The World Court’s Ruling regarding Israel’s West Bank Barrier and the Primacy of International Law: An Insider’s Perspective

Pieter H. F. Bekker

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.cornell.edu/cilj/vol38/iss2/6
The World Court's Ruling Regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective

Pieter H.F. Bekker†

Introduction ....................................................... 553

I. Judicial Focus .................................................. 556

II. Palestine's Participation and Representation in the ICJ Proceeding ........................................ 557

III. "Occupied" Status of Palestinian Territory ................. 557

IV. Illegality of Israeli Settlements ............................ 558

V. "Geneva" and Human Rights Protections for Palestinians . 560

VI. Israel's Security Defense Rejected ........................ 561

VII. To Bind or Not To Bind? ...................................... 564

VIII. Implementation .............................................. 565

Conclusion ......................................................... 566

Introduction

On July 9, 2004, the International Court of Justice ("ICJ" or "Court"), the principal judicial organ of the United Nations ("UN") seated at the Peace Palace in The Hague (The Netherlands), issued an Advisory Opinion in the case concerning the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory." The ruling was in response

† LL.M. (Harvard); LL.B., Ph.D. (Int'l Law) (Leiden). The author, who was a staff lawyer in the ICJ Registry between 1992 and 1994, served as Senior Counsel to Palestine in the advisory proceeding before the ICJ while on unpaid leave from his law firm. The views expressed herein, which are based on a presentation given as part of a program organized by the Cornell Jewish Law Students Association and the National Lawyers Guild on November 22, 2004, are solely those of the author. Portions of this speech have been adapted from a talk given by the author at the United Nations International Meeting on the Question of Palestine, held at the UN Office in Geneva on March 9, 2005.


38 CORNELL INT'L L.J. 553 (2005)
to a 90-8 vote by the UN General Assembly in December 2003\(^2\) that requested the Court’s advice regarding the legal aspects of Israel’s construction of a barrier separating part of the West Bank and East Jerusalem from Israel.\(^3\)

The case before the ICJ represented my inaugural involvement with the Middle East crisis. Never before had I studied the problem closely, from either side. My conviction as a former United Nations official and ICJ staff lawyer that the primacy of international law must be upheld motivated me to serve on Palestine’s legal team in the ICJ case.\(^4\) There is nothing “anti-Israeli” or “pro-Palestinian” about supporting that fundamental principle. There also is nothing inconsistent about condemning suicide bombings and colonial settlements in occupied territory equally, as I do. My involvement with Palestine has remained limited to the ICJ proceeding, and these observations are made in my individual capacity as an ICJ specialist.\(^5\)

---

**Opinion on Construction of a Wall in the Occupied Palestinian Territory, 99 Am. J. Int’l L. 1 (2005).**

2. *Yes to Israel Vote*, *Calgary Sun*, Dec. 9, 2003, at 26. Voting against the resolution were the United States, Israel, Australia, Ethiopia, Nauru, Marshall Islands, Micronesia, and Palau. *Id.*

3. The text of the General Assembly’s request read as follows:

> 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?

Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory (Israel’s Apartheid Wall), G.A. Res. ES-10/14, 10th Emergency Special Sess., Agenda Item 5 (2003). For a background description of the Assembly’s request, see Pieter H.F. Bekker, *The UN General Assembly Requests a World Court Advisory Opinion on Israel’s Separation Barrier*, American Society of International Law, at http://www.asil.org/insights/insighl21.htm (Dec. 2003). It must be emphasized that this was not a contentious proceeding involving Palestine and Israel as “parties.” There are no “parties” in advisory proceedings initiated by eligible UN organs. As the ICJ pointed out, “The Court’s Opinion is given not to the States, but to the organ which is entitled to request it.” Wall Opinion, 2004 I.C.J. 131, para. 47, reprinted in 43 I.L.M. at 1025 (quoting Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, 1950 I.C.J. 65, 71); see also id. at para. 50, reprinted in 43 I.L.M. at 1025 (“The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute.”).

4. See Advisory Opinion, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, 34, para. 57 (Apr. 26) [hereinafter PLO Mission Opinion]. In that case, the ICJ recalled “the fundamental principle of international law that international law prevails over domestic law,” which it noted “was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since . . .”

5. My dealings were limited to interactions with officials in Palestine’s Permanent Observer Mission to the United Nations in New York. For an authoritative description of Palestine’s status within the United Nations, see PLO Mission Opinion, 1988 I.C.J. at 15, para. 8. (defining PLO’s status as an “organization[ ] which ha[s] received a standing invitation from the General Assembly to participate in the sessions and the work of the General Assembly as an observer”).
To be clear, no cause is so just that it can justify targeting innocent civilians and noncombatants through suicide bombings or other violent attacks, and nobody questions Israel's right to protect its citizens against such attacks, so long as Israel complies with international law. Those suicide bombings rightly were condemned, in no uncertain terms, in not one but two long paragraphs in Palestine's written statement to the ICJ, and again as part of Palestine's oral statement before the Court. But the focus on suicide bombings is mistaken in this context.

As an officer of the Court, my duty in any case is to search for the truth and to apply the applicable law to the facts. What are the facts in this particular case? In stark contrast to what Israel has claimed and some media have reported, the ICJ case was not about Israel's right to protect itself (i.e., Israeli sovereign territory and its inhabitants) through the construction of a "fence" or "barrier" or "wall"—Israel, if it chooses, has both the right under international law to build a security fence and the practical possibility and ability to do so, as long as it does so on its own territory.

Rather, the case was about the actual course, or the route, of the West Bank barrier ("the Wall") as it extends past the "Green Line"—the line indicated in the 1949 Israel-Jordan Armistice Agreement that constitutes the recognized Israeli border pending the outcome of "final status" negotiations. For this reason, although it purportedly protects Israeli citizens against suicide bombings and other violent attacks, the Wall—or at least 99% of it that is situated to the east of the Green Line—is an illegal measure. In fact, as aerial photographs and other objective evidence submitted to the ICJ demonstrate, the Wall is designed to protect and perpetuate settlements in the West Bank and in East Jerusalem—measures repeatedly declared by the competent UN bodies to be illegal under international law.

The 64-page judicial opinion is a landmark ruling in more than one respect. It represents a historic development pertaining to the question of...
Palestine, as well as a unique opportunity for emphasizing the rule of international law in the efforts to resolve the Israeli-Palestinian problem. The ICJ's authoritative statements on the applicable international law should change the parameters for any negotiated solution to this problem. First, the ruling was the first-ever international judicial pronouncement on a current aspect of the crisis. Second, the ICJ authorized what it called "Palestine" to participate (over Israel's objection). Third, the Court concluded that the Palestinian territory concerned is "occupied" by Israel, and not "disputed," as Israel has claimed. Fourth, the ICJ found that the Israeli settlements, around which the Wall is built, violate international law. Fifth, the Court concluded that the Geneva Conventions are applicable to the Palestinian population and that international human rights law applies to Palestinians alongside international humanitarian law. The ICJ found that Israel's construction and operation of the Wall violates both. Finally, the ICJ rejected Israel's security arguments pertaining to the Wall on the basis of the applicable international law.

The sections that follow highlight some of the ICJ's principal pronouncements in this case.

1. Judicial Focus

First and foremost, it must be underscored that the ICJ case signaled the first time that an international judicial organ has ruled, based on facts documented in numerous United Nations reports, on a prominent aspect of the problem by applying rules of international law. In the past, only the General Assembly and the Security Council, which are the political organs of the United Nations, had dealt with the Israeli-Palestinian problem, with varying results.

While the ICJ acknowledged that the Security Council, by Resolution 1515 of November 19, 2003, had endorsed the so-called "Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" ("Roadmap"), it pointed out that neither the Roadmap nor Resolution 1515 contains any specific provisions concerning the construction of the Wall, so that these documents did not prevent the ICJ from ruling on the Wall's legality.9

In other words, the ICJ rejected Israel's argument that the Wall's existence is presumptively intertwined with the Roadmap process and that it cannot be treated as distinct from that process.10 Instead, the ICJ con-

10. Israel contended that "[t]he only way to resolve the differences between Israel and the Palestinians, including the dispute over the fence, is through direct negotiations, as stipulated by UN Security Council resolutions and the Roadmap." ICJ Advisory Opinion on Israel's Security Fence, 9 July 2004, Israeli Statement, Wall Opinion, 2004 I.C.J. 131 [hereinafter "Israeli Statement"] (text on file with author), available at http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2004/Statement+on+ICJ+Advisory+Opinion+9-July-2004.htm (last visited Mar. 5, 2005). This statement ignores that Israel actively opposed and delayed adoption of the Roadmap and has attached more than a dozen reservations to it. Moreover, Israel has violated many binding Secur-
cluded that the Wall is not part of any future "permanent status" issues (such as borders and refugees). Rather, it exists outside the negotiating framework for peace and outside the boundaries of international law; thus endangering the feasibility of a viable state for the Palestinian people and undermining future negotiations based on the "two-state" principle and international law.

II. Palestine's Participation and Representation in the ICJ Proceeding

Another highlight of the case is the fact that the ICJ allowed Palestine to participate in the proceeding, despite its Observer status with the UN General Assembly. Palestine did not waste this unique opportunity. Its legal team before the ICJ consisted of the leading international law and ICJ specialists from Oxford and Cambridge, Belgium, Egypt, Palestine, and myself from The Netherlands. Palestine's team members were of Christian, Jewish, and Muslim faiths. We readily accepted this assignment because we were all convinced that the Wall, having regard to its location and the restrictive measures surrounding its construction and operation, constitutes a gross violation of international law.

Most important, Palestine's legal team did not receive any instructions whatsoever from the Palestinian authorities in Ramallah. Palestine let the specialists handle the case.

III. "Occupied" Status of Palestinian Territory

Another major development represented by the ICJ ruling relates to the fact that it is the first time that an international court has ruled on the status of the Palestinian territory.

The ICJ noted that the territories situated between the line indicated in the 1949 Israel-Jordan Armistice Agreement, the so-called "Green Line," and the former eastern boundary of Palestine under the League of Nations Mandate of Palestine (including East Jerusalem) are occupied territories in which Israel has had the status of "occupying Power" since 1967. The Court thus rejected Israel's position that these are "disputed" territories...
whose legal status is subject to negotiation.14

This point alone should have a major impact on the Roadmap process. As of July 9, 2004, neither Israel nor its allies can claim in good faith15 that the territory that is the subject of the Israeli-Palestinian crisis is "disputed," as opposed to "occupied." Important legal ramifications flow from this characterization, especially the illegality of the acquisition of territory resulting "from the threat or use of force against the territorial integrity or political independence of any State,"16 and the prohibition on making changes to the status of the occupied territory, including the transfer of the Israeli population to occupied Palestinian territory, as Israel has done through settlements built since 1967.17

IV. Illegality of Israeli Settlements

Perhaps the most remarkable aspect of the ruling is the fact that the ICJ explicitly condemned the settlements that Israel has established in Palestinian territories occupied by it since 1967. Israel had initially justified the settlements as being only "temporary" structures when it began building them some 37 years ago and now there are nearly 400,000 Israeli settlers living in over 150 settlements—thus causing one to doubt the legitimacy of similar guarantees made in connection with the Wall.18

14. See Benjamin Netanyahu, Why Israel Needs a Fence, N.Y. TIMES, July 13, 2004, at A19 (asserting that the "fence is being built in disputed territories that Israel won in a defensive war in 1967").
15. U.N. CHARTER art. 2(2).
17. See id. at paras. 117, 120, reprinted in 43 I.L.M. at 1041-42 (noting that international humanitarian law "prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory").
18. Israel's claim that the Wall is a "temporary" measure, Israeli Statement, supra note 10, is not credible given the multi-million-dollar investment Israel is making in connection with the Wall, as documented in UN reports and Israeli government sources. Furthermore, even if the Wall were temporary, much of the damage being done in connection with the construction of the Wall is permanent and irreversible (e.g., some 100,000 trees, including 83,000 olive trees, have been uprooted). Moreover, Israel's claim that the Wall is simply an inconvenience to the Palestinians affected by it trivializes the crippling and lasting effects of the Wall on the Palestinian people and the Palestinian economy, as documented in UN reports. Once the Wall is completed, Palestine estimates that 37.5% of the Palestinian population of the West Bank, or 865,300 people, either will be located on the Israeli side of the Wall or will have lost land to the other side of the Wall. See Palestinian Statement, supra note 6, at 121-22, para. 271. The ICJ considered that "the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation." Wall Opinion, 2004 I.C.J. 131, para. 121, reprinted in 43 I.L.M. at 1042 (emphasis added). See also Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967, at 2, U.N. Doc. E/CN.4/2004/6 (Sept. 8, 2003), available at http://www.unhchr.ch/html/menu2/2/60chr/summaries/8_E.doc (last visited Mar.
While Palestine did not specifically ask the ICJ to declare the settlements illegal, the Court felt logically bound to come to this conclusion. Palestine had submitted a series of satellite images and other evidence showing what Palestine and other participants in the advisory proceeding argued was an unmistakable connection between the route of the Wall and the Israeli settlements in the West Bank and in East Jerusalem. Based on this evidence, the ICJ observed that, within the "Closed Area" between the Green Line and the Wall, the Wall’s "sinuous route has been traced in such a way as to include within that area the great majority of Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem)," involving around 80% of the Israeli settlers.\(^{19}\) The ICJ concluded that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law."\(^{20}\)

Even Judge Buergenthal (United States), the only ICJ judge who dissented on the grounds that the Court should have declined to render the advisory opinion, stated that "the segments of the wall being built by Israel to protect the settlements are ipso facto in violation of international humanitarian law."\(^{21}\) Even he recognized that the Wall, or at least large segments of it, is built "to protect the settlements." This means that the ICJ was, in fact, unanimous on the question of the illegality of the settlements that the Wall obviously is designed to protect. The settlements being clearly illegal under international law, there can be no legal right to protect such settlements or related infrastructure by diverting the course of the Wall away from the Green Line. It really is a clear and shut case.

In light of the Court's holding regarding the Israeli settlements, no UN member state can declare in good faith that any Israeli settlement constitutes an acceptable reality on the ground that future negotiations on final status issues cannot upset. Israel cannot claim under international law that any land occupied by it since 1967 should be a part of the State of Israel, now or in the future, unless the Palestinians voluntarily give up their territorial rights. Prime Minister Sharon's "Disengagement Plan," which the Israeli Parliament accepted on October 26, 2004, violates international law to the extent it unilaterally perpetuates any illegal settlements in the West Bank or in East Jerusalem.

Faced with these statements of the UN's judicial body, Palestinians rightly wonder why they should negotiate with Israel over what 15 international judges have already declared illegal. This question is legitimate, because the ICJ referred to the need to achieve "as soon as possible, on the basis of international law, a negotiated solution."\(^{22}\) As of July 9, 2004,
Israel no longer can claim in good faith that the settlements are legal, or at best "disputed," and that their fate should be negotiated. Why should illegality be subject to negotiations, which according to the ICJ are to proceed "on the basis of international law?"

V. "Geneva" and Human Rights Protections for Palestinians

The ICJ also found that both the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War,23 to which Israel is a party, and the 1907 Hague Regulations Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land,24 a source that is binding on Israel as customary international law, are applicable to Israel's occupation of the Palestinian territories, and have been violated by Israel's construction of the Wall.25 The ICJ thereby rejected Israel's position that, since Article 2 of the Fourth Geneva Convention says that the Convention applies only to "occupation of the territory of a High Contracting Party," and since the West Bank and East Jerusalem are not within the recognized territory of any such party, Israel is not legally bound to apply the Convention on those places.26

In a key ruling, the Court concluded that the Fourth Geneva Convention is applicable de jure in the Occupied Palestinian Territory given the existence of an armed conflict that had arisen between Israel and Jordan, two contracting parties, at the start of the June 1967 war.27 It noted that numerous resolutions of the General Assembly and the Security Council have affirmed the de jure applicability of the Fourth Geneva Convention and that Israel's Supreme Court found in a May 30, 2004 judgment that the Convention applied in Rafah, which is situated in the Occupied Palestinian Territory.28 Specifically, the ICJ concluded that the changes caused by Israel in the demographic composition of the Palestinian area affected by the Wall are in contravention of Article 49 of the Fourth Geneva Convention concerning the deportation or transfer of civilian population.29

---


28. Id. at paras. 98-100, reprinted in 43 I.L.M. at 1037; see also SC Res. 1544 (May 19, 2004). More than two dozen Security Council resolutions adopted over a 30-year period and numerous General Assembly resolutions have confirmed that the Fourth Geneva Convention is applicable to the Occupied Palestinian Territory.

The ICJ also rejected Israel's claim that the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and the UN Convention on the Rights of the Child, all human rights treaties that have been ratified by Israel, are not applicable to the Occupied Palestinian Territory. The Court pointed out that the protection offered by human rights conventions, which are applicable both to territories over which a state has sovereignty and to those over which that state exercises jurisdiction outside sovereign territory, does not cease in case of armed conflict, save through the effect of provisions for derogation included in those instruments—none of which were found to apply in the case of the Wall.30

VI. Israel's Security Defense Rejected

Israel has offered no adequate explanation of the justification for the actual route that the Wall follows to the east of the Green Line, beyond bald assertions of its security interest. In the aftermath of the ICJ's ruling, Israel stated that "[i]f there were no [Palestinian] terrorism, there would be no fence."31 This statement ignores both the place of occurrence of the terror attacks on Israelis and the route of the Wall in the context of international law.

Under international law, Israel can defend only Israeli territory, which undeniably is situated to the west of the Green Line. In other words, Israel should build a security fence on its own territory along the Green Line if it wants to protect Israeli citizens against Palestinian terrorists entering Israel and stay within the bounds of the applicable international law. If the Wall truly were about Israel's security, it could be built on Israel's own territory, not on territory that the great majority of the world community considers to be occupied Palestinian land and where Israel has no proprietary rights. If Israel had built the entire Wall on its own territory along the Green Line, there in fact would have been no ICJ case.

Apart from the problem of the Wall's location, Israel's claim that "[t]he fence is a non-violent security measure and it saves lives"32 is not supported by the facts or the law. In fact, the Wall has resulted in widespread property destruction and it has taken lives. Innocent Palestinian civilians have lost their lives as a consequence of the discriminatory permit and gate system administered by Israel in connection with the Wall. For example, the Israeli Defense Forces prevented an ambulance on its way to the nearest hospital with Lamis Taysser, a 26-year-old Palestinian woman who was in labor, from crossing a gate in the Wall on December 23, 2003. One of her...
twin babies died during birth in the ambulance, and the other succumbed the next day on Christmas Eve, all because of the Wall.\(^3^3\)

The ICJ was not convinced that the specific course that Israel has chosen for the Wall was necessary to attain its security objectives. The Court recognized that the Wall is not just a linear phenomenon, but that it comes with a regime of restrictive measures affecting the Palestinian population.\(^3^4\)

In the Court's view, the Wall, along the route chosen, and its associated regime "gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel."\(^3^5\)

After weighing all the arguments, including arguments that Israel chose not to plead before the ICJ, the Court concluded that "the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order."\(^3^6\)

Thus, as of July 9, 2004, Israel's Supreme Court cannot conclude in good faith that the route of the Wall to the east of the Green Line that the ICJ rejected satisfies the necessity criterion that international law attaches to state actions that derogate from fundamental rules of humanitarian and human rights law. This argument was explicitly rejected by the ICJ.\(^3^7\) And if the necessity criterion is not satisfied, the related criterion of proportionality, on which the Supreme Court rulings rely, becomes moot.\(^3^8\) The ICJ's ruling calls for Israel "to dismantle forthwith the structure" of the Wall (i.e., 99% of it that extends past the Green Line into the West Bank)—it is not simply a matter of the "adjustment" within the West Bank of the Wall's route as it runs to the east of the Green Line, as the decisions of Israel's Supreme Court suggest.\(^3^9\) The principle of the primacy of international law leaves no margin of appreciation for Israel's courts—they must recognize and enforce the ICJ's ruling on this point by rejecting any segment extending past the Green Line into the West Bank.


\(^{34}\) Wall Opinion, 2004 I.C.J. 131, paras. 85, 133, 142, reprinted in 43 I.L.M. at 1033, 1047-48, 1050. Segments of the Wall involve "double-walled" areas in which a second wall extends from the principal wall and encircles and encloses a certain area.

\(^{35}\) Id. at para. 137, reprinted in 43 I.L.M. at 1049.

\(^{36}\) Id.

\(^{37}\) Id. para. 136, reprinted in 43 I.L.M. at 1048-49.

\(^{38}\) See Oil Platforms (Iran v. U.S.), 2003 I.C.J. 90, paras. 43, 73-77, reprinted in 42 I.L.M 1334, 1353, 1360-62; see also id. at para. 48, reprinted in 42 I.L.M. at 1387 (Higgins, J., separate opinion) (asserting that "in general international law, 'necessary' is understood also as incorporating a need for 'proportionality'"). The question of proportionality does not arise because the requirement that the Wall be a proportionate response to threats facing Israel would arise only if the initial necessity, which must arise from military operations (not merely military occupation), were demonstrated.

\(^{39}\) Wall Opinion, 2004 I.C.J. 131, para. 163(3)(B), reprinted in 43 I.L.M. at 1055; cf. H.C. 2056/04, Beit Sourik Village Council v. Israel, reprinted in 43 I.L.M. 1099 (2004) (holding that the route of the Wall was satisfied by military necessity but that some portions of the Wall did not meet the proportionality requirement). General Assembly Resolution ES-10/13 of October 21, 2003, which was sponsored by the European Union and adopted by a vote of 144-4, had already demanded that Israel stop and reverse its construction of the Wall. Israel's failure to comply with that resolution led to the Assembly's request for an advisory opinion.
Israel's complaint, voiced in the aftermath of the ICJ ruling, that "the Advisory Opinion fails to address the essence of the problem and the very reason for building the fence—Palestinian terror," is refuted by the very text of the Opinion. One is reminded that Israel chose not to address the merits in the ICJ proceeding, focusing instead on making its case in the "court of public opinion."

Benjamin Netanyahu, Israel's Finance Minister and a former Prime Minister, nonetheless commented in a leading newspaper on July 13, 2004, that "the court's decision makes a mockery of Israel's right to defend itself." The text of the ICJ's Opinion, which devotes at least five paragraphs (138-42) on several pages to the issue, again suggests the opposite. In this context, the ICJ recognized explicitly that Israel "has the right, and indeed the duty, to respond [to deadly acts of violence against its civilian population] in order to protect the life of its citizens." But the Court emphasized at the same time that the "measures taken are bound nonetheless to remain in conformity with applicable international law."

These latter words routinely are ignored in reporting about the ICJ case, even though they constitute the very essence of the ICJ's ruling and its emphasis on the applicability of international law.

A state's right to self-defense does not extend to territory occupied illegally under international law and not forming part of a recognized state. The right to self-defense is premised upon the occurrence of "an armed attack" under Article 51 of the UN Charter and applies only "in the case of armed attack by one State against another State." As the ICJ noted, "Israel does not claim that the attacks against it are imputable to a state's right to self-defense under international law."

40. Israeli Statement, supra note 10.
41. See Wall Opinion, 2004 I.C.J. 131, paras. 138-42, reprinted in 43 I.L.M. at 1049-50 (concluding that Israel could have prevented terror using less restrictive means); see also id. at para. 55, reprinted in 43 I.L.M. at 1027 (mentioning "the security threat to which the wall is intended to respond"); id. at para. 57, reprinted in 43 I.L.M. at 1027-28 (noting Israel's security concerns); id. at para. 80, reprinted in 43 I.L.M. at 1032 ("what Israel describes as a 'security fence'"); id. at para. 116, reprinted in 43 I.L.M. at 1041 ("Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank"); id. at para. 137, reprinted in 43 I.L.M. at 1049 (mentioning Israel's "security objectives"); id. at para. 141, reprinted in 43 I.L.M. at 1050 ("The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population.").
42. Benjamin Netanyahu, supra note 14. Mr. Netanyahu also complained that the ICJ's Opinion "mentions terrorism only twice." The issue is not, however, how many times the ICJ uses the specific words "terror" or "terrorism." Violence is referred to by different words in international law, which the Advisory Opinion employs in multiple forms. See, e.g., Wall Opinion, 2004 I.C.J. 131, para. 141, reprinted in 43 I.L.M. at 1050. (referring to "deadly acts of violence"). Also, a state's right to protect its citizens in light of national security requirements must be distinguished from that state's right to self-defense under international law. See infra note 46.
44. Id. The ICJ concluded that "Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above." Id. at para. 142, reprinted in 43 I.L.M. at 1050.
45. Id. at para. 139, reprinted in 43 I.L.M. at 1049-50.
foreign State," so that "Article 51 of the Charter has no relevance in this case."\footnote{46} In any event, it is not a general right for a state to take forcible measures outside its sovereign territory in order to prevent the commission of crimes within the state.

 VII. To Bind or Not To Bind?

 While it is true that Advisory Opinions of the ICJ formally are non-binding, it would be a mistake to claim that this nonbinding character means that such opinions are without legal effect: the legal reasoning embodied in them reflects the Court's authoritative views on important issues of international law and, in arriving at them, the ICJ follows essentially the same rules and procedures that govern its binding judgments delivered in contentious cases between sovereign states.\footnote{47} An Advisory Opinion derives its status and authority from the fact that it is the official pronouncement of the principal judicial organ of the United Nations.

 Indeed, Judge Rosalyn Higgins, the British ICJ judge who was critical of large parts of the ICJ's opinion but ultimately voted in favor of all its operative paragraphs, stated that "the Court's position as the principal judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal is the same" as a binding decision of a UN organ acting under Articles 24 and 25 of the UN Charter.\footnote{48} The Court's Advisory Opinion includes clear findings that the construction of the Wall and its associated regime are contrary to international law and that the Israeli settlements established on the West Bank (including East Jerusalem) are in breach of international law.

 The fact that the ICJ concluded that the obligations violated by Israel's construction of the Wall include certain obligations *erga omnes*, i.e., obligations that all states must observe and which constitute *intransgressible* principles or "super-rules" of international law, means that those obligations transcend, as it were, the nonbinding Opinion that refers to them.\footnote{49} In other words, these obligations can be said to apply to Israel and other

\footnote{46} Id. As mentioned above, Israel does not recognize Palestinian statehood. In the case of military operations forming part of an armed conflict (including in occupied territory), the conditions of international humanitarian law apply, which include that of absolute military necessity under Article 53 of the Fourth Geneva Convention. Id. at para. 135, *reprinted in* 43 I.L.M. at 1048.

\footnote{47} As a free handbook issued by the ICJ Registry explains, "the authority and prestige of the Court attach to its advisory opinions and . . . where the organ or agency concerned endorses that opinion, that decision is as it were sanctioned by international law." \textsc{The International Court of Justice} 87 (4th ed. 1996), *available at* http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookchapter6.HTM (last visited Mar. 6, 2005).


\footnote{49} See Wall Opinion, 2004 I.C.J. 131, paras. 88, 155-57, *reprinted in* 43 I.L.M. at 1034, 1053. In this context, the ICJ referred to the Palestinian people's right to self-determination and fundamental principles of international humanitarian law. See id.
states independently of the Court's Opinion. Israel may attack the ICJ as the messenger, but the message itself is indeed of an intransgressible nature.

VIII. Implementation

As a first step toward implementation of the ICJ's ruling, the UN General Assembly voted overwhelmingly (150-6) to acknowledge the Advisory Opinion and to demand Israel's compliance on July 20, 2004, while deciding "to reconvene to assess the implementation of the present resolution." This represents only the third instance in which the Assembly has decided on follow-up action after receiving an advisory opinion, having received a dozen since 1945.

This development means that we now know the legal position regarding core aspects of the Israeli-Palestinian problem, including the Wall and the settlements, as judicially determined by the ICJ in its Advisory Opinion and as acknowledged by the General Assembly, the UN organ endowed with primary responsibility for the question of Palestine. The Opinion thus represents what one of Israel's leading international law scholars has called the law at large recognized by the United Nations. That law represents the will of the international community. As a UN member state, Israel is bound by that law, as are all the other member states.

The July 20, 2004 resolution specifically considered that "respect for the International Court of Justice and its functions is essential to the rule of law and reason in international affairs." Yet Israel's Finance Minister

---


53. The importance of the rule of law rightly was stressed in the UN Secretary-General's address to the 59th Session of the General Assembly: "Today the rule of law is at risk around the world. Again and again, we see fundamental laws shamelessly disregarded—those that ordain respect for innocent life, for civilians, for the vulnerable—especially children." Kofi Annan, Secretary-General's Address to the General Assembly (Sept. 21, 2004), available at http://www.un.org/apps/sg/sgstats.asp?mid=1088 (last visited Mar. 6, 2005). As examples, the Secretary-General referred to the destruction of homes and land seizure in Palestine and "needless civilian casualties caused by Israel's excessive use of force." Id. The ICJ concluded, inter alia, that the Wall violates funda-
wrote in the *New York Times*, in reaction to the ICJ's ruling, that "the government of Israel will ignore it." The Sharon administration has kept true to this pledge not to comply with the obligations mentioned in the ICJ's ruling. This stance puts at risk Israel's claim that it is the only law-abiding democracy in the Middle East, for Israel's Supreme Court has ruled that Israeli law consists of both domestic law and customary international law. "Law" also means international law (including intransgressible principles) binding on Israel. Israel cannot claim immunity from international law. Israel's administrative, legislative and judicial organs must respect the primacy of international law.

Conclusion

There would have been no ICJ case had Israel built the Wall entirely on its own territory along the Green Line, as opposed to constructing it around illegal settlements in occupied Palestinian land, including East Jerusalem. It cannot credibly be said that Israel was treated unfairly in the ICJ proceeding or that the ICJ's ruling is one-sided as Israel has claimed.

Israel had the opportunity to participate fully in the written and oral phases of the proceeding and to submit to the ICJ whatever evidence it deemed fit. It chose not to address the merits in the written phase and it elected not to participate at all in the oral phase. The ICJ's ruling contains many paragraphs addressing arguments that Israel chose not to plead mental.

57. Israel's contention that the Israeli Supreme Court "alone has the capacity to fully address all aspects of" the Wall matter underscores Israel's claim to such immunity. Israeli Statement, *supra* note 10. As Judge Schwebel (U.S.) stated in his separate opinion attached to the PLO Mission Opinion: "[o]n the international legal plane, national law cannot derogate from international law, . . . a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations." PLO Mission Opinion, 1988 I.C.J. 12, 42 (Apr. 26) (Schwebel, J., separate opinion). The same considerations apply to the decisions of a state's highest court that go against the state's international obligations. The ICJ held that "[a]ll legislative and regulatory acts adopted with a view to [the Wall's] construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective [by Israel]." Wall Opinion, 2004 I.C.J. 131, para. 151, reprinted in 43 I.L.M. at 1052. In addressing this point, there is no margin of appreciation left for Israel's Government or courts.
58. The United Nations, 44 of its member states (including Israel), Palestine, the League of Arab States, and the Organization of the Islamic Conference all filed written statements within the time limit fixed by the ICJ in an Order dated December 19, 2003. See ICJ Communiqué 2004/5 (Feb. 3, 2004). During February 23-25, 2004, the ICJ heard the oral statements of 12 UN member states representing four different regions (South Africa; Algeria; Saudi Arabia; Bangladesh; Belize; Cuba; Indonesia; Jordan; Mada-
during the oral phase. The ICJ emphasized that “both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law,” and that “[i]llegal actions and unilateral decisions have been taken on all sides. . . .”

Nobody questions Israel’s right to protect its citizens against violent attacks that the Palestinian leadership unequivocally has condemned, so long as Israel complies with international law. Noting that “Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population,” the ICJ confirmed that Israel “has the right, and indeed the duty, to respond in order to protect the life of its citizens,” but at the same time reminded Israel that any “measures taken are bound nonetheless to remain in conformity with applicable international law”—a requirement that the Wall, in its location and operation, fails to meet.

The July 9, 2004 Opinion has become the yardstick for measuring Israel’s compliance with international law. In evaluating how to respond to the adverse ruling, Israel and other states should consider that countries that are the target of ICJ rulings by and large comply with such rulings to avoid being considered an outlaw or “rogue” member of the community of nations, defying international law and undermining the authority of the principal judicial organ of the United Nations. No state is immune from international law, and the ICJ plays an essential “guardian” role in protecting the primacy of the intransgressible principles of international law identified by it.

The ICJ’s findings in the Wall Opinion are rooted in international law and have the strength of that law. The ruling constitutes a most powerful reminder that the question of Palestine, in all its facets, is subject to inter-
gascar; Malaysia; Senegal; and Sudan), in addition to the League of Arab States, the Organization of the Islamic Conference, and Palestine.

59. The ICJ took the first 65 paragraphs of its 1635-paragraph ruling to analyze Israel’s procedural objections (which the ICJ rejected unanimously), even though Israel chose not to participate in the hearings and plead those objections, and it devoted several pages to the merits of arguments that Israel did not even make in its written statement of January 30, 2004.

60. Wall Opinion, 2004 I.C.J. 131, para. 162, reprinted in 43 I.L.M. at 1054. Israel obtained knowledge of Palestine’s legal arguments more than two weeks before January 30, 2004, the deadline for filing written statements with the ICJ, after the Israeli authorities at Ben Gurion International Airport in Tel Aviv temporarily confiscated (and presumably made copies of) all of the documents in the possession of three members of Palestine’s ICJ team returning from a team meeting in Geneva, Switzerland, on January 12, 2004. This prompted Palestine’s Permanent Observer to the United Nations to file an official complaint with the UN Secretary-General on January 14, 2004.

61. Id. at para. 141, reprinted in 43 I.L.M. at 1050. As aptly summarized by one scholar:

It is important to appreciate that the Court is not objecting to the security wall as a means of insulating Israeli society against Palestinian terrorism, but to the construction of the wall on occupied Palestinian territory and the evident effort to incorporate almost 80 percent of the Israeli settlements (including 320,000 of about 400,000 settlers), which were established in violation of Article 49(6) of the Fourth Geneva Convention.

national law. The General Assembly’s acknowledging resolution demanded (1506) not that Israel and all UN member states comply with the nonbinding ruling of the ICJ, but that they comply with “the legal obligations as mentioned in the Advisory Opinion,” thereby underscoring that the focus should not be on the ICJ as the messenger, but on those legal obligations.

Useful lessons can be learnt from history. Namibia, which once was occupied by South Africa against the will of the international community, gained independence in 1990, nineteen years after the ICJ issued its Advisory Opinion that paved the way for Namibian statehood. While there are important differences between the Namibian situation and the Israeli-Palestinian crisis, there is no reason why the ICJ’s ruling of July 9, 2004 should not prove to be a similar catalyst for change in the situation between Israel and Palestine and will lead, in the shortest possible term, to what the principal judicial organ of the United Nations described as “the establishment of a Palestinian State, existing side by side with Israel and its other neighbors, with peace and security for all in the region.”

In attaining that goal, all those involved must respect the primacy of international law. As stated by Richard Falk, “Anyone who believes in the rule of law in international affairs should be encouraged by the approach taken by the Court, so widely and impressively endorsed in this advisory opinion.”

63. Falk, supra note 61, at 46.