Israel, the United States and the European Union have argued that the ICJ either lacked jurisdiction to render an advisory opinion, or that it was not appropriate to render an opinion in this matter. The main jurisdictional arguments are discussed below.

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<sup>26</sup> ICJ Statute, *supra* note 24, art. 65.

<sup>27</sup> UN Charter, *supra* note 23, art. 96, para. 1.

<sup>28</sup> ICJ Statute, *supra* note 24, art. 65, para. 1.

<sup>29</sup> Written statements were submitted, in order of filing, by Guinea, Saudi Arabia, the Arab League, Egypt, Cameroon, the Russian Federation, Australia, Palestine, the United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, the United States of America, Morocco, Indonesia, the Organization of the Islamic Conference, France, Italy, the Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland (on its own behalf), Ireland (on behalf of the European Union), Cyprus, Brazil, Namibia, Malta, Malaysia, the Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal and the Democratic People’s Republic of Korea. *See Verbatim Record*, *supra* note 21, at 16-17.

<sup>30</sup> The parties presenting oral statements were Palestine, South Africa, Algeria, Saudi Arabia, Bangladesh, Belize, Cuba, Indonesia, Jordan, Madagascar, Malaysia, Senegal, Sudan, the Arab League, and the Organization of the Islamic Conference. *See, Verbatim Record*, *supra* note 21, at 4-8.

**A. The Request for an Advisory Opinion is Beyond the Competence of the UN General Assembly or the 10<sup>th</sup> Emergency Special Session**

Israel challenged the competence of the UN General Assembly to seek an advisory opinion on the question of the legality of the wall.<sup>31</sup> Israel has maintained that it is the UN Security Council that is seized of the matter, not the UN General Assembly, and that the UN Security Council has not ‘failed to act’ in such a way that the General Assembly may assert competence over the question. In legal terms, Israel claims that the request for an advisory opinion is *ultra vires* the competence of the General Assembly in the manner in which it sought the opinion.<sup>32</sup>

The first part of Israel’s argument relates to the functional division between the UN General Assembly and the UN Security Council under the Charter; it claims that the General Assembly had no authority over the issue, either through the Special Session, or through a regular session because it is one on which only the UN Security Council could act, and it did act on it.<sup>33</sup> While there is considerable debate about the functional divisions between the two main UN bodies as set out in the Charter, there is little question that the General Assembly has had broad authority over the Palestine question since the conflict first arose. Moreover, although the General Assembly’s freedom to act is constrained by the UN Security Council when the latter is exercising its responsibility for maintaining peace and security under Article 24(1)<sup>34</sup> of the UN Charter, when the UN Security Council has failed to exercise those functions, the General Assembly “may recommend measures for the peaceful adjustment of any situations...likely to impair general welfare or friendly relations among nations, including situations arising from violations of provisions of the present Charter...”<sup>35</sup> Moreover, the “General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers of and functions of any organs provided for in the Charter and, except as provided for in Article 12,<sup>36</sup> may make recommendations to Members of the United Nations or to the Security Council or both on any such questions or matters.”<sup>37</sup>

The UN General Assembly has claimed that its authority to act in the absence of requested Security Council action has been established through the procedures set out under the Resolution 377 (V) A, the ‘Uniting for Peace Resolution,’ passed in 1950.<sup>38</sup> This Resolution, passed by the General Assembly in response to the repeated failure of the UN Security Council to handle an escalating situation in Korea, provides that if the UN Security Council fails to take action (1) because the Permanent Members fail to agree and (2) where “there appears to be a threat to peace, breach of the peace, or act of aggression...” the UN General Assembly shall consider the matter in an ‘emergency

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<sup>31</sup> See Israel’s Written Statement, *supra* note 21, at 57.

<sup>32</sup> See Israel’s Written Statement, *supra* note 21, at 57-81.

<sup>33</sup> See *id.*

<sup>34</sup> See UN Charter, *supra* note 23, art. 24, para 1.

<sup>35</sup> UN Charter, *supra* note 23, art. 14.

<sup>36</sup> The UNGA may not act when the UNSC is acting “in respect of any dispute or situation” relating to international peace and security.

<sup>37</sup> UN Charter, *supra* note 23, art. 10.

<sup>38</sup> G.A. Res. 377 (V), UN GAOR, 5<sup>th</sup> Sess., UN Doc. A/RES/377 (1950).

special session'. In order to convene an emergency special session there has to be either a request from the UNSC, upon a vote supported by seven members, or a request from a majority of the Member States.<sup>39</sup>

Israel argues, however, that the Security Council did not 'fail to act' in such a way that the Uniting for Peace procedures could be triggered.<sup>40</sup> A UN Security Council Resolution was in fact adopted by the Council just nineteen days before the Emergency Session.<sup>41</sup> Hence, the UN General Assembly must abstain from handling the matter because the UN Security Council was already seized of the issue.<sup>42</sup>

Palestine responded to this argument by arguing that in the *Namibia Advisory Opinion*,<sup>43</sup> the ICJ held that "[a] resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted."<sup>44</sup> Furthermore, Palestine argues that nothing in the UN Charter prevents the UN General Assembly from requesting this advisory opinion and that the request does not interfere with the UN Security Council's authority.<sup>45</sup> The Arab League's written submission claims that Article 96(1) of the UN Charter provides for "almost complete liberty of the [General] Assembly in requesting an opinion of the Court..."<sup>46</sup> Consequently, the UN General Assembly has the power to request "an opinion on questions relevant to the exercise of its broad powers under the Charter in relation to a territory with an international status over which it has continuing responsibility..."<sup>47</sup>

From the facts preceding the request, the argument that the UN Security Council did not take action concerning the wall has merit. First, the UN Security Council Resolution Israel refers to in its statement fails to consider the wall. Second, a draft resolution dealing with the wall was presented to the UN Security Council on October 14, 2003, but the resolution did not pass the United States' veto.<sup>48</sup> Responding to this failure of the UN Security Council to take action, the UN General Assembly adopted Resolution ES-10/13, which demanded that Israel halt its construction of the wall. The Secretary General was also requested by the General Assembly to report on Israel's compliance with this

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<sup>39</sup> G.A. Res. 377 (V), UN GAOR, 5<sup>th</sup> Sess., Annex, at 1, UN Doc. A/RES/377.

<sup>40</sup> See Israel's Written Statement, *supra* at note 21, at 119, para. 10.3. Israel contends that the UN Charter gives exclusive authority to the Security Council to address the issues underlying the advisory request, citing *inter alia*, articles 11, 12, 24(1), 33, 34, 36, 37 and 38. See *id.*, at paras. 4.46-4.58.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [*Namibia Advisory Opinion*], 1971 I.C.J. 16 (Jun. 1971).

<sup>44</sup> See Palestine Oral Statement, *Verbatim Record*, *supra* note 21, at 31, para. 7 (quoting *Namibia Advisory Opinion*, at 22, para. 20).

<sup>45</sup> See *id.* at 31, para. 8.

<sup>46</sup> See Written Statement of the Arab League, available at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwframe.htm>>, para. 3.2.

<sup>47</sup> *Id.* at para 3.2.

<sup>48</sup> See S/2003/980 *supra* note 2.



resolution, and his report of November 24, 2003 concluded Israel had failed to comply.<sup>49</sup> Faced with Israeli non-compliance as reported by the Secretary General, the UN General Assembly then sought the advisory opinion of the ICJ. In this case the UN Security Council failed to take action concerning the wall, which gave the UN General Assembly the competence to convene an emergency session. When Israel failed to comply with the Secretary General and General Assembly's request to "stop and reverse the construction of the wall" the UN General Assembly had authority to take action, including to request an advisory opinion.

### ***B. The Request for an Advisory Opinion does not Pose a Legal Question***

The second part of Israel's argument relates to the authority of the General Assembly to seek an advisory opinion on the matter.<sup>50</sup> This argument also raises two points: the scope of General Assembly authority to seek an advisory opinion, and whether the advisory opinion poses a "legal question." Concerning the scope of the General Assembly's authority to seek advisory opinions, both the UN Charter and ICJ jurisprudence establish that such authority is extremely broad. Article 96 of the Charter, granting the authority to the primary UN organs to seek advisory opinions, states that either the General Assembly or the Security Council may request an advisory opinion on *any legal question*.<sup>51</sup> Thus, as long as the question posed is legal, either organ may seek the advice of the ICJ.

Israel has also challenged whether the question referred to the Court is a 'legal question'. In fact, according to Israel, it is unclear whether the Court is being asked to find that the construction of the fence is unlawful, or is to assume illegality.<sup>52</sup> Also, it is unclear to whom or what the 'legal consequences' refer, and the question does not state for whom the 'legal consequences' are to be considered.<sup>53</sup> Thus, the question referred is uncertain in its terms, with the result that it is not amenable to a response by the Court.<sup>54</sup>

In response, Palestine relied on the ICJ opinion in the *Threat or Use of Nuclear Weapons* case<sup>55</sup>: "Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regards to the obligations imposed upon them by international law."<sup>56</sup> The ICJ is guided by much precedent in giving advisory opinions on legal principles in highly-charged political situations.<sup>57</sup>

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<sup>49</sup> *Supra* note 4.

<sup>50</sup> See Israel's Written Statement, *supra* note 21, at 83-88.

<sup>51</sup> UN Charter, *supra* note 23, art. 96.

<sup>52</sup> See Israel's Written Statement, *supra* note 21, at 120, para. 10.4.

<sup>53</sup> *Id.*

<sup>54</sup> See *id.* at 120, para. 10.5.

<sup>55</sup> See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (Jul. 1996).

<sup>56</sup> See Palestine Oral Statement, *Verbatim Record*, *supra* note 21, at 32, para 11 (quoting *Legality of the Threat or Use of Nuclear Weapons*, *id.*, at 234, para. 13).

<sup>57</sup> See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 55; *Namibia Advisory Opinion*, *supra* note 43; *Western Sahara, Advisory Opinion [Western Sahara]*, 1975 I.C.J. 12 (Oct. 1975); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Jun. 1986).

The Arab League argued that the question presented to the Court is by definition a ‘legal question’. On the one hand it deals with “the *international legal aspects* of a set of facts” and on the other hand “the *interpretation* of international norms” applicable in this case. In sum, the question must be a legal question, because it is “framed in terms of law and raise[s] problems of international law....”<sup>58</sup>

The UN General Assembly in its role as the political organ of the UN may at any time request the ICJ to give an advisory opinion on a legal issue. A legal issue may include political issues and considerations without losing its legal character. The question posed in this case asks the ICJ to rule on the “legal consequences” of the construction of the wall. Requesting the ICJ to conduct a legal analysis when political issues are involved does not turn the process into political decision-making; it is irrelevant that the context of this case concerns political issues. The Court is constrained to determining what legal norms are applicable in this case, and the consequences of these norms on the construction of the wall.<sup>59</sup>

Whether the ICJ actually renders the opinion sought is governed by the language of Article 65.1 of the Statute of the ICJ, which states that the Court “...*may give an advisory opinion on any legal question...*”<sup>60</sup> The ICJ has addressed the scope of this language numerous times, and has thus far refused to find that it does not have authority to interpret any legal question posed by either the Security Council or the General Assembly.<sup>61</sup>

### ***C. States Must Consent to ICJ Jurisdiction***

Article 36 of the ICJ statute provides that the Court may only hear cases if the parties to the dispute consent to the Court’s jurisdiction.<sup>62</sup> In this case Israel contends that the advisory opinion request relates to the core issues of the ongoing dispute between Israel and Palestine, and if the Court were to render an opinion it would be substantially equivalent to deciding that dispute.<sup>63</sup> Israel points out that a state is not obliged to allow its disputes to be submitted to judicial settlement without its consent. In sum, Israel has not consented to the Court’s jurisdiction and claims that it would therefore be inconsistent with international law to impose a judicial settlement on Israel.

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<sup>58</sup> Written Statement of the Arab League, *supra* note 46, para 3.3. (quoting *Western Sahara*, *supra* note 57, at 18, para. 15).

<sup>59</sup> For an excellent analysis of the jurisdictional issues raised in the request for advisory opinion on the wall, see Iain Scobbie, *Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory: request for an advisory opinion, An analysis of issues concerning competence and procedure, Hotung Project-Law, Human Rights and Peace Building in the ME—Papers, No. 1*, available at <[www.soas.ac.uk/lawpeacemideast](http://www.soas.ac.uk/lawpeacemideast)>.

<sup>60</sup> ICJ Statute, *supra* note 24, art. 65, para. 1.

<sup>61</sup> See, for example, *Western Sahara*, *supra* note 57, at 19 (“there is nothing in the charter or the Statute to limit either the competence of the General Assembly to request an Advisory Opinion, or the competence of the Court to give one, to legal questions relating to existing rights or obligations...” at para. 18).

<sup>62</sup> ICJ Statute, *supra* note 24, art. 36.

<sup>63</sup> See Israel’s Written Statement, *supra* note 21, at para. 10.7.

The United States also argued against finding that the ICJ has jurisdiction. In its statement, the US claimed that it was concerned that an advisory opinion in this case could undermine the principle of resolving disputes through negotiations by the parties and the requirement of consent. “Lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.”<sup>64</sup>

Palestine argued that the ICJ has earlier held that as a member of the United Nations a state has “accepted the provision of the Charter and the Statute ... [and] thereby in general given its consent to the exercise by the Court of its advisory opinion.”<sup>65</sup> Moreover, in this particular case the UN General Assembly has in fact a vital role and therefore a responsibility to act, including by requesting an advisory opinion.<sup>66</sup> Furthermore, this is not an issue between two Member States and the issue does not fall within Israel’s domestic jurisdiction.<sup>67</sup> In sum, Israel does not have a veto over the UN General Assembly’s request for an advisory opinion.<sup>68</sup> Rather, the UN General Assembly has a “long-standing and legitimate institutional role” to ask for this advisory opinion.<sup>69</sup>

Israel’s argument claiming that consent is required in this matter conflates the requirement that a state must consent before the ICJ can exercise jurisdiction in a contentious case with the broad authority of the ICJ to render an advisory opinion in any legal matter brought to it by UN bodies. The key distinction between the Court’s role in the two types of cases is that a contentious case involves a dispute between two or more states that triggers the compulsory jurisdiction of the Court, and an advisory request seeks a legal interpretation from the Court which is not binding on any state. Thus, for a state to be compelled to comply with an ICJ decision, it must consent to jurisdiction; an advisory opinion does not compel a state to take or forego any action, thus state consent is not required.<sup>70</sup> For example, in the *Western Sahara Advisory Opinion*,<sup>71</sup> the Court indicated that the General Assembly’s request had not been made with “‘the object of ... bring[ing] before the Court ... a dispute or legal controversy ... [with a view to its subsequent] peaceful settlement’ but only to assist the General Assembly in carrying out its special

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<sup>64</sup> See Written Statement of the United States of America, available at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>, at para. 3.4.

<sup>65</sup> See Palestine Oral Statement, *Verbatim Record*, *supra* note 21, at 34, para 21 (quoting *Western Sahara*, *supra* note 57, at para. 30)

<sup>66</sup> See *id.* at 34, para. 22.

<sup>67</sup> See *id.* at 34, para. 22.

<sup>68</sup> See *id.* at 35, para. 23.

<sup>69</sup> *Id.*

<sup>70</sup> See Scobbie, *Legal Consequences*, *supra* note 59.

<sup>71</sup> See *Western Sahara*, *supra* note 56, at 12.

responsibilities concerning the decolonization of the territory.”<sup>72</sup> In that case, the Court also emphasized that by rendering an advisory opinion it was not compromising “the legal positions of the parties to the underlying dispute:..”<sup>73</sup>

As noted at the outset, an advisory opinion requested by a specific, recognized body, is authorized by the UN Charter.<sup>74</sup> By becoming a member of the UN, every state recognizes and grants this power to the UN, including recognizing the advisory competence of the ICJ.

#### ***D. The Issue is Speculative, and Cannot be Decided Without Additional Facts***

Israel also challenged the ICJ’s competence over the matter by claiming that the ICJ will have to rely on second-hand sources, and that the Court would consequently have to speculate about essential and complex facts of the case.<sup>75</sup> The Palestinian statement pointed out that Israel itself abstained from submitting any information on the merits of the case, and failed to present any oral statements on its own behalf,<sup>76</sup> arguing that the only facts missing were those Israel might have submitted. The record was fully substantiated with direct and authoritative evidence of all available facts concerning the wall, supplemented by numerous reports by recognized organizations as well as the UN.<sup>77</sup> If Israel were allowed to simply prevent the Court from considering the issue because Israel alone had not provided facts about the case, then Israel would be afforded veto power over the advisory process.<sup>78</sup>

Even in a contentious case, the ICJ declined to allow such an argument to prevent exercise of its jurisdiction. In the *Military and Paramilitary Activities (Nicaragua v. United States)* contentious case, after having appeared and argued its position on the merits, the United States decided not to make further appearance in a later stage, arguing

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<sup>72</sup> *Id.* at 26.

<sup>73</sup> Written Statement of the United States of America, *supra* note 64, at para. 3.9 (citing *Western Sahara*, *supra* note 57, at 28.

<sup>74</sup> The advisory procedure of the Court is only available to recognized international organizations. The only bodies currently authorized to request advisory opinions are the 5 organs of the United Nations and the 16 specialized agencies of the United Nations. When the Court receives such a request, it decides which states and organizations might provide helpful information, and invites them to present oral and written statements. *See* UN Charter, *supra* note 23, art. 96.

<sup>75</sup> *See* Israel’s Written Statement, *supra* note 21, at para. 10.7.

<sup>76</sup> Although submitting a written statement confined to challenges on competence and jurisdiction grounds, Israel did not appear and present any oral statement on its own behalf at the ICJ. Instead, it organized a series of demonstrations and protests outside the World Court building, including a display of a charred Israeli school bus as a symbol of Palestinian violence. *See*, Arthur Max, *World Court Hears Case on Israeli Barrier*, Associated Press (Feb. 23, 2004), *available at* <<http://www.twincities.com/mld/twincities/8019092.htm?1c>>.

<sup>77</sup> *See* Palestine Oral Statement, *Verbatim Record*, *supra* note 21, at 36, para. 27.

<sup>78</sup> *See id.* at 36, para. 28. At least in contentious cases, the ICJ’s interpretation of its Statute and practice establishes that a state’s failure to appear will not prevent the Court from adjudicating the merits of the case. *See* Stanimir A. Alexandrov, *Non-Appearance before the International Court of Justice*, 33 Colum. J. Transnat’l. L. 41 (1995).

that it no longer consented to ICJ jurisdiction over the case.<sup>79</sup> The United States claimed that because it was no longer present and submitting facts relevant to its contentions, the Court could not decide the case; nevertheless, the ICJ ruled on the merits.<sup>80</sup>

The ICJ accepts facts that have not been contested. Israeli abstention from submitting facts in this case should not undermine the Court's ability to give an advisory opinion. The Court has extensive and authoritative information from other sources than Israel to fully inform a legal interpretation of the issue presented.

### *E. Fairness and Judicial Propriety Preclude Decision*

In its submission to the ICJ, Israel also claims that both general fairness and judicial propriety compel the Court not to answer the request for an advisory opinion.<sup>81</sup> Israel emphasizes the precarious security situation; that it is the almost daily terrorist attacks that have necessitated construction of the wall. Israel's position is that the terrorist attacks must be seen in light of Security Council Resolution 1373 (2001)<sup>82</sup>, as they are the threat to international peace and security, and give Israel the right to self-defense. Israel notes that neither the United Nations Report nor the General Assembly Resolution refers to Resolution 1373 or the illegal terrorist attacks.<sup>83</sup> In sum, Israel claims that it is inappropriate to give an advisory opinion in this case, as it is not the wall that is a breach of peace and security, but Palestinian terrorist attacks—and those are not the subject of the claim before the Court.<sup>84</sup>

In addition, Israel contends that any response to the advisory opinion request would undercut the Roadmap initiative which the Security Council has endorsed.<sup>85</sup> The United States has echoed this position, claiming that “the giving of an advisory opinion in this matter risks undermining the peace process and politicizing the Court.”<sup>86</sup> The United States argues that: “[B]ecause of the manner in which this proceeding has arisen, including the formulation of the question...” “[i]t is not clear what issues might be engaged in this case.”<sup>87</sup> This argument points out that one of the issues the Court will have to consider is the security situation, which is best dealt with through the political process. The Road Map, presented as a comprehensive political plan to deal with the Palestinian-Israeli conflict, includes necessary arrangements for the security problems.<sup>88</sup>

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<sup>79</sup> See *Military and Paramilitary Activities*, *supra* note 57, at para. 1-13.

<sup>80</sup> See *id.* For commentary on the relevance of this case to the consequences of non-appearance, see generally, Alexandrov, *supra* note 78, at 68-72.

<sup>81</sup> See Israel's Written Statement, *supra* note 21, at 91-117.

<sup>82</sup> S.C. Res. 1373, UN SCOR, 4385th mtg., UN Doc. S/Res/1373 (2001) (affirming that terrorism constitutes a threat to international peace and security, and recognizing the right of individual or collective self-defense.)

<sup>83</sup> See Israel's Written Statement, *supra* note 21, at paras. 0.2 and 0.4.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See Written Statement of the United States of America, *supra* note 64, at para. 1.4.

<sup>87</sup> See *id.* at para 1.5.

<sup>88</sup> *Id.*

According to the US: “The applicable arrangements [between Israel and Palestine] are complex, given the division of responsibilities between the parties and the evolving situation....These geographic divisions [dividing the West Bank and Gaza into Areas A, B, C, with security responsibilities divided between Israel and the Palestinians] and further adjustments in their territorial scope have been disrupted by the violence during the past three years. One of the purposes of the Quartet’s Road Map is to return the parties to their previous areas of responsibility and to promote further territorial adjustments en route to permanent status.”<sup>89</sup> The United States concludes that the Road Map is the appropriate means to handle this situation. If the Court gives an advisory opinion it must therefore “avoid any actions that would interfere with or be inconsistent with the Roadmap.”<sup>90</sup>

Russia and the European Union took similar positions. Russia contended that “negotiations shall remain the only instrument to achieve peaceful and just settlement of the Palestinian-Israeli conflict.”<sup>91</sup> Whether the Court “decides to give an advisory opinion” or not, it should refrain from interfering with the negotiation process or render “the two-State solution impossible.”<sup>92</sup> Russia instead proposed that “the full arsenal of political means should be used” in order to enforce the existing Resolutions and agreements. The European Union claimed that an advisory opinion is ‘inappropriate’,<sup>93</sup> in that it does not help to re-launch the political dialogue necessary for a permanent solution to the Palestinian-Israeli conflict.<sup>94</sup>

Palestine and other state participants argued that it might be plausible to claim that the wall was a security arrangement to protect Israel from suicide bombings and intended to provide security, if it were constructed on Israeli territory, but that such an argument is implausible when the route of the wall is entirely on Palestinian territory.<sup>95</sup> The Palestine statement claimed that the sole reason for construction of the wall was to “attempt to change the legal status...” of Occupied Palestine Territory.<sup>96</sup> Palestine also maintained that an advisory opinion would further the Road Map and ongoing negotiations. It pointed out that in the *Threat or Use of Nuclear Weapons* opinion, the Court held that negotiations cannot be regarded as a “compelling reason to decline to exercise ... jurisdiction.”<sup>97</sup> Further, the Road Map does not address the wall at all; indeed “the Wall itself ... is inconsistent with the Road Map.”<sup>98</sup> Therefore, an advisory opinion would only strengthen the Road Map.<sup>99</sup> Finally, the wall concerns the present situation in the

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<sup>89</sup> *Id.* at para. 4.11.

<sup>90</sup> *Id.* at para. 2.21.

<sup>91</sup> Written Statement of the Russian Federation, available at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>, at 5.

<sup>92</sup> *Id.*

<sup>93</sup> See Written Statement of Ireland on behalf of the European Union, available at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>, at 4.

<sup>94</sup> *Id.*

<sup>95</sup> See Palestine Oral Statement, *supra* note 21, *Verbatim Record*, para. 19.

<sup>96</sup> *Id.* at para. 24.

<sup>97</sup> *Id.* at para. 31.

<sup>98</sup> *Id.* at para 32.

<sup>99</sup> See *id.*

Occupied Palestine Territory,<sup>100</sup> and has little bearing on a “final settlement” or “the boundaries of a future Palestinian State.”<sup>101</sup> In sum, the Court can give an advisory opinion without deciding the political issues of the conflict.

In conclusion, Israel’s security argument is undermined by its construction of the wall on territory outside its own recognized boundaries. The Road Map, whatever solution it might provide for a final settlement, provides little guidance on the legality or consequences of the wall. An advisory opinion by the ICJ, thus, neither compromises the security of the area, nor the Road Map.

#### **IV. SUMMARY OF THE ARGUMENTS BEFORE THE ICJ ON THE MERITS**

The arguments presented in support of the request to the ICJ focus on violations of international humanitarian law, as well as violations of human rights law and the more general public international law of nations.<sup>102</sup> Although acknowledging that Israel has a right to take measures to protect legitimate security interests, the participants point out that such measures must comply with requirements of ‘strict military necessity,’ and must conform to international humanitarian law and human rights law. The Palestinian statement details the harms caused to Palestinians by the wall, including the extensive destruction of Palestinian homes and other property; infringements of the requirements of freedom of movement; violations of rights to education, work, health care, and a basic standard of living; and violations of the rights against arbitrary interference of home and residence.<sup>103</sup> Palestinian arguments are that Israeli actions in constructing the wall and confiscating Palestinian property are not necessary or proportionate, but amount to grave breaches of the Fourth Geneva Convention, illegally effect transfer of the occupied population, and give rise to criminal liability on the part of the Israeli government. Moreover, Palestine and the Arab states claim that Israel’s motives in constructing the wall are to annex more territory and to deny Palestinian sovereignty and self-determination.

Palestine, the League of Arab States, and other participants have raised concerns that construction of the wall and the treatment of civilians at checkpoints violate both international humanitarian law and human rights law. The main international humanitarian law sources relied on in the submissions are: the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (4th Geneva Convention);<sup>104</sup> the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land

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<sup>100</sup> *See id.* at para. 33.

<sup>101</sup> Palestine Oral Statement, *supra* note 21, *Verbatim Record*, at para. 33.

<sup>102</sup> Palestine’s Written Statement, *supra* note 20; *See also* Written Statement of the Arab League, *supra* note 46; Written Statement of the Republic of South Africa; Written Statement of the Organization of the Islamic Conference; Written Statement of Sweden; Written Statement of the Swiss Confederation; Written Statement of Ireland, *available at* <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>.

<sup>103</sup> Palestine’s Written Statement, *id.*, at 51, para. 20.

<sup>104</sup> Convention Relative to the Protection of Civilian Persons in Time of War [4th Geneva Convention], Aug. 12, 1949, 6 U.S.T. 3516, 75 UNT.S. 287.

(Hague Convention) and its appended 1907 Hague Regulations respecting the Laws and Customs of War on Land (Hague Regulations).<sup>105</sup>

Participants also rely on a series of treaties and instruments, of which Israel is a signatory, or which comprise customary legal norms, to raise violations of international human rights law: the Universal Declaration on Human Rights<sup>106</sup>; the UN Charter<sup>107</sup>; the International Covenant on Economic, Social, and Cultural Rights (CESCR)<sup>108</sup>; the International Covenant on Civil and Political Rights (CCPR)<sup>109</sup>; the International Convention on the Elimination of all forms of Racial Discrimination (CERD)<sup>110</sup>; the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)<sup>111</sup>; and the Convention on the Rights of the Child (CRC)<sup>112</sup>.

Israel, on the other hand, refutes the applicability of most of the international humanitarian law and human rights provisions of the cited instruments.<sup>113</sup> Israel claims that since it has not adopted the Hague Regulations into domestic law, those provisions do not apply.<sup>114</sup> Israel also claims that it has not incorporated the 4<sup>th</sup> Geneva Convention into its law, and even if it had, that Convention is not applicable to the Occupied Palestinian Territories because historical events did not create a High Contracting Party responsible for applying the Convention provisions in the area.<sup>115</sup> At the same time, Israel claims that because there is an armed conflict in existence between the parties in the Middle East, only international humanitarian law could apply, and not human rights law. Thus, despite its ratification of the CCPR, the CESCR and other human rights treaties, Israel maintains they are inapplicable vis-à-vis its actions in the Occupied Palestinian Territories.<sup>116</sup>

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<sup>105</sup> Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations [Hague Regulations], Oct. 18, 1907, 36 Stat 2277, T.S. 539. While Israel is not a party to the Hague Convention or Hague Regulations, many of the rights and obligations embodied therein are now considered customary international law, binding on all states. The applicability of the 4th Geneva Convention to the Palestinian territory, Jerusalem, and other Arab territories has been affirmed by G.A. Res. 51/132, UN GAOR, 51st Sess., UN Doc. A/RES/51/132 (1997).

<sup>106</sup> G. A. Res. 217 (III), UN GAOR, 3<sup>rd</sup> Sess., UN Doc.A/Res/217 (1948)

<sup>107</sup> UN Charter, *supra* note 23.

<sup>108</sup> International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 UNT.S. 3 (entered into force Jan. 3, 1976) [CESCR].

<sup>109</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 UNT.S. 171 (entered into force Mar. 23, 1976) [CCPR].

<sup>110</sup> Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [CERD].

<sup>111</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [CEDAW].

<sup>112</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [CRC].

<sup>113</sup> *See Report of the Secretary General, Annex 1, supra* note 4. (In his report to the General Assembly, the Secretary General attached a summary of Israel's and Palestine's legal positions).

<sup>114</sup> *See id.* At the same time, Israel claims that the defense of 'necessities of war' under art. 23(g) of the Hague Regulations justifies its actions in seizing property to construct the wall. *See discussion infra* at Sec. VB.

<sup>115</sup> This is the so-called "missing reversioner" argument through which Israel claims the 4<sup>th</sup> Geneva Conv. cannot apply to the OPT's. *See discussion infra* note 148 and accompanying text.

<sup>116</sup> *See Report of the Secretary General, Annex 1, supra* note 4.



As far as the argument that the route for constructing the wall violates Palestinian sovereignty, Israel claims that the relevant UN Security Council Resolutions did not establish the borders between Israel and the Palestinians as the 1949 armistice lines (the “Green Line”). Israel maintains that the borders remain disputed. Moreover, the Government of Israel states that the wall is consistent with its Article 51 obligations under the UN Charter as a self-defense measure, and that since the beginning of construction, the number of suicide bombings has declined.<sup>117</sup>

Further, Israel denies the claims that it is permanently transferring ownership of land by expropriating Palestinian property. The state claims that it has put a process in place by which any injured party can petition the Israeli Supreme Court, and can obtain compensation. Israel also insists that it is not changing the residency status of any Palestinians affected by the wall, that it has a process for issuing permits to benefit those residing in Closed Areas, and thus is not preventing legitimate movement of the Palestinian civilian population.<sup>118</sup>

## **V. AN ANALYSIS OF THE MAIN SUBSTANTIVE ARGUMENTS ON THE LEGALITY OF THE WALL AND ITS CONSEQUENCES.**

### ***A. Israel’s Construction of the Wall Denies Palestinians Their Right of Self-Determination and all Related Rights of Palestinians as a People***

On the basis of arguments Israel has made to the UN General Assembly, the UN Security Council, the Secretary General and before other international bodies, Israel has maintained that it does not consider itself bound by The Hague Regulations, the Geneva Conventions or human rights law in relation to Palestinian civilians. First, it contends that the Geneva Conventions and the Hague Regulations have not been incorporated into domestic legislation. Second, Israel maintains that those Conventions do not apply in the Occupied Palestinian Territory because the territory is not a territory of a High Contracting Party. Third, the legal status of the Occupied Palestinian Territory is disputed; the 1949 armistice line has not been confirmed as international boundaries. Finally, Israel contends that human rights law is only applicable in peacetime, and then only for the protection of its own citizens.

These arguments and contentions require an examination of the international status of the area of Israel’s claimed borders as well as the Occupied Palestinian Territories. The controversy of the legal status of Occupied Palestine Territories goes back to the time of the Ottoman Empire.<sup>119</sup> It was after the dissolution of the Ottoman Empire and the

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<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> For legal and historical background to the Palestine question, *see generally* M. Cherif Bassiouni, *The Middle East: The Misunderstood Conflict*, 19 *Kansas L. Rev.* 373 (1971) [Bassiouni]; Sally V. Mallison & W. Thomas Mallison, *The Juridical Bases for Palestinian Self-Determination*, 1 *Palestine Y’Book Int’l. L.* 36 (1984) [Mallison, *Palestinian Self-Determination*]; *The Transformation of Palestine: Essays on the Origin and Development of the Arab-Israeli Conflict* (I. Abu-Lughod ed. 1971) [Abu-Lughod]; and W. Thomas Mallison and Sally V. Mallison, *An International Law analysis of the Major United Nations*

extension of the League of Nations Mandate system that the international status of Palestine as a Mandate was decided. At the time, Great Britain was given the Mandate over Palestine. In the *SW Africa* cases, the ICJ recognized that supervisory functions over the administration of the Mandate fell to the UN after the termination of the League of Nations.<sup>120</sup> The source of the UN's authority over the Palestine Question is debated by legal scholars, but derives through some combination of the provisions in the Mandate itself, the Trusteeship Council of the UN, customary international law on self-determination of peoples, and the Partition Plan embodied in UNGA Resolution 181.<sup>121</sup>

The British Mandate received authority under the League of Nations treaty to protect and preserve rights of native Palestinians in Palestine; legal experts contend that Britain had no authority to transfer or give away those rights to anyone or any other entity.<sup>122</sup> Thus, it was a provisional mandate until Palestine obtained independence. Britain, however adopted a policy, the Balfour declaration of 2 November 1917, promoting Zionist immigration into Palestine.<sup>123</sup> There was widespread Palestinian resistance to European colonization of Palestine by Zionists to achieve their political objective of a 'national home for the Jewish people,' in disregard of the rights of the population already residing there, the native Palestinians – including Palestinian Jews who opposed Zionism.<sup>124</sup>

After the end of the Second World War and in the face of increasing Zionist terrorism and conflict between the Palestinians and the Zionist immigrants, Britain decided that it would terminate its mandate, and requested a special meeting of the UN General Assembly. Upon the request by Britain to terminate the Mandate, the UN initiated a study, which resulted in the United Nations Special Committee on Palestine Majority Report. As a consequence of the Report, despite serious legal and factual errors contained within it, the UN General Assembly adopted Resolution 181.<sup>125</sup>

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*Resolutions Concerning the Palestine Question*, ST/ST/SER.F/4 (1979) [Mallison, *International Law Analysis*].

<sup>120</sup> See Written Statement of the Arab League, *supra* note 46, at para. 8.7.

<sup>121</sup> For a range of views discussing the source of UN authority over the Palestine question, see John Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 B.U. Int'l. L.J.1 (1989) [Quigley]; Anthony D'Amato, *The West Bank Wall, Part I: Jurisdiction*, *Jurist* (Feb. 24, 2004); *Part II, The Merits*, (March 2, 2004), and Anthony D'Amato, *The Legal Boundaries of Israel in International Law*, *Jurist* (April 8, 2002), available at: <http://jurist.law.pitt.edu/world/israelborders.php>; See also, Mallison, *Palestinian Self-Determination*, *supra* note 120, at 44-57; and Mallison, *International Law Analysis*, *supra* note 119, at 9-27.

<sup>122</sup> See especially arts. 3, 5, 6, 9, 15 of the Mandate, and Preamble for purpose. See also Quigley, *id.*, at 12-25; Mallison, *International Law Analysis*, *supra* note 119 at 24-25.

<sup>123</sup> Quigley, *id.* at 16-18; Mallison, *International Law Analysis*, *id.* at 11, 12. See also, W. T. Mallison, *The Balfour Declaration: An Appraisal in International Law*, in Abu-Lughod, *supra* note 119 at 61-111.

<sup>124</sup> Mallison, *International Law Analysis*, *id.* at 10; see generally, W.T. Mallison, *The Zionist-Israeli Juridical Claims to Constitute 'The Jewish People' Nationality Entity and to Confer Membership in It: appraisal in Public International Law*, 32 Geo. Wash. L. Rev. 983 (1964) [Mallison, *The Jewish People*].

<sup>125</sup> G.A. Res. 181 (II), UN GAOR, 1st Special Sess., Supp. No. 1, UN Doc. A/181 (II) (A+B) (1947). See Mallison, *International Law Analysis*, *supra* note 119 at 13. Note that UNGA Resolution was a recommendation to the parties only, since it is unlikely that the GA had legal authority to mandate the partition of Palestine. See Quigley, *supra* note 121 at 21; D'Amato *supra* note 121.

Resolution 181 adopted the Special Committee's proposal recommending the creation of two independent states, one 'Jewish' and one 'Arab', with a special International Regime for Jerusalem as a *corpus separatum*, under international administration.<sup>126</sup> The United Nations Conciliation Commission on Palestine was created to resolve remaining issues between the parties, and to protect the rights of peoples in Palestine after Britain withdrew. The Commission was given the power to establish the frontiers of the two states and Jerusalem according to geographic boundaries laid out in the Plan, with certain modifications. Moreover, the Commission was to select a Provisional government in each of the two states through democratically-held elections, with both Arabs and Jews entitled to vote in the state where they became citizens (that is, both states would represent both those Arabs and Jews geographically within that territory).<sup>127</sup>

According to the recommendations in Resolution 181, the territory of Palestine would be divided into eight parts, three each to the Jewish and Arab states, with Jaffa an Arab area in the Jewish state. The West Bank and Gaza Strip, were among the areas designated in Resolution 181 as Palestinian, in the 'Arab' territories.<sup>128</sup> The key requirement incorporated in the Partition scheme was that, if the recommendations were adopted, the rights of minorities in each territory were to be fully respected, that is, there was to be full equality of all citizens, whether they were a minority or majority in the newly-created state, with equal voting rights.<sup>129</sup> The legal significance of the non-discriminatory provisions was that they did not incorporate Zionist claims to establish an exclusive, religious-preferenced state in any part of partitioned Palestine.<sup>130</sup> Nevertheless, Israel declared its 'Jewish state' in May 1948 but did not define the borders of its state, and, in the ensuing conflict, caused the exodus of over 700,000 Palestinian refugees and enlarged its territory to encompass all the remaining areas that were allocated to the 'Arab state' except the West Bank and Gaza Strip.<sup>131</sup> These fell under Jordanian and Egyptian administration, respectively. In the ensuing conflict, and with Israeli acquisition of the remaining territories, the 'Arab state' envisioned by Resolution 181, was never established. Under negotiated truce arrangements, the parties withdrew to the borders now internationally legally recognized as the 1949 Armistice Lines, and Israel incorporated its expanded areas into its domestic jurisdiction.<sup>132</sup>

In 1967, Israel invaded and militarily occupied the West Bank and Gaza Strip, as well as the Golan Heights and Sinai Peninsula, the latter areas belonging to the sovereign states of Syria and Egypt. The West Bank and Gaza – Palestinian areas allocated under the Partition Plan to the "Arab state"—were seized from Jordan and Egypt, and Israel

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<sup>126</sup> Mallison, *International Law Analysis*, *supra* note 119 at 17, 18; Quigley, *supra* note 120 at 18-21.

<sup>127</sup> See G.A. Res. 181, *supra* note 125, at 134. Mallison, *International Law Analysis*, *id.*, at 19-21.

<sup>128</sup> See generally, Janet Abu-Lughod, *The Demographic Transformation of Palestine*, in Abu-Lughod, *supra* note 119 at 139-163.

<sup>129</sup> See G.A. Res. 181, *supra* note 125, at ch. 2, para. 1-8. See Mallison, *International Law Analysis*, *supra* note 119 at 19-21.

<sup>130</sup> Mallison, *id.* See also, Mallison, *The Jewish People*, *supra* note 124; cf, N. Feinberg: *the Recognition of the Jewish People in International Law*, *The Jewish Y'bk. Int'l. L.* 1 (1948).

<sup>131</sup> See S. Flapan, *The Birth of Israel: Myth and Realities* 18 (1987), *cited in* Quigley, *supra* note 122 at 22.

<sup>132</sup> Quigley, *id.* at 22.

established its authority in those areas under military regulations.<sup>133</sup> Israel has never declared its borders. Participants in the advisory request nevertheless contend that Israel is bound by legal obligations arising from the customary law of nations, the UN Charter, and the body of UN Resolutions on the Middle East conflict, particularly Resolutions 181, 194, 242 and 338.<sup>134</sup> These include the requirement to enact a constitution, respecting the full and equal rights of all its citizens, a condition required by Resolution 181 and by customary and treaty law ratified by Israel.<sup>135</sup> These also include a prohibition of annexation of territory beyond recognized borders, under UN Charter, Article 2(4), and customary law.<sup>136</sup> Finally, these include a series of obligations and proscriptions under international humanitarian and human rights law, binding on Israel through custom and treaty.<sup>137</sup>

Israel's invasion and occupation of the Palestinian territories by force, and its military occupation, have the legal status of a 'belligerent occupation,' both because they violate the integrity of territory defined by recognized borders, and violate the prohibition of use of force. The UN and the majority of its member states have recognized the 1949 Armistice Line as *de facto* Israeli borders<sup>138</sup> and the West Bank and Gaza as 'occupied territories.'<sup>139</sup> Numerous UN General Assembly and Security Council resolutions reaffirm such recognition.<sup>140</sup>

Additionally, the Palestinians have been recognized as a "people" with international juridical status, including the right to self-determination and to a sovereign state under customary international law as well as various international resolutions incorporating customary norms, including the League of Nations Covenant (Art. 22), Resolution 181, the UN Charter of 1969, and others. This principle was most recently reaffirmed by General Assembly Resolution 58/21.<sup>141</sup> On these grounds, Palestine and other participants argue that Israel's occupation of Palestinian territories and construction of the wall beyond the Green Line is a violation of the Palestinian people's right to self-

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<sup>133</sup> Quigley, *id.* at 30-32.

<sup>134</sup> G.A. Res. 181, *supra* note 125; G.A. Res. 194, UN GAOR, 3<sup>rd</sup> Sess., UN Doc. A/Res/194 (1948); S.C. Res. 242, UN SCOR, 1382h mtg., UN. Doc. S/Res/242 (1967); S.C. Res. 338, UN SCOR, 1747<sup>th</sup> mtg., UN Doc. S/Res/338 (1973).

<sup>135</sup> See generally G.A. Res. 181, *supra* note 125.

<sup>136</sup> See UN Charter, *supra* note 23, art. 2, para. 4.

<sup>137</sup> See *supra* notes 104-113.

<sup>138</sup> See Mallison, *International Law Analysis*, *supra* note 119 at 46-48.

<sup>139</sup> See generally Palestine Oral Statement, *Verbatim Record*, *supra* note 21; Palestine's Written Statement, *supra* note 20; Written Statement of the Arab League, *supra* note 46.

<sup>140</sup> See, for example, S.C. Res. 242, *supra* note 134.

<sup>141</sup> G.A. Res. 58/21, UN GAOR, 58th Sess., UN Doc. A/RES/58/21 (2004). See also G.A. Res. 2649, UN GAOR, 25th Sess., Supp. No. 27, UN Doc. A/RES/2649 (1970), (condemning the denial of the peoples in southern Africa and Palestine their rights of self-determination); UNGA Res. 3236 (11/22/74) (reaffirming 'the inalienable rights of the Palestinian people in Palestine, including the right of self-determination...national independence and sovereignty..'); UNGA 3070 (11/30/73) (affirming the 'legitimacy of the peoples struggle for liberation from alien subjugation by all means including armed struggle.').

determination (UN Charter, Art. 1(2); CESC, Art. 1(1); and CCPR, Art. 1(1)).<sup>142</sup> Related to the violations of self-determination are actions that violate the Palestinian people's rights to sovereignty over their natural resources (CESC, Art. 1(2) and Art. 25; and CCPR, Art. 1(1)).

The right of self-determination also encompasses the right of a people to leave and return to their country. Participants point to the fundamental prohibition against forcible expulsion that exists in numerous international conventions (Hague Regulations, Art. 46 and 4<sup>th</sup> Geneva Convention, Art. 45, both requiring repatriation after the cessation of hostilities).<sup>143</sup> The Nuremberg trials established that deliberately blocking the right of return of persons forcibly expelled falls within the scope of a grave breach of humanitarian law under Art. 147 of the 4<sup>th</sup> Geneva Convention.<sup>144</sup> The right of return and repatriation is expressed in numerous conventions as well (Geneva Convention, Art. 6(4) and 158(3); Universal Declaration of Human Rights, Art. 13(2); CCPR, Art. 12(4); and CERD, Art. 5(d)(iii)). The CCPR also includes a general provision in Art. 2(1), prohibiting governmental interference with rights guaranteed therein for any discriminatory purpose, which would include the right to return and the right against forced transfer and expulsion.<sup>145</sup>

### ***B. Israel's Destruction and Expropriation of Palestinian homes and other Property Violates International Humanitarian and Human Rights Law***

Israel is prohibited from destroying the property of the occupied Palestinians, unless destruction is absolutely necessary (4<sup>th</sup> Geneva Convention, Art. 53; Hague Regulation, Art. 23, 46, 52).<sup>146</sup> For its part, Israel has stated that it may seize property in cases of necessity. Furthermore, Israel argues that "there is no change in ownership of the land" and that Palestinians are afforded compensation and a possible remedy through resort to the Israeli Supreme Court.<sup>147</sup>

Concerning the applicability of international humanitarian law to its actions, Israeli authorities have relied on article 23(g) of the Hague Regulations even though the Regulations have not been incorporated into Israeli law. Israel has also asserted that land requisitions are proportionate to the threat and damage that terrorism has caused. Concerning the 4<sup>th</sup> Geneva Convention, Israel argues that it has not incorporated it into domestic law, either. Israel has also consistently maintained that since the Occupied Palestinian Territories were not sovereign territory prior to annexation by Jordan and

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<sup>142</sup> UN Press Release, *supra* note 24, quoting the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories as saying, "the Wall violated the prohibition on the acquisition of territory by forcible means and seriously undermined the right to self-determination of the Palestinian people."

<sup>143</sup> See Palestine Oral Statement, *Verbatim Record*, *supra* note 21, at 44.

<sup>144</sup> Gail Boling, *Palestinian Refugees and the Right of Return: An International Law Analysis*, BADIL Information & Discussion Brief, no. 8, at 13-14 (Jan. 2001), available at <[http://www.badil.org/Publications/Legal\\_Papers/RoR48.pdf](http://www.badil.org/Publications/Legal_Papers/RoR48.pdf)>.

<sup>145</sup> *Id.* at 16.

<sup>146</sup> 4<sup>th</sup> Geneva Convention art. 53, *supra* note 105; Hague Regulations art. 23, 46, 52, *supra* note 106.

<sup>147</sup> See *Report of the Secretary General*, Annex 1, at 8, *supra* at note 4.

Egypt, they are not a territory of any High Contracting Party as required by the 4<sup>th</sup> Geneva Convention, and thus that Convention is inapplicable to the area.<sup>148</sup>

Because the wall was built on Palestinian territory beyond the Green Line, Israel's argument that destruction of Palestinian homes and land is a necessary security measure is not sustainable. Furthermore, "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully" and wantonly is considered a grave breach of international humanitarian law (4<sup>th</sup> Geneva Convention, Art. 147).<sup>149</sup> If Israel confiscates Palestinian land, it is prevented from making permanent changes that do not benefit the local inhabitants (Hague Regulations, Art. 55).<sup>150</sup> The destruction of Palestinian homes, uprooting of trees, building of Israeli settlements and concrete walls do not "ring" of anything temporary. The Commission on Human Rights has confirmed that Israel's property destruction constitutes a violation of the 4<sup>th</sup> Geneva Convention.<sup>151</sup>

Palestine also argues that by creating a regime that prevents Palestinians' freedom of movement Israel violates international human rights law.<sup>152</sup> There are at least three international conventions to which Israel is a signatory that guarantee the right to freedom of movement (CCPR, Art. 12(1); CERD, Art. 5(d)(i); CEDAW, Art. 15(4)). Although Israel has consistently maintained the non-applicability of these human rights treaties to its actions in the OPT's, the international consensus and authoritative statements are to the contrary.<sup>153</sup> Most recently, in August 2003, the UN Human Rights Committee said that both humanitarian law and human rights law apply to Israel in the Occupied Territories.<sup>154</sup>

The Hague Regulations and 4<sup>th</sup> Geneva Conventions provisions cited above clearly establish the right to internal movement in occupied territory. Restrictions on movement within areas of an individual's lawful residence, which are justified on national security must be necessary, proportionate to the interests to be protected, and based on clear legal grounds. "These conditions would not be met, for example, ... if an individual were prevented from traveling internally without a specific permit."<sup>155</sup> As mentioned above, all Palestinians living between the Green Line and the wall are required to obtain permits. Permits must also be obtained in order to cross the barrier for work, school, family

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<sup>148</sup> See Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 Israel L. Rev. 279 (1968). This "missing reversioner" argument is exclusive to Israel, and is not shared or supported by authoritative bodies. See discussion and authorities cited in *The Separation Barrier and International Humanitarian Law*, Briefing paper, Harvard Program on Humanitarian Policy and Conflict Research, (Feb. 2004), available at <[http://www.hamoked.org.il/items/3552\\_eng.pdf](http://www.hamoked.org.il/items/3552_eng.pdf)>.

<sup>149</sup> See 4th Geneva Convention, art. 147, *supra* note 105.

<sup>150</sup> See Hague Regulations, art. 155, *supra* note 106.

<sup>151</sup> ESCOR Res. 2002/7, *supra* note 23.

<sup>152</sup> See Palestine Oral Statement, *Verbatim Record*, *supra* note 21, at 51.

<sup>153</sup> See International Committee of the Red Cross, *Commentaries to the Conventions* [ICRC Commentary] arts. 1 and 2, available at <<http://www.icrc.org/ihl.nsf/COMART?OpenView&Start=1&Count=150&Expand=4#4>>.

<sup>154</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel 21/03/2003*, H.R. Comm., 78th Sess., UN Doc. CCPR/CO/78/ISR (2003).

<sup>155</sup> Human Strategies for Human Rights, *General Comments Issued by the Human Rights Committee Treaty Body for the ICCPR*, available at <[http://www.hshr.org/UN\\_General\\_Comments\\_ICCPR.html](http://www.hshr.org/UN_General_Comments_ICCPR.html)>.

visitation, or medical care in these areas; however, permits are often denied on “security grounds.”<sup>156</sup> Nor are restrictions on movement allowed for any discriminatory purpose under the CERD and CEDAW provisions. Nevertheless, Israel has only required these permits of the Arab Palestinians.

These restrictions on movement have taken a severe toll on the Palestinians’ right to work (CESCR, Art. 6). Israel’s giving permits on such a limited basis cannot possibly fulfill their duty to safeguard the right to work for the Palestinians (CESCR, Art. 6(1)). As a consequence, many Palestinians have lost their income and are forced to rely on aid.<sup>157</sup> Unemployment is at 40%, causing some two-thirds of the population to live below the poverty line.<sup>158</sup> As a further hindrance to human rights, Israel has put checkpoints far apart and opens them at irregular times, without notice, forcing civilians to make costly, long journeys to reach an open checkpoint or preventing them from returning home for days at a time. This often deters people from making the journey at all.<sup>159</sup> The restrictions on movement have also had negative consequences for the right to an adequate standard of living, education, family, and health care.

### ***C. Israel’s Construction of the Wall Violates Additional Rights of Palestinians Under International Humanitarian and Human Rights Law***

As the occupying power, Israel is required to ensure the welfare of Palestinians in the Occupied Territories (Hague Regulations, Art. 43). Imposing collective punishment or restrictions as a means of oppressing or discriminating against the population, even as a security measure, are strictly prohibited (4<sup>th</sup> Geneva Convention, Art. 33, 64; CERD, Art. 1; CESCR, Art. 2(1); CCPR, Art. 2(1)). Most generally, Israel has a duty to all Palestinians in the Occupied Territories to ensure an adequate standard of living, including food, housing, and living conditions (CESCR, Art. 11; CEDAW, Art. 14(2)(h); CRC, Art. 14(2)(h)). The statistics cited above regarding poverty and healthcare show that Israel has not attempted to secure this right for the Palestinians. Israel must also ensure the occupied population has emergency medical services, foodstuffs, and medical goods, respect the sick, and allow access to health care (4<sup>th</sup> Geneva Convention, Art. 16, 20, 55, 56, 59; CESCR, Art. 11, 12; CEDAW, Art. 12(1), 14(2)(b); CERD, Art. 5(e)(iv)). Letting people die before they can access healthcare and stopping ambulances at checkpoints clearly violate these provisions. The wall has also damaged the integrity of the family, as relatives on either side of the wall are frequently prohibited visitation (CESCR, Art. 10(1); CCPR, Art. 17(1), 23; CEDAW, Art. 13). Finally, the wall has severely deteriorated the right to education (4<sup>th</sup> Geneva Convention, Art. 50; CESCR, Art. 13; CRC, Art. 23(2), 24(2)(e), 28). The journey to checkpoints is long, and often parents are not let through with their children, so children are deterred from going to

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<sup>156</sup> Amnesty International, *Israel and the Occupied Territories: The Place of the Fence/Wall in International Law*, (released Feb. 19, 2004) available at <<http://web.amnesty.org/library/print/ENGMDE150162004>>.

<sup>157</sup> UNRWA, *supra* note 12.

<sup>158</sup> Amnesty International, *supra* note 156, at 8.

<sup>159</sup> Human Rights Watch, *Israel’s ‘Separation Barrier’ in the Occupied West Bank: Human Rights and International Humanitarian Law Consequences*, (released Feb. 2004) available at <[http://hrw.org/english/docs/2004/02/20/isrlpa7581\\_txt.htm](http://hrw.org/english/docs/2004/02/20/isrlpa7581_txt.htm)>.

school. As the reports above indicate, teachers are often denied access at the checkpoints and children on their way to school are abused.<sup>160</sup>

#### ***D. Israel's Argument of Material Necessity Cannot Justify Construction of the Wall***

Article 27 of the 4<sup>th</sup> Geneva Convention requires Israel, as an occupying power, to treat the occupied Palestinian population humanely. Commentary to the Convention indicates “any discriminatory measure whatsoever is banned . . . The obligation to give humane treatment and to respect fundamental rights remains valid in relation to persons . . . whether in the territory of a Party to the conflict or in occupied territory. It is in such situations, when human values appear to be in greatest danger, that the provision assumes its full significance.”<sup>161</sup> Nevertheless, Israel has justified the wall on the grounds of military necessity to protect its territory from terrorists. This argument is not sustainable, however, because Israel has constructed the wall beyond its own territory. Israel has also attempted to justify the wall by way of necessity to protect the Israeli settlements living in Palestinian territory; however under international law, the settlements are clearly illegal, so this argument fails as well.<sup>162</sup> The settlements also violate the prohibition against transferring members of one’s own population into the occupied territories (4<sup>th</sup> Geneva Convention, Art. 49(6)). Therefore, the wall and the consequential demolition of Palestinian property and derogation of Palestinian rights are not a proportionate security measures to the harm they purport to prevent. Israel is required to, but has not yet attempted, a less intrusive means to ensure security. The Special Rapporteur reported that the construction of the wall has “more to do with territorial expansion, *de facto* annexation or conquest, than security” and raises “serious doubts about the good faith of Israel’s justifications in the name of security.”<sup>163</sup>

### **VI. POSSIBLE OUTCOMES OF THE ICJ OPINION, AND SOME CONCLUSIONS**

#### ***A. Jurisdictional arguments: The ICJ is Unlikely to Decline to Render an Advisory Opinion.***

It is highly unlikely that the Court will decline jurisdiction to render the advisory opinion; in fact, it has never refused to render an advisory opinion requested by a UN body. Most recently, the Court has indicated that it has broad competence to issue advisory opinions.<sup>164</sup> The only precedent for declining an advisory request is the *Status of Eastern Carelia* case, in which the Permanent Court of International Justice (PCIJ)—the ICJ’s predecessor—found that the consent of the two states directly involved in the dispute was

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<sup>160</sup> Amnesty International, *supra* note 156.

<sup>161</sup> ICRC Commentary, *supra* note 153.

<sup>162</sup> See G.A. Res. 58/98, UN GAOR, 58th Sess., UN Doc. A/RES/58/98 (2003).

<sup>163</sup> UN Press Release, *supra* note 24.

<sup>164</sup> See, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, (the *Cumaraswamy case*), Advisory Opinion, 1999 I.C.J. Rep. 62 (Apr. 28, 1999); see also, *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 55.



required before it could render the opinion.<sup>165</sup> The ICJ has issued advisory opinions in the face of objections based on ‘politicization;’<sup>166</sup> that an opinion would be outside the competence of the UN body requesting it;<sup>167</sup> that an opinion would add nothing to existing UN General Assembly or UN Security Council resolutions on the matter;<sup>168</sup> that an opinion would not be useful;<sup>169</sup> that consent of all parties is required;<sup>170</sup> and that an opinion would prejudice ongoing negotiations.<sup>171</sup> However, the ICJ has never found an obstacle to rendering an advisory opinion, recently reaffirming that: “There has been no refusal, based on the discretionary power of the Court, to act upon a request for an advisory opinion in the history of the present Court.”<sup>172</sup>

Since an opinion on the merits is probable, it remains to examine the possible range of options the Court has before it, and on what issues it is most likely to rule. These options are examined below, in order of the most narrow to the most expansive, with a brief discussion of the Court’s likely concerns in deciding among its options.

***B. Arguments on the Merits: The Court May Address a Range of Legal Issues, from the Most Narrow to the Major Underlying Issues of the Conflict***

The main argument made by those supporting the Advisory Request concerned the path of the wall: all agreed that if the wall were built solely within Israeli boundaries, there would be no challenge to its legality.<sup>173</sup> Thus, should the Court wish to find the most narrow grounds for its opinion, it could address only the route of the wall, to determine the consequences of Israel’s construction outside the boundaries of the 1949 Armistice Agreement. The Court could engage in an analysis of whether the 1949 Armistice Lines are settled under international law, or remain disputed. If the former, the ICJ will likely confirm the UN General Assembly’s claim that Israel’s construction of the wall in its

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<sup>165</sup> *Status of Eastern Carelia*, Permanent Court of International Justice, Advisory Opinion, 1923 PCIJ Series B, No. 5 (dispute between Finland and Russia when Russia was not a member of the League of Nations, and both states did not concede to PCIJ jurisdiction). For the distinction between competence to render advisory opinions and jurisdiction over contentious cases under the ICJ Statute in comparison to the Statute of the ICJ’s predecessor, the Permanent Court of Justice (PCIJ), see Scobbie, *Legal Consequences*, *supra* note 59 at 5-6. The distinction in the provisions between the two Statutes on this point is one of the main reasons for the PCIJ decision declining to render an advisory opinion in the *Eastern Carelia Advisory Opinion* case, heavily relied on by Israel in claiming the ICJ lacks competence to render an opinion on the wall. See Written Statement of Israel, *supra* note 21, at 93ff.

<sup>166</sup> See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 55.

<sup>167</sup> See *Namibia Advisory Opinion*, *supra* note 43.

<sup>168</sup> See *Western Sahara*, *supra* note 57; *Namibia Advisory opinion*, *supra* note 43.

<sup>169</sup> See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 55; see also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 2<sup>nd</sup> Phase, Advisory Opinion*, 1950 I.C.J. 221 (Jul. 18, 1950).

<sup>170</sup> See *Western Sahara*, *supra* note 57; see also, *Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations (the Mazilu case)*, Advisory Opinion, 1989 I.C.J. Rep. 177; and *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (the Cumaraswamy case)*, Advisory Opinion, 1999 I.C.J. Rep. 62.

<sup>171</sup> See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 55.

<sup>172</sup> See *id.*, at 233, para. 14.

<sup>173</sup> See Palestine Oral Statement, *Verbatim Record*, *supra* note 21, at 23; See also Palestine’s Written Statement, *supra* note 20; Written Statement of the Arab League, *supra* note 46.

current route is illegal; if the latter, the legality may be less clear, and the Court may engage in further inquiry on the issue. However, the Court does not need to determine precisely what the Israeli borders are as a matter of international law in order to affirm the illegality of the wall's current path.

Some legal experts on the question conclude that the only *de jure* boundaries were those established under Resolution 181 for the two entities that were to be created in Palestine: for Israel, those were pre-1949 Armistice borders defining the 'Jewish state.'<sup>174</sup> The Armistice Agreements of 1949 did not establish new *de jure* boundaries, but recognized the expanded *de facto* boundaries claimed by Israel. These boundaries may have obtained international recognition, by virtue of subsequent Security Council resolutions.<sup>175</sup> Other experts dispute the authority of Resolution 181 to establish *de jure* boundaries at all, since the Partition Resolution was a recommendation to the parties to the conflict, thus could not be binding, and in any event violated the terms of the Mandate on Palestine through which the UN was exercising authority over the matter.<sup>176</sup> Although there has been no subsequent *de jure* establishment of any final borders within which the Palestinian state recognized by Resolution 181 is to be established, there is both international and UN recognition that Israel is illegally occupying the areas of the West Bank, Gaza and East Jerusalem it seized in 1967.<sup>177</sup> These areas remain 'international,' and are recognized as the territorial unit within which Palestinian self-determination will be exercised. Thus, at a minimum, the ICJ could find that Israel is not entitled to take actions which prejudice the well-established legal right of the Palestinian people to exercise self-determination over those areas, actions that prejudice the final status of those territories.

If the Court finds that the 1949 Armistice Line settles the question of the borders, it need not further examine the consequences of the wall, as everything related to its construction will consequently be prohibited as also illegal. In its opinion, the Court may, nevertheless, address the consequences to Palestinians of Israel's actions, and discuss how such actions violate various humanitarian and human rights provisions. However, if the Court believes the borders are not settled, that they remain 'disputed,' then the Court must address whether international humanitarian law and/or human rights law provisions nevertheless constrain Israeli actions in the Palestinian territories; and if so, which provisions apply.

If the ICJ addresses the applicability of international humanitarian law in the Occupied Territories it will most likely find both the Hague Regulations of 1907 and the 4<sup>th</sup> Geneva Convention of 1949 clearly applicable in the Occupied Territories – both because Israel has agreed that certain provisions of those treaties apply to the territories in some

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<sup>174</sup> See Mallison, *International Law Analysis*, *supra* note 119, at 47.

<sup>175</sup> See S.C. Res. 242, UN SCOR, 1382th mtg., UN. Doc. S/Res/242 (1967) (referring to the requirement that Israel 'withdraw from territories occupied in the recent conflict,' but not referring to withdrawal from territories occupied before 1967). See Mallison, *id.*

<sup>176</sup> Quigley, *supra* note 122, at 18-21.

<sup>177</sup> See S.C. Res. 242, *supra* note 176; S.C. Res. 1515, UN SCOR, 4862nd mtg., UN Doc. S/Res/1515 (2003); G.A. Res. 3236, UN GAOR, 29 Sess., Supp. No. 30, UN Doc. A/RES/3236 (XXIX) (1974); G.A. Res. 3210, UN GAOR, 29 Sess., Supp. No. 30, UN Doc. A/RES/3210 (XXIX) (1974).

circumstances, and because they have become customary norms and thus universally applicable. Under the Hague Regulations and the 4<sup>th</sup> Geneva Convention, the status of the West Bank, Gaza and East Jerusalem as ‘occupied,’ is a matter of factual inquiry, and the requisite facts exist to establish Israel as ‘occupier’ and the Palestinians as ‘occupied,’ or ‘protected persons.’<sup>178</sup> From this conclusion, the ICJ will examine the main contention put forth by Israel, which is that the wall is necessary protection against suicide bombers entering Israel from the occupied territories, and the Palestinian position that the wall’s location is not calculated to prevent suicide bombers as it is not constructed on the Israeli side of the 1949 armistice line. Israel’s argument is that if humanitarian or human rights law is applicable, it has the right to protect its people and territory under the principle of “necessity.”<sup>179</sup>

The ICJ has recently decided a case examining the defense of “necessity.” In the *Gabcikovo-Nagymaros Project Case*, the ICJ found that the necessity defense was unavailable even if the state claiming the defense did not cause the danger to itself.<sup>180</sup> Whether or not the state ‘contributed’ to the danger is the test, and as long as the state’s actions were a factor in causing the danger, it cannot claim the defense of ‘necessity.’ Thus, under prior precedent, the Court is unlikely to find that Israel meets the requirements to claim that building the wall is ‘necessary’ because of the danger of Palestinian suicide bombings.

### ***C. Additional Considerations and Consequences of an Advisory Opinion in the Context of the Palestine-Israel Conflict***

It is unlikely that the Court will address the additional contentions by the claimants that Israeli actions, in constructing the wall, in the wall regime it has put in place and the consequences, constitute war crimes. The above conclusions alone are sufficient for the Court to address the basic question put forward by the advisory opinion request and confirm, without more, that Israel’s construction of the wall in the location it has been constructed, is a violation of international law. Such conclusion will logically lead to the implication that everything related to the wall’s construction—land expropriation, dispossession, denial of international humanitarian law and human rights obligations—will consequently be prohibited as also illegal, without the necessity of examining precisely which actions constitute further violations of law. Moreover, in rendering an

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<sup>178</sup> See Hague Regulations art. 42, *supra* note 105; 4<sup>th</sup> Geneva Convention arts. 1, 2(1) and 2(2), 3 and 4, *supra* note 104. See also ICRC Commentary on arts. 1 and 2, *supra* note 153.

<sup>179</sup> Under Art. 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts of the UN’s International Law Commission, “necessity” is an extraordinary defense, and is strictly limited. It cannot be invoked if the state’s own actions create the situation of danger. The UN Human Rights Committee has noted that Israel itself contributes to suicide bombings through “the illegal occupation of Palestinian territory, the bombing of civilian areas, extrajudicial killings, the disproportionate use of force by the IDF, the demolition of homes, the destruction of infrastructure, mobility restrictions and the daily humiliation of Palestinians...” (Oct. 9, 2002 HRC report). See John Quigley, *The Defense of Necessity in Request for Advisory Opinion in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (3/7/2004), available at: <[http://www.Frederick K\\_ Cox International Law Center War Crimes Research Portal - Instant Analysis.htm](http://www.Frederick K_ Cox International Law Center War Crimes Research Portal - Instant Analysis.htm)>.

<sup>180</sup> *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Rep., 1997 (25 Sept. 1997).

advisory opinion, the Court will likely steer clear of opining on issues that could make one of the affected entities vulnerable to criminal prosecution at the fledgling International Criminal Court. The merits of the claim that construction of the wall and the regime that Israel has put in place around it violates international law are very strong, without the need for additional examination of whether they subject Israel to criminal culpability. In fact, Israel's own legal advisors on the case have conceded that the Court is likely to render an opinion unfavorable to Israel.<sup>181</sup>

Moreover, the Court is most likely, in a dispute as longstanding, contentious and politically charged as this, to seek a relatively narrow ground for its opinion.<sup>182</sup> Israel and its supporters have strenuously argued that this it is inappropriate for the Court to render an opinion in this situation, which should only be decided through political negotiations.<sup>183</sup> Thus, the Court will be mindful of charting a fine line between what is likely to be perceived as an overly political opinion from a clearly legal one, and is unlikely to reach issues that are not absolutely essential to a narrow decision.

Nevertheless, the Court will be aware of the ramifications of an advisory opinion in this case, with the clear precedent of its advisory and contentious decisions in the *South West Africa Cases*. In the ongoing tension between the UN and South Africa concerning the Namibia (South West Africa) mandates, the ICJ gave a series of decisions and advisory opinions.<sup>184</sup> In 1970, the Security Council adopted a resolution declaring that "the continued presence of the South African authorities in Namibia is illegal, and...consequently all acts taken by the Government of South Africa, on behalf of or concerning Namibia after the termination of the Mandate, are illegal and invalid."<sup>185</sup> The Security Council called on all states to "refrain from any dealings with the Government

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<sup>181</sup> See Ori Nir, *Israel Fears Isolation, Sanctions Over Fence: Slam the Court, Advisers Urge*, Forward, January 9, 2004, available at <[www.forward.com/issues/2004/04.01.09/news1.html](http://www.forward.com/issues/2004/04.01.09/news1.html)>, (citing Alan Dershowitz, one of the advisors to Israel on the wall case, as encouraging Israeli supporters to discredit the court: "The case is a foregone conclusion...Israel's going to lose. The only question is whether it will lose unanimously, and there is a substantial chance it might." He argues that those who support Israel should "be prepared to expose this court for what it really is...it would be insulting to kangaroos to call it a kangaroo court"). Dershowitz's views of the ICJ are not shared by international legal scholars, see *The World Court*, 80 Am. Soc. Int'l. L. Proceedings 201 (1986) (*Remarks of international law experts John R. Stevenson, Lori F. Damrosch, Abraham D. Sofaer, Oscar Schachter, Antony D'Amato*).

<sup>182</sup> As this article went to press, the Israeli Supreme Court ruled that the route of the wall violated the rights of Palestinians affected by the wall under international humanitarian law, and that a small portion of the wall had to be changed. See, Molly Moore, *Israeli Court Orders Changes in Barrier: Route Through West Bank Found to Violate Palestinians' Rights*, Washington Post, July 1, 2004(A 01), available at: <<http://www.washingtonpost.com/wp-dyn/articles/A16630-2004Jun30.html>>; *Beit Sourik Village Council v. the Government of Israel, Commander of the IDF Forces in the West Bank*, HCI 2056/04 (Jun. 30, 2004).

<sup>183</sup> See, for example, Ruth Wedgwood, *The International Court of Justice and the Israeli "Fence,"* available at <[www.benadorassociates.com/article/2222](http://www.benadorassociates.com/article/2222)> (Feb. 23, 2004).

<sup>184</sup> See the *Namibia Advisory Opinion*, *supra* note 43; See also, *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, 1955 ICJ Rep. 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion*, 1956 I.C.J. 20 (Jun. 1); *International Status of South West Africa, Advisory Opinion*, 1950 I.C.J. 128 (Jul. 11); and the contentious case, *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 2<sup>nd</sup> Phase, 1966 I.C.J. 6 (Jul. 18);

<sup>185</sup> See S.C. Res. 276, UN SCOR, 1527th mtg., UN Doc. S/RES/276 (1970).

of South Africa.” When South Africa failed to act in accordance with the UN resolutions, the Security Council sought an advisory opinion from the ICJ on the legal consequences of South Africa’s failure to comply.<sup>186</sup> The Court’s advisory opinion agreed with the UN that “South Africa is under obligation to withdraw its administration from Namibia immediately...” It further stated that “States members of the United Nations are under obligation...to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.”<sup>187</sup> Commentators claim that the ICJ opinions and rulings in the South Africa cases were important factors in the establishment of sanctions against South Africa.<sup>188</sup>

The ICJ’s advisory opinions are not binding. However, there is no doubt that what the Court opines in its response to the request for an opinion on the wall will have far-reaching implications for the ongoing Israeli-Palestinian conflict, no matter how narrowly the Court frames its decision.

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<sup>186</sup> The request was: “What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolutions 276 (1970)?” See *Namibia Advisory Opinion*, *supra* note 43.

<sup>187</sup> *Namibia Advisory opinion*, *supra* note 43, at 58.

<sup>188</sup> See, eg, Ernst Klein, South West Africa/ Namibia (Advisory Opinions and Judgments) in 2 Encyclopedia of Public International Law 260-70 (analyzing the four advisory opinions, two judgments and various orders of the ICJ in the South West Africa/Namibia matters, and concluding: “Whichever way the South West Africa/Namibia decisions are seen, it is certain that without this judicial basis the legal and political pressure upon South Africa would not have been as strong as it has been...” at p. 269). Israeli officials affirm this view, see Nir, *supra* note 181, (*quoting* Israeli justice minister Yosef Lapid as saying that the process “will turn Israel into an apartheid-era South Africa...” and that “I am afraid that we will be boycotted in every international forum.”)