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of the *Wall* advisory opinion, the Court could not give the problem, including its many legal and factual aspects, the thorough treatment it deserved.[82]

In a matter as fundamental and as contested as self-defense, it is dysfunctional to build a comprehensive exposition on the shaky foundations provided by essentially passing references—four paragraphs—to a new approach to the concept. As Lauterpacht observed in his analysis of judicial caution: "there is room for the view, frequently acted upon by the Court, that the systematic generalisation of the rules applied by it or of its decisions not accompanied by a statement of the underlying rules is the function of writers."[83]

THE ADVISORY OPINION: THE LIGHT TREATMENT OF INTERNATIONAL HUMANITARIAN LAW

By David Kretzmer[*]

Ever since the occupation of the West Bank and Gaza began in 1967, the Supreme Court of Israel has entertained petitions challenging actions of the Israeli authorities in those territories. The Court has delivered dozens of judgments in which it addressed questions of international humanitarian law in a situation of belligerent occupation.[1] For a long time the Supreme Court was the sole judicial actor in this sphere. While its judgments were subjected to scrutiny and criticism by academics,[2] no other judicial organs, domestic or international, ruled on the difficult legal issues discussed by the Court. The request for an advisory opinion provided the International Court of Justice (ICJ) with a unique opportunity to address and clarify some of the issues that had previously remained in the exclusive domain of the Supreme Court of Israel. Unfortunately, the Court did not take full advantage of this opportunity. As Judge Rosalyn Higgins noted in her separate opinion, the Court refrained from engaging in a detailed analysis of the law, thereby failing to follow "the tradition of using advisory opinions as an opportunity to elaborate and develop international law."[3] The opinion is especially weak on questions of international humanitarian law (IHL), which makes it extremely difficult to know what the Court actually decided on these questions.[4]

Some norms of IHL are *jus strictum*, recognizing no qualifications or restrictions; others are *jus aequum*, in which questions of military necessity and proportionality are of their very essence.[5]

[82] *See* Oil Platforms, Separate Opinion of Judge Owada, *supra* note 71, para. 38.

[83] LAUTERPACHT, *supra* note 78, at 83.

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[1] The present writer has discussed the jurisprudence of the Court in these petitions elsewhere. DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES (2002).

[2] *See, e.g.*, *id.*; Antonio Cassese, *Powers and Duties of an Occupant in Relation to Land and Natural Resources*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 419 (Emma Playfair ed., 1992); Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Reunification of Families*, 1988 ISR. Y.B. HUM. RTS. 173; Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Deportations*, 1993 ISR. Y.B. HUM. RTS. 1; Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations*, 1996 ISR. Y.B. HUM. RTS. 1; Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing Off of Houses*, 2000 ISR. Y.B. HUM. RTS. 285; Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AJIL 44, 89–95 (1990).

[3] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (Int'l Ct. Justice July 9, 2004), 43 ILM 1009 (2004) [hereinafter Advisory Opinion], Separate Opinion of Judge Higgins, 43 ILM at 1058, para. 23 [hereinafter Higgins Opinion]. As Professor Watson mentions, there is no accepted terminology for the barrier. Geoffrey R. Watson, *The "Wall" Decisions in Legal and Political Context*, 99 AJIL 6, 7 n.3 (2005) (in this Agora). The General Assembly used the term "wall," and the ICJ followed suit, even though this term is highly loaded and was obviously chosen for its political effect. In actual fact, only a small section of the barrier is a wall; in most places it is a fence (together with surrounding trenches and other obstacles). I have chosen to use the term "barrier," which in my mind most accurately reflects the nature of the "structure."

[4] Higgins Opinion, *supra* note 3, para. 24.

[5] On the distinction between *jus strictum* and *jus aequum* in the law of armed conflict, see 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 129 (1968).

Rigorous examination of the specific facts would seem to be indispensable in any inquiry into compliance with norms of the latter type, especially when carried out by a judicial body. Elsewhere in this Agora it is correctly pointed out that such a rigorous examination is conspicuous by its absence from the advisory opinion.[6]

The International Court employed general language and reached wide conclusions. However, Judge Higgins stresses that the Court found that by building the barrier Israel had violated norms of IHL relating to only two issues: Israeli settlements and confiscation and destruction of private property.[7] In the first two parts of this Note, I will discuss these issues. In the third part, I shall refer to the connection between the Court's findings and its conclusions regarding illegality of the whole barrier. I shall conclude with some brief remarks on why the lack of sound legal reasoning in the opinion may have a negative effect on future compliance with IHL that could offset the positive effect the opinion may have had on Israel's willingness to reconsider the barrier's route.

I. ISRAELI SETTLEMENTS

The argument that establishing Israeli settlements in the occupied territories violates international law has been accepted by the United Nations Security Council,[8] the International Committee of the Red Cross (ICRC),[9] the states parties to the Geneva Conventions,[10] foreign governments,[11] and many academic writers.[12] The government of Israel has strenuously challenged the argument,[13] particularly insofar as it rests on Article 49(6) of the Fourth Geneva Convention, which prohibits an occupying power from deporting or transferring parts of its own civilian population into the territory it occupied.[14]

The first petitions relating to settlements reached the Supreme Court of Israel soon after the government of Menachem Begin came to power in 1977. Begin's government regarded settlement of Jews in all parts of the historic land of Israel as a fundamental part of its policy. Ruling that *all* settlements were illegal would have resulted in a major confrontation between the Court and the executive branch of government, which may well have reacted by introducing parliamentary legislation legitimizing the settlement policy, or curbing the Court's jurisdiction to review measures in the occupied territories. Fear of a negative reaction did not prevent the Court from examining the legality of specific settlements on narrow grounds.[15] However, the

[6] Watson, *supra* note 3, at 24–25.

[7] Higgins Opinion, *supra* note 3, para. 24.

[8] SC Res. 452 (July 20, 1979).

[9] ICRC, Conference of High Contracting Parties to the Fourth Geneva Convention, Official Statement, para. 5 (Dec. 5, 2001), *available at* <http://www.icrc.org/Web/Eng/siteengO.nsf/htmlall/57JRGW>.

[10] Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration, para.12 (Dec. 5, 2001), *available at* <http://www.eda.admin.ch/eda/e/home/foreign/humsec/hupomi/4gc.html>.

[11] For the U.S. position, see Letter of the State Department Legal Adviser Concerning the Legality of Israeli Settlements in the Occupied Territories, 17 ILM 777 (1978). For the position of the European Union, see Declaration by the Presidency on Behalf of the European Union on Israeli Settlement Activities, EU Press Release (Apr. 4, 2001), *at* <http://www.caabu.org/press/documents/eu-settlements-2001.html>.

[12] *See, e.g.*, EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 140 (1993); Yoram Dinstein, *Settlement and Expulsion in the Occupied Territories*, 6 TEL AVIV U. L. REV. 188 (1979) (in Hebrew); Roberts, *supra* note 2, at 84–85.

[13] *See* ISRAEL NATIONAL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL 54–55 (1981); Dov Shefi, *The Reports of the U.N. Special Committees on Israeli Practices in the Territories—A Survey and Evaluation*, *in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS 285, 313–17 (Meir Shamgar ed., 1982).

[14] Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 49(6), 6 UST 3516, 75 UNTS 287 [hereinafter Fourth Geneva Convention]. This is not the only argument against the legality of the settlements. A succinct presentation of the various arguments may be found in International Humanitarian Law Research Initiative, The Legal Status of Israeli Settlements under IHL: Policy Brief (Jan. 2004), *available at* <http://www.ihlresearch.org/.

[15] *See* HCJ 606/78, Ayoub v. Minister of Defense, 33(2) P.D. 113 [hereinafter *Beth El* case]; HCJ 390/79, Dweikat v. Israel, 34(1) P.D. 1 [hereinafter *Elon Moreh* case]. English translations of these cases may be found in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, *supra* note 13, at 371 and 404, respectively. (All further references to these cases are to the English translation.) In the latter case the Supreme Court held that

Court steadfastly refused to rule on the legality of settlements under Article 49(6), even when government counsel expressly invited the Court to "confirm to the authorities that also from the aspect of the Geneva Convention there is nothing wrong in transferring land to settlers for their settlement needs."[16] It justified this refusal by holding that the prohibition in Article 49(6) did not reflect customary international law, and would therefore not be enforced by the domestic courts since it had not been incorporated by parliamentary legislation.[17] The Court also refused to rule on other arguments relating to the general legality of settlements, such as the contention that establishing a settlement on public land is incompatible with the duty of an occupying power, under Article 55 of the Hague Regulations, to administer such land in accordance with the rules of usufruct.[18]

Given this attitude of the Supreme Court, when dealing with the separation barrier it was in no position to rule that the Israeli settlements that were to be included on the western (Israeli) side of the barrier were illegal. Most of the portions of the route that were challenged in the *Beit Sourik* case[19] surrounded the West Bank settlements of Mevo Choron, Har Adar, Giv'at Ze'ev, New Giv'on, and Har Shmuel.[20] The Court cited the affidavit of the military commander that "the fence is intended to prevent the unchecked passage of inhabitants of the area into Israel *and their infiltration into Israeli towns located in the area* [i.e., the West Bank]."[21] It saw no problem with this purpose. The Court regarded protection of persons living in the Israeli settlements in the West Bank as a legitimate military need.

The ICJ was obviously not subject to the constraints on the settlement issue faced by the Israeli Supreme Court. Not surprisingly, it adopted the position taken in the past by virtually the entire international community, and most experts in international law, Israelis and others alike, that the Fourth Geneva Convention applies to Israel's actions in the West Bank.[22] Having

a requisition order for private land to set up a settlement was invalid, as it had been issued for political rather than security reasons, and the intention was that the settlement would be permanent.

[16] *Elon Moreh* case, *supra* note 15, at 438.

[17] *Id.*; *Beth El* case, *supra* note 15. In his decision in the *Beth El* case, Justice Landau intimated that even if the rule in Article 49(6) had been part of customary law, he would have regarded the general legality of settlements as nonjusticiable, since it was a matter that should be dealt with on the political level. *Id.* at 389–400.

Israeli courts follow the approach of English law that customary international law is part of the common law of the land that will be enforced by the courts unless contradicted by parliamentary legislation; conventional international law may not be enforced by the courts unless it has been incorporated in the domestic legal system through parliamentary legislation.

[18] HCJ 277/84, Ayreib v. Appeals Committee, 40(2) P.D. 57. The Court denied the standing of a Palestinian whose ownership claims in the land had been rejected to challenge the use being made of the land. When Peace Now submitted a petition to the Court challenging the legality of the whole settlement policy on a variety of grounds, the Court ruled that such a general petition was nonjusticiable. HCJ 4481/91, Bargil v. Israel, 47(4) P.D. 210, *Eng. trans. at* <http://62.90.71.124/eng/verdict/framesetSrch.html>. For the provision of the Hague Regulations, see Regulations Respecting the Laws and Customs of War on Land, Art. 55, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[19] HCJ 2056/04, Beit Sourik Village Council v. Israel (June 30, 2004), 43 ILM 1099 (2004).

[20] The route was also close to the Jerusalem suburb of Ramot, part of which lies in the portions of greater Jerusalem annexed by Israel in 1967; Mevasseret, which lies in Israel; and Maccabim, which was built on territory that was no-man's-land between 1949 and 1967.

[21] *Beit Sourik*, *supra* note 19, para. 29 (emphasis added).

[22] Advisory Opinion, *supra* note 3, paras. 90–101. The government of Israel has consistently contested the formal application of the Fourth Geneva Convention, although it has declared that Israeli forces would respect its humanitarian provisions. *See* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1971 ISR. Y.B. HUM. RTS. 262; Nissim Bar-Yaacov, *The Applicability of the Laws of War to Judea and Samaria (the West Bank) and to the Gaza Strip*, 24 ISR. L. REV. 485 (1988). The Supreme Court of Israel has never ruled on the question of the Convention's applicability, since it has held that controversial provisions (mainly paragraphs 1 and 6 of Article 49) are not reflective of customary international law. KRETZMER, *supra* note 1, at 35–40. As Professor Watson points out, in recent years the Court has been prepared to assess whether actions of the military are compatible with the Fourth Geneva Convention, without formally deciding either whether the Convention applies de jure, or whether the relevant provisions are reflective of customary law. This practice has allowed the Court to enjoy the best of both worlds: it could apply the Convention without formally challenging the view, adopted by the government of Israel in international fora, that the Geneva Convention does not apply de jure. While this approach may not be satisfying from the legal point of view, it is probably politically astute. Judging from the way the Court has used similar tactics in other fields, after a while the caveat (that the parties concerned have agreed to application of the Convention) may well fall aside, and the Convention will be applied as a matter of course.

established this, and noting that Article 49(6) survives the one-year time limit on application of certain provisions in the Convention in occupied territory laid down in Article 6(3), the Court proceeded to discuss the former provision.[23] It rejected the longstanding Israeli argument that the term "transfer" in Article 49(6) implies an element of coercion and opined that this provision "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."[24]

The Court's view that Article 49(6) does not apply only to forced transfers is well-founded. As paragraph 1 of Article 49 refers expressly to forcible transfers, it seems fair to conclude that the term "transfer" in paragraph 6 means both forcible and nonforcible transfers. This conclusion would seem to flow from the object of the Fourth Geneva Convention, which is to protect civilians in the occupied territory, and not the population of the occupying power.[25] From the point of view of the protected persons, whether the transfer of outsiders into their territory is forcible or not would seem to be irrelevant.[26] It therefore seems to me quite clear that by actively organizing or encouraging transfer of its own population into the occupied territory, an occupying power does indeed violate Article 49(6). Nevertheless, I have some doubts whether "*any* measures" taken by an occupying power to bring about that end are covered by Article 49(6) itself.

It will be recalled that in criminalizing violations of Article 49(6), the Rome Conference that finalized the Statute of the International Criminal Court (ICC) broadened that provision, by adding the words "directly or indirectly."[27] This change was generally regarded as an attempt to extend criminalization of actual transfer of the population expressly prohibited under Article 49(6) to all measures taken to bring about such a transfer. If such measures are included in Article 49(6) itself, why was the Rome addition necessary? Furthermore, as violations of Article 49(6) not only incur state responsibility, but also could involve individual criminal liability, great care must be displayed in drawing the parameters of the prohibited conduct.[28]

Be this as it may, the Court was on firm ground in deciding that by establishing settlements on the West Bank, the State of Israel had violated Article 49(6).[29] The big question, however, is the effect of this violation on the legality of the separation barrier. And it seems to me that on this question, the reasoning of the Court leaves a lot to be desired.

From arguments presented in the opinion, one can discern three different theories on the relationship between the illegality of the settlements and the illegality of the barrier's route. The first is that including the settlements on the west side of the barrier reveals that the barrier

[23] It was perhaps somewhat surprising that the International Court applied the one-year rule, even though this rule is regarded as somewhat of an anomaly. *See* Roberts, *supra* note 2, at 55–57; Yuval Shany, *Epilogue* to THE SEPARATION SEAM: A MULTIDISCIPLINARY VIEW 86, 96 (Concord Research Center for the Interplay Between International Norms and Israeli Law, 2004) (in Hebrew). The rule was abrogated by Article 3(b) of Additional Protocol I. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 3 [hereinafter Additional Protocol I]. Although Israel is not a party to the Additional Protocol, it has never relied on the one-year rule. In HCJ 7015/02, Ajuri v. IDF Commander, 56(6) P.D. 352, *Eng. trans. at* <http://62.90.71.124/eng/verdict/framesetSrch.html>, the Supreme Court expressly relied on Article 78 of the Convention, even though this is one of the provisions that does not apply after the one-year rule comes into play. One question that was not addressed by the International Court is whether the "military operations" mentioned in Article 6(3) are restricted to the original military operations that led to the occupation. What happens if there is a recurrence of military operations? This question is raised by Roberts, *supra*, at 55, and by Michael J. Dennis, *Application of Human Rights Treaties in Times of Armed Conflict*, 99 AJIL 119, 133–34 (2005) (in this Agora). *See also* Imseis, *infra* note 41.

[24] Advisory Opinion, *supra* note 3, para. 120.

[25] According to Article 4 of the Fourth Geneva Convention, *supra* note 14, nationals of the occupying power are not regarded as protected persons.

[26] BENVENISTI, *supra* note 12, at 140.

[27] Rome Statute of the International Criminal Court, July 17, 1998, Art. 8(2)(b)(viii), UN Doc. A/CONF.183/9* (1998), 37 ILM 999 (1998), *corrected through Jan. 16, 2002, at* <http://www.icc-cpi.int>. Violation of Article 49(6) was not included among acts that amount to grave breaches under Article 147 of the Fourth Geneva Convention. Under Article 85, paragraph 4(a) of Additional Protocol I to the Geneva Conventions, *supra* note 23, violation of Article 49(6) was added to the list of grave breaches. However, since Israel is not a party to the Additional Protocols, this amendment does not bind it. Israel is also not a party to the Rome Statute.

[28] *See* Shany, *supra* note 23, at 97.

[29] Advisory Opinion, *supra* note 3, para. 120.

has a political motive—expansion of Israeli territory and bringing illegal settlements into Israel. Building the barrier must therefore be seen as an instrument of annexation, in violation of international law. This was the theory adopted by the UN special rapporteur for the occupied territories, John Dugard.[30] The validity of the theory itself was recognized by the Supreme Court of Israel, which held that had the intention in fixing the barrier's route been to annex territories to Israel, the route would have been illegal.[31]

The debate in Israel clearly demonstrates that the government did indeed have political intentions in setting the barrier's route.[32] However, in its written statement to the Court the government of Israel declared that the barrier "is intended solely as a temporary, nonviolent defensive measure to guard against suicide and other attacks against Israel and Israelis,"[33] and that it will be adjusted or dismantled if so required as part of a political settlement.[34] These assurances were also given to various UN bodies.[35] Probably because it did not have the evidentiary basis to do so, the Court refrained from contesting these assurances or from questioning whether they related only to the decision to construct the barrier rather than the route chosen.[36] It was therefore reluctant to adopt Professor Dugard's view that the real purpose of the barrier was de facto annexation, not security. Thus, instead of emphasizing the purpose of the barrier or its route, it mentioned fears about the barrier's possible consequences. Its conclusion was that the barrier "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."[37] This is a dubious proposition on which to base the illegality of the barrier. If the premise that the sole purpose of the barrier is to prevent infiltration of terrorists into Israel remains unchallenged, why does the *potential* permanency of the barrier make it unlawful?[38]

[30] UN Commission on Human Rights, 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, paras. 27–28, UN Doc. E/CN.4/2004/6/Add.1 (addendum to the special rapporteur's report of Sept. 8, 2003).

[31] *Beit Sourik*, *supra* note 19, para. 27.

[32] Strong evidence for this was recently provided by Zipi Livni, a minister in the Sharon government, in an interview published in the daily *Haaretz*. Ms. Livni stated:

> In the future conception of Israel's security, the construction of the fence is supposed to transfer 85 to 90 percent of the area to the Palestinians who live beyond the fence. If Israel places itself around the fence in order to provide security for the settlement blocs, this should make life easier for the Palestinians, even at the price of harming villages in proximity to the fence. When the dilemma is between the life of an Israeli citizen who lives in a settlement and the difficulty that we are causing the Palestinian villager in working his land, due to the construction of the fence, my moral choice is clear.

Gideon Alon, *'I'll Take Existence,'* HAARETZ, Sept. 20, 2004 (all cites herein to this Israeli daily are to the English-language edition).

[33] Written Statement of the Government of Israel on Jurisdiction and Propriety 5 (Jan. 30, 2004), Advisory Opinion, *supra* note 3, *available at* <http://www.icj-cij.org>.

[34] *Id.*

[35] Advisory Opinion, *supra* note 3, para. 116.

[36] *Id.*, para. 121, in which the Court states:

> Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature . . . , it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access.

[37] *Id.*

[38] *See* Higgins Opinion, *supra* note 3, para. 31 (stressing that the barrier does not at the present time constitute, per se, a de facto annexation). *But cf.* Separate Opinion of Judge Koroma, Advisory Opinion, *supra* note 3, 43 ILM at 1056, para. 2. Judge Koroma opines that the construction of the barrier has involved annexation of parts of occupied territory by Israel. He does not contend with Israel's argument that the barrier is temporary and is being built only for security purposes, but takes the view that anything that changes the character of the occupied territory is illegal. As a variation on its view that construction of the barrier around the settlements could become permanent, the Court also mentions that by giving expression *in loco* to the illegal settlements, Israel was impeding the exercise by the Palestinians of their right to self-determination. Advisory Opinion, *supra*, para. 122. The weakness of this argument was exposed in the Higgins Opinion, *supra*, para. 30, and the Separate Opinion of Judge Kooijmans, Advisory Opinion, *supra*, 43 ILM at 1065, paras. 31–32 [hereinafter Kooijmans Opinion].

The second theory regarding the connection between the illegality of the settlements and the illegality of the barrier's route relies on the Court's wide definition of the acts covered by Article 49(6). According to this theory, since the settlements are illegal, *any* acts taken to strengthen them are regarded as measures forbidden by Article 49(6) itself. I have already expressed reservations about the wide definition of the acts prohibited by Article 49(6). According to the interpretation of the Court, even if the authorities were to build a fence around a settlement so as to protect the civilians living there, they would violate Article 49(6).[39] While this may conceivably be a reasonable outcome in a situation of "mere occupation," it seems less reasonable if the situation is one of active armed conflict.[40] In such a situation, a theory that posits that the fact that civilians are living in an illegal settlement should prevent a party to the conflict from taking any measures to protect them would seem to contradict fundamental notions of international humanitarian law.[41] After all, the measures may be needed to protect civilians (rather than the settlements in which they live) against a serious violation of IHL.[42]

The third theory on the connection between the legality of the settlements and the legality of the barrier is possibly the most problematical. Assuming, quite rightly, that the rationale behind Article 49(6) is to prevent an occupying power from changing the demographic composition of the occupied territory, the Court concluded that any acts taken by an occupying power to alter the demographic composition of the occupied territory *in themselves* constitute violations of Article 49(6).[43] This conclusion is dubious and, I would say, dangerous, as it confuses

[39] This conclusion can most clearly be drawn from Judge Buergenthal's statement that as the settlements are illegal, segments of the wall being built to protect them "are *ipso facto* in violation of international humanitarian law." Advisory Opinion, *supra* note 3, Declaration of Judge Buergenthal, 43 ILM at 1078, para. 9 [hereinafter Buergenthal Declaration]. And see the view of Professor Dugard, UN Commission on Human Rights, *supra* note 30, para. 26.

[40] The argument that the situation obtaining in the occupied territories is one of active armed conflict is discussed below.

[41] *See* Shany, *supra* note 23, at 93. Shany argues that by intimating that in an armed conflict a state is prohibited from taking measures to protect acts done illegally in the past, the Court confused the fundamental distinction between *jus ad bellum* and *jus in bello*. In his contribution to this Agora, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ* Wall *Advisory Opinion*, 99 AJIL 102, 112 n.52 (2005), Ardi Imseis takes issue with my argument. He overstates my position, which is only that it is not self-evident that the fact that the settlements were established in violation of international law means that *any* measures to protect civilians in those settlements are necessarily illegal. It was therefore incumbent on the ICJ to explain why segments of the barrier that were constructed to protect persons in the settlements were unlawfully constructed, even if no specific norms of IHL (such as the prohibition on confiscation of private property) were violated. If one takes Imseis's view, one is led to the conclusion that the Israeli forces are prevented from lifting a finger to defend civilians in the settlements. This would seem to be an unacceptable conclusion, especially if one accepts (as Imseis does) that there has not been a close to military operations in the occupied territories. It becomes even more unreasonable if one takes into account that under the Oslo Accords and subsequent agreements between Israel and the PLO, the status of the settlements was to be decided in the final agreement between the parties. *See* Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Art. V(3) & Annex II, Isr.-PLO, 32 ILM 1525 (1993). Pending such an agreement, Israel retained "responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility." Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Art. XII, Isr.-PLO, 36 ILM 551 (1997).

The maxim *ex injuria jus non oritur*, cited in the separate opinion of Judge Elaraby and supported by Imseis, has limited application in the law of armed conflict. First, an occupying power acquires powers rather than rights. Second, this law rests on the fundamental distinction between *jus ad bellum* and *jus in bello*. Whether an occupation was lawful or not has no influence on the powers and duties of the occupant. *See* Trial of Wilhelm List and Others (1948), 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 59 (1949). The situation should be no different in a less radical situation in which the occupying power has in the past violated norms of IHL in the occupied territories.

[42] On this point it is worth citing the remark of Judge Higgins that

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

Higgins Opinion, *supra* note 3, para. 19. Common Article 3 of the Geneva Conventions, which lays down the minimum standards to be applied by all parties even in noninternational armed conflicts, prohibits violence to life and person of persons taking no active part in hostilities "at any time and in any place whatsoever." *See, e.g.*, Fourth Geneva Convention, *supra* note 14, Art. 3.

[43] Advisory Opinion, *supra* note 3, paras. 133, 134. In the latter paragraph the Court summarizes its opinion and states: "Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes

the object of a treaty provision, which is relevant in interpreting that provision,[44] and the terms of the provision itself.[45] Even if it is argued that Article 49(6) gives expression to a general principle in international customary law that forbids an occupying power from changing the demographic composition of occupied territory, the acts prohibited in Article 49(6) can only be those defined in this provision itself. As stressed above, this principle becomes especially important in an age when individuals who commit acts that violate Article 49(6) could face criminal liability.

How, then, does the illegality of the settlements affect the legality of the barrier? Having failed to find that the purpose of the route was annexation of territory to Israel, or to rule (correctly, in my mind) that building a fence around settlements involved ipso facto a violation of international humanitarian law, the Court could only have provided a persuasive answer to this question by doing what it consistently refrained from doing, namely, by conducting a painstaking examination of the segments of the barrier whose route had been determined or affected by the settlements so as to see which rights of Palestinians had been harmed by the construction of those segments. In those cases where it found—as it might very well have done in most, if not all, cases—that land rights or other rights of Palestinians protected under IHL or international human rights treaties were harmed,[46] it should have addressed a number of questions. First, were the rights affected protected by *jus strictum* norms, such as the prohibition on confiscation of private property? If so, construction of the barrier in that section would obviously have been illegal. If not, the question would have had to be whether protection of civilians in illegal settlements could legitimately be regarded as a measure taken on grounds of military necessity. As intimated above, it does not seem to me that a negative answer to this question is self-evident. Even if the Court had held that measures to protect civilians, wherever they happen to be, may be regarded as a legitimate military measure, it would have to consider the issue of proportionality addressed by the Supreme Court in the *Beit Sourik* case.[47] I maintain that in addressing this question, one of the factors that should have been taken into account is the illegality of the settlements, and the consequent duty of the occupying power to return its civilians in those settlements to its own territory.

II. SEIZURE OF LAND AND DESTRUCTION OF PROPERTY

The power of military authorities in occupied territory to seize private land for security needs is a complicated issue on which there is some confusion in the literature. The Hague Regulations were drawn up at a time when attitudes on private property in times of armed conflict reflected prevailing notions of laissez-faire and a clear separation between the property of the

referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above." The Court failed to mention paragraphs 1 and 2 of Article 49, which would seem to be more pertinent when the changes in the demographic composition of the occupied territories are effected by the forcible removal of local residents. The Court cited evidence that the barrier had forced local Palestinian residents to depart from certain areas. *Id.*, para. 133. In these circumstances one would have expected the Court to examine whether this amounted to a forcible transfer, prohibited under paragraph 1 of Article 49, and if so, whether the exception in paragraph 2, permitting evacuation for the population's security or imperative military reasons, applied.

[44] *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 31, 1155 UNTS 331.

[45] The Supreme Court of Israel would seem to have fallen into a similar trap in deciding which acts are covered by Article 49(1) of the Convention, which prohibits deportation of protected persons from occupied territory. The Court held that as the basis for this provision was the experience with the deportations carried out by the Nazis, only acts such as those are covered by the prohibition. I have criticized this view elsewhere. KRETZMER, *supra* note 1, at 43–52.

[46] The Court took the position that international human rights conventions to which Israel is a party bind it in its actions in the occupied territories. The present writer has no problem with this position, which, as the Court itself pointed out, has been adopted by the UN Human Rights Committee. *But see* Dennis, *supra* note 23.

[47] *Beit Sourik*, *supra* note 19. This point was appreciated by Judge Kooijmans, who remarked in his separate opinion that "construction of the wall should also have been put to the proportionality test, in particular since the concepts of military necessity and proportionality have always been intimately linked in international humanitarian law." Kooijmans Opinion, *supra* note 38, para. 34.

sovereign and that of individuals.[48] The provisions in the regulations regarding protection of property reflect these attitudes. While the drafters of the Fourth Geneva Convention added provisions relating to the destruction of property, they made no attempt to modify or clarify the provisions of the Hague Regulations on confiscation and requisition of private property.

The Hague Regulations distinguish between rules that apply in cases of hostilities (section II), and those that apply in cases of military authority over the territory of the hostile state (section III). Article 23(g), which appears in section II, prohibits the destruction or seizure of the enemy's property "unless . . . imperatively demanded by the necessities of war." Article 46, which appears in section III, forbids the confiscation of private property, while Article 52 prohibits the occupying army from demanding requisitions in kind and services "except for the needs of the army of occupation."[49]

The taking of land by the Israeli authorities to construct the barrier obviously raises several legal questions. In the first place, is Article 23(g) relevant in examining the power to seize the land? The special rapporteur for the occupied territories, Professor Dugard, thought it was.[50] So did the Supreme Court of Israel[51] and some participants in the proceedings before the International Court.[52]

The argument for the relevance of Article 23(g) may rest on one of two alternative reasons. First, although this provision appears in the section dealing with hostilities, it has been argued that it can be extended by analogy to occupied territories.[53] The second reason is that soon after violence erupted in September 2000, the Israeli authorities claimed that the situation on the West Bank and in Gaza had become one of "active warfare" or "armed conflict short of war."[54] Citing the number of instances in which there had been exchanges of fire and other uses of armed force against the Israeli military or civilians, the authorities argued that the situation could be described as one of "protracted armed violence between governmental authorities and organized armed groups," the classic definition of a noninternational armed conflict.[55] The Supreme Court accepted this argument.[56] The commission of inquiry established by the UN Commission on Human Rights soon after violence erupted in September 2000 did not exclude the possibility that the situation was one of armed conflict; rather, it chose to leave the question open, stating that it did not have enough information to take a position.[57]

[48] This point has recently been developed in an essay by Eyal Benvenisti, The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective, *at* <http://www.tau.ac.il/law/members/benvenisti/articals/amos.doc> (visited Sept. 27, 2004); *see also* SCHWARZENBERGER, *supra* note 5, at 259; Cassese, *supra* note 2, at 422.

[49] Hague Regulations, *supra* note 18, Arts. 23(g), 46, 52.

[50] UN Commission on Human Rights, *supra* note 30, para. 29.

[51] *Beit Sourik*, *supra* note 19, para. 32.

[52] Higgins Opinion, *supra* note 3, para. 23.

[53] SCHWARZENBERGER, *supra* note 5, at 253, 314; *see also* ICRC, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 301 (Jean Pictet gen. ed., 1958) (expressing the view that Article 23(g) of the Hague Regulations is wider than Article 53 of the Fourth Geneva Convention, as it covers all parties involved in war, while Article 53 is concerned only with occupied territories) [hereinafter ICRC COMMENTARY].

[54] Report of the United Nations High Commissioner for Human Rights on Her Visit to the Occupied Palestinian Territories, Israel, Egypt, and Jordan (8–16 November 2000), UN Doc. E/CN.4/2001/114, para. 73 (2000), *available at* <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=2260> (describing the position as presented to the high commissioner by senior officers of the Israel Defense Forces); THE MITCHELL REPORT: REPORT OF THE SHARM EL-SHEIKH FACT-FINDING COMMITTEE (Apr. 2001), *available at* <http://www.mideastweb.org/mitchell_report.htm> (quoting statements submitted by the government of Israel). The wording of the government claim was somewhat unfortunate and confusing, as it assumed that there is a difference between armed conflict and war. It seems, however, that the intention was to claim that there were active hostilities that amounted to an armed conflict but that did not involve another state. In other words, the claim was that a noninternational armed conflict was taking place.

[55] Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT–94–1–AR72, para. 70 (Oct. 2, 1995).

[56] *See* HCJ 3239/02, Marab v. IDF Commander, 57(2) P.D. 349; *Ajuri*, *supra* note 23; HCJ 3451/02, Almadani v. Minister of Defense, 56(3) P.D. 30. English translations of these cases are available at <http://62.90.71.124/eng/verdict/framesetSrch.html>.

[57] UN Commission on Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Human Rights Inquiry Commission, UN Doc. E/CN.4/2001/121, paras. 39–40, *available at* <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=2260>.

Assuming that we reject the view that Article 23(g) applies in all cases of occupation, the question whether the situation on the West Bank is not only a situation of occupation, but also one of active hostilities or armed conflict, could determine whether this provision is relevant in examining the seizure of land. The implications of this question also go far beyond the issue of the power to requisition land.[58] One would therefore have expected the International Court to discuss whether the situation on the West Bank is merely an occupation or an occupation in which hostilities amounting to armed conflict are taking place. It did nothing of the sort but simply stated that "[o]nly Section III [of the regulations] is currently applicable in the West Bank and Article 23(g) of the Regulations, in Section II, is thus not pertinent."[59] The Court failed to explain why it had reached this conclusion. Was it because the violence is not of the level and intensity required for the situation to be regarded as an armed conflict? If so, what evidence did the Court have to make such an assessment? Or was it perhaps because even if hostilities that reach the degree and level required to be regarded as an armed conflict take place in occupied territories, the occupying power remains restricted to its powers under the law of belligerent occupation and may not resort to that part of the *jus in bello* that applies to active hostilities? I doubt whether this position is tenable.[60]

Finally, was the Court's view on the pertinence of Article 23(g) a function of its approach that Article 51 of the UN Charter had no bearing on the case? The Court stated that Article 51 applies only to armed attacks by a state and that in any event, as the threat to Israel originated within the occupied territory, Israel could not invoke its right of self-defense under this article.[61] From the latter point it might be concluded that the Court took the view that when violence originates in occupied territory, the ensuing conflict must be seen as a noninternational conflict.[62] Presumably, it was of the opinion that the Hague Regulations do not apply to such a conflict. I do not intend to discuss the highly problematical approach of the Court to Article 51 here.[63] Suffice it to say that the question whether the conflict that arose after the beginning of the second intifada in September 2000 should be regarded as an international or a noninternational armed conflict is one on which well-respected experts have expressed different opinions.[64] If the ICJ was indeed taking a position on this issue, one would have expected it to give us some guidance on why it was adopting one approach rather than the other.

Assuming that Article 23(g) does not apply, does the occupying power have the power to seize private property? Article 46 of the Hague Regulations prohibits *confiscation* of private property. This prohibition is not subject to any qualification. While it could possibly be argued that the term

[58] *See, e.g.*, Orna Ben-Naftali & Keren Michaeli, *"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233 (2003); David Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defense?* 16 EUR. J. INT'L L. (forthcoming 2005).

[59] Advisory Opinion, *supra* note 3, para. 124.

[60] As mentioned above, Schwarzenberger takes the view that provisions relating to the destruction and seizure of private properties during fighting apply to occupied territories. He argues that this interpretation is required when military operations become necessary in the case of a local rebellion or operations against partisans. SCHWARZENBERGER, *supra* note 5, at 257.

[61] Advisory Opinion, *supra* note 3, para. 139.

[62] This was indeed the view taken explicitly by Judge Kooijmans. Kooijmans Opinion, *supra* note 38, paras. 35–36.

[63] The Court's approach on this issue was criticized by Judge Buergenthal in his declaration and by Judges Higgins and Kooijmans in their separate opinions. Buergenthal Declaration, *supra* note 39, paras. 5–6; Higgins Opinion, *supra* note 3, paras. 33–34; Kooijmans Opinion, *supra* note 38, paras. 35–36; *see also* Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AJIL 26 (2005) (in this Agora).

[64] In an expert opinion submitted to the Supreme Court of Israel in support of a petition challenging the legality of "targeted killings," Professor Antonio Cassese states that the applicable law to the violent conflict between Israel and armed Palestinian groups "is the body of international customary and treaty rules relating to international armed conflicts, in particular to *occupatio bellica* of foreign territory." Cassese proceeds to rely in his opinion on provisions that relate to active hostilities in international conflicts. Antonio Cassese, Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law 2 (June 13, 2003), *in* HCJ Petition 769/02 (on file with author). On the other hand, the UN Human Rights Inquiry Commission thought that if an armed conflict existed, it should be regarded as a noninternational conflict, as only one state was involved. UN Commission on Human Rights, *supra* note 57, para. 39. (The members of the Commission were Professor John Dugard, Professor Richard Falk, and Dr. Kamal Hossain.)

"confiscation" refers to seizure of property without payment of compensation,[65] experts on international law agree that the prohibition in Article 46 includes the expropriation of private land, i.e., compulsory acquisition of the land by the authorities against payment of compensation.[66] The only exception to this prohibition is the expropriation of land, according to the local law in the occupied territories, when carried out for the benefit of the local population.[67] In theory, at least, the Israeli authorities have accepted this view.[68]

But what about the temporary requisition of land? Article 52 of the Hague Regulations states that "[r]equisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation."[69] This provision raises three fundamental questions. In the first place, does "requisitions in kind" refer to immovable property, or, as the term seems to indicate, only to movables? Second, if the term does include land, what is meant by "needs of the army of occupation"? Finally, if the term does not include land, does the occupying power therefore lack the power to requisition land in any circumstances?

The Supreme Court of Israel addressed the first two questions in the *Beth El* case,[70] where the authorities had issued requisition orders for land on which they subsequently decided to build settlements. Although Justice Moshe Landau admitted that the wording of Article 52 seems to exclude land, he cited authorities who concede that an occupying power does indeed have the power to requisition land for the needs of the army of occupation.[71] On this issue, he appears to have been on firm ground. Thus, in his edition of Oppenheim's *International Law*, Sir Hersch Lauterpacht takes the view that Article 52 refers only to movables,[72] but that the prohibition on confiscation in Article 46 does not apply to the temporary use of immovable private property for the necessities of war.[73] Georg Schwarzenberger, on the other hand, claims that the prohibition on confiscation applies to any unauthorized interference with private property,[74] but that the requisitions in kind referred to in Article 52 include the temporary use of land.[75] Other experts also recognize the power to requisition land for temporary use, without examining whether this power derives from Article 52 of the Hague Regulations.[76]

Whether or not this power is based on Article 52, land may be requisitioned only if it meets a military necessity test. But what is the nature of that test? Article 52 refers to "needs of the army of occupation." While this term seems narrower than the term "military necessity,"[77] the

[65] See SCHWARZENBERGER, *supra* note 5, at 245, who explains that in the law of peace confiscation means unlawful expropriation, i.e., expropriation for reasons other than the public interest and without adequate compensation. He concedes, however, that in the law of war any interference with private property is regarded as illegal confiscation, subject to three exceptions: requisition, seizure of certain types of property mentioned in Article 53(2) of the Hague Regulations, and expropriation for the public benefit under the local law. *Id.* at 266; *see also* CANADA, JUDGE ADVOCATE GENERAL, THE LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS §1238 (2003), *available at* <http://www.forces.gc.ca/jag/training/publications/law_of_armed_conflict/loac_2004_e.pdf> (defining confiscation as the "taking of enemy public movable property without the obligation to compensate the state to which it belongs").

[66] *See* 2 OPPENHEIM'S INTERNATIONAL LAW, para. 140 (Hersch Lauterpacht ed., 7th ed. 1952); SCHWARZENBERGER, *supra* note 5, at 266; GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 186 (1957).

[67] *See* SCHWARZENBERGER, *supra* note 5, at 266; Cassese, *supra* note 2, at 421.

[68] *See Beit Sourik*, *supra* note 19, para. 27; HCJ 393/82, Jam'iat Ascan Elma'almoon Eltha'aoniah Elmahduda Elmaoolieh v. Commander of IDF Forces, 37(3) P.D. 785, 795, *summarized in Eng. in* 1984 ISR. Y.B. HUM. RTS. 301.

[69] Hague Regulations, *supra* note 18, Art. 52.

[70] *Beth El* case, *supra* note 15.

[71] *Id.* at 390–92.

[72] OPPENHEIM'S INTERNATIONAL LAW, *supra* note 66, para. 147. Lauterpacht claims that the quartering of soldiers in private houses may be regarded as a special kind of requisition in kind.

[73] *Id.*, para. 140.

[74] SCHWARZENBERGER, *supra* note 5, at 266.

[75] *Id.* at 245–46, 269.

[76] *See* ICRC COMMENTARY, *supra* note 53, at 301; VON GLAHN, *supra* note 66, at 186; Hans-Peter Gasser, *Protection of Civilians*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 262 (Dieter Fleck ed., 1995); *see also* UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, para. 11.78 (2004).

[77] *See* SCHWARZENBERGER, *supra* note 5, at 245–46 (stating that the term "needs of the army of occupation" was "intentionally chosen as being narrower than necessities of war or military necessities").

Israeli Supreme Court held that in a situation of belligerency no real distinction may be drawn between the narrow military needs of the army and the wider security needs of the state.[78] This holding led it to rule that a civilian settlement that fulfilled a security function could be regarded as a need of the army of occupation.[79]

In its decision in *Beit Sourik*, the Supreme Court relied on both Articles 23(g) and 52 of the Hague Regulations as the basis for the military commander's power to requisition the land needed to build the barrier.[80] Ignoring the distinction between needs of the army of occupation and the necessities of war, it spoke of military needs.

Whatever the test of military necessity, what distinguishes requisition of land from confiscation is its temporary nature.[81] The Supreme Court has taken a formalistic approach to this distinction.[82] According to this approach, if the authorities leave the title untouched, and issue orders for taking temporary possession of the land against payment, the seizure will be regarded as a requisition rather than an expropriation.

The ICJ was of the opinion that Israel had violated both Articles 46 and 52 of the Hague Regulations,[83] a view shared by Judge Higgins in her separate opinion.[84] Neither the Court nor Judge Higgins saw fit to explain why they had reached that conclusion. Since the Court had rejected the pertinence of Article 23(g), one might have thought its reason for finding the taking of land illegal was that it did not regard taking land for the barrier as serving the needs of the army of occupation, the grounds for requisition allowed by Article 52. However, in dealing with exceptions to the prohibitions on the taking of land, the Court mentions that Article 46 contains no qualifying provision, but it makes no mention of the qualifying provision in Article 52.[85]

It therefore seems that the Court refused to regard taking land for the barrier as temporary requisition and saw it as a form of confiscation. Given that the land was requisitioned for a limited period of time and payment was offered, as well as the Supreme Court's stance that confiscation was consequently not involved, it would have been helpful if the International Court had clearly defined the boundaries between confiscation and a requisition that purports to be temporary.

The International Court also found a violation of Article 53 of the Fourth Geneva Convention, which prohibits the destruction of property "except where such destruction is rendered absolutely necessary by military operations."[86] It is difficult to believe that the destruction of olive trees, water wells, and other property along some sections of the route satisfies the stringent demands of this test. Nevertheless, in order to make a judicial finding that Article 53 had been violated, it was incumbent upon the Court to examine whether the test had been met in concrete cases of property destruction. Instead of conducting such an examination, the Court simply stated that "on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered

[78] *Beth El* case, *supra* note 15, at 391–92. The Court relied for this interpretation on authorities who mention that the term "needs of the army of occupation" was employed to stress that property in occupied territory may not be exploited for the war economy of the occupying power. This view does indeed have some support, *see* SCHWARZENBERGER, *supra* note 5, at 270. In later cases the Court refined its approach by clarifying that security needs must be given a narrow interpretation, and do not include the national, economic, or social interests of the occupying power, or security interests based on a broad political agenda. *Jam'iat Ascan Elma'almoon Eltha'aooniah Elmahduda Elmaoolieh*, *supra* note 68, at 794; *Elon Moreh* case, *supra* note 15, at 422.

[79] *Beth El* case, *supra* note 15. I have criticized this approach elsewhere. KRETZMER, *supra* note 1, at 83; *see also* Gasser, *supra* note 76, at 262. In the *Elon Moreh* case, *supra* note 15, the Court qualified this ruling when it held that if the dominant purpose in establishing the settlement was political, it was illegal to requisition land for the settlement even if the army claimed that the settlement would fulfill a security function.

[80] *Beit Sourik*, *supra* note 19, para. 32.

[81] SCHWARZENBERGER, *supra* note 5, at 276, emphasizes that in the case of immovable property, all that the occupying power really needs is possession, as opposed to title.

[82] *See Beit Sourik*, *supra* note 19, para. 32; *Beth El* case, *supra* note 15, at 390.

[83] Advisory Opinion, *supra* note 3, para. 132.

[84] Higgins Opinion, *supra* note 3, para. 24.

[85] Advisory Opinion, *supra* note 3, para. 135.

[86] Fourth Geneva Convention, *supra* note 14, Art. 53.

absolutely necessary by military operations."[87] Apart from its questionable fairness,[88] the manner in which the Court presented its approach exposes a misconception about the role of military necessity in the law of armed conflict. It appears that the Court confused this role with the role of necessity as a defense against wrongful acts.[89]

In discussing the general defense of necessity in international law, the Court relied on the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission (ILC).[90] It ignored the fact that the ILC itself has pointed out that in the law of armed conflict the "principal role of 'military necessity' is not that of a circumstance exceptionally precluding the wrongfulness of an act which, in other circumstances, would not be in conformity of an obligation under international law."[91] On the contrary, only when "military necessity" is absent from the case in point does the general law prohibiting an act apply.[92] In other words, in IHL "military necessity does not override the law, it is an integral part of it."[93]

Within the context of adversary proceedings it is reasonable to demand that the state that destroyed property prove military necessity since it should possess the information needed to do so; but that does not change the nature of the substantive norm. No finding of a violation of the norm can be made unless the question of military necessity is properly addressed. In the present context this means, of course, that destruction of property cannot be regarded as "contrary to the prohibition in Article 53" without establishing that it was not imperatively demanded by military operations.

The International Court had no information on the issue of military necessity.[94] Rather than conceding the lack of evidence and refraining from making a finding on Article 53, it based its finding on its lack of conviction "on the material before it" that the destruction was imperatively demanded for military operations. This statement is difficult to reconcile with the Court's decision, rejected by Judge Thomas Buergenthal, that it had sufficient information to give the requested opinion.[95]

In an attempt to overcome this difficulty, Judge Hisashi Owada opined that the damage caused to property had been so great that no "justification based on the 'military exigencies', even if fortified by substantial facts, could conceivably constitute a valid basis for precluding the wrongfulness of the act on the basis of the stringent conditions of proportionality."[96] While the damage to property in many, or even most, segments of the barrier may well have been so great as to exclude any possible justification, the presumption that it was so in all cases hardly

[87] Advisory Opinion, *supra* note 3, para. 135.

[88] *See id.*, Separate Opinion of Judge Owada, 43 ILM at 1091, para. 25 [hereinafter Owada Opinion].

[89] The Court dealt with the general defense of necessity but stated that it would not consider whether this defense applies to norms of IHL. Advisory Opinion, *supra* note 3, para. 140. Judge Higgins intimated that she supports the generally accepted (and, I would argue, correct) approach that as norms of IHL already incorporate considerations of military necessity, the general defense of necessity cannot be raised against violations of IHL. Higgins Opinion, *supra* note 3, para. 14.

[90] Advisory Opinion, *supra* note 3, para. 140.

[91] Report of the International Law Commission on the Work of Its Thirty-second Session, [1980] 2 Y.B. Int'l L. Comm'n, pt. 2, at 32, para. 27, UN Doc. A/CN.4/SER.A/1980/Add.1(Part 2). The ILC added that "what is involved is certainly not the effect of 'necessity' as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather the effect of 'non-necessity' as a circumstance precluding the lawfulness of conduct which that rule normally allows." *Id.*

[92] *Id.*

[93] Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 76, at 1, 33.

[94] *See* Owada Opinion, *supra* note 88, para. 22; Buergenthal Declaration, *supra* note 39, para. 3.

[95] Judge Higgins was obviously aware of this problem and tried to circumvent it by relying on the burden of proof. She ended her separate opinion by stating that Israel had not "explained to the United Nations or to this Court why its legitimate security needs can be met only by the route selected." Higgins Opinion, *supra* note 3, para. 40. The validity of this answer was challenged by Judge Buergenthal. He opined that in the context of an advisory opinion it was improper for the Court to base legal conclusions on the failure of a state to provide information necessary for the Court to make a finding well based in law, when that state was not a party to the proceedings, and had no legal obligation to appear before the Court or to provide it with information. Buergenthal Declaration, *supra* note 39, para. 10.

[96] Owada Opinion, *supra* note 88, para. 24.

provides a sound basis for a judicial finding that relates to the whole barrier. Is it not conceivable, for example, that in some sections topographical factors made the chosen route the best possible one for building a barrier to prevent terrorists from infiltrating into Israel in an area where many terrorists had done so in the past? If the damage in such a case was minimal, and the persons harmed were compensated, would the "stringent conditions of proportionality" not have been met? Or is there a rule of IHL that military measures to protect the right to life of Israelis threatened by "so-called terrorist attacks by Palestinian suicide bombers"[97] are always outweighed by damage to property?

III. VIOLATIONS OF IHL AND LEGALITY OF THE WHOLE BARRIER

In the above discussion I have stressed two main points. First, military necessity forms an integral part of many norms of IHL. Examining compliance with such norms is a complicated task that must be based on in-depth analysis of the concrete facts in a specific situation. Second, even if one concedes, as I certainly do, that the facts available to the International Court were sufficient for it to conclude that Israel had violated various norms of IHL, no attempt was made to explain why these violations would result in the illegality of the whole barrier, or specific segments of it.[98] It is certainly conceivable, as Judge Buergenthal pointed out in his declaration, that some segments of the barrier meet the demands of international law, and others do not.[99]

The only possible explanation for the conclusion that the construction of the whole barrier contravenes international law in general, and international humanitarian law in particular, is that some principle forbids an occupying power from building such a barrier in occupied territory, even when this construction involves neither the attempted annexation of territory, nor a specific violation of international humanitarian law or international human rights law, such as the unlawful seizure or destruction of property, unjustified limitations on freedom of movement, or arbitrary interference with the right to privacy and family. Does such a principle exist?

It seems clear to me that the answer is negative.[100] Assume for the moment that an occupying power faces a situation in which civilians in its own territory are under constant attack from forces operating in the occupied territory. Assume, further, that the topography of the border area between the territory of the occupying power and the occupied territory is such that building a fence on its side of the border would not be effective and would endanger its own forces, but that building the barrier a few meters from the border in an uninhabited desert area of the occupied territory would avoid these difficulties. Exactly what principle of IHL would be violated by construction of the barrier, per se?

It has sometimes been suggested that the occupying power is restricted in its actions to measures necessary only to protect its own troops in the occupied territory, and that it may not take measures that are connected with the security of its own territory.[101] As mentioned above,

[97] *Id.*, para. 31.

[98] See the remark of Judge Higgins that "the Court's findings of law are notably general in character, saying remarkably little as concerns the application of specific provisions of the Hague Rules or the Fourth Geneva Convention along particular sections of the route of the wall." Higgins Opinion, *supra* note 3, para. 40.

[99] Buergenthal Declaration, *supra* note 39, para. 5.

[100] This was also the view of Judge Elaraby, who stressed that military necessity could possibly justify construction of the barrier, but not the destruction and demolition of property that accompanied the construction process. Advisory Opinion, *supra* note 3, Separate Opinion of Judge Elaraby, 43 ILM at 1081, para. 3.2.

[101] *See* BENVENISTI, *supra* note 12, at 214. Compare International Humanitarian Law Research Initiative, The Separation Barrier and International Humanitarian Law: Policy Brief (July 2004), *available at* <http://www.ihlresearch.org/>, which states that "the state of necessity refers only to situations that are *within* the occupied territory, and facing the occupying power in the course of occupation." Contrary to the view presented by Ardi Imseis in this Agora, *supra* note 41, at 112 n.52, it does not seem to me that this brief supports the thesis that an occupying power may not take measures in the occupied territory whose object is to defend the territory of the occupying power from attacks originating in the occupied territory. Such a thesis ignores the fact that the law of occupation is part of the law of armed conflict. Becoming an occupying power in the course of an armed conflict cannot prevent a state from taking measures in the occupied territory necessary to protect the population in its own territory against attacks originating in the occupied territory. *See* SCHWARZENBERGER, *supra* note 5, at 178. See also UK MINISTRY OF DEFENCE, *supra* note 76, para. 11.78, which expressly states that temporary military

Article52 of the Hague Regulations provides that private property may be requisitioned only for the needs of the army of occupation. However, the term "needs of the army of occupation" is intimately connected to the specific issue regulated in Article 52, namely, requisition of private property.[102] The use of this term in that context cannot lead one to conclude that all security measures taken by the occupying power must also be restricted to this narrow military purpose. Article 64(2) of the Fourth Geneva Convention provides that the occupying power may

> subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, *and to ensure the security of the Occupying Power*, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[103]

While this particular provision refers only to changes in the local law, there is no good reason to believe that ensuring the security of the occupying power is relevant only in this context.

It goes without saying that the power of the occupying forces to take security measures to protect the defense of their own country is not unlimited: such measures may not violate *jus strictum* norms of IHL; they must be taken in good faith; and they are always subject to considerations of military necessity and proportionality. But if they meet these requirements, they do not per se constitute a violation of IHL.

IV. Concluding Observations

There can be little doubt that in constructing the barrier Israel committed serious violations of IHL. Until the decision of the Supreme Court of Israel and the advisory opinion of the International Court were handed down, the authorities showed little to no willingness to change the barrier's route so as to prevent or remedy such violations, even though there was ample evidence of the hardships caused to Palestinians and a fair amount of domestic and international criticism. To what extent the pending opinion of the ICJ influenced the Israeli Supreme Court's decision in *Beit Sourik* is impossible to know. What is clear is that the decision in that case has forced the authorities to reconsider the barrier's route.[104] Although the government itself is reluctant to admit it, it seems that the advisory opinion has had a positive influence, too.[105] It is not conceivable that the government will decide to dismantle the whole barrier and build it in Israeli territory, but it has decided to modify segments of the route and some of the ongoing violations of IHL may be terminated.

use of land in occupied territory includes "construction of defensive positions." Even Pellet, whose article is cited by Imseis as the main source for his view that the occupying power is restricted to measures to protect its own forces, stresses that his view relates to a situation in which military operations have ceased. Alain Pellet, *The Destruction of Troy Will Not Take Place*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 2, at 169, 198. Rejecting defense of the occupying power's population from attack as a legitimate military objective leads to conclusions that expose the fallacy of the thesis. Assume, for example, that mortars fired from the occupied territory threaten civilians in the territory of the occupying power but not the security of its troops in the occupied territory. Would the occupying power be prohibited from taking any measures to stop those attacks? If the answer is negative, the question necessarily becomes which measures are lawful. As indicated in the text, this depends on whether they violate *jus strictum* norms or other standards of IHL, first and foremost of which is the requirement of proportionality. Examining whether a particular measure meets these standards is not the same as challenging whether the purpose of the measures is a legitimate military objective.

[102] *See* DORIS APPEL GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY 243–45 (1949). Graber traces the discussions on the question of requisitions and contributions that preceded adoption of the Hague Regulations and shows that the term "needs of the army of occupation" was adopted in this specific context.

[103] Fourth Geneva Convention, *supra* note 14, Art. 64(2) (emphasis added).

[104] See the article by Israel's foremost military commentator, Ze'ev Schiff, *Full of Mistakes—Until the Court Ruled*, HAARETZ, Sept. 21, 2004. *See also* Yuval Yoaz, *Constructed Section of Fence to Be Reviewed, High Court Told*, HAARETZ, Sept. 13, 2004.

[105] As Professor Watson mentions, *supra* note 3, at 25, in a case dealing with the barrier that came before the Supreme Court after the advisory opinion was delivered, the Court demanded that the state inform it of its attitude to the ICJ opinion, and declared that it was clear that it would have to give it due consideration. Yuval Yoaz, *Mazuz: Hague Ruling on Fence Could Lead to Sanctions on Israel*, HAARETZ, Aug. 20, 2004.

The chance that it might force Israel to change the route of the barrier and to mitigate some of the damage caused in its construction gives rise to a natural and understandable tendency to welcome the Court's opinion, whatever its deficiencies. However, another side to the story must be considered, even if we regard strengthening compliance with IHL as the main aim both of the General Assembly's request and of the Court's opinion.

International mechanisms for ensuring compliance with norms of IHL have always been extremely weak. It is essential that they be strengthened. A major step in this direction has been taken with the establishment of the International Criminal Court. Nevertheless, while this step has been welcomed by many, some experts and a few states, foremost among which are the United States and Israel, remain skeptical. Their skepticism is mainly grounded in the fear that the ICC's decisions will be dictated by politics rather than by law. In this atmosphere the credibility of international judicial organs involved in assessing compliance with IHL becomes more important than ever. This credibility rests largely on the professionalism of such organs and the soundness in law of their opinions. When looked at from this point of view, an opinion whose findings "are not legally well-founded"[106] is hard to applaud.

CRITICAL REFLECTIONS ON THE INTERNATIONAL HUMANITARIAN LAW ASPECTS OF THE ICJ *WALL* ADVISORY OPINION

By Ardi Imseis[*]

I shall confine my brief thoughts on the recent advisory opinion of the International Court of Justice (ICJ) on the legal consequences of the construction of a wall in the occupied Palestinian territory (OPT) to the Court's treatment of international humanitarian law (IHL) in general, and to the law of belligerent occupation in particular. To that end, I will focus on the following four areas: the Court's consideration of the applicable law as regards IHL; the Court's interpretation of Article 6 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War;[1] the Court's consideration of the concept of military necessity in the context of foreign military occupation; and the Court's consideration of the responsibility of third states, particularly the high contracting parties to the Fourth Geneva Convention, for violations of relevant principles of IHL by an occupying power.

Before I delve into these matters, however, I feel it important to register my general agreement with the Court's conclusions on all the material issues that were before it: namely, that the Court had proper jurisdiction under the United Nations Charter and its governing Statute to entertain the question put to it by the General Assembly and that no compelling reasons militated against the Court's using its discretionary power to refuse such jurisdiction;[2] that the applicable law in the case was the law on self-determination of peoples, IHL, and international human rights law, in addition to other general principles of public international law; that the construction of the wall and its associated regime (including for the purpose of protecting and consolidating illegal civilian colonies in the OPT) violates the applicable international law and that violation is not vitiated by the law of self-defense or necessity; that Israel is under an obligation to terminate its breaches of international law (including its prolonged frustration of the right of the

[106] *See* Buergenthal Declaration, *supra* note 39, para. 3.

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[1] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 187 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention].

[2] On this point, I fully endorse the analysis and opinion offered by Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AJIL 42 (2005) (in this Agora).