
**IMPLEMENTATION OF THE ICJ ADVISORY
OPINION—LEGAL CONSEQUENCES OF THE
CONSTRUCTION OF A WALL IN THE
OCCUPIED PALESTINIAN TERRITORY:
FENCES [DO NOT] MAKE GOOD NEIGHBORS?**

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Good fences make good neighbors – Robert Frost¹

And who is my neighbor? – a Lawyer²

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¹ ROBERT FROST, *Mending Wall*, in COLLECTED POEMS, PROSE, & PLAYS, 39, 39-40 (Literary Classics of the U.S. 1995) (1914). Verses 31-33 offer much wisdom to this case: “Before I built a wall I’d ask to know / What I was walling in or out, / And to whom I was like to give offense.”

² *Luke* 10:29 (New Revised Standard Version). Saint Luke’s parable of the Good Samaritan, *Luke* 10:25-37, provides an insightful context of how a stranger teaches that the neighbor is the unknown victim of brutality:

I. INTRODUCTION

On July 9, 2004, the International Court of Justice (ICJ) issued its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion). The decision was the much anticipated climax of earlier action in the U.N. General Assembly (General Assembly/Assembly). Within days after the ICJ issued the advisory opinion, the General Assembly reconvened the Tenth Emergency Special Session (Occupied East Jerusalem and the rest of the Occupied Palestinian Territory) to debate this decision of the Court and how it might be implemented. Arab and Non-Aligned delegations, which had called for the resumption of the Assembly's long-running emergency special session, praised the ICJ advisory opinion as a political, moral and legal victory, even though it is generally thought that advisory opinions are not binding on parties as are decisions on the merits that involve contentious matters between or among States.³ These delegations welcomed the opinion and expressed their resolve to prepare a draft resolution that

[A] lawyer stood up to test Jesus. "Teacher," he said, "what must I do to inherit eternal life?" He said to him, "What is written in the law? What do you read there?" He answered, "You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself." And he said to him, "You have given the right answer; do this, and you will live." But wanting to justify himself, he asked Jesus, "And who is my neighbor?" Jesus replied, "A man was going down from Jerusalem to Jericho, and fell into the hands of robbers, who stripped him, and went away, leaving him half dead. Now by chance a priest was going down that road; and when he saw him, he passed by on the other side. So likewise a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan while traveling came near him; and when he saw him, he was moved with pity. He went to him and bandaged his wounds, having poured oil and wine on them. Then he put him on his own animal, brought him to an inn, and took care of him. The next day, he took out two denarii gave them to the innkeeper, and said 'Take care of him; and when I come back, I will repay you whatever more you spend.' Which of these three, do you think, was a neighbor to the man who fell into the hands of robbers?" He said, "The one who showed him mercy." Jesus said to him, "Go and do likewise."

³ But see Robert Ago, "Binding" *Advisory Opinions of the International Court of Justice*, 85 AM. J. INT'L L. 439, 439 (1991) (The author, a former judge of the ICJ, studies the role of advisory opinions that have been requested in different contexts and suggests that specialists and participants in the development of international justice carefully evaluate the role of advisory opinions. Judge Ago raises a question for these specialists and participants to consider: whether the Statute of the ICJ might be amended so as to enable international organizations to be parties to disputes with which they are involved rather than to request advisory opinions?). See also Kenneth Lawing Penegar, *Relationship of Advisory Opinions of the International Court of Justice to the Maintenance of World Minimum Order*, 113 U. PA. L. REV. 529, 536 (1965) (The author presents the argument that advisory opinions of the Court should be encouraged as a policy alternative for furthering international peace and security notwithstanding problems in doing so.)

would demand that Israel abide by the principles and conclusions presented in the ICJ's opinion.⁴

The background of the advisory opinion follows. On December 8, 2003, the General Assembly, after debating the issue of recent developments in the Middle East involving Palestine, Israel, and Israel's erection of a security wall (a system of walls, fences, ditches, and other barricading methods) affecting the occupied territories⁵, decided to seek an advisory opinion of the ICJ.⁶ While neither the U.N. Charter (Charter) nor the Statute of the ICJ (Statute) provide any details about how advisory opinions are to be implemented, it is thought that these opinions can be used by the political organs of the U.N., such as the General Assembly, to assist them in settling disputes or for providing these organs with authoritative legal guidance pertaining to some issue of concern to them.⁷ After recalling various precedents and principles and reiterating grave concern for the building and maintenance of the security wall, which has disrupted the lives of thousands of civilians and adversely affected the Middle East peace process, the draft resolution, in accordance with Article 96 of the U.N. Charter and Article 65 of the ICJ Statute, requested the ICJ "to urgently render" an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?⁸

In accordance with its Statute,⁹ the ICJ held public hearings during which oral statements and comments were presented by the United

⁴ Press Release, International Court of Justice, General Assembly meets in emergency session to debate world Court's decision on Israeli security barrier (July 16, 2004) (on file with the United Nations, GA/10246).

⁵ The concept of military occupation has been a source of legal analysis for some time; however, it has acquired a particular profile in regard to the Israeli occupation of Palestinian territories that are associated with the subject matter of the Court's advisory opinion. See Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 AM. J. INT'L L. 44 (1990).

⁶ G.A. Res. ES-10/14, U.N. GAOR, 10th Emergency Special Sess., Agenda Item 5, at 2, U.N. Doc. A/RES/ES-10/14 (Dec. 8, 2003).

⁷ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 731 (4th ed. 1990).

⁸ See *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, G.A. Res. ES-10/14, 10th Emergency Special Sess., Agenda Item 5 (2003)(posing the question); see also *International Court of Justice Press Release: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Press Release 2003/44 (December 18, 2003).

⁹ See Statute of the International Court of Justice arts. 65-68, June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter I.C.J. Statute].

Nations and its Member States beginning on February 23, 2004. Realizing the delicate issues at stake, the ICJ decided that Palestine might also take part in the hearings. In addition, the ICJ permitted the filing of written statements by a large number of States, as provided for under Article 66.2 of the Statute.¹⁰

This paper first examines the advisory opinion and the justifications the opinion offered to substantiate its conclusions. In doing so, it respectfully critiques certain justifications relied on by the Court in reaching its conclusions. The article then considers the General Assembly's response to the Court's advisory opinion. It evaluates the principal implications of the General Assembly's actions to implement the advisory opinion. As suggested in the heading of this article, which quotes from Robert Frost's poem, "Mending Wall" – "good fences make good neighbors" – the article concludes by reminding the reader that neither the advisory opinion nor the subsequent General Assembly resolution by itself will resolve the legal and political issues concerning Israel and Palestine that emerge from the erection and maintenance of the security barrier. The article borrows from the wisdom of the parable of the Good Samaritan used by Jesus to answer the question posed by a lawyer – and who is my neighbor?¹¹ – to view the advisory opinion and the ensuing resolution as important, but not exclusive elements, in the search for a just solution to the situation in the Middle East. Perhaps these reflections may offer Israel, Palestine, other States, and concerned U.N. bodies some food for thought in their efforts to assist these troubled neighbors' search for obtaining and maintaining a stable peace.

II. CONSIDERATIONS ABOUT THE JURISDICTION OF THE COURT

With the request for an advisory opinion in hand, the ICJ first considered whether it had jurisdiction to give the advisory opinion.¹² If the answer were in the affirmative, then the ICJ would need to decide if there was any reason why it should decline to exercise its jurisdiction.¹³ Regarding the first inquiry, the ICJ recalled the role of Article 65.1 of its

¹⁰ By January 30, 2004, Written Statements were filed by Australia, Belgium, Brazil, Cameroon, Canada, Cuba, Cyprus, Czech Republic, Egypt, France, Germany, Greece, Guinea, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Korea, Kuwait, Lebanon, Malaysia, Malta, Marshall Islands, Micronesia, Morocco, Namibia, Netherlands, Pakistan, Palau, Palestine, Russian Federation, Saudi Arabia, Senegal, South Africa, Spain, Sudan, Sweden, Switzerland, Syria, United Kingdom, United States, Yemen, European Union, League of Arab States, Organization of the Islamic Conference, and the United Nations (*available at* <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>).

¹¹ *Luke supra* note 2.

¹² I.C.J. Statute art. 36, para. 6; I.C.J. Statute art. 68.

¹³ *See* Legality of the Threat or Use of Nuclear Weapons, (I) I.C.J. 226, para. 10, at 232 (July 8, 1996).

Statute.¹⁴ In doing so, the Court reiterated that only a U.N. organ that is authorized under the Charter could request an advisory opinion; moreover, the request must concern a legal question that falls within the scope of the requesting organ's competence.¹⁵

In response to the General Assembly's request for an advisory opinion, the ICJ acknowledged that the General Assembly, in exercising its authority under Article 96, paragraph 1, of the Charter, has the legal competence to seek the ICJ's advisory opinion.¹⁶ In reaching a decision about whether it has jurisdiction, the ICJ can consider the relationship between the question that is the subject of the advisory opinion and the activities of the General Assembly.¹⁷ The ICJ recalled that a number of Member States brought the question of the construction of the wall in the Occupied Palestinian Territory before the General Assembly in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what some U.N. Member States considered a threat to international peace and security.¹⁸ In this context, the ICJ also noted the events that led to the adoption of Resolution ES-10/14.¹⁹ The ICJ was aware that the activities of the General Assembly on the security barrier

¹⁴ I.C.J. Statute art. 65, para. 1 ("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.").

¹⁵ See Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, para. 21, at 333-34 (July 20).

¹⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. para. 163 (July 9), available at http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf [hereinafter Construction of a Wall]. The Court unanimously reached the conclusion in a vote of 15 to 0.

¹⁷ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 70 (Mar. 30); Legality of the Threat or Use of Nuclear Weapons, 1996 (I) I.C.J. 226, para. 11-12, at 233 (July 8).

¹⁸ G.A. Res. ES-10/2, U.N. GAOR, 10th Emergency Special Sess., Agenda Item 5, at 1, U.N. Doc. A/RES/ES-10/2 (1997).

¹⁹ *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, G.A. Res. ES-10/14, 10th Emergency Special Sess., Agenda Item 5 (2003). The Tenth Emergency Special Session of the General Assembly, at which Res. ES-10/14 was adopted, was first convened upon the rejection by the Security Council, on March 7 and March 21, 1997, as a result of negative votes by the United States, a permanent member of the Council, of two draft resolutions that addressed certain Israeli settlements in the Occupied Palestinian Territory. See U.N. SCOR, 3747th mtg. at 4, U.N. Doc. S/PV.3747 (1997); U.N. SCOR, 3756th mtg. at 6, U.N. Doc. S/PV.3756 (1997). In a letter dated March 31, 1997, the Chairman of the Arab Group requested "that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled 'Uniting for Peace'" with a view to discussing the "Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory." Letter dated March 31, 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General,

were complemented by those of the Security Council (Council), which has also discussed the Israeli-Palestinian issues on previous occasions.²⁰ Additional background, however, pertains to the issue of jurisdiction.

On October 27, 2003, the General Assembly adopted Resolution ES-10/13 demanding that Israel stop the construction of the security wall in the Occupied Palestinian Territory. During the same time frame, the Security Council on November 19, 2003 adopted Resolution 1515 (2003), in which it “[e]ndorse[d] the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict” (Roadmap).²¹ Many States acknowledged the significance of the Roadmap and the efforts of the Quartet, regardless of each State’s view of the General Assembly’s request for the advisory opinion. On December 12, 2003, the Tenth Emergency Special Session of the General Assembly resumed its work and adopted Resolution ES-10/14 requesting the present advisory opinion. Israel was of the view that the General Assembly acted *ultra vires* under the Charter when it requested this advisory opinion.²²

Israel based its objection and *ultra vires* claim on Article 12.1 of the Charter. Article 12.1 requires that the General Assembly refrain from making any recommendation concerning a dispute or situation that is cur-

U.N. GAOR, 10th Emergency Special Sess., Annex, at 2, U.N. Doc. A/ES-10/1 (1997).

²⁰ By a letter dated October 9, 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the “grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard.” Letter of October 9, 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, U.N. SCOR, at 1, U.N. Doc. S/2003/973 (2003). This letter was accompanied by a draft resolution to be considered by the Council. The text of the draft resolution condemned the illegal construction of a wall erected by Israel in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held meetings on October 14, 2003 to consider the item entitled, “The situation in the Middle East, including the Palestine question”. It also had before it another draft resolution proposed by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. U.N. SCOR, at 1, U.N. Doc. S/2003/980 (prov. ed. 2003). This second draft resolution was put to a vote after an open debate and was not adopted because of the negative vote of the United States, a permanent member of the Council. U.N. SCOR, 4841st mtg. at 23, U.N. Doc. S/PV.4841 (prov. ed. 2003) and U.N. SCOR, 4842d mtg. at 2, U.N. Doc. S/PV.4842 (prov. ed. 2003).

²¹ Letter dated May 7, 2003 from the Secretary-General addressed to the President of the Security Council, U.N. SCOR, U.N. Doc. S/2003/529 (2003). The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations.

²² Written Statement of the Government of Israel on Jurisdiction and Propriety, para. 4.1 (Jan. 30, 2004) [hereinafter Statement of Israel].

rently before the Security Council unless the Council consents to the General Assembly's action.²³ As has been noted, the Security Council simultaneously considered various aspects of the Palestine-Israel question of which it was seized. The ICJ, however, concluded that a request for an advisory opinion is not a "recommendation" on a dispute or situation.²⁴ Although Article 24 of the Charter states that the Security Council has "primary responsibility for the maintenance of international peace and security," the ICJ asserted that Article 24 refers to the Security Council's primary rather than restricted competence.²⁵ Thus, the General Assembly retains the authority, *inter alia*, under Article 14 of the Charter, to "recommend measures for the peaceful adjustment" of various situations.²⁶

It is significant to note that both the General Assembly and the Security Council, in taking account of their respective practices, have interpreted and applied Article 12 of the Charter in such a way that the Assembly cannot make a recommendation on a question concerning the maintenance of international peace and security if the matter or situation is before the Council. For example, during its fourth session in 1949, the Assembly refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the same question was before the Council.²⁷ These organs of the U.N., however, found ways of avoiding problems posed by Article 12, thereby enabling both bodies to act on different aspects of the same matter or situation. For example, the Council deleted particular items from its agenda in order to enable the Assembly to deliberate on them.²⁸ Illustrative of this procedure are the Spanish question of 1946²⁹ and the incidents pertaining to the Greek border of

²³ "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." U.N. CHARTER art. 12, para. 1.

²⁴ Construction of a Wall, 2004 I.C.J. para. 25.

²⁵ Construction of a Wall, 2004 I.C.J. para. 26.

²⁶ See Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), 1962 I.C.J. 151, at 163 (July 20) (stating "the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so").

²⁷ See U.N. GAOR Ad Hoc Political Comm., 4th Sess., 56th mtg. at 339 U.N. Doc. A/AC.31/SR.56 (1949).

²⁸ *Id.*

²⁹ See S.C. Res. 10, U.N. SCOR, 1st Sess., 79th mtg. (1946). In April of 1946, the Security Council condemned the Franco regime in Spain and established a subcommittee to determine whether the regime posed a threat to international peace and security. S.C. Res. 4, U.N. SCOR, 1st Sess., 39th mtg. However, on November 4, 1946, when it adopted Resolution 10, the Council concluded that the Spanish

1947.³⁰ In a similar fashion, the Security Council decided on January 31, 1951 to remove the situation involving the Republic of Korea from matters of which it was seized in order to permit the General Assembly to take action.³¹

On other occasions, the General Assembly has taken the initiative to exercise its authority, notwithstanding Security Council activity on other facets of the same matter or situation. The General Assembly concluded, for example, that it was capable of adopting recommendations in the matter of the Congo in 1961.³² In 1963, the General Assembly addressed issues concerning the matter of the Portuguese colonies³³ even though these cases were on the Council's agenda, and, by doing so, the Assembly noted that the Council had not adopted any *recent* resolution concerning them.³⁴ The ICJ also observed that it was becoming less unusual for the

Question be removed from its list of seized items and decided "that all records and documents be put at the disposal of the General Assembly."

³⁰ See S.C. Res. 34, U.N. SCOR, 2d Sess., 202d mtg. at 5 U.N. Doc. S/555 (1947). In this resolution the Council concluded that the Greek situation involving Albania, Yugoslavia, and Bulgaria be removed from its list of seized matters and requested the Secretary-General to place the pertinent records and documents at the disposal of the General Assembly.

³¹ See S.C. Res. 90, U.N. SCOR, 531st mtg. at 1 U.N. Doc. S/1995 (1951). The Council had been investigating the complaint of aggression upon the Republic of Korea and had issued a series of resolutions. However, in this resolution it decided to remove the item from its list of seized matters. Unlike the resolutions involving the Spanish Question and the Greek border situation, this resolution did not state that the Security Council records and documents were to be placed at the disposal of the General Assembly.

³² G.A. Res. 1599, U.N. GAOR, 15th Sess., 985th plen. mtg. at 17 (1961); G.A. Res. 1600, U.N. GAOR, 15th Sess., 985th plen. mtg. at 17 (1961). The situation in the Congo involved internal armed conflict and the presence of foreign military and paramilitary personnel (including personnel from a State Member, Belgium). The resolutions of the Security Council and General Assembly pertaining to this situation urged the Congolese to use peaceful means to resolve their internal disputes and sought the withdrawal of Belgian forces from the Congo.

³³ G.A. Res. 1913, U.N. GAOR, 18th Sess., 1270th plen. mtg. at 48, U.N. Doc. A/1913 (1963). This situation involved the presence of Portugal in territories under its administration, which the Security Council had concluded were entitled to self-determination and independence. This particular resolution of the General Assembly records the litany of previous resolutions of Security Council and the General Assembly that addressed Portugal's unwelcome presence in these territories.

³⁴ U.N. GAOR 3d Comm., 23d Sess., 1637th mtg. at 2, U.N. Doc. A/C.3/L.1637/REV.2 (1968). In responding to a question posed during the Twenty-Third Session of the General Assembly, the Legal Counsel for the United Nations confirmed that the General Assembly "interpreted the words 'is exercising . . . the functions'" in Article 12 of the Charter to mean "is exercising the functions at this moment."

General Assembly and the Security Council to address simultaneously the same issue or situation.³⁵

It is also relevant here to appreciate that each of these political bodies of the U.N. (the General Assembly, the ICJ, and the Security Council), in the exercise of their respective Charter competences, can simultaneously address different facets of the same situation or matter. Thus, while the Security Council may concentrate on the aspects related to international peace and security, the General Assembly has a different set of topics in mind when considering the humanitarian, social and economic aspects of the same issue.

The ICJ accordingly concluded that the General Assembly's action in seeking the advisory opinion was consistent with the requirements of Article 12.1 of the Charter. The Court acknowledged that the General Assembly's request for an advisory opinion satisfied this same Article's provisions, and that the General Assembly acted in a manner consistent with its competence.³⁶ The ICJ also found that the General Assembly's request fulfilled other relevant conditions³⁷ and that there were no procedural irregularities in seeking the advisory opinion.³⁸

³⁵ Construction of a Wall, 2004 I.C.J. para. 27.

³⁶ Construction of a Wall, 2004 I.C.J. para. 28.

³⁷ It was contended that the present request for an advisory opinion did not fulfill the essential conditions set by G.A. Res. 377, U.N. GAOR, 5th Sess., 302d plen. mtg., U.N. Doc A/1481 (1950), under which the Tenth Emergency Special Session was convened and has continued to act. In 1950, the provisions of the Rules of Procedure of the General Assembly were modified by the adoption of G.A. Res. 377 which amended Rule 8 of the Rules of Procedure of the General Assembly by including a condition that an emergency special session shall be convened within twenty-four hours of the Secretary-General receiving a request for the session from the Security Council. In this regard, Israel asserted in its contest of jurisdiction that "[t]he Security Council was never seised of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention." Statement of Israel, para. 4.40. Since the specific issue was never brought before the Security Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting S.C. Res. 1515, U.N. SCOR, 4862d mtg., U.N. Doc. S/RES/1515 (2003), which endorsed the "Roadmap" before the adoption by the General Assembly of G.A. Res. ES-10/14, 10th Emergency Special Sess., Agenda Item 5, U.N. Doc A/RES/ES-10/14 (2003), the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. Statement of Israel, para. 4.45. The Court was of the view that the Tenth Emergency Special Session was properly reconvened and seised of the issue and could, therefore, adopt any resolution falling within the subject-matter for which the Session had been convened including a resolution seeking the Court's advisory opinion. Construction of a Wall, 2004 I.C.J. paras. 29-32.

³⁸ Construction of a Wall, 2004 I.C.J. para. 35. Regarding the alleged procedural irregularities, the Court noted that the Emergency Special Session appeared to have been convened in accordance with Rule 9(b) of the Rules of Procedure of the

In addition, the ICJ addressed Israel's jurisdictional contention that the request for an advisory opinion by the General Assembly was not on a "legal question" within the meaning of Article 96.1 of the Charter and Article 65.1 of the ICJ's Statute.³⁹ Israel argued that under these two provisions, the question must be "reasonably specific" to constitute a "legal question."⁴⁰ Otherwise the ICJ is incapable of formulating a response. The justifications for this challenge made by Israel were two-fold.⁴¹ First, the question regarding the "legal consequences" of construction of the wall allows for only two possible interpretations, each of which would lead to a course of action denied to the Court.⁴² Second, Israel described the General Assembly's request as a hypothetical question. Israel explained that the General Assembly based its request on a disputed assumption and that it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.⁴³ On a somewhat related matter, Israel finally qualified the General Assembly's question as abstract and plagued with imprecision.⁴⁴

With regard to Israel's suggestion about the imprecision of the General Assembly's request, the ICJ remarked that the General Assembly's question posed identifiable legal issues because the situation arising from the security wall raised matters involving international law and international humanitarian law, e.g., the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention) and resolutions of the General Assembly and Security Council.⁴⁵ The Court decided the question presented by the General Assembly was "framed in terms of law and raise[d] problems of interna-

General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the ICJ stated in its advisory opinion of June 21, 1971, 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." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 22 (June 21)*. The Court concluded that no reason for rebutting this presumption was presented in this case. *Construction of a Wall, 2004 I.C.J. para. 35*.

³⁹ Statement of Israel, para. 5.1.

⁴⁰ Statement of Israel, para. 5.3.

⁴¹ Statement of Israel, para. 5.7.

⁴² *Id.* The first interpretation would require that the Court to find that the erection of the barrier was unlawful and then give its opinion as to the legal consequences. The second interpretation would have the Court assume that the barrier is unlawful and then give its opinion on the consequences of the assumed illegality.

⁴³ Statement of Israel, para. 5.11.

⁴⁴ Statement of Israel, para. 5.12.

⁴⁵ *Construction of a Wall, 2004 I.C.J. para. 37*. The Fourth Geneva Convention in part identifies and raises the duties of an "occupying power" toward civilian populations in the territory of occupation. It follows that this instrument raises legal

tional law.” Consequently, because the General Assembly’s request presented a question of legal character, the request was by its very nature amenable to a reply based on law.⁴⁶

Ambiguity in the General Assembly’s request did not deprive the ICJ of exercising its jurisdiction to provide the opinion.⁴⁷ The ICJ saw that it did what it had often done in the past—identify “the existing principles and rules, interpret and apply them. . . , thus offering a reply to the question based on law.”⁴⁸ The ICJ also referred to past decisions in favor of its providing opinions on ambiguous questions, citing its previous advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* where it found that “the Court may give an advisory opinion on any legal question, abstract or otherwise.”⁴⁹

responsibilities that have been triggered by the erection and maintenance of the wall that adversely affected the lives of Palestinians.

⁴⁶ See *Western Sahara*, 1975 I.C.J. 6, 7-8 (May 22). In its May 22, 1975 order, the ICJ noted that the request for an advisory opinion focused on the legal dispute between Spain and Morocco regarding the territory of the Western Sahara; consequently, it was appropriate for the court to respond in the affirmative to the request for an advisory opinion posed by an appropriate organ of the United Nations (in this case, the General Assembly) that had its own responsibilities toward the situation that was also a legal dispute between two Member States.

⁴⁷ The ICJ relied on the Permanent Court of International Justice’s opinion in *Interpretation of the Greco-Turkish Agreement of December 1, 1926* (Final Protocol, Article IV), 1928 P.C.I.J. (ser. B) No. 16 (Aug. 28). The ICJ noted in one of its own earlier advisory opinions that “the question put to the Court is, on the face of it, at once infelicitously expressed and vague” (Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 348 (July 20)) but then interpreted the question and answered it. Thus, the ICJ has seen the need to broaden, interpret and even reformulate the questions put to it. See also Advisory Opinion No. 8, *Jaworzina*, 1923 P.C.I.J. (ser. B) No. 8 (Dec. 6); *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, 1956 I.C.J. 23, 25 (June 1); *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the Charter), 1962 I.C.J. 151, at 157-162 (July 20).

⁴⁸ *Construction of a Wall*, 2004 I.C.J. para. 45 (citing *Legality of the Threat or Use of Nuclear Weapons*, 1996 (I) I.C.J. 226, para. 13, at 234 (July 8)).

⁴⁹ In relying on the advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, 1996 (I) I.C.J. 226, para. 15, at 236 (July 8), the Court noted its advisory opinions in *Conditions of Admission of a State to Membership in the United Nations* (Article 4 of the Charter), 1947-1948 I.C.J. 57, 61 (May 28); *Effect of Awards of Compensation Made By the United Nations Administrative Tribunal*, 1954 I.C.J. 47, 51 (July 13); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, para. 40, at 27 (June 21). However, the ICJ ultimately concluded that the question posed about the legal consequences of the construction of the wall is not an abstract one; moreover, it would be for the Court to determine for whom any such consequences arise. *Construction of a Wall*, 2004 I.C.J. para. 40.

In realization of the fact that this case put forward some difficult political issues, the ICJ deduced that any allegation the case involved a political issue would not bar the ICJ from exercising jurisdiction over the matter.⁵⁰

Unlike domestic practice in the United States where courts may exercise their discretion and avoid deciding a case involving a political issue that is regarded as non-justiciable,⁵¹ international law and international relations and politics frequently intersect. For example, the case under study involves many difficult and delicate political issues involving the Middle East, the relations between Arab States and Israel, and the interests of third-party States in resolving or not political discussions that continue to emerge from the establishment of an Arab State in Palestine. At the same time, questions of international law and international humanita-

⁵⁰ Construction of a Wall, 2004 I.C.J. para. 41. The ICJ stated that the fact that a legal question also has political aspects, “as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a ‘legal question’ and to ‘deprive the Court of a competence expressly conferred on it by its Statute.’” Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, para. 14, at 172 (July 12). Whatever the political characteristics of the matter in which the advisory opinion is sought, the ICJ cannot disregard the legal character of a question that mandates the discharge of an essentially judicial task, and this can include an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law. Cf. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), 1947-1948 I.C.J. 57, 61-62 (May 28); Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 6-7 (Mar. 3); Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), 1962 I.C.J. 151, 155 (July 20). In its 1980 advisory opinion on the *Interpretation of the Agreement of 25 March 1951 Between The Who and Egypt*, the ICJ emphasized that “in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate. . . .” Interpretation of the Agreement of 25 March 1951 Between The Who and Egypt, 1980 I.C.J. 73, para. 33, at 87 (Dec. 20). The ICJ has also affirmed in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that “the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.” Legality of the Threat or Use of Nuclear Weapons, 1996 (I) I.C.J. 226, para. 13, at 234 (July 8). See also Brownlie, *supra* note 6, at 732 (reiterating that, while advisory opinion cases may indeed have political ramifications, the Court has often concluded that requests for advisory opinions, in principle, should not be refused).

⁵¹ In U.S. constitutional law, the doctrine of non-justiciability of an issue because it is a political question relies on a prudential determination that there is a textual commitment that the issue properly belongs to a coordinate branch of the government other than the judicial branch. See *Baker v. Carr*, 369 U.S. 186, 198-204 (1962).

rian law intersect the very facts that give rise to the political issues just mentioned. Some of these legal issues involve the legal rights and obligations of Israel regarding peace, security and terrorism; they also give rise to legal principles that address the self-determination claims of Palestinians along with their responsibilities to combat terrorism. Judicial bodies, not parliaments or international organizations have a monopoly on such matters.

Taking account of all of these questions and concerns, the Court unanimously concluded that it had jurisdiction over the matter presented in the General Assembly's request for an advisory opinion.⁵²

III. THE PROPRIETY OF AN ADVISORY OPINION—AN ABUSE OF JUDICIAL DISCRETION?

Once the ICJ concluded that it had jurisdiction to respond to the request for the advisory opinion, it addressed whether the Court, as a matter of propriety, should decline to exercise jurisdiction if the request would render the exercise of judicial authority inconsistent with its judicial function.⁵³ In doing so, the Court noted that it has often “cited Statute Article 65.1, which states that ‘[t]he Court *may* give an advisory opinion . . .’ (emphasis added)” thereby implying that it has a discretionary power to decline to render an advisory opinion even though the conditions of jurisdiction are met.⁵⁴ The ICJ recalled its role as the principal judicial body of the U.N. and, given its responsibilities under Article 92 of the Charter, it found that it should not decline to give an advisory opinion in this case.⁵⁵ When exercising its discretionary function, the ICJ noted

⁵² Construction of a Wall, 2004 I.C.J. paras. 42 and 163(1).

⁵³ Judge Buergenthal, concluding that the Court should have exercised its discretion to decline the request for an advisory opinion, dissented from its decision to hear the case. While he stated that he agreed with much of the opinion, he stated that he was “compelled to vote against the Court’s findings on the merits” because it did not have a “requisite factual bases for its sweeping findings.” Consequently, it should have declined to hear the case. He relied upon the opinion in the *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, pp. 28-29, para. 46, in which the “ICJ emphasized that the critical question in determining whether or not to exercise its discretion is ‘whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character.’” Construction of a Wall (declaration of Judge Buergenthal) para. 1, (July 9, 2003) [hereinafter “Buergenthal Wall Declaration”] available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

⁵⁴ Construction of a Wall, 2004 I.C.J. para. 44 (citing *Legality of the Threat or Use of Nuclear Weapons*, 1996 (I) I.C.J. 226, para. 14, at 234 (July 8)).

⁵⁵ Construction of a Wall, 2004 I.C.J. para. 44 (citing *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, 1962 I.C.J. 151, at 155 (July 20) and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. 1, at 29 (Apr. 29) for the principle

that the Court has never declined a request for an advisory opinion.⁵⁶ Only once did the ICJ's predecessor, the Permanent Court of International Justice (PCIJ), conclude that it should not reply to a question put to it.⁵⁷ This was due to the particular circumstances of the case, including the fact that the question posed concerned a preexisting dispute involving a State that was not party to the PCIJ's Statute and was not a member of the League of Nations.⁵⁸

Israel, however, argued that issuing an advisory opinion in these proceedings would raise certain issues – specifically those surrounding the dispute between Palestine and Israel – that more properly belonged before the Court in a contentious case, which is the conventional legal forum for addressing an inter-State controversy.⁵⁹ Of course one problem with this assertion is that Palestine, which is not a State, could not be a party to a contentious proceeding because “[o]nly States may be parties in cases before the Court.”⁶⁰

that only “compelling reasons” should lead the ICJ to refuse giving its opinion once it is requested).

⁵⁶ Construction of a Wall, 2004 I.C.J. para. 44. Judge Buergenthal made an important distinction about the record in a contentious case versus one in a request for an advisory opinion. He noted:

[I]t could be argued that the Court lacked many relevant facts bearing on Israel's construction of the wall because Israel failed to present them, and that the Court was therefore justified in relying almost exclusively on the United Nations reports submitted to it. This proposition would be valid if, instead of dealing with an advisory opinion request, the Court had before it a contentious case where each party has the burden of proving its claims. But that is not the rule applicable to advisory opinion proceedings which have no parties. Once the Court recognized that Israel's consent to these proceedings was not necessary since the case was not brought against it and Israel was not a party to it, Israel had no legal obligation to participate in these proceedings or to adduce evidence supporting its claim regarding the legality of the wall. While I have my own views on whether it was wise for Israel not to produce the requisite information, this is not an issue for me to decide. The fact remains that it did not have that obligation. The Court may therefore not draw any adverse evidentiary conclusions from Israel's failure to supply it or assume, without itself fully enquiring into the matter, that the information and evidence before it is sufficient to support each and every one of its sweeping legal conclusions.

Buergenthal Wall Declaration, para. 10.

⁵⁷ See Advisory Opinion No. 5, Status of Eastern Carelia, 1923 P.C.I.J. (ser. B) No. 5, at 29 (July 23).

⁵⁸ Construction of a Wall, 2004 I.C.J. para. 44. For the court's earlier recognition of the P.C.I.J. advisory opinion on the status of Eastern Carelia, see *Legality of the Threat or Use of Nuclear Weapons*, 1996 (I) I.C.J. 226, para. 14, at 236-36 (July 8).

⁵⁹ See Statement of Israel, para. 7.1. See also Construction of a Wall, 2004 I.C.J. para. 56.

⁶⁰ I.C.J. Statute art. 34, para. 1. The ICJ exercises its authority in two categories of proceedings. The first is in requests for advisory opinions where an appropriate organ of the United Nations seeks the legal opinion of the court in order for that organ to carry out its functions in accordance with Article 95 of the Charter and Article 65 of

The ICJ responded by noting that, while States may have an interest in the outcome of the advisory opinion, it would not deprive the ICJ from exercising its discretion. Exercising jurisdiction would be proper because the Court gives its opinion, which offers guidance to the requesting organ, to the U.N. rather than to States. Moreover, the Court's activity in issuing an advisory opinion reflects its appropriate "participation in the activities of the Organization, and, in principle, should not be refused."⁶¹ While the ICJ was aware that Israel and Palestine expressed "radically divergent views on the legal consequences of Israel's construction of the wall,"⁶² the ICJ recalled that "[d]ifferences of views. . . on legal issues have existed in practically every advisory proceeding" and this would not prevent the ICJ from exercising its discretion to provide the opinion sought by the General Assembly.⁶³ Furthermore, the Court concluded that the matter before it superseded a conventional bilateral question or dispute that is typically found in a contentious case. This request for an advisory opinion involved a difficult issue that had long been considered by the General Assembly and the Security Council as pertaining to international peace and security and related humanitarian law issues in a region of the world long immersed in conflict and tension. In this proceeding, the General Assembly determined on its own that it required the advisory opinion to execute legally and properly its duties under the Charter.⁶⁴ Therefore, the Court was obligated as the chief judicial organ

the Statute of the ICJ. By contrast, contentious cases are brought by and involve States who are parties to a dispute and seek a decision of the ICJ on the merits so that the dispute may be resolved in accordance with Articles 34, 35, and 36 of the Statute of the ICJ. Contentious cases are brought before the Court either by a special agreement of the States who are parties to the dispute or by a State which submits an application for the Court to hear the merits of the case in accordance with Article 40, paragraph 1 of the Statute of the ICJ.

⁶¹ *Construction of a Wall*, 2004 I.C.J. para. 47 (citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1950 I.C.J. 65, 71 (Mar. 30) and also *Western Sahara*, 1975 I.C.J. 12, para. 31, at 24 (Oct. 16)).

⁶² *Construction of a Wall* 2004 I.C.J. para. 48.

⁶³ *Id.* (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. at 24).

⁶⁴ The ICJ pointed out that advisory opinions have the purpose of furnishing the elements of law necessary for U.N. bodies to conduct legally their action. In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." 1951 I.C.J. 15 at 19. Also, in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court noted that, "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." 1971 I.C.J. at 24. The ICJ has also concluded that the advisory opinion requested would "furnish the General Assembly with elements of a

of the U.N. to consider in accordance with Article 65 of the Statute of the ICJ, the request that would provide the legal guidance sought by the General Assembly. The Court was not obligated to render an opinion. Rather, it was obligated to consider the request and then exercise its discretion, which could either provide or deny the legal opinion that was requested. The Court accordingly voted 14 to 1 no to exercise its discretion and comply with the request for the advisory opinion.⁶⁵

IV. BACKGROUND ON THE LEGAL STATUS OF THE TERRITORY IN QUESTION

With the questions of jurisdiction and discretion disposed, the Court moved on to address the General Assembly's request for the advisory opinion. Since the question posed by the General Assembly concerned the legal consequences of the construction of the security wall, this issue necessitated that the ICJ determine whether the construction of that wall breached any international legal obligation.⁶⁶ Essential to this task was determining the status of the territory concerned in the request for the advisory opinion.

In order to secure an understanding of the legal issues before it, the Court delved into the history inextricably linking Israel and Palestine. For centuries, Palestine had been a part of the Ottoman Empire, but, after the First World War, was entrusted to a British Mandate in accordance with paragraph 4 of Article 22 of the Covenant of the League of Nations.⁶⁷ As the ICJ stated in an earlier case, "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a

legal character relevant to its further treatment of the decolonization of Western Sahara." *Western Sahara*, 1975 I.C.J. at 37. Moreover, it is up to the U.N. body requesting the advisory opinion to determine how it is to use the opinion it has requested. As the ICJ stated in the *Legality of the Threat or Use of Nuclear Weapons*:

Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.

Legality of the Threat or Use of Nuclear Weapons, 1996 (I) I.C.J. 226, para. 16, at 237 (July 8).

⁶⁵ *Construction of a Wall*, 2004 I.C.J. paras. 65 and 163 (2).

⁶⁶ *Construction of a Wall*, 2004 I.C.J. para. 69. *See also id.* at para. 39.

⁶⁷ *Construction of a Wall*, 2004 I.C.J. para. 70. Article 22, paragraph 4 of the Covenant stated in relevant part that, "Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone."

sacred trust of civilization.”⁶⁸ Two important principles applied to mandates: (1) the principle of non-annexation, and (2) the principle that peoples not yet able to govern themselves formed “a sacred trust of civilization.”⁶⁹ The territorial boundaries geographically defining the Mandate for Palestine were previously established by several instruments including the Anglo-Transjordanian Treaty of February 20, 1928.⁷⁰

In 1947, the United Kingdom declared that it would leave the territory of this mandate by August 1, 1948. This date was subsequently advanced to May 15, 1948, presumably in light of General Assembly Resolution 181 (II) of November 29, 1947, which recommended action on two items: a territorial partition establishing two States, one Arab and the other Jewish; and a special international regime for Jerusalem, a city of great significance to Arab, Jew, and Christian.⁷¹ Although the Arab population of Palestine and some Arab States rejected this plan on the basis that it was unbalanced, Israel took advantage of the resolution’s provisions and quickly proclaimed its independence on May 14, 1948.⁷²

As a consequence of Israel’s action, Israel and several Arab States soon found themselves engaged in armed conflict.⁷³ Thus, the Plan of Partition called for under Resolution 181 was never implemented. Under its Resolution 62 (1948) of November 16, 1948, the Security Council concluded that an armistice needed to be established in all sectors of Palestine. Furthermore, the Council urged adoption of a ceasefire on all parties.⁷⁴ In due course, the U.N.-inspired negotiations successfully led to the conclusion of a truce in 1949.⁷⁵ Articles V and VI of the Agreement signed in Rhodes on April 3, 1949 between Israel and Jordan fixed the armistice demarcation line between Israeli and Arab forces (the “Green Line”).⁷⁶ Article III, paragraph 2 of that agreement prohibited any element of the military or paramilitary forces of either party from advancing beyond or passing the armistice demarcation lines for any reason.⁷⁷ However, the demarcation lines were subject to modification upon agreement by the parties as future developments might warrant.⁷⁸

⁶⁸ International Status of South-West Africa, 1950 I.C.J. 128, 132 (July 11).

⁶⁹ *Id.* at 131.

⁷⁰ Construction of a Wall, 2004 I.C.J. para. 70.

⁷¹ Construction of a Wall, 2004 I.C.J. para. 71.

⁷² *Id.*

⁷³ See S.C. Res. 49, U.N. SCOR, Third Year, 302d mtg., U.N. Doc. S/773 (1948); S.C. Res. 50, U.N. SCOR, 3rd Sess., 331st mtg., U.N. Doc. S/801 (1948).

⁷⁴ Construction of a Wall, 2004 I.C.J. para. 72.

⁷⁵ *Id.*

⁷⁶ See Hashemite Kingdom of Jordan-Israel General Armistice Agreement, U.N. Doc. S/1302/Rev. 1 (Apr. 3, 1949). The term “Green Line” evolved from the use of green ink to mark the line of demarcation. See Construction of a Wall, 2004 I.C.J. para. 72.

⁷⁷ Construction of a Wall, 2004 I.C.J. para. 72.

⁷⁸ *Id.*

In 1967, armed conflict resumed in the region, and the Israeli forces occupied the territories that had constituted Arab sectors, including those known as the West Bank, lying to the east of the Green Line.⁷⁹ On November 22, 1967, the Security Council adopted Resolution 242 (1967), which objected to the Israel's acquisition of territory through armed conflict and called for the withdrawal of Israeli armed forces from the territories occupied in the 1967 conflict.⁸⁰ When Israel subsequently pursued measures in these territories to change Jerusalem's status, the Security Council, recalled that acquisition of territory by military conquest is inadmissible; moreover, it condemned the acquisition and confirmed that all actions taken by Israel to change the status of Jerusalem were invalid.⁸¹ When Israel adopted on July 30, 1980 the Basic Law⁸² making Jerusalem the united capital of Israel, the Security Council adopted another resolution declaring that the enactment of the Basic Law constituted a violation of international law and that all legislative and administrative measures taken by Israel that have altered the character and status of the Holy City of Jerusalem were null and void.⁸³ The Council also decided not to recognize this 'basic law' and any other actions pursued by Israel that would seek to alter the character and status of Jerusalem.⁸⁴ In an effort to resolve some of the tensions in the region, Israel and Jordan entered an agreement on October 26, 1994 establishing the boundary between the two States.⁸⁵ Beginning in 1993, a number of agreements were also formulated by Israel and Palestine necessitating the transfer of certain powers and responsibilities over the Occupied Palestinian Territory.⁸⁶

Taking into account the history that underlies the advisory opinion, the Court proceeded to investigate the legality of the Israeli actions that were the subject of the General Assembly's request for the advisory opinion. The ICJ acknowledged that under Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague

⁷⁹ Construction of a Wall, 2004 I.C.J. para. 73.

⁸⁰ Construction of a Wall, 2004 I.C.J. para. 74.

⁸¹ *Id.* (citing S.C. Res. 298, U.N. SCOR, U.N. Doc. S/Res/298 (1971)).

⁸² 113 Basic Law, 30 July 1980, Vol. 6: 1979-1980.

⁸³ Construction of a Wall, 2004 I.C.J. para. 75 (citing S.C. Res. 478, U.N. SCOR, U.N. Doc. S/Res/478 (1980)).

⁸⁴ *Id.*

⁸⁵ Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, 2042 U.N.T.S. 395.

⁸⁶ Construction of a Wall, 2004 I.C.J. para. 77. In order to facilitate the Middle East peace process, Israel and Palestine agreed on September 13, 1993 to establish a Palestinian Interim Self-Government Authority, an elected Council for the Palestinian people in the West Bank and the Gaza Strip, and a five-year transition period leading to a permanent settlement of the disputes between Israel and Palestine taking account of Security Council Resolutions 242 and 338. See the Avalon project of Yale University Law School, www.yale.edu/lawweb/avalon/mideast/isrplo.htm (visited on October 20, 2004).

Convention of October 18, 1907, a territory is considered occupied when placed under the authority of a hostile force; however, the area of occupation is restricted to that where the authority is both established and exercised.⁸⁷ The region between the Green Line and the previous eastern boundary of Palestine that existed under the Mandate was occupied by Israel in 1967 during the Six Day War. As a consequence of this armed conflict, Israel became the Occupying Power of this region under applicable customary international law.⁸⁸ It is in these territories that Israel constructed the security wall described in the report of the Secretary-General that was before the General Assembly.⁸⁹

V. WAS THERE A BREACH OF INTERNATIONAL LEGAL OBLIGATIONS?

A. *Identifying the Applicable Law*

With this setting in mind, the ICJ then identified the law to be applied in its advisory opinion, including juridical instruments and customary international law. With this task accomplished, it could then assess the legality of Israel building and maintaining the security wall. One of the fundamental principles applicable to the General Assembly's question was Article 2.4 of the United Nations Charter, which states that "All Members shall refrain in their international relations from the threat or

⁸⁷ Construction of a Wall, 2004 I.C.J. para. 78.

⁸⁸ *Id.*

⁸⁹ See *Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13*, U.N. GAOR, 10th Emergency Special Sess., U.N. Doc. A/ES-10/248 (2003) [hereinafter Secretary-General's Report]. According to the report of the Secretary-General, the wall as completed or under construction in some areas barely deviates from the Green Line; however, it lies within occupied territories for most of its course. The security wall deviates more than 7.5 kilometers from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. Secretary General's Report, para. 7. On the basis of this route, approximately 975 square kilometers (or 16.6 per cent of the West Bank) would lie between the Green Line and the wall. This area is thought to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled enclaves. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 live in East Jerusalem) would be living in the area between the Green Line and the wall. *Id.*, at para. 8. The construction of the wall has been accompanied by the creation of a new administrative régime establishing the part of the West Bank lying between the Green Line and the wall as a "Closed Area." Traditional residents of this area could no longer remain in it unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods. *Id.*, at paras. 17-27.

use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” This Charter obligation provided the foundation for application of General Assembly Resolution 2625 (XXV) of October 24, 1970 entitled the “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.” Through the declaration contained in this resolution, the General Assembly emphasized that territorial acquisition resulting from the threat or use of force cannot be considered a lawful acquisition.⁹⁰

In this context, the ICJ noted that the principle of self-determination of peoples found in Article 1.2, a prominent element of the U.N. Charter, applies to this case.⁹¹ In addition to the Charter, the ICJ identified several juridical instruments that bear on the Assembly’s request. Common Article 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) echoes the Charter by reaffirming the right of all peoples to self-determination and imposes on state parties an obligation to promote achieving this right in accordance with the U.N. Charter.⁹²

Also pertinent to this case is the fact that the ICJ emphasized in 1971 that recent developments in international law addressing issues of non-self-governing territories acknowledged that the principle of self-determination applies to these territories in accordance with the U.N. Charter.⁹³ For example, Article 1, paragraph 2 of the Charter recognizes the principle that the development of friendly relations amongst nations is based in

⁹⁰ Construction of a Wall 2004, I.C.J. para. 87 (discussing Military and Paramilitary Activities (Nicaragua v. United States), 1986 I.C.J. 14 (June 27) at 98-101, which acknowledged that the principles concerning the use of force incorporated in the Charter reflect customary international law). The same principle, according to the ICJ, applies to those situations involving the territorial acquisition resulting from the threat or use of force. *Id.*

⁹¹ Construction of a Wall, 2004 I.C.J. para. 88 (citing G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, at 123, U.N. Doc. A/8082 (1970), which states in applicable part that, “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution]. . . of their right to self-determination.”)

⁹² *Id.*

⁹³ *Id.* The ICJ continued by stating that, “These developments leave little doubt that the ultimate objective of the sacred trust” referred to in Article 22, paragraph 1, of the Covenant of the League of Nations “was the self-determination. . . of the peoples concerned.” Legal Consequences for States of the Continued Presence of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31 (June 21). The ICJ has referred to this principle elsewhere in its jurisprudence. See also Western Sahara, 1975 I.C.J. at 68. There is little doubt that the right of peoples to self-determination is a right *erga omnes*. See Concerning East Timor (Portugal v. Australia), 1995 I.C.J. 90, 102 (June 30).

part on the principle of self-determination of peoples. In addition, the growth of the United Nations membership, which has almost quadrupled its original membership, demonstrates the importance and realization of the principle of self-determination.

The Court was also of the view that international humanitarian law applied to this case. While Israel is not a party to the Fourth Hague Convention of 1907, and therefore to the annexed Hague Regulations, the ICJ reasoned that these Regulations revised the general laws and customs of war that existed at that time.⁹⁴ The International Military Tribunal of Nuremberg concluded that the “rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.”⁹⁵ It would therefore seem that these principles found in the Regulations evolved into customary law. The ICJ likewise concluded that the principles of the Hague Regulations have also become part of customary law, and this deduction was reinforced by the fact that all the participants in the proceedings before the Court had acknowledged this.⁹⁶

The ICJ also considered the applicability of the Fourth Geneva Convention to the request for this advisory opinion. The Court noted that it was significant that Israel became a party to the Convention on July 6, 1951, and Jordan became a party on May 29, 1951.⁹⁷ Moreover, the Court found that neither Israel nor Jordan made any reservation that would apply to the application of this instrument to the case under discussion.⁹⁸ Furthermore, Palestine declared on June 7, 1982 that it would follow the principles of the Fourth Geneva Convention.⁹⁹

Article 2 of the Fourth Geneva Convention applies to “all cases of declared war or any other armed conflict” that “may arise between two or more High Contracting Parties” – regardless of whether all States pertinent to the situation recognize that a state of war exists.¹⁰⁰ Of particular significance in this advisory opinion is the fact that the Fourth Convention applies to all cases of occupation of the territory of a High Contracting Party, regardless of whether the occupation is accompanied by armed resistance.¹⁰¹ Even though one of the Powers to the conflict is not

⁹⁴ Construction of a Wall, 2004 I.C.J. para. 89.

⁹⁵ Judgment of the International Military Tribunal at Nuremberg, 6 F.R.D. 69, 188 (1946). The ICJ reached a similar conclusion when it examined the rights and duties of belligerents in their conduct of military operations. *See* Legality of the Threat or Use of Nuclear Weapons, (I) I.C.J. 226, para. 15, at 236 (July 8, 1996).

⁹⁶ Construction of a Wall, 2004 I.C.J. para. 89.

⁹⁷ Construction of a Wall, 2004 I.C.J. para. 91.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Geneva Convention relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, art. 2, para. 1, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

¹⁰¹ *Id.*, at para. 2.

a party, those who are shall remain bound by the Convention in their mutual relations.¹⁰² They shall also be bound by the Convention in any relation otherwise covered by the Convention with a non-party if the non-party accepts and applies its provisions.¹⁰³ As was mentioned previously, Palestine stated that it was obligated to follow the instrument when it made its 1982 declaration.¹⁰⁴

The ICJ noted that after the 1967 Six Day War and the ensuing occupation of the West Bank, Israel issued a military administrative order¹⁰⁵ stating that its military courts must apply the provisions of the Fourth Geneva Convention with respect to judicial procedures.¹⁰⁶ The administrative order specified that in case of conflict between the order and the Fourth Geneva Convention, the Convention would prevail.¹⁰⁷ Israel has also stated on several occasions that it *generally* applies the provisions of the Fourth Geneva Convention within the occupied territories of Palestine.¹⁰⁸ However, Israel argued here that the Convention does not apply *de jure* within those territories because, under Article 2.2, its provisions pertain only to cases of occupation falling under the control of a High Contracting Party involved in an armed conflict.¹⁰⁹

The ICJ mentioned, however, that, under customary international law and Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith; moreover, the terms of the treaty are to be construed in accordance with the ordinary meaning given to its terms and in light of the instrument's object and purpose.¹¹⁰ The ICJ indicated that, under the Article 2.1 of the Fourth Geneva Convention, the instrument is applicable when two conditions are fulfilled:¹¹¹ (1) an armed conflict exists (2) between two contracting parties.¹¹² If those two conditions are satisfied, the Convention applies to any territory occupied in the course of the conflict by any contracting party.¹¹³ While this argument

¹⁰² *Id.*, at para. 3.

¹⁰³ Construction of a Wall, 2004 I.C.J. para. 92. Fourth Geneva Conv., Art. 2, para. 3.

¹⁰⁴ See *supra* note 100 and accompanying text.

¹⁰⁵ Construction of a Wall, 2004 I.C.J. para. 93.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Construction of a Wall, 2004 I.C.J. para. 94.

¹¹¹ *Id.*

¹¹² Construction of a Wall, 2004 I.C.J. para. 95.

¹¹³ The ICJ viewed that the object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding territories not falling under the sovereignty of one of the contracting parties. Thus, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable. In the ICJ's estimation, this interpretation reflects the intention of the drafters to protect civilians who find themselves in the hands of

has some weak points, it is generally sound given the situation that Israel is in control of land as an Occupying Power. Both the General Assembly and the Security Council have applied a similar understanding about the applicability of the Fourth Convention to the situation of the Occupied Territories. For example, on December 10, 2001 and December 9, 2003, the General Assembly reaffirmed that the Fourth Geneva Convention “is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967.”¹¹⁴

The Security Council correspondingly acknowledged that parties involved in the conflict between Israel and Palestine should comply with the humanitarian principles of the Fourth Geneva Convention.¹¹⁵ The Council called upon “Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation.”¹¹⁶ In 1979, the Security Council examined the Israeli practice of establishing settlements in the Occupied Palestinian territories and once again affirmed that the Fourth Geneva Convention applied to these territories, including Jerusalem. Moreover, it called on Israel “to abide scrupulously by” the terms of this instrument.¹¹⁷ The Security Council continued this reasoning well into the 1990s in a line of resolutions pertaining to Israel and Palestine.¹¹⁸

the occupying Power. The Court’s interpretation is confirmed by the *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross to draft the Geneva Conventions recommended that these instruments be applicable to any armed conflict “whether [it] is or is not recognized as a state of war by the parties” and “in cases of occupation of territories in the absence of any state of war.” *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-26 April 1947*, p. 8. The ICJ further noted that the parties to the Fourth Geneva Convention endorsed this interpretation at their Conference on July 15, 1999 when “reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem.” Subsequently, on December 5, 2001, the High Contracting Parties once again reaffirmed the “applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem.” *Construction of a Wall*, 2004 I.C.J. paras. 95, 96.

¹¹⁴ G.A. Res. 58/97, U.N. GAOR, 58th Sess., Agenda Item 84, at 2, U.N. Doc. A/RES/58/97 (2003). *See also* G.A. Res. 56/60, U.N. GAOR, 56th Sess., Agenda Item 88, at 2, U.N. Doc. A/RES/56/60 (2002).

¹¹⁵ U.N. SCOR, 1361st mtg. para. 2, U.N. Doc. S/RES/237 (1967).

¹¹⁶ U.N. SCOR, 1512th mtg. para. 4, U.N. Doc. S/RES/271 (1969).

¹¹⁷ U.N. SCOR, 2134th mtg. para. 3, U.N. Doc. S/RES/446 (1979).

¹¹⁸ On December 20, 1990, the Security Council adopted its Resolution 681 urging “the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention. . . to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention.” U.N. SCOR, 2970th mtg. para. 4, U.N. Doc. S/RES/681 (1990). In Resolutions 904 of March 18, 1994 and 799 of December 18, 1992, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories. U.N.

The ICJ also concluded that the Fourth Geneva Convention applied to any occupied territory arising from an armed conflict between two High Contracting Parties.¹¹⁹ The Court held that because Israel and Jordan were parties to that Convention when the Six Day War began, the Convention applies in the Palestinian territories that had been to the east of the Green line and were subsequently occupied by Israel.¹²⁰

A further issue of contention that surfaced in this advisory opinion concerned whether the ICCPR and the ICESCR applied to the Occupied Palestinian Territory. Israel ratified both the ICCPR and the ICESCR in October of 1991.¹²¹ Israel had also become a party to the U.N. Convention on the Rights of the Child (CRC) in 1989.¹²² In assessing the applicability of the ICCPR, ICESCR, and CRC to these proceedings, the ICJ addressed: (1) the relationship between international humanitarian and human rights law and (2) the applicability of human rights instruments outside a state party's territory.¹²³

Previously, in another advisory opinion, the ICJ concluded that the ICCPR's protections do not disappear in times of war, except by operation of ICCPR Article 4, under which some, but not all, provisions may be derogated from during a national emergency.¹²⁴ However, Article 6, dealing with the respect for the right to life, is one of the non-derogable terms as specified by Article 4, paragraph 2.¹²⁵ The ICJ noted that the applicable *lex specialis* (the law designed to regulate the conduct of hostilities in armed conflict) determines the test for arbitrary deprivations of life.¹²⁶ The ICJ thus concluded that the protection afforded under human rights conventions can only be derogated from in armed conflict if provisions similar to those of ICCPR Article 4 have been satisfied.¹²⁷

One major obstacle regarding the application of the ICCPR, ICESCR, and CRC still had to be resolved: namely, whether they are applicable outside the territories of the state parties. If they are applicable outside the territories of state parties, what circumstances would permit or warrant their application? An affirmative finding that they could apply to territories outside of those of state parties would have a profound impact on this and other cases. While Israel proffered a sensible argument that

SCOR, 3351st mtg. at 1, U.N. Doc. S/RES/904 (1994) and U.N. SCOR, 3151st mtg. para. 2, U.N. Doc. S/RES/799 (1992).

¹¹⁹ Construction of a Wall, 2004 I.C.J. para. 101.

¹²⁰ *Id.*

¹²¹ Construction of a Wall, 2004 I.C.J. para. 103.

¹²² *Id.*

¹²³ Construction of a Wall, 2004 I.C.J. para. 104.

¹²⁴ See Legality of the Threat or Use of Nuclear Weapons, (I) I.C.J. 226, para. 25, at 240 (July 8, 1996).

¹²⁵ See, International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 4.2, 999 U.N.T.S. 171, 174.

¹²⁶ Construction of a Wall, 2004 I.C.J. para. 105.

¹²⁷ Construction of a Wall, 2004 I.C.J. para. 106.

the instruments did not apply in Palestine and its territories, the ICJ noted that under ICCPR Article 2.1, each state party “undertakes to respect and to ensure to all individuals within its territory and *subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind”(emphasis added).¹²⁸ Thus, this provision was interpreted in a manner to protect individuals who are present within a State’s territory *and* subject to that State’s jurisdiction. But, the ICJ extended this provision so that it could also be construed to cover those persons outside the State’s territory but subject to its jurisdiction.¹²⁹

The Court acknowledged that the jurisdiction of States is primarily territorial, but it further observed that parties to the ICCPR should be bound to the instrument’s provisions when they are responsible for acts normally falling within the scope of the Covenant’s provisions but extending beyond the parties’ territories.¹³⁰ The Human Rights Committee, which is responsible for monitoring state party compliance with the ICCPR, has concluded that the Covenant applies where the party exercises its jurisdiction in a foreign territory.¹³¹ The ICJ was thus able to reason that the ICCPR is applicable to acts of a party exercising jurisdiction outside its own territory.¹³²

More problematic in this case is the application of the ICESCR. While the ICJ noted that the ICESCR “guarantees rights which are essentially territorial,” it nonetheless concluded that the instrument applies to territories over which a State party has sovereignty and those over which it exercises territorial jurisdiction.¹³³ In justification of its position, the ICJ cited Article 14 of the ICESCR, which provides “for transitional measures in the case of any State which ‘at the time of becoming a Party, has

¹²⁸ Construction of a Wall, 2004 I.C.J. para. 108.

¹²⁹ *Id.*

¹³⁰ Construction of a Wall, 2004 I.C.J. para. 109.

¹³¹ *Id.* As the Court noted, the Committee ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It similarly decided the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero v. Uruguay*). The *travaux préparatoires* of the Covenant confirm this interpretation of Article 2 by demonstrating that the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence. See the discussion of the preliminary draft in the Commission on Human Rights, U.N. ESCOR, 6th Sess., 194th mtg. at 46, U.N. Doc. E/CN.4/SR.194 (1950); and *Annotations on the Text of the Draft International Covenants on Human Rights*, U.N. GAOR, 10th Sess., Annex, Agenda Item 28, pt. II, chpt. V, at 4, U.N. Doc. A/2929 (1955).

¹³² Construction of a Wall, 2004 I.C.J. para. 111.

¹³³ Construction of a Wall, 2004 I.C.J. para. 112.

not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge.’”¹³⁴ However, this bold assertion extending the application of the instrument appears to strain the plain meaning of the instrument’s text.¹³⁵ If this supra-territorial provision were intended to apply to all provisions of the instrument, it would properly belong in a section or article that applied clearly to all, rather than one, requirement or obligation. Moreover, the ICJ relied on no further elaboration of the objectives of the ICESCR nor any *travaux préparatoires* to substantiate its claim.¹³⁶

Interestingly, the ICJ relied on the position Israel advanced in its reports to the U.N. Committee on Economic, Social and Cultural Rights, where Israel presented “statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories”. Israel, however, denied application of the same rights to Palestinians residing in the same territory.¹³⁷ The ICJ rejected Israel’s narrow view about to whom obligations were owed when it applied the provisions of the ICESCR to which it is a Party. The Court noted that the Occupied Palestinian Territories have, for over thirty-seven years, been subject to Israel’s jurisdiction as an occupying Power.¹³⁸ Consequently, Israel was bound by the ICESCR to treat uniformly *all*, not just some, persons under its jurisdiction within the territories it controlled.

Finally, with regard to the Convention on the Rights of the Child, Article 2 asserts that “States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction. . . .” As

¹³⁴ *Id.*

¹³⁵ Vienna Convention on the Law of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340 states that, “A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose.” (emphasis added).

¹³⁶ Article 32 of the Vienna Convention on the Law of Treaties enables the interpreter to use the preparatory work of an instrument if the methods of interpretation permitted under Article 31 “(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” *Id.* art. 32, at 340.

¹³⁷ Construction of a Wall, 2004 I.C.J. para. 112. See also U.N. ESCOR, 19th Sess., 53rd mtg. para. 8, U.N. Doc. E/C.12/1/Add. 27 (1998) (wherein the Committee stated, “The Committee notes with concern that the Government’s written and oral reports included statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied territories but that the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant. The Committee is of the view that the State’s obligations under the Covenant apply to all territories and populations under its effective control. The Committee therefore regrets that the State party was not prepared to provide adequate information in relation to the occupied territories.”).

¹³⁸ *Id.*

with the ICCPR, it was a relatively easy feat for the ICJ to conclude that the CRC is applicable within the Occupied Palestinian Territory.¹³⁹

B. *Applying the Law to the Facts*

Once the Court identified the rules and principles of international law – including treaties and norms of customary law – relevant to the advisory opinion, the ICJ determined whether the construction of the security wall violated any provisions of the applicable law. Of particular relevance to the ICJ in this regard was the position of Palestine, which asserted that the wall interferes with the territory in which the Palestinian people are entitled to exercise their right of self-determination; moreover, the wall violates the legal prohibition against acquiring territory through the use of force.¹⁴⁰ The Palestinian position emphasized that the route of the wall would alter the demographic composition of the Occupied Palestinian Territory by reinforcing the illegal Israeli settlements.¹⁴¹ The Israelis maintained that the wall's sole purpose was to enable it to combat effectively terrorist attacks launched from the West Bank and would only be a temporary measure.¹⁴²

The ICJ recalled that both the General Assembly and the Security Council concluded with regard to Palestine that the customary rule of “the inadmissibility of the acquisition of territory by war” applies to this case.¹⁴³ In recalling this norm, the Security Council has affirmed that implementation of the Charter requires establishing a just and lasting peace in the Middle East based on the following principles: (1) Withdrawal of Israeli armed forces from the occupied territories; and, (2) termination of any belligerency and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area to live in peace within secure and recognized boundaries.¹⁴⁴

With regard to the principle of self-determination addressed earlier, the ICJ observed that the existence of a “Palestinian people” is no longer an issue that should be debated.¹⁴⁵ Furthermore, the Court viewed that

¹³⁹ Construction of a Wall, 2004 I.C.J. para. 113.

¹⁴⁰ Construction of a Wall, 2004 I.C.J. para. 115. *See also Summary legal position of the Palestine Liberation Organization: Report of the Secretary-General*, G.A. Res. ES-10/14, U.N. GAOR, 10th Emergency Special Sess., Annex II, Agenda Item 5, at 10, U.N. Doc. A/RES/ES-10/14 (2003).

¹⁴¹ *See* Written Statement Submitted by Palestine on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, paras. 271 - 279 (Jan 30, 2004), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

¹⁴² Secretary-General's Report, para. 29.

¹⁴³ Construction of a Wall, 2004 I.C.J. paras. 74 and 87.

¹⁴⁴ U.N. SCOR, 1382nd mtg. para. 1, U.N. Doc. S/RES/242 (1967).

¹⁴⁵ Construction of a Wall, 2004 I.C.J. para. 118. *See also* G.A. Res. 58/163, U.N. GAOR, 58th Sess., Agenda Item 116, at 1, U.N. Doc. A/RES/58/163 (2004). Judge Buergenthal agreed with the Court's conclusions regarding Article 49.6. *See*

the route of the security wall was inconsistent with this right of self-determination, and that Israel was in violation of Article 49.6 of the Fourth Geneva Convention, which states that the Occupying Power “shall not deport or transfer parts of its own civilian population into the territory it occupies.”¹⁴⁶ The ICJ stated that this provision prohibits (1) deportations or forced transfers of population from an occupied territory, and (2) transfers of its own population into the occupied territory.¹⁴⁷ In spite of this legal obligation, Israel, since 1977, has established settlements in the Occupied Palestinian Territory in violation of Article 49.¹⁴⁸ While putting a favorable light on Israel’s assertion that the security wall is only a temporary measure, the ICJ considered that the construction of the wall and its maintenance are a *fait accompli*, which could be construed as a *de facto* annexation.¹⁴⁹

The Court also concluded that construction and maintenance of the security wall invoked a number of issues raising principles of international humanitarian law and international human rights. With regard to international humanitarian law, the ICJ recalled that Section III of the Hague Regulations of 1907 deals with military authority that is exercised in occupied territories. Article 43 of these regulations requires the occupying power to “take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country.”¹⁵⁰ In addition, Article 46 of the same regulations states that private property must be “respected” and not be confiscated.¹⁵¹ Deducing from these texts, the Court determined that the Israeli actions in building the security wall trammel these provisions.¹⁵²

Articles 47,¹⁵³ 49,¹⁵⁴ 52,¹⁵⁵ 53,¹⁵⁶ and 59¹⁵⁷ of the Fourth Geneva Convention must also be considered at this stage of examining the Court’s

Buergenthal Wall Declaration, para. 9 (citing Paragraph 6 of Article 49 of the Fourth Geneva Convention).

¹⁴⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49.6, 75 U.N.T.S. 287, 318.

¹⁴⁷ Construction of a Wall, 2004 I.C.J. para. 120.

¹⁴⁸ *Id.*

¹⁴⁹ Construction of a Wall, 2004 I.C.J. para. 121.

¹⁵⁰ Construction of a Wall, 2004 I.C.J. para. 124.

¹⁵¹ *Id.*

¹⁵² Construction of a Wall, 2004 I.C.J. para. 132

¹⁵³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 47, 75 U.N.T.S. 287, 318. Article 47 states:

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

¹⁵⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 75 U.N.T.S. 287, 318. Article 49 states:

application of the law. Israel's actions of erecting and maintaining the security wall violated these provisions that are geared to the political,

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased. The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated. The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place. The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand. The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

¹⁵⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 52, 75 U.N.T.S. 287, 322. Article 52 states:

No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention. All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

¹⁵⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 53, 75 U.N.T.S. 287, 322. Article 53 states:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

¹⁵⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 59, 75 U.N.T.S. 287, 326. Article 59 states:

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing. All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection. A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

social, and economic integrity of territories that have been occupied through the exercise of armed force.¹⁵⁸

With regard to the ICCPR, the ICJ recognized that Article 4 of the Covenant permits derogation in times of public emergency that threatens the “life of the nation.”¹⁵⁹ In this context, Israel made use of its right of derogation by calling attention to the “continuous threats and attacks on its very existence as well as on the life and property of its citizens.”¹⁶⁰ The ICJ, however, expressed the view that this derogation would only apply to Article 9 of the ICCPR based on a communication that Israel submitted to the Secretary-General in 1991 derogating the right to liberty and security of the person in cases of arrest or detention. Consequently, the Court concluded that the other articles of the Covenant remain unaffected by any claim of derogation not only in Israeli territory, but also in the Occupied Palestinian Territory.¹⁶¹ (This conclusion of the Court appears to conflict with the terms of the ICCPR as will be discussed in a moment.) Among the obligations that the ICJ believed remained intact and unaffected by the derogation claim was Article 17.1, which prohibits “arbitrary or unlawful interference with a person’s privacy, family, home or correspondence” and “unlawful attacks on a person’s honor and reputation.”¹⁶² In addition, the Court asserted that Article 12.1 pertaining to liberty of movement would still apply. This provision mandates that, “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”¹⁶³

It needs to be understood, however, that the non-derogation provision of Article 4 is clear in its limitation affecting only certain specified provisions of the ICCPR that include: the inherent right to life (Article 6); the prohibition against torture, etc. (Article 7); the prohibitions against slavery and servitude (Article 8, paragraphs 1 and 2); the prohibition against imprisonment for the inability to fulfill a contractual obligation (Article 11); the principle of legality—*nullum crimen sine lege* (Article 15); the right to be recognized as a person before the law (Article 16); and the right to freedom of thought, conscience and religion (Article 18). Absent from the Article 4 non-derogation list are the freedom of movement

¹⁵⁸ Construction of a Wall, 2004 I.C.J. para. 132.

¹⁵⁹ Construction of a Wall, 2004 I.C.J. para 127.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Construction of a Wall, 2004 I.C.J. para. 128.

¹⁶³ Construction of a Wall, 2004 I.C.J. para. 129. In addition to the general guarantees of freedom of movement under Article 12 of the ICCPR, the ICJ emphasized the significance of the specific guarantees of access to the Christian, Jewish and Islamic Holy Places. Needless to say, the erection of the barrier interfered with these obligations going back to the Mandate of 1922 and extending to the recent peace treaty between Israel and Jordan.

(Article 12) and prohibitions on interference with privacy, family, home, communications, and a person's honor or reputation (Article 17), which the Court seemingly mistakes as non-derogable because they were not mentioned in the Israeli statement of 1991.¹⁶⁴

The ICJ also found that a number of provisions of the ICESCR were relevant to this case. These include: the right to work (Articles 6 and 7); protection and assistance accorded to the family and to children and young persons (Article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right "to be free from hunger" (Article 11); the right to health (Article 12); the right to education (Articles 13 and 14).¹⁶⁵ In its evaluation of the evidence presented in the case, the Court concluded that the erection and maintenance of the security wall interfered with these rights.¹⁶⁶ Finally, the CRC contains similar provisions addressing unlawful interference with privacy, family, and home (Article 16); right to health issues (Article 24); standard of living rights (Article 27); and the right to education (Article 28), which the Court concluded were applicable to this case.¹⁶⁷ The ICJ noted that the creation of an enclosed area between the Green Line and the wall including settlement enclaves has imposed restrictions on the freedom of movement of the residents of the Occupied Palestinian Territory (with the exception of Israeli citizens who are free to come and go as they please).¹⁶⁸ In summation, the ICJ found that the wall's construction unlawfully impeded the liberty of movement guaranteed under Article 12.1 of the ICCPR. Moreover, this action improperly interfered with the rights to work, health, education and the adequate standard of living protected by the ICESCR and the CRC.¹⁶⁹ Finally, the construction of the wall generated demographic changes that conflicted with Article 49.6 of the Fourth Geneva Convention and associated Security Council resolutions.¹⁷⁰

C. Possible Exceptions to Israel's Legal Obligations

The ICJ was conscious of the fact that the applicable international humanitarian law takes account of and makes provisions for military and other exigencies in certain circumstances.¹⁷¹ Under appropriate circum-

¹⁶⁴ See International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 6, 7, 8, 11, 12, 15, 16, 17, 18, 999 U.N.T.S. 171.

¹⁶⁵ Construction of a Wall, 2004 I.C.J. para. 130; see also International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3.

¹⁶⁶ Construction of a Wall, 2004 I.C.J. para. 136.

¹⁶⁷ Construction of a Wall, 2004 I.C.J. para. 131. Arguably, these rights of children have been compromised by the erection and maintenance of the security wall.

¹⁶⁸ Construction of a Wall, 2004 I.C.J. para. 133.

¹⁶⁹ Construction of a Wall, 2004 I.C.J. para. 134.

¹⁷⁰ *Id.*

¹⁷¹ Construction of a Wall, 2004 I.C.J. para.127.

stances, a State might therefore be exempt from its legal obligations if these exigencies existed. An exemption could benefit and reinforce the Israeli arguments regarding the legality of the barrier and the regime established to maintain it should there be a finding that Israel confronted exigent circumstances that warranted erection and maintenance of the security wall. But neither Article 46 of the Hague Regulations of 1907, pertaining to protections to persons and their property, nor Article 47 of the Fourth Geneva Convention, regarding protection of persons in occupied territories, appears to make any relevant provision for derogation of obligations in emergency situations. The silence of the Fourth Geneva Convention enabled the ICJ to conclude that forcible transfers of population and deportations are prohibited under Article 49.1 of this instrument. While paragraph 2 of this Article makes an exception for those cases in which “the security of the population or imperative military reasons so demand,”¹⁷² this immunity does not pertain to Article 49.6, which prohibits the occupying Power from moving its own civilian population into the territories it occupies—as was the situation in this case.

Article 53 of the Fourth Geneva Convention addresses the destruction of personal property, but it makes an exception “where such destruction is rendered absolutely necessary by military operations.” Although the ICJ acknowledged the possibility that military exigencies can be invoked in occupied territories after the conclusion of military operations, it remained unsatisfied that the destruction carried out by Israel in the construction of the security wall was necessitated by any permissible military considerations that would trigger the exception.¹⁷³

As previously mentioned, the ICCPR permits limited derogation of certain obligations if conditions identified with some specificity exist. While Israel may have had some grounds to restrict the right to freedom and security of person,¹⁷⁴ it was the view of the Court that Israel was obligated to respect all the other provisions of the ICCPR where no evidence supporting the grounds for derogation existed.¹⁷⁵ The Court suggested that Article 17 of the ICCPR dealing with protection against arbitrary or unlawful interference with privacy and the home is not qualified by considerations of exigency and, therefore, its substantive content cannot be derogated.¹⁷⁶ But as demonstrated earlier, there are problems with this assertion. Article 12.3 limits the application of any restrictions on liberty of movement that “shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recog-

¹⁷² Construction of a Wall, 2004 I.C.J. para. 135.

¹⁷³ *Id.*

¹⁷⁴ Construction of a Wall, 2004 I.C.J. para. 127.

¹⁷⁵ Construction of a Wall, 2004 I.C.J. para. 136.

¹⁷⁶ *See id.*

nized in the present Covenant.”¹⁷⁷ However, as was also previously mentioned, it is doubtful that the non-derogation provisions of Article 4 of the ICCPR apply to Articles 12.3.

Insofar as the ICESCR is concerned, Article 4 provides:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.¹⁷⁸

As it did with regard to derogation of rights permitted under the ICCPR, the ICJ concluded that it is not sufficient that restrictions be directed to the authorized ends, which permit derogation; they must also be *necessary* for the attainment of those ends.¹⁷⁹ Upon reviewing the record and submissions in this case, the ICJ found that the grounds permitting restriction or derogation of rights under these two instruments did not exist.¹⁸⁰ The Court also noted that the restrictions resulting from Israel’s construction of the wall placed on the Palestinians’ enjoyment of economic, social and cultural rights, failed to meet a condition contained in Article 4 (“solely for the purpose of promoting the general welfare in a democratic society”).¹⁸¹

In summation, the ICJ remained unconvinced that erection and maintenance of the wall was necessary to achieve Israel’s legitimate security interests. Moreover, the barrier and its associated regime gravely impeded significant rights of Palestinians, and could not be justified either by military exigencies, national security, or public order.¹⁸² Thus, in a vote of 14 to 1, the ICJ concluded that by constructing the security wall, Israel breached obligations under these applicable international humanitarian laws and human rights instruments.¹⁸³ The Court then examined and discussed the implications of its application of the law in this case by identifying the legal consequences for concerned parties.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* citing ICESCR art. 14.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Construction of a Wall, 2004 I.C.J. para. 137.

¹⁸³ Construction of a Wall, 2004 I.C.J. para. 163(3). Judge Buergenthal stated in his separate opinion that his negative votes should not be viewed as reflecting his view that the construction of the wall by Israel does not raise serious questions as a matter of international law. He believed that there did exist serious questions, and he stated that there was much in the advisory opinion with which he agreed. He hastened to add that he was compelled to vote against the Court’s findings on the merits because it did not have before it the requisite factual bases for its sweeping findings; therefore, it should have declined to hear the case. See Buergenthal Wall Declaration, para. 1.

VI. LEGAL CONSEQUENCES

Although the ICJ concluded that Israel violated several international legal obligations by constructing and maintaining the wall, the Court acknowledged its duty to comment on Israel's self-defense argument made under Article 51 of the Charter and Security Council Resolutions 1368 (2001) and 1373 (2001).¹⁸⁴ The Court agreed that Article 51 of the Charter acknowledges the inherent right of self-defense, which it stated applied in the case of armed attack by one State against another State.¹⁸⁵ A difficulty the Court had in applying this argument of self-defense is that the attacks against Israel, which Israel argued justified erecting the barrier, were not the acts of a foreign State. Moreover, the Court noted that Israel, rather than another State, exercises control over the Occupied Palestinian Territory where the barrier was erected.¹⁸⁶ The threats con-

¹⁸⁴ Construction of a Wall, 2004 I.C.J. para 139 (citing S.C. Res 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/Res/1368 (2001) and S.C. Res 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/Res/1378 (2001)). Both of these resolutions of the Security Council were adopted shortly after the terrorist attacks in the United States on September 11, 2001. Each resolution thus concerned the right of States to individually or collectively pursue measures to defend against terrorist incidents. *Id.*

¹⁸⁵ *Id.*; see also THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 790-800 (Bruno Simma ed., 2d ed. 2002), wherein Prof. Albrecht Randelzhofer examines the difficult relation between Article 51 and Article 2.4 and the difficulty in assessing how a State can rely on the self-defense justification.

¹⁸⁶ Construction of a Wall, 2004 I.C.J. para. 139. Judge Buergenthal concluded that there were two principal problems with Court's conclusions about and interpretation of Article 51. The first was that the Charter does not make the exercise of self-defense dependent upon an armed attack by another State, putting aside the question of whether Palestine should be considered as a State or not. He noted that in the resolutions cited by the Court, the Security Council has made it clear that "international terrorism constitutes a threat to international peace and security" while "reaffirming the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)" (Security Council resolution 1373 (2001)). He noted that Security Council Resolution 1368 (2001), adopted one day after the September 11, 2001 attacks on the United States, invoked the right of self-defense to combat terrorism. In neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case. The second problem Judge Buergenthal identified was that in assessing the legitimacy of the self-defense claim, it is irrelevant that Israel is alleged to exercise control in the Occupied Palestinian Territory. He believed that attacks against Israel must permit Israel to exercise its right of self-defense, provided that the measures it takes are otherwise consistent with the legitimate exercise of that right. To determine whether the construction of the wall by Israel meets that test, all relevant facts bearing on issues of necessity and proportionality must be analyzed. In his estimation, the Court used a formalistic approach to evaluate the right of self-defense and did not properly consider the reality that Israel faces. See Buergenthal Wall Declaration para. 6.

fronting Israel would not trigger application of Security Council Resolutions 1368 (2001) and 1373 (2001), which provide support for claims made by States exercising the right of self-defense against terrorist activities. Consequently, the ICJ concluded that Israel's claims in support of the security wall could not be based on Article 51 of the Charter.¹⁸⁷ However, the language of Article 51 needs to be examined carefully.¹⁸⁸ The article does not specify who must be or can be the author of or be responsible for an attack that can trigger application of the self-defense provision. The only State to which Article 51 refers is the Member State that has taken or wishes to take action in its own or collective self-defense.

Another legal consequence for Israel pertains to its claim that a state of necessity existed thereby justifying the erection and maintenance of the security wall. The ICJ, however, pointed out that a state of necessity under customary international law was a measure that Israel could invoke based on some exceptional basis, which was not present in this case.¹⁸⁹ In reaching this conclusion, the ICJ stated that the defense was regulated by *Gabèikovo-Nagymaros Project (Hungary/Slovakia)* in which the Court concluded that a state of necessity argument is recognized by customary international law, but it exists only on an "exceptional basis"; moreover, it can be invoked only under strictly defined conditions that extend beyond the subjective assessment of the State relying on the state of necessity argument.¹⁹⁰ The Court also referred to the findings of the International Law Commission, which determined that this defense is legitimate if it is the only way for the State to protect against a grave and

¹⁸⁷ Construction of a Wall, 2004 I.C.J. para. 139.

¹⁸⁸ U.N. CHARTER art. 51 states in entirety:

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

¹⁸⁹ Construction of a Wall, 2004 I.C.J. para 140.

¹⁹⁰ Construction of a Wall, 2004 I.C.J. para 140, (citing *Gabèikovo-Nagymaros Project (Hungary v. Slovakia)*, I.C.J. 3, para. 51, at 40 (Feb. 5, 1997)). The ICJ noted in paragraph 52 of the *Gabèikovo-Nagymaros Project* decision that customary law defines the basic conditions set forth in Draft Article 33:

[I]t must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity."

imminent peril.¹⁹¹ Based on the evidence presented, the ICJ concluded that Israel had not met the customary law standard for a state of necessity argument that would justify the construction of the wall as the only way to safeguard its legitimate interests to protect against grave and imminent peril.¹⁹² In reaching this conclusion, the Court seemed to suggest that a security fence could be in order, but it would have to be erected on Israel's territory rather than on a territory Israel merely occupied.¹⁹³

The ICJ hastened to add that Israel has indeed confronted "numerous indiscriminate and deadly acts of violence against its civilian population" and has the right and duty to protect the life of its citizens, but the measures pursued must accord with germane international law.¹⁹⁴ Based on this record, the ICJ concluded that the construction of the wall was contrary to international law.¹⁹⁵

The Court then applied its findings to the question posed by the General Assembly in its request for the advisory opinion.¹⁹⁶ The law's application would determine the legal consequences for Israel, other States, and the U.N. itself.

A. *For Israel*

The ICJ thus addressed four issues pertaining to Israel: (1) does Israel have a legal obligation to halt the construction and extension of the security wall; (2) is Israel obligated to make reparations for damage arising from unlawful conduct;¹⁹⁷ (3) does Israel have a continuing duty to

¹⁹¹ *Id.* See Article 25 and its commentary of the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission on the Work of its 53rd Session, Official Records of the General Assembly, 56th Session, Supplement No. 10 (A/56/10) Chapter IV.E.1.

¹⁹² Construction of a Wall, 2004 I.C.J. para 140.

¹⁹³ As the ICJ stated, "the Court is not convinced that the construction of the wall *along the route chosen* was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction." (emphasis added). *Id.*

¹⁹⁴ Construction of a Wall, 2004 I.C.J. para 141.

¹⁹⁵ Construction of a Wall, 2004 I.C.J. para 142.

¹⁹⁶ While conceding that that all or segments of the wall may violate international law, Judge Buergenthal stated that to reach this conclusion without having or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defense, military necessity and security needs, given the repeated deadly terrorist attacks to which Israel has been and continues to be subjected, cannot be justified as a matter of law. In his view, the nature of these attacks and their impact on Israel and its population were not seriously examined by the Court. Judge Buergenthal did not suggest that such an examination would relieve Israel of the charge that the wall it is building violates international law, only that without this examination the findings made could not be legally founded. See Buergenthal Wall Declaration, paras. 3,4.

¹⁹⁷ The Court noted that reparations could include: restitution, including demolition of the wall and the restoration of property requisitioned or expropriated

comply with international obligations associated with the construction of the wall; and, (4) under the Fourth Geneva Convention, does Israel have an obligation to prosecute persons alleged to have committed grave breaches of international humanitarian law for acts associated with the wall?¹⁹⁸

The ICJ found that Israel must halt further construction of the wall and dismantle the completed portions of the structure.¹⁹⁹ In this context, it asserted that any actions taken by Israel authorizing construction of the wall must be repealed or otherwise neutralized.²⁰⁰

Concerning the reparations issues, the ICJ concluded that Israel is obligated to pay damages to anyone adversely affected.²⁰¹ The ICJ also found that Israel is obligated to return land (including orchards, olive groves and other immovable property) seized from any person and used in constructing the wall.²⁰² If this restitution were materially impossible, however, Israel would then have an obligation to compensate the affected persons for the damage they have suffered in accordance with the applicable rules of international law.²⁰³

With regard to the third issue, the ICJ found that Israel is “obliged to comply with the international obligations breached by construction of the wall”; furthermore, Israel is required to respect the legitimate claim of the Palestinian people to self-determination.²⁰⁴ In addition, Israel is obligated to ensure freedom of access to the Holy Places under its control.²⁰⁵

for its construction; and, appropriate compensation to individuals whose homes or agricultural holdings were destroyed. *Construction of a Wall*, 2004 I.C.J. para. 145.

¹⁹⁸ *Id.*

¹⁹⁹ *Construction of a Wall*, 2004 I.C.J. para 151.

²⁰⁰ *Id.*

²⁰¹ *Construction of a Wall*, 2004 I.C.J. para. 152. Recalling that the essential forms of reparation in customary law were established by the Permanent Court of International Justice and are:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

Factory at Chorzów, Merits (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13)).

²⁰² *Construction of a Wall*, 2004 I.C.J. para. 153.

²⁰³ *Id.*

²⁰⁴ *Construction of a Wall*, 2004 I.C.J. para. 149.

²⁰⁵ *Construction of a Wall*, 2004 I.C.J. paras. 129 and 149.

Finally, the Court evaded the last question and concluded that Israel must discontinue all violations of its international obligations – including the Fourth Geneva Convention’s applicable provisions – flowing from the construction of the wall in the Occupied Palestinian Territory.²⁰⁶

B. *For Other Concerned States*

Interestingly, it was the view of the ICJ majority that other States have legal obligations as a result of Israel’s activities that were deemed incompatible with international law.²⁰⁷ As a consequence of the findings pertaining to Israel’s conduct and the resulting duties, the ICJ concluded that Israel had violated *erga omnes* obligations.²⁰⁸ The ICJ reiterated the *erga omnes* principle formulated in *Barcelona Traction* specifying that certain obligations are by their very nature the concern of all States because they are all responsible for observing and enforcing these obligations.²⁰⁹ In this case, Israel’s *erga omnes* obligations include those affecting the self-determination rights of the Palestinian people.²¹⁰

²⁰⁶ Construction of a Wall, 2004 I.C.J. para. 150. The Court then cited its decisions in the following cases: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 149; United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 44, para. 95; Haya de la Torre, Judgment, I.C.J. Reports 1951, p. 82.

²⁰⁷ Judge Kooijmans joined Judge Buergenthal and disagreed with the majority conclusion that all States have an obligation not to recognize the “illegal situation” and not to render aid or assistance to maintain the wall’s construction. Judge Kooijmans concluded that the request for the advisory opinion did not necessitate that the ICJ determine the obligations of other States, the reasoning the ICJ used to justify this portion of its opinion was insufficient, and, after concluding that all States had obligations, the ICJ failed to give them instruction on what they should do or refrain from doing. Construction of a Wall, 2004 I.C.J. (separate opinion of Judge Kooijmans, at para. 1). See also Construction of a Wall, 2004 I.C.J. para. 155.

²⁰⁸ Construction of a Wall, 2004 I.C.J. para. 155 and 156. para. The Court recalled that in the *East Timor* case, it described as “irreproachable” the assertion that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character” I.C.J. Reports 1995, p. 102, para. 29. The Court also recalled that under the terms of General Assembly resolution 2625 (XXV), “Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle. . .”

²⁰⁹ *Id.* (citing *Barcelona Traction, Light and Power Company, Limited, Second Phase (Belgium v. Spain)*, 1970 I.C.J. 3, at 32 (Feb. 5)).

²¹⁰ *Id.* (citing *Legality of the Threat or Use of Nuclear Weapons*, 1996 (I) I.C.J. 226, para. 79, at 257 (July 8)). With regard to international humanitarian law, the Court noted that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and

The Court further emphasized that because Article 1 of the Fourth Geneva Convention provides that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in *all* circumstances,” (emphasis added), every state party, regardless of whether it is a party to any conflict regarding Israel, has an obligation to honor and observe the requirements of this instrument.²¹¹ Hence, these States have an obligation to avoid any cooperation with Israel that would result in direct or indirect support of the security wall.²¹² In addition, state parties have a duty to ensure Israel’s compliance with the international humanitarian law provisions of the Fourth Geneva Convention.²¹³

C. *For the United Nations*

The Court, moreover, recognized that there may be some consequences for the U.N., in particular, the General Assembly (which requested the advisory opinion) and the Security Council, to consider further action needed to terminate the illegal situation resulting from the wall’s construction.²¹⁴ By acknowledging the primary objectives of the U.N. to maintain international peace, and security and to promote the peaceful resolution of disputes, the ICJ emphasized the “urgent necessity” for the U.N. “to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion. . . .”²¹⁵ The ICJ did not elaborate on how these U.N. bodies would achieve these goals. It appears that the General Assembly found this exhortation by the Court directed to the U.N. to be the green light to proceed with the resolution finally adopted on July 20, 2004.

VII. SUBSEQUENT ACTION BY THE UNITED NATIONS—A WORK IN PROGRESS?

Picking up on the cue of the ICJ, the General Assembly, on July 16, 2004, resumed its Tenth Emergency Special Session to consider the ICJ’s advisory opinion. While the opinion was advisory in its nature – i.e., not generating any legal obligation – the question loomed: what would the General Assembly do with it? As previously noted, advisory opinions do not exist in a vacuum because they are usually designed to help one of the

‘elementary considerations of humanity’. . .”, that they are “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.” The ICJ noted that these rules incorporate obligations that are essentially of an *erga omnes* character.

²¹¹ Construction of a Wall, 2004 I.C.J. para. 158.

²¹² Construction of a Wall, 2004 I.C.J. para. 159.

²¹³ *Id.*

²¹⁴ Construction of a Wall, 2004 I.C.J. para. 160.

²¹⁵ Construction of a Wall, 2004 I.C.J. para. 161.

political bodies of the U.N. meet its obligations. The General Assembly responded quickly to the ICJ's advisory opinion, and, in less than two weeks, it met formally on three occasions and adopted, after a vote,²¹⁶ Resolution A/ES-10/L.18/Rev.1 of July 20, 2004. The members of the League of Arab States²¹⁷ and the Chairman of the Coordinating Bureau of the Non-Aligned Movement (NAM) requested resumed meetings of the Tenth Emergency Special Session.²¹⁸

On July 16, the General Assembly debated on the advisory opinion and assessed whether the "security barrier in the West Bank was illegal and should be torn down."²¹⁹ During the session, Arab and Non-Aligned delegations acclaimed the Court's ruling as a political, moral and legal victory, even though the opinion was considered to be non-binding by itself.²²⁰ As just mentioned, a political organ of the U.N. usually uses the opinions of the ICJ to execute its responsibilities. This case was no exception. The ensuing debate demonstrated that like-minded delegations intended to push for a vote on a draft resolution demanding that Israel cease further construction, dismantle the barrier, and make reparations to Palestinians whose lives have been harmed by the wall.²²¹

In his July 16 intervention, Ambassador Nasser Al-Kidwa, the Permanent Observer for Palestine stated that the ICJ's decision was "a watershed event. . . based on international law and the ideals of peace and reconciliation."²²² Al-Kidwa further asserted that the opinion presented a clear and comprehensive appropriation of the applicable rules of international law and defined very well the legal obligations that emanated

²¹⁶ In recent times based on the author's personal observations of and participation in U.N. meetings during the past eight years, the General Assembly has tended to adopt resolutions without a vote—that is, by consensus. However, this trend has not precluded that on especially contentious issues adoption (or not) of the draft resolution is determined by the democratic process requiring the taking of a recorded vote. This latter course was the one necessitated in the resolution that responded to the ICJ's advisory opinion.

²¹⁷ Document A/ES-10/274, July 13, 2004, containing a letter of July 12, 2004 from the Permanent Representative of Jordan addressed to the President of the General Assembly.

²¹⁸ Document A/ES-10/275, July 13, 2004, containing a letter of July 13, 2004 from the Chargé d'affaires a.i. of the Permanent Mission of Malaysia to the United Nations addressed to the President of the General Assembly.

²¹⁹ *U.N. Press Release: General Assembly Meets in Emergency Session to Debate World Court's Decision on Israeli Security Barrier*, U.N. Doc. GA/10246 (July 16, 2004).

²²⁰ *Id.*

²²¹ The author was present during the July 19 and 20, 2004 meetings of the Special Emergency Session of the General Assembly.

²²² *U.N. Press Release: General Assembly Meets in Emergency Session to Debate World Court's Decision on Israeli Security Barrier*, U.N. Doc. GA/10246 (July 16, 2004).

from Israel's breaches of the applicable law by constructing the security wall.²²³ In his estimation, the draft resolution that the General Assembly would consider had a twofold purpose: (1) to endorse the advisory opinion and (2) to demand adherence to all international legal obligations by Israel and from other States.²²⁴ The Palestinian permanent representative further indicated that States must be prepared to engage in those necessary actions pursuant to their legal obligations in the event of Israel's failure to comply.²²⁵ The General Assembly action that would implement the advisory opinion could be viewed as an opportunity to convince Israel that its actions concerning the wall's construction were unacceptable to the international community.

Israel responded to the Palestinian position by stating that Israel and other States had previously opposed the request for the advisory opinion because of the negative impact it would have on the peace process that was already under way.²²⁶ Israel acknowledged that it had international legal obligations; however, it asserted that the request for the advisory opinion improperly politicized the Court and its functions.²²⁷ Israel also noted that the conflict in the Middle East was two-sided on all fronts and that Palestine also had responsibilities including abandoning terror as one of its strategies.²²⁸ Before concluding his remarks, the Israeli delegate noted that the security wall had achieved a beneficial purpose because it served as a catalyst to restart the stalled "Roadmap."²²⁹

Australia was one of the delegations that lamented the ICJ's ruling on the security wall and voted against the General Assembly resolution requesting the advisory opinion.²³⁰ The Australian delegation contended that the resolution focused on an isolated issue that concerned many complex circumstances and suggested that it contributed nothing beyond existing resolutions previously adopted, which concerned settlement of the Israeli-Palestinian dispute.²³¹

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* The Senegalese ambassador also suggested that, if applied fully in good faith, it would set the course for the international community to help re-launch the negotiations between the two sides towards implementation of the Roadmap peace plan. He also reaffirmed that the United Nations must continue its leading role to resolve the Palestinian-Israeli conflict until the objectives of the Roadmap had been attained. He opined that the Court ruling also offered the international community a unique opportunity to accelerate the progress of the Palestinian people in their struggle to exercise self-determination.

²³⁰ *Id.*

²³¹ *Id.*

The Deputy Permanent Representative of India maintained that the only peaceful solution to the ongoing violence concerning Palestine and Israel had to be established in political dialogue, efforts to reconcile, and perseverance.²³² In his judgment, the Quartet-backed Roadmap should be pursued as the preferred means of achieving peace, but he called upon Israel to consider the advisory opinion and the vast international opinion associated with it.²³³

The South African ambassador stated that it should be recognized at the outset that no sustainable political dialogue or peace in the Middle East was possible until the fundamental rights and obligations of both parties—Palestinians and Israelis—were acknowledged and respected by all. Each party had the right to live in peace and security, free from violence. He argued that any solution favoring one side could not be sustained for long.²³⁴ He concluded by suggesting that Israel could have averted the request for the advisory opinion by constructing the wall on its own territory.²³⁵

It was the view of the United States, as presented by the new U.S. Permanent Representative John Danforth, that since the draft resolution interfered with the essential political solution required to resolve the Israeli-Palestinian conflict, it must be opposed.²³⁶ The U.S. ambassador further stated that the political process and negotiations involving the concerned parties would ensure balance in resolving this longstanding problem whereas the draft resolution would not guarantee this.²³⁷ Ambassador Danforth also indicated that the ICJ's interpretation of Article 51 of the Charter suggested that the right of a State to exercise its right of self-defense existed only in the face of an attack by another State and not against a non-State entity such as Palestine. If this interpretation were an authentic view of the meaning of Article 51, the Charter would be irrelevant in those situations where terrorist organizations rather than States posed threats to peace.²³⁸

The July 16 meeting was adjourned in order that delegations could study the draft resolution that Jordan introduced. In U.N. practice, this typically presents the opportunity for "interested delegations" to consult with one another in an effort to remove or minimize obstacles that might prevent adoption of a draft resolution.

After a weekend recess, the General Assembly reconvened the Tenth Emergency Special Session on July 19, but it met only long enough to postpone action on the draft resolution after it became apparent that

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

some delegations, otherwise in favor of having a resolution implementing the advisory opinion, were divided over elements in the draft text as it then read. It appeared that some of the more notable divisions were within the membership of the European Union. While the EU generally favors resolutions that would implement the key elements of the advisory opinion, the text as it then read lacked balance and did not address any responsibilities that Palestine may have regarding events that served as catalysts for the erection of the wall by Israel.²³⁹

The draft text prepared by the Arab group of U.N. Members and introduced by Jordan would have the General Assembly acknowledge the Court's opinion and take note of its finding that the construction of the wall in the manner in which it was conducted contravened public international law.²⁴⁰ The text as then drafted would also state that, consistent with what is "essential to the rule of law and reason in international affairs," Israel must comply with all legal obligations that would include cessation of expansion of the wall.²⁴¹ Moreover, the General Assembly demanded that Israel dismantle the sections of the wall that had been erected to date and make reparations for the damage that had resulted from the construction.²⁴² The initial draft resolution also stated that if Israel did not comply with the demands of the General Assembly, the latter would reconvene to consider further actions that may be appropriate to the situation.²⁴³

Before the brief meeting of July 19 adjourned, the Israeli ambassador intervened and protested the meeting and its brevity. He argued that Members and observers were summoned to a meeting designed to provide details about the draft, but none had been presented.²⁴⁴ In a passionate intervention, he concluded by stating that the Palestinian Authority was in no position to preach to anyone about law and order, saying, "They should not lecture anyone about the rule of law or accuse others of being outlaws. . . . We have indeed reached the point where the inmates are running the asylum."²⁴⁵

Before adjourning the meeting, General Assembly President Julian Robert Hunte commented on troublesome issues. He urged caution against language that would inflame tensions and complicate efforts to resolve disputes.²⁴⁶ Hunte strongly objected to Israel's characterization

²³⁹ *U.N. Press Release: General Assembly Emergency Session Postpones Action on Draft Resolution Concerning Israel's Separation Barrier*, U.N. Doc. GA/10247 (July 19, 2004).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

that the debates concerning this issue were analogous to “inmates running an asylum.”²⁴⁷ This was a clear objection to the statement made earlier in the meeting by the Israeli ambassador. Mr. Hunte asserted that the United Nations is “the mother and father of democracy” and had the role of providing a forum in which the great international issues of the day can be debated.²⁴⁸ The General Assembly President then urged all delegations to observe the proper decorum and exercise the dignity necessary to these difficult proceedings in order for the General Assembly to function appropriately.²⁴⁹ He then gavelled the session to adjournment and quickly exited from the dais.²⁵⁰ This may have been the President’s discrete commentary that fences do not make good neighbors and that neighbors should really work harder at being good neighbors.

The General Assembly reconvened on July 20 to take action on the draft resolution, which it subsequently approved overwhelmingly by a recorded vote of 150 in favor,²⁵¹ 6 opposed,²⁵² and 10 abstentions.²⁵³

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ The author was present and watching these proceedings including the action of President Hunte. Typically, the presiding officers in General Assembly meetings linger for a few moments to consult with various delegations or to exchange greetings with delegates. This did not happen once the gavel announcing the conclusion of the session hit the dais.

²⁵¹ Voting in favor: Afghanistan, Albania, Algeria, Andorra, Antigua and Barbuda, Argentina, Armenia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cape Verde, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic People’s Republic of Korea, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, Eritrea, Estonia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Libya, Liechtenstein, Lithuania, Luxembourg, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia and Montenegro, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, Uzbekistan, Venezuela, Viet Nam, Yemen, Zambia, and Zimbabwe. *U.N. Press Release: General Assembly Emergency Session Overwhelmingly Demands Israel’s Compliance with International Court of Justice Advisory Opinion*, U.N. Doc. GA/10248 (July 20, 2004).

Prior to the vote, however, the European Union requested a “brief” recess in an effort to overcome some difficulties with elements found in that text.²⁵⁴ Some delegations noted at this stage that the text presented was still too one-sided regarding where fault rested for the underlying problems that may have warranted the security measures pursued by Israel.²⁵⁵ President Hunte granted the recess, which turned out to be something other than “brief.” The text introduced earlier by the Jordanian delegation was then subjected to several amendments that were proposed by the Permanent Representative of Liechtenstein.²⁵⁶

Like most other General Assembly resolutions, this draft generally recalled the legal background of international law and international humanitarian law, the Charter, and earlier relevant resolutions of both the General Assembly and the Security Council.²⁵⁷ Moreover, it evoked the illegality of territorial acquisition from the use of force or its threatened use.²⁵⁸ This draft also reaffirmed the permanent responsibility of the United Nations concerning the Palestinian issue until it is

²⁵² Voting against: Australia, Federated States of Micronesia, Israel, Marshall Islands, Palau, and the United States. *Id.*

²⁵³ Abstaining: Cameroon, Canada, El Salvador, Nauru, Papua New Guinea, Solomon Islands, Tonga, Uganda, Uruguay, and Vanuatu. The following countries were recorded as absent: Angola, Benin, Central African Republic, Chad, Comoros, Côte d’Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Ethiopia, Georgia, Guinea-Bissau, Iraq, Kiribati, Liberia, Madagascar, Malawi, Niger, Republic of Moldova, Rwanda, Saint Kitts and Nevis, Samoa, Sao Tome and Principe, Seychelles, Somalia, and Tajikistan. *Id.*

²⁵⁴ The author was again present at this stage of the proceedings and observed a representative of the European Union request the recess from the President.

²⁵⁵ *Id.* In U.N. chambers, small groups of delegates frequently caucus to discuss the proceedings and to offer strategies for dealing with developments in proceedings. This meeting was no different. A few groups of delegations situated near the author made these remarks that would be designed to make the draft resolution more palatable.

²⁵⁶ *Id.* These amendments added a new fifteenth preambular paragraph that read as follows:

Calling upon both parties to fulfill their obligations under relevant provisions of the Road Map, the Palestinian Authority to undertake visible efforts on the ground to arrest, disrupt and restrain individuals and groups conducting and planning violent attacks, and the Government of Israel to take no actions undermining trust, including deportations and attacks on civilians and extrajudicial killings.

In addition, a new sixteenth preambular paragraph was added that read as follows:

Reaffirming the fact that all States have the right and the duty to take actions in conformity with international law and international humanitarian law, to counter deadly acts of violence against their civilian populations in order to protect the life of their citizens.

²⁵⁷ G.A. Res., U.N. GAOR, 10th Emergency Special Sess., U.N. Doc.A/ES-10/L.18/Rev.1 (2004) (Draft), pmbl. paras. 1, 2, 3, 5, 6, 7.

²⁵⁸ A/ES-10/L.18/Rev.1 (2004), pmbl. para.4.

resolved in accordance with applicable international law,²⁵⁹ the right of the Palestinian people to self-determination and a territorial State of their own,²⁶⁰ and the assurance of implementing the two-State solution of Israel and Palestine coexisting in peace and security within the pre-1967 borders.²⁶¹

It was at this point that two new preambular paragraphs were amended to the draft resolution. The first requested Israel and Palestine to honor their obligations under the Roadmap; the Palestinian Authority to undertake visible efforts arrest and restrain individuals and groups engaged in violent attacks; and Israel to reestablish trust by stopping deportations, attacks on civilians, and extrajudicial killings.²⁶² The second reaffirmed the principle that “all States have the right and the duty to take actions in conformity with international law and international humanitarian law to counter deadly acts of violence against their civilian population in order to protect the lives of their citizens.”²⁶³ These amendments enabled the European Union to act in a united fashion when voting. Moreover, previous discussions in the chamber revealed that these two additions to the preambular section added some needed balance to the general tenor of the draft resolution that was absent in the previous text.

The preambular section also took account of those elements in the ICJ advisory opinion that stated: (1) the construction of the wall was contrary to international law; (2) Israel is obliged under international law to stop further construction of the wall and dismantle its existing segments; (3) Israel has a legal obligation to make reparations for any injury caused by the wall’s construction; (4) all States are obliged to avoid and comply with the illegal situation resulting from the construction of the wall and those States which are party to the Fourth Geneva Convention have the additional obligation to ensure compliance by Israel with international humanitarian law as embodied in that Convention; and finally, (5) the United Nations should consider any additional action that may be required to end the illegal situation resulting from the construction of the wall, taking due account of the Court’s advisory opinion.²⁶⁴

Finally, the preambular section of the draft resolution noted that the ICJ’s conclusion that Israel and Palestine are obliged to observe scrupulously the rules of international humanitarian law, particularly those designed to protect civilian life, and that the tragic situations surrounding

²⁵⁹ A/ES-10/L.18/Rev.1 (2004), pmb. para.8.

²⁶⁰ A/ES-10/L.18/Rev.1 (2004), pmb. para.12. .

²⁶¹ A/ES-10/L.18/Rev.1 (2004), pmb. para.13.

²⁶² A/ES-10/L.18/Rev.1 (2004), pmb. para.15 ; U.N. General Assembly, Press Release, GA/10247 (July 20, 2004).

²⁶³ A/ES-10/L.18/Rev.1 (2004), pmb. para.16 ; U.N. General Assembly, Press Release, GA/10248 (July 20, 2004).

²⁶⁴ A/ES-10/L.18/Rev.1 (2004), pmb. para.20.

the facts of this case can be avoided in the future through good faith implementation of all relevant Security Council resolutions.²⁶⁵

The operative elements of the draft resolution began by *demanding* that Israel comply with its legal obligations that were “mentioned” (earlier the word used was “identified”) by the Court in the advisory opinion.²⁶⁶ The word “demand” is one of the strongest action-oriented verbs that can be used in U.N. resolutions.²⁶⁷ Interestingly, the next operative paragraph was amended so that all U.N. Member States were “called upon” (in an earlier draft the word “demanded” was used) to comply with their legal obligations mentioned in the advisory opinion.²⁶⁸ Apparently, the standard of expectations for Israel was different than the standard applied to other States.

In an effort to provide some balance to the resolution, another operative paragraph called on both Israel and the Palestinian Authority to implement immediately their respective obligations outlined by the Quartet and endorsed by Security Council Resolution 1515 (2003) to implement the Roadmap calling for two States living side by side in peace and security.²⁶⁹

In addition, all State Parties to the Fourth Geneva Convention were called upon “to ensure respect by Israel for the Convention.”²⁷⁰ The modalities for implementing this Convention’s provisions then followed.

After the vote, many delegations took the floor to explain their vote or position. In doing so, many noted the importance of respecting international law in difficult situations such as this one.²⁷¹ The U.S. delegation

²⁶⁵ A/ES-10/L.18/Rev.1 (2004), pmb. para.22.

²⁶⁶ A/ES-10/L.18/Rev.1 (2004) para. 2.

²⁶⁷ In the eight years experience of participating in the negotiations the accompany drafting General Assembly resolutions, the author has observed how particular formulations used in draft resolutions are used to signify strength or weakness. The words chosen to signify intensity can also reveal the potency of the underlying consensus. For example, the General Assembly can “take note” of something. This is a weak formulation that can be fortified by the General Assembly instead using the word “reaffirming.” When the General Assembly asks States to do something, it can “request” or “call upon” them (weak) or it can “urge” them (stronger). In this context, the word “demand” can be used, but it is employed in critical circumstances in which the subject has no option in the matter in that it must do the thing or take the action specified.

²⁶⁸ A/ES-10/L.18/Rev.1 (2004) para. 3.

²⁶⁹ A/ES-10/L.18/Rev.1 (2004) para. 6.

²⁷⁰ A/ES-10/L.18/Rev.1 (2004) para. 7. “Ensure respect” replaced the original term “compliance.” The formulation “ensure respect” tends to signify a stronger commitment than the word “compliance”, which appeared in an earlier draft.

²⁷¹ *U.N. Press Release: General Assembly Emergency Session Overwhelmingly Demands Israel’s Compliance with International Court of Justice Advisory Opinion*, U.N. Doc. GA/10248 (July 20, 2004).

reiterated the points it had made at the July 16 meeting of the Emergency Special Session.²⁷²

The Israeli Permanent Representative stated that the General Assembly failed to promote the cause of Middle East peace by “pandering to one viewpoint and marginalizing the scourge of terrorism.”²⁷³ Israel thanked the delegations that voted against the resolution and those that had “tried to introduce some semblance of balance into the text.”²⁷⁴ Israel raised the point, however, that one key issue still faced all concerned with this matter.²⁷⁵ The issue was whether States would defer to those who failed to acknowledge the reasons that led to the construction of the wall in the first place.²⁷⁶ In the Israeli ambassador’s view, this “myopic” resolution ignored the justification for a comprehensive solution to the shared issues facing Israel and Palestine.²⁷⁷

The European Union made an intervention worthy of note. It stated that while it was united in its opposition to placement of the security wall, it supported Israel’s claim to act in self-defense. However, it reaffirmed the principle that the Roadmap constituted the basis for a feasible peaceful settlement to the conflict between Palestine and Israel. Consequently, it was vital for the success of the Roadmap that both sides cease all further acts of violence.²⁷⁸

VIII. WHAT THE FUTURE MAY ENTAIL

Typically, at this stage, many law review or journal articles present a conclusion that ties up some elements of the paper’s substance and poses issues that warrant further reflection as new developments occur. In this case, my task needs to be more humble. Neither the ICJ’s advisory opinion nor the General Assembly Resolution of July 20, 2004, by themselves, will permanently resolve the issues that still fuel the tensions in the Middle East that pertain to Israel and Palestine.

Whether referring the matter of the Israeli security wall to the International Court of Justice will ultimately be viewed as a helpful step in resolving Middle East tensions will need more time to be answered. Given the restless political environment, however, veterans of U.N.

²⁷² *Id.* These concerns noted that the advisory opinion failed to emphasize the need for the ongoing political solution that was in place that was trying to resolve the Israeli-Palestinian conflict. Consequently, the General Assembly’s resolution that emphasized the advisory opinion over the political solution had to be rejected. The political process was balanced, unlike the advisory opinion, which deemphasized the terrorist threat the confronted Israel.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

debates may have grounds to question if peace between Israel and Palestine will be accelerated by the advisory opinion and the ensuing resolution. Surely the application of international law and the obligations of all entities to this body of law are important steps forward in securing peace in this troubled world. But it is a mistaken course to emphasize one set of related actions and to forget the need to continue efforts for a negotiated settlement that is the best hope of establishing a just and lasting peace. Nonetheless, the advisory opinion and the subsequent resolution can serve as catalysts for these essential negotiations. The ICJ itself acknowledged that the issue of the security wall is an issue that is only one element of a greater whole.²⁷⁹ It is thus incumbent on the political organs of the U.N. and Member States to acknowledge in a similar vein that their efforts in securing a just and lasting peace are also a part of the greater whole.²⁸⁰ The Canadian delegation suggested that the draft resolution would not accomplish all the responsibilities of the U.N. concerning the maintenance of security and peace in the Middle East.²⁸¹ Although suggestions and comments about terrorism had been made throughout the debate, the draft resolution provided little guidance about how to address effectively acts of terrorism, which have a direct bearing on the relationship between Palestine and Israel.

Without a doubt, Israel has a right to defend its legitimate interests, which include the protection of its nationals. But it also has the obligation to protect those under its authority who are not its citizens, as was previously discussed above in the discussions on the Fourth Geneva Convention.²⁸² Moreover, Israel cannot ignore the whole of the very principle, namely G.A. Resolution 181 (II), November 29, 1947, that recognized the Jewish State's right to exist. This resolution establishing Israel's territorial right, however, simultaneously recognized the right of an Arab State of Palestine to exist— "to achieve the vision of two States living side by side in peace and security."²⁸³ Both objective and equitable political action and the rule of law are essential to ensuring that Israel and Palestine do not rely on fences making "good neighbors." It is clear from this case, that the wall as constructed has exacerbated the relations

²⁷⁹ Construction of a Wall, 2004 I.C.J. para. 54 ("The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.").

²⁸⁰ *Id.*

²⁸¹ U.N. Press Release: General Assembly Emergency Session Overwhelmingly Demands Israel's Compliance with International Court of Justice Advisory Opinion, U.N. Doc. GA/10248 (July 20, 2004).

²⁸² See *supra* text accompanying note 45.

²⁸³ U.N. SC Res. 1515, U.N. SCOR, U.N. Doc. S/RES/1515 (2003).

between Israel and Palestine. For example, Palestinian property was confiscated in order to erect the wall in some locations. In addition, the presence of the wall cut off access from homes to places of work and worship, markets, and schools.

It is the logical encounter of reason and civil debate that resolves disputes far more permanently than military might or brute force, which history demonstrates to be an ineffective means for reconciling neighbors. When one considers the concerns raised about the lack of balance in the draft resolution, the expectations demanding fulfillment of duties and legal obligations by some, but not all, neighbors (Israel and Palestine) would appear to be an incomplete solution to the pressing issues of the Middle East. It is the duty of all people of good will to help create favorable conditions for resolving this conflict that has been an ongoing source of suffering for Palestine and Israel. In isolation, the advisory opinion and the resolution of July 20 fall short of this task. In conjunction with the Roadmap and the labor of all people of good will, Israelis and Palestinians may one day soon be able to turn to one another in fraternal greeting and say, "Hello, neighbor. . . ."

Realizing who one's neighbor is and why it is essential to respect one's neighbor will provide an important, perhaps even necessary, basis for resolving this dispute once and for all. If the outsider Samaritan of Saint Luke's Gospel can exercise mercy toward the victim of brigands and thereby demonstrate that even an unknown stranger can be a neighbor, think of the possibilities that may emerge from those who live side by side. The neighbor is truly the one who can show mercy to the unknown and different person.²⁸⁴ There was hope for this occurring in First Century Palestine, when the parable of the Good Samaritan took place. Perhaps one day the same may be said of Palestine and Israel – "two States living side by side in peace and harmony" – in the Twenty-first Century.

²⁸⁴ See Luke, *supra* note 2.