

COMMENTS

Bringing Down the Barrier: A Comparative Analysis of the ICJ Advisory Opinion and the High Court of Justice of Israel's Ruling on Israel's Construction of a Barrier in the Occupied Territories

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I.	INTRODUCTION	275
II.	THE BARRIER, THE WALL, AND THE SECURITY FENCE	278
III.	INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION	281
	A. <i>Controversial Jurisdictional Issues</i>	281
	B. <i>Rendering the Wall Illegal</i>	284
	C. <i>Dissenting Voices</i>	286
IV.	THE DECISION OF THE HIGH COURT OF JUSTICE OF ISRAEL.....	288
	A. <i>The Interests at Stake</i>	288
	B. <i>Framing the Issues</i>	289
	C. <i>Finding the Israeli Government's Actions Illegal</i>	290
V.	ANALYSIS	295
	A. <i>Who Seemed to "Get It Right"?</i>	295
	B. <i>A Stretching Exercise of Jurisdiction</i>	296
	C. <i>Which Frame Fits Best?</i>	297
	D. <i>Finding Illegality in a More Persuasive Manner</i>	299
	E. <i>"Formalism of an Unevenhanded Sort"</i>	301
VI.	CONCLUSION	302

I. INTRODUCTION

Images of young Palestinians suffering and dying from the wounds of war play before the world's eyes. Pictures of frantic and weeping Israelis suffering another bus bomb flash on the front pages of

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newspapers worldwide. The Israeli-Palestinian conflict is at the forefront of international concerns for peace and security. After years of fighting, Abraham's children, Jews and Arabs, leave the world desperately desiring a solution to such a volatile, sensitive, and complex situation. In yet another chapter in this ongoing dispute, Israel's construction of a barrier in the Occupied Territories recently raised controversy around the world.¹

Both sides of the dispute hold emotional and passionate claims in this ongoing struggle.² Having suffered persecution for centuries in the countries in which they had lived during the millennia that followed the disintegration of the Jewish nation, the Jewish people sought the land and nation they believed Jehovah had promised their patriarch, Abraham.³ Following the Holocaust and World War II, Jews fleeing war-torn Europe returned to the land of their forefathers.⁴ Nevertheless, with the establishment of the state of Israel in 1948 came Arab apprehension.⁵ Tensions grew between Israel and its Arab neighbors, eventually leading to the Six Day War of 1967.⁶ Foreseeing an imminent attack by its Arab

1. See Aluf Benn, *Sharon Draws a Line in the Hills*, WASH. POST, Feb. 8, 2004, at B-1 ("The very nature of the fence—an ugly scar through Palestinian farms and neighborhoods—has helped create a united international front against its rights."); Greg Myre, *Israelis to Extend Barrier Deeper into the West Bank*, N.Y. TIMES, June 15, 2004, at 11 ("Bush has called the fence's route 'a problem.'"); Noam Chomsky, *A Wall as a Weapon*, N.Y. TIMES, Feb. 23, 2004, at 21 (stating that the British foreign minister has deemed the barrier "unlawful"); Sharmila Devi & Mark Turner, *Red Cross Says Israeli Barrier Is Illegal*, FIN. TIMES, Feb. 19, 2004, at 9 (stating that the Red Cross condemned it as a "breach of international humanitarian law").

2. Compare Michael Curtis, *International Law and the Territories*, 32 HARV. INT'L L.J. 457, 460 (1991) ("[T]he core of the Arab-Israeli conflict remains what it has been for some seventy years, the implacable opposition by Arab states, except Egypt since 1979, to the Jewish presence in the Mandate area of Palestine and, since 1948, to the existence of the state of Israel. The Palestinian question . . . is derivative from that central problem.") with Richard Falk & Burns Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza*, 32 HARV. INT'L L.J. 129, 132-33 (1991) ("Civil resistance by almost the entire Palestinian population is seen to be justified—indeed mandated—by the long duration and especially the harshness of the Israeli occupation, an occupation that has included and continues to include large-scale, severe, and persistent violations of the law of belligerent occupation and systematic deprivations of fundamental human rights.")

3. *Genesis* 12:1, 6-7; 13:15; CECIL ROTH, A HISTORY OF THE JEWS: FROM EARLIEST TIMES THROUGH THE SIX DAY WAR 7-14 (1970); HAIG KHATCHADOURIAN, THE QUEST FOR PEACE BETWEEN ISRAEL AND THE PALESTINIANS 22-23 (2000).

4. See ROTH, *supra* note 3, at 404-10 ("Morally incapable of return to the ruined homes where their kindred had been slaughtered . . . they could see no conceivable future except in Palestine."). See generally STEVEN T. KATZ, 1 THE HOLOCAUST IN HISTORICAL CONTEXT: THE HOLOCAUST AND MASS DEATH BEFORE THE MODERN AGE (1994).

5. HOWARD M. SACHAR, A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME 309 (1979); Curtis, *supra* note 2, at 458-60; ROTH, *supra* note 3, at 418-19.

6. See JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE 76-81, 161-64 (1990). "As tension grew, Israel announced a full military mobilization." *Id.* at 161.

neighbors, Israel responded by significantly expanding its territorial presence in the area.⁷

As a result, thousands of Arab Palestinians tragically lost their homes and lands and were never able to return to them.⁸ Many Palestinian refugees began living in ransacked refugee shelters.⁹ In the midst of Palestinian misery and desperation, terrorist organizations sprang up.¹⁰ Over the years, Israeli civilians died at the hands of often young, Palestinian terrorists pleading for the world's attention.¹¹ In retaliation, Israeli incursions into Palestinian towns would frequently result in the tragic loss of additional Palestinian homes and lives.¹² Countless lives have since been lost on both sides.¹³

Recognizing the right to self-determination of the Palestinian people, the United Nations and the international community for the most part have been largely sympathetic to the Palestinian struggle.¹⁴ Those sympathetic to Israel nevertheless deem the United Nations a "political battlefield" rather than a "court of justice."¹⁵ Israel views the policy of the United Nations as overly stringent for demanding that Israel abide by international humanitarian norms when the United Nations is at the same time unwilling to demand from Palestinians the responsibilities for curbing violence and terror against Israeli civilians.¹⁶

In the midst of passionate claims and political pressures from both sides of the conflict, the international community looked to the International Court of Justice (ICJ) as the premier judicial organ of the United Nations to provide an objective and fair legal solution to this

7. See Curtis, *supra* note 2, at 464 ("Israel's present occupation of the West Bank and Gaza was brought about by attempts by Arab states to change the Mideast map by threatening Israel with annihilation in 1967."); ROTH, *supra* note 3, at 433-35 ("Within less than three days, the entire Arab-occupied territory of the historic Palestine on the west bank of the Jordan had been occupied.").

8. See DAVID GILMOUR, *DISPOSSESSION: THE ORDEAL OF THE PALESTINIANS 1917-1980* 117-22, 128-30 (1980); Falk & Weston, *supra* note 2, at 132. See generally QUIGLEY, *supra* note 6, at 161-64.

9. Falk & Weston, *supra* note 2, at 132.

10. See *id.* at 130-33 (describing a "profound disillusionment about the will and capability of the outside world . . . to provide a solution"); KHATCHADOURIAN, *supra* note 3, at 8.

11. Falk & Weston, *supra* note 2, at 130-33 (discussing Palestine's desperation to gain the world's attention).

12. *Id.* at 134-36 (describing "cruel and repressive violence").

13. See, e.g., *id.*

14. Falk & Weston, *supra* note 2, at 133-34; KHATCHADOURIAN, *supra* note 3, at 8-9, 22.

15. Curtis, *supra* note 2, at 462; Tovah Lazaroff, *The Hague to Rule on Fence July 9*, JERUSALEM POST, June 27, 2004, at 1 ("If [the ICJ advisory opinion] runs against Israel, it will be another proof that the United Nations is not a positive force in the Middle East conflict.").

16. Curtis, *supra* note 2, at 461.

international dispute.¹⁷ At the request of the United Nations General Assembly, the ICJ rendered an advisory opinion regarding Israel's construction of the wall.¹⁸ After hearing a separate case brought by Palestinian inhabitants, Israel's High Court of Justice also ruled on the matter.¹⁹ But which court provided a more objective analysis of the issues surrounding the matter? Did the ICJ, as the premier interpreter of international law, supply a thorough and legally complete solution to the matter? Or, did the decision of the High Court of Justice of Israel, a national court susceptible to political pressures of its own, ironically provide the more objective and persuasive legal solution? To determine the answers to these questions, it is important to first note the facts and circumstances surrounding the construction of the barrier.

II. THE BARRIER, THE WALL, AND THE SECURITY FENCE

With the failure of the Camp David talks in 2000, the Israeli-Palestinian conflict reached unprecedented heights of violence.²⁰ Included in the violence that escalated between September 2000 and April 2004 were 780 terror attacks committed within Israel and more than 8200 attacks unleashed in the surrounding area, killing 900 Israeli citizens and residents and injuring more than 6000.²¹ Specifically, 150 suicide bombings had occurred since September 2000.²² The government of Israel ordered various military operations and took several other measures to stop the terror attacks, but it claimed that none of these actions were successful in curbing the attacks.²³ On August 14, 2002, the Israeli government approved a plan to build a security fence along a 116-kilometers-long "Seamline Area" in an attempt to curb the terror attacks.²⁴ The security fence was to be built on both public and private land, with parts extending past the "Green Line"²⁵ and others confined

17. Chomsky, *supra* note 1. The United States and the United Kingdom opposed an ICJ advisory opinion on the barrier.

18. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, at 16 (July 9), <http://www.icj-cij.org>.

19. H.C. 2056/04, Beit Sourik Vill. Council v. Israel, at 2, <http://62.90.71.124/eng/verdict/framesetSrch.html>.

20. *Id.*

21. *Id.*; Lazaroff, *supra* note 15, at 1; *but see* Joseph Berger, *Israelis Say They Have Foiled Planned Attacks by Militants*, N.Y. TIMES, June 20, 2004, at 1-16 (reporting lower numbers).

22. Berger, *supra* note 21, at 1-16.

23. H.C. 2056/04, *Beit Sourik Vill. Council*, at 2-3.

24. *Id.* at 3-4.

25. The "Green Line" refers to the boundary between Israel and the West Bank before the 1967 War. *See* Greg Myre, *Israel Adjusts Route of West Bank Barrier to Obey Its Court*, N.Y. TIMES, July 30, 2004, at A4.

within it.²⁶ Stating that its purpose was to defend itself against the Palestinian terrorist infrastructure, Israel began construction on the fence, and segments of the fence have since been completed.²⁷

Deemed the “barrier” by the Secretary General, the “wall” by the ICJ,²⁸ and the “security fence”²⁹ by the government of Israel, the obstacle consists of a “smart fence” used “to alert the forces deployed along its length of any attempt at infiltration.”³⁰ On the external side of the fence is an anti-vehicle obstacle used to prevent vehicles from slamming into the fence to break through.³¹ In addition to concrete or metal barriers in certain segments, there is an electric fence with a number of roads on the internal side, including: “a dirt road (for the purpose of discovering the tracks of those who pass the fence), a patrol road, and a road for armored vehicles.”³² The average width of the fence is fifty to seventy meters.³³ Where there are topographical constraints, a narrower separation fence, consisting of an electronic fence and components to support it, is used instead.³⁴

In determining the route of the security fence, Israeli military commanders took the position that, although the Green Line had been taken into consideration, a “security zone” had to be established between the fence and the Green Line so as to allow pursuit of terrorists and others who cross the separation fence before they are able to enter Israel.³⁵ The Israeli military argued that placing the route of the fence adjacent to Israeli towns would not provide a solution to the danger of attacks or infiltration into those towns.³⁶ Israeli military officials

26. H.C. 2056/04, *Beit Sourik Vill. Council*, at 3-4, 6.

27. *Id.* at 3.

28. Advisory Opinion No. 131, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 131, at 29 (July 9), <http://www.icj-cij.org>.

29. See Israel Diplomatic Network, *The Anti-Terrorist Fence: The Reasons Behind the Fence: First Priority—Saving Lives* (Oct. 28, 2004), at <http://securityfence.mfa.gov.il/mfm/web/main/mission>. The Israeli government insists that because less than three percent of the structure will actually be made of concrete, with the remaining ninety-seven percent consisting of barbed wire and metal fences, the term “security fence” is more appropriate than the terms “wall” or “barrier.” Israel Diplomatic Network, *The Anti-Terrorist Fence: Concept and Guidelines: A Fence, Not a Wall*, at <http://securityfence.mfa.gov.il> (last visited Apr. 21, 2005); see also Israel Diplomatic Network, *The Anti-Terrorist Fence: More on this Web Site: The Anti-Terrorist Fence—An Overview: A Comprehensive Summary of the Major Issues Concerning the Fence*, at <http://securityfence.mfa.gov.il/mfm/Data/48152.doc> (last visited Apr. 21, 2005).

30. H.C. 2056/04, *Beit Sourik Vill. Council*, at 5.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 8.

36. *Id.*

highlighted the need to take into account topographical considerations such as mountains and hills in relation to their strategic defensive positions when observing the route of the separation fence.³⁷

The Council for Peace and Security, a group of Israeli military experts opposed to the stance taken by the Israeli military, argued for a route closer to the Green Line.³⁸ The Council for Peace and Security took the position that the route of the fence should be distanced from Palestinian villages instead of from Israeli towns.³⁹ They stressed that a route close to Palestinian villages would require the construction of passages and gateways that would produce “friction” and “bitterness,” thus “increasing the danger to security.”⁴⁰ The Council also disputed the Israeli military’s claimed security advantage derived from topographical control of mountains and hills closely overlooking Palestinian villages.⁴¹

On the international front, the Arab states, led by the Palestinian Authority, urged the United Nations to take action against Israel.⁴² On July 9, 2004, the ICJ, upon request by the General Assembly, issued an advisory opinion condemning Israel’s actions in constructing the fence as a violation of international law.⁴³ On the Israeli domestic front, Palestinian landowners and village councils, complaining that their lands were illegally seized and that access to vital areas and services had become highly impeded, brought their case against the Israeli government in a separate action before the High Court of Justice of Israel.⁴⁴ The High Court of Justice of Israel found the route of the security fence illegal under international law and ordered a rerouting and compensation for the landowners who were not provided with substitute

37. *Id.*

38. *Id.* at 11-12.

39. *Id.*

40. *Id.* at 11.

41. *Id.*

42. Kirk Semple, *U.N. Chief Denounces West Bank Barrier*, N.Y. TIMES, Nov. 29, 2003, at A-6; *U.N. Resolution Condemns Israeli Barrier*, N.Y. TIMES, Oct. 22, 2003, at A-3; Stephanie Giry (associate editor at *Foreign Affairs* magazine), *The ICJ Should Stay Away*, JERUSALEM POST, Feb. 22, 2004, at 13.

43. Advisory Opinion No. 131, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 131, at 16 (July 9), <http://www.icj-cij.org>.

44. H.C. 2056/04, *Beit Sourik Vill. Council*, at 6-8, available at <http://62.90.71.124/eng/verdict/framesetSrch.html>. The lands seized were those in the villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A’anan, Beit Likia, Beit Ajaza, and Beit Daku, which are adjacent to the towns of Mevo Choron, Har Adar, Mevasseret Zion, and the Jerusalem neighborhoods of Ramot and Giv’at Zeev that are to the west and northwest of Jerusalem. *Id.* Israel is the first occupying power in the history of belligerent occupation that has allowed local inhabitants in occupied territories a right to appeal to the High Court for injuries sustained under Israeli military action. Curtis, *supra* note 2, at 482.

lands.⁴⁵ An overview and broad comparative analysis of both the ICJ advisory opinion and the High Court of Justice of Israel ruling will be made to determine which decision was the most legally persuasive one in resolving the dispute over the legality of the barrier.

III. INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION

A. *Controversial Jurisdictional Issues*

When the General Assembly, upon the urging of the Palestinian Authority, requested that the ICJ deliver an advisory opinion concerning Israel's construction of the wall, the ICJ had to address whether it had jurisdiction to deliver such an opinion.⁴⁶ The General Assembly was alleged to have committed several "procedural irregularities" in submitting its request for an advisory opinion.⁴⁷ Among the alleged procedural irregularities was that of sending the request for an advisory opinion directly to the ICJ even though the United Nations Security Council was purportedly actively engaged in the Israeli-Palestinian conflict.⁴⁸

The General Assembly claimed that its actions fell under the Uniting for Peace Resolution (General Assembly Resolution 377), under which its Tenth Emergency Special Session had initially convened in 1997 to address the Israeli-Palestinian conflict after the Security Council's failure to act on the matter.⁴⁹ Having reconvened the Tenth Emergency Special Session eleven times since 1997, the General Assembly reconvened the session yet again to submit the request for an advisory opinion while still holding its regular session.⁵⁰ Israel claimed that the General Assembly had acted *ultra vires* under the U.N. Charter, as the Security Council is given the "primary responsibility for the maintenance of international peace and security" under article 24 of the U.N. Charter.⁵¹

Under the Uniting for Peace Resolution, the General Assembly can act to make recommendations regarding a threat to the peace or a breach of the peace when the Security Council "fails to exercise its primary

45. H.C. 2056/04, *Beit Sourik Vill. Council*, at 43-45, <http://62.90.71.124/eng/verdict/framesetSrch.html>.

46. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, at 7, 11.

47. *Id.* at 14-21

48. *Id.* at 16.

49. *Id.* at 12, 16-18; G.A. Res. 377, U.N. GAOR, 5th Sess., at 10-12, U.N. Doc. A/RES/377(V) (1950), <http://www.un.org/documents/ga/res/5/ares5.htm>.

50. *Id.* at 17.

51. *Id.* at 14-15 (quoting U.N. CHARTER art. 24).

responsibility for the maintenance of international peace and security.”⁵² This occurs when one or more permanent members of the Security Council casts a negative vote and the circumstances are such that there appear to be “threats to the peace, breaches of the peace or acts of aggression.”⁵³ The ICJ ruled that although no proposal requesting an advisory opinion had been made to the Security Council in 2004, since the Tenth Emergency Special Session had first convened in 1997, the Security Council had continually failed to act on the case of certain Israeli settlements when there was a threat to international peace and security and also when, in 2003, a draft resolution concerning the construction of the wall by Israel was rejected because of the negative votes of a permanent member.⁵⁴ The ICJ stated that the Security Council’s inaction entitled the General Assembly to act within the broader subject matter of the Israeli-Palestinian conflict for which the Tenth Emergency Special Session had been convened.⁵⁵

Israel nevertheless contended that, in light of judicial propriety, the ICJ should have used its discretion to decline exercising its jurisdiction because Israel had not consented to its jurisdiction.⁵⁶ In Advisory Opinion No. 61, *Western Sahara*, the ICJ ruled that when a response by the ICJ to a request to issue an advisory opinion would “circumvent[] the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent,” the court would decline the request for an advisory opinion.⁵⁷ Nevertheless, the ICJ distinguished *Western Sahara* by noting that the issue of whether or not to exercise jurisdiction to render an advisory opinion depended on whether the legal controversy had arisen as a result of General Assembly proceedings or whether it had arisen independently in bilateral relations, for the latter of which the ICJ would decline to issue an opinion.⁵⁸ If the current matter had arisen strictly as a bilateral matter, then the court would have

52. *Id.* at 16 (quoting G.A. Res. 377, *supra* note 49, at 10).

53. *Id.* (quoting G.A. Res. 377, *supra* note 49, at 12).

54. *Id.* at 16-17.

55. *Id.* at 17.

56. *Id.* at 18-22.

57. *Id.* (quoting Advisory Opinion No. 61, *Western Sahara*, 1975 I.C.J. 12, 24-25). The IJC was confirming a long line of cases supporting this proposition. *Western Sahara*, 1975 I.C.J. 12, at 27 (citing Advisory Opinion No. 8, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1950 I.C.J. 65); *see also* Advisory Opinion No. 53, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16.

58. Advisory Opinion No. 131, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 131, at 23 (July 9) (citing *Western Sahara*, 1975 I.C.J. at 25).

declined the request, but the ICJ emphasized that the construction of the wall was “directly of concern to the United Nations” because of the prior nature of the Mandate and Partition Resolutions concerning Palestine.⁵⁹ The ICJ then dismissed any concessions that the Palestinian Authority and Israel had given to each other in attempting to settle their disputes outside the ICJ’s jurisdiction.⁶⁰ The ICJ defended this action because it said that the object of allowing the General Assembly to request an advisory opinion was to assist the General Assembly in the proper exercise of its functions, and thus the ICJ was compelled to accept the request and provide the General Assembly with an opinion.⁶¹

The ICJ further dismissed arguments that an advisory opinion would impede a political, negotiated solution to the Israeli-Palestinian conflict.⁶² The court did, however, concede that it was aware that the question of the wall was part of a “greater whole” in the conflict, a fact of which the court promised to take careful account.⁶³ Addressing Israel’s concerns that the ICJ did not have enough information from both sides of the conflict to understand the nature and the scope of the security threat and the impact of the construction on the Palestinians, the ICJ emphasized that it had sufficient information from that provided by the Secretary-General, as well as from Israel’s written statement on jurisdiction and judicial propriety combined with documents from the Israeli government available in the public domain.⁶⁴

In support of its charge that the ICJ improperly delivered the advisory opinion, Israel contended that Palestine had responsibility for acts of terrorism against Israeli civilians for “which the wall [was] aimed at addressing.”⁶⁵ Thus, Israel argued that Palestine lacked the necessary good faith and clean hands to bring a dispute before the ICJ.⁶⁶ The ICJ ruled, however, that this argument was not pertinent to the advisory opinion, as the request for the advisory opinion had come from the General Assembly and not from the Palestinian Authority.⁶⁷ The advisory

59. *Id.* at 23, 24-30 (referencing the “Mandate for Palestine [as] laid down by various instruments” and G.A. Res. 181, Future Government of Palestine, U.N. Doc. A/RES/181(II) (A&B) (1947)).

60. *Id.* at 23-24.

61. *Id.* at 24.

62. *Id.* at 22-23.

63. *Id.* at 25.

64. *Id.* at 26.

65. *Id.* at 28.

66. *Id.*

67. *Id.*

opinion, the ICJ defended, was to be delivered “to the General Assembly, and not to a specific State or entity.”⁶⁸

B. Rendering the Wall Illegal

After addressing jurisdictional issues concerning its issuance of the advisory opinion, the ICJ began the rest of its opinion by drawing upon the rules and principles of international law “relevant in assessing the legality of the measures taken by Israel.”⁶⁹ It opened by quoting article 2, paragraph 4, of the United Nations Charter:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.⁷⁰

The ICJ then emphasized General Assembly Resolution 2625, entitled Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, which stressed that “territorial acquisition[s] resulting from the threat or use of force” could not be recognized as legal.⁷¹ The ICJ then noted that the principle of self-determination applied to the Palestinian people.⁷² Recognizing that Israel was not a party to the Hague Convention of 1907, the court stressed that the Hague Regulations were nevertheless binding on Israel because they had become part of customary international law.⁷³

The ICJ declared that Israel’s construction of the wall was “tantamount to *de facto* annexation” because of the wall’s proximity to illegal Israeli settlements in the Occupied Territories.⁷⁴ Because of this *de facto* annexation, the ICJ stated that Israel’s actions seriously impeded the right of self-determination of the Palestinian people and thus breached “Israel’s obligation to respect that right.”⁷⁵ Highlighting the impediments of access to work, health, and education in addition to the confiscation of

68. *Id.*

69. *Id.* at 35.

70. *Id.* (quoting U.N. CHARTER art. 2, para. 4).

71. *Id.* at 36 (citing G.A. Res. 2625, U.N. GAOR, 5th Sess., at 121-24, U.N. Doc. A/RES/2625 (XXV), <http://www.un.org.documents/ga/res/25/ares25.htm> (“Every State has the duty to refrain from the threat or use of force . . . as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.”)).

72. *Id.*

73. *Id.* (citing Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Regulations]).

74. *Id.* at 47.

75. *Id.*

agricultural lands and property, the ICJ emphasized violations of the Geneva Convention and other international agreements like the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the United Nations Convention on the Rights of the Child.⁷⁶ After citing these violations, the ICJ then proceeded to discuss its consideration of military exigencies allowed by international humanitarian law under special circumstances, and then dismissed them quickly on the grounds that the court was not convinced of the necessity of military operations.⁷⁷ The court declared that, from the material available to it, it could not be persuaded that the wall was necessary to achieve security objectives.⁷⁸

Having deemed the construction of the wall an action not in conformity with various “international legal obligations incumbent upon Israel,” the ICJ addressed Israel’s claim that the construction of the wall was in conformity with Israel’s right to self-defense under article 51 of the Charter of the United Nations and Security Council Resolutions 1368 and 1373.⁷⁹ The ICJ referred to the assertion of Israel’s Permanent Representative to the United Nations that, because Security Council resolutions clearly recognize the right to the use of force in self-defense, Israel’s “non-forcible measures” in self-defense should also be recognized.⁸⁰ Dismissing this claim, the ICJ declared that article 51 of the Charter recognizes the “right of self-defense in the case of armed attack by one State against another State.”⁸¹ The ICJ stressed that Israel failed to claim that the “attacks against it were imputable to a foreign State.”⁸² Further emphasizing that Israel controlled the Occupied Palestinian Territory, the ICJ stated that Israel claimed a threat from within, not outside, its territory, and thus the situation was different from

76. *Id.* at 54 (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, <http://www.un.org/documents/ga/res/44/a44r025.htm> [hereinafter Geneva Convention]; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976, and ratified by the United States June 8, 1992), <http://www.un.org/documents/ga/res/21/ares21.htm>; Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/RES/44/25 (1989), Corr. 1 (1990) (entered into force Sept. 2, 1990), <http://www.un.org/documents/ga/res/44/a44r025.htm>)).

77. *Id.*

78. *Id.* at 55.

79. *Id.* at 56 (citing U.N. CHARTER art. 51; S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001)).

80. *Id.*

81. *Id.* at 56 (quoting U.N. CHARTER art. 51).

82. *Id.*

the situations for which Security Council Resolutions 1368 and 1373 were intended.⁸³

Mentioning the “numerous indiscriminate and deadly acts of violence against [Israel’s] civilian population,” the ICJ dodged the label of terrorism and stated that Israel had the right and duty to respond to protect the lives of its citizens.⁸⁴ However, it emphasized that any measures had to remain in compliance with the applicable international laws.⁸⁵ After hinting to the principle of proportionality, the ICJ concluded that, in the light of the material it had received, it was “not convinced that the construction of the wall . . . was the only means to safeguard the interests of Israel against the peril [Israel] invoked as justification.”⁸⁶ Without the justifications of self-defense or a state of necessity, the ICJ deemed Israel’s construction of the wall contrary to and in breach of international law.⁸⁷

Having concluded that Israel violated international law, the ICJ proceeded to cite the legal consequences for Israel, other Member States, and the United Nations.⁸⁸ Regarding Israel, the ICJ noted Israel’s legal obligations to end the construction of the fence and to make reparations for the damage arising from its unlawful conduct.⁸⁹ With regard to other Member States, the ICJ held that they had an obligation not to recognize Israel’s actions regarding the wall or to render aid or assistance to the illegal construction.⁹⁰ Addressing the United Nations’ obligations, the ICJ cited the responsibility of the Security Council to consider the “flagrant and systematic violation of international law norm[s] and principles by Israel . . . and to take all necessary measures to put an end [to] those violations.”⁹¹ The ICJ required both the Security Council and the General Assembly to consider its advisory opinion.⁹²

C. *Dissenting Voices*

In her separate opinion Judge Rosalyn Higgins, who voted in favor of the advisory opinion, stressed that the obligations of humanitarian law

83. *Id.* (citing S.C. Res. 1368, *supra* note 79; S.C. Res. 1373, *supra* note 79 (condemning terrorism in response to the attacks of September 11, 2001)).

84. *Id.* at 57.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 59-60.

90. *Id.* at 61.

91. *Id.* at 58.

92. *Id.* at 61.

had to be viewed in the context of a conflict, something she believed the ICJ precluded in formulating its question of the legality of the wall.⁹³ She agreed with the outcome of the decision but contended that the protection of civilians remained an “intransgressible obligation of humanitarian law” for both the occupier and for those wishing to free themselves from occupation.⁹⁴ Judge Higgins departed in her concurrence from the ICJ’s treatment of Israel’s self-defense claims.⁹⁵

Judge Higgins noted that Palestine could not enjoy an invitation to proceedings before the court and benefit from humanitarian law as a separate international entity and yet simultaneously not function in the same manner in her analysis of Israel’s claim of self-defense against an armed attack.⁹⁶ She questioned who should be held responsible for the groups sent to kill innocent Israeli civilians.⁹⁷ Although she did not believe that nonforcible measures like the building of a wall fell within the article 51 self-defense provision, she criticized the court’s dismissal of Israel’s defense claims.⁹⁸ She predicted that even if Israel’s actions were deemed to fall under the justification of self-defense, in applying the principle of proportionality, Israel’s actions would nevertheless result in a finding of illegality under international law.⁹⁹ She stressed that the ICJ was unpersuasive in declaring that an occupying power lost the right to defend its citizens from armed attacks merely because the attacks arose from within the occupied territory itself.¹⁰⁰ She argued that this was especially ironic as the ICJ elsewhere in its advisory opinion emphasized that the occupied territories were not annexed but were “‘other than’ Israel.”¹⁰¹ Consequently, she deemed this treatment of Israel’s self-defense claims “formalism of an unevenhanded sort,” and she emphasized the need for a balanced opinion recalling the obligations on both sides.¹⁰²

Judge Thomas Buergenthal, who voted against the advisory opinion, noted in his declaration that even though the deadly terrorist attacks by Palestinian terror groups in Israel that came from the

93. Advisory Opinion No. 131, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 131 (July 9) (Higgins, J., concurring), at 3-4, <http://www.icj-cij.org>.

94. *Id.* at 5.

95. *Id.* at 7-8.

96. *Id.* at 7.

97. *Id.*

98. *Id.* at 7-8.

99. *Id.*

100. *Id.* at 7.

101. *Id.*

102. *Id.*

Occupied Territories were not justified as a matter of law, the ICJ failed to note or give consideration to those attacks in its advisory opinion.¹⁰³ He acknowledged that considering this would not relieve Israel from its breach of international law, but it would better serve the humanitarian needs of the Palestinian people, as the ICJ's credibility would not be questioned.¹⁰⁴ Echoing Judge Higgins's concerns over the ICJ's analysis of Israel's self-defense, Judge Buergenthal concluded that the ICJ's shallow, formalistic approach ignored the issues of military necessity and proportionality which are at the heart of the dispute.¹⁰⁵ He stressed that, without this proper analysis, the ICJ could not articulately rebut Israel's defenses of military exigencies and national security.¹⁰⁶

IV. THE DECISION OF THE HIGH COURT OF JUSTICE OF ISRAEL

In rendering its decision, the High Court of Justice of Israel dealt with the issues of military necessity and self-defense, and it delved further in applying the principle of proportionality highlighted by Judge Higgins and Judge Buergenthal.

A. *The Interests at Stake*

Palestinians from villages whose lands were seized for the construction of the fence brought their suit before the High Court of Justice of Israel (High Court) and petitioned for the termination of the construction of the security fence and for compensation for the loss of their property.¹⁰⁷ The Council for Peace and Security joined them as amici curiae, providing military expertise for the proposal of an alternate route to the Israeli military commander's proposed route.¹⁰⁸

The government of Israel and the commander of the Israeli Defense Forces argued that the security fence and its route were a "project of utmost national importance" necessary for controlling the flow of residents, preventing arms smuggling, and preventing Palestinian infiltrators from establishing terror cells within Israel.¹⁰⁹ They claimed

103. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (July 9) (Buergenthal, J., Declaration), at 1, <http://www.icj-cij.org>.

104. *Id.*

105. *Id.* at 2.

106. *Id.* at 2-3.

107. H.C. 2056/04, Beit Sourik Vill. Council v. Israel, at 6-8, *available at* <http://62.90.71.124/eng/verdict/framesetSrch.html>.

108. *Id.* at 11.

109. *Id.* at 8.

that the segments of the fence already constructed proved their efficacy.¹¹⁰ In defending the seizure of lands for the security fence construction, the Israeli government claimed that the lands were seized for combat purposes under the laws of belligerent occupation.¹¹¹ The Israeli government claimed that the processes of seizure were legal, since the residents were informed about the processes and were given the opportunity to participate and appeal, even though, according to the Israeli government, the residents did not always attempt to have their arguments heard.¹¹² The Israeli government contended that it accorded great weight to the residents' interests in the area to minimize their injury, and it promised that compensation would be provided for the seizure of the residents' lands and crops.¹¹³

B. Framing the Issues

Citing the number of terror attacks and the deaths and injuries resulting from those attacks, the High Court began its legal analysis of the construction of the fence in the context of Israel's belligerent occupation of the Occupied Territories.¹¹⁴ The High Court conceded that the legality of security measures had to be examined within the framework of the Hague Regulations and the Geneva Convention.¹¹⁵ Nevertheless, the court stressed that its analysis had to be done in a flexible manner in light of the prolonged occupation.¹¹⁶

The High Court recognized that the purpose of the law of belligerent occupation was to allow for the orderly administration of an occupied territory until a peace treaty establishing the formal disposition of land is signed.¹¹⁷ The High Court acknowledged the idea that the Israeli occupation operates as an exceptional emergency regime that requires the unique protection of the law of belligerent occupation.¹¹⁸ Nevertheless, it stressed that, because the occupation is prolonged, Israel should apply the higher humanitarian standards of the law of armed conflicts.¹¹⁹ The High Court emphasized that humane treatment in

110. *Id.*

111. *Id.* at 9.

112. *Id.*

113. *Id.* at 9-10.

114. *Id.* at 2-6, 13.

115. *Id.* at 13-14 (citing Geneva Convention, *supra* note 76; Hague Regulations, *supra* note 73).

116. *Id.* at 13-21; *see also* ESTHER R. COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982 188 (1985) (discussing proper analysis of belligerent occupancy).

117. H.C. 2056/04, *Beit Sourik Vill. Council*, at 14-18; COHEN, *supra* note 116, at 67.

118. H.C. 2056/04, *Beit Sourik Vill. Council*, at 15-16; COHEN, *supra* note 116, at 67.

119. *See* H.C. 2056/04, *Beit Sourik Vill. Council*, at 18-21; COHEN, *supra* note 116, at 67.

belligerent occupation serves to administer the Occupied Territories with the least amount of force.¹²⁰ The court recognized that when a state invokes self-defense, the invocation denotes in law a “recourse . . . to means not usually permitted under the law.”¹²¹ For there to be a legitimate invocation of self-defense, there must be an “instant and overwhelming danger” to a state’s safety or to that of its nationals’ lives or property.¹²² The danger defended against must be an unlawful or unjustified danger.¹²³ Additionally, the state invoking self-defense must have “no choice of means” and no recourse to other lawful or pacific means to respond to the imminent danger.¹²⁴ The exercise of self-defense by the state, the High Court emphasized, must not be unreasonable or excessive, and it must be done in good faith.¹²⁵

C. *Finding the Israeli Government’s Actions Illegal*

The High Court then ruled that, under the rules for belligerent occupation, the Israeli military commander had the authority to order the construction and dictate the route of the security fence.¹²⁶ The High Court began by ruling that, under the law of belligerent occupation, the construction of the security fence in the Occupied Territories was legal, but that segments of the fence were illegal under the proportionality principle.¹²⁷ Scrutinizing the military commander’s authority, the High Court emphasized that a military commander’s authority was limited to making security decisions and did not extend to making political decisions.¹²⁸ The High Court also emphasized that belligerent occupation is inherently temporary, and as such, the military commander’s authority to make decisions regarding the construction and route of the fence were also of a temporary nature.¹²⁹ According to the High Court, this

120. See H.C. 2056/04, *Beit Sourik Vill. Council*, at 18-21. See generally Adam Roberts, *Prolonged Military Occupation: The Israel-Occupied Territories Since 1967*, 84 AM. J. INT’L L. 44 (1991) (discussing the rules for prolonged occupations in the context of Israel and other nations).

121. See H.C. 2056/04, *Beit Sourik Vill. Council*, at 16-17; see also BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 92-93 (1987).

122. CHENG, *supra* note 121, at 94.

123. *Id.* at 95.

124. *Id.*

125. H.C. 2056/04, *Beit Sourik Vill. Council*, at 14-16, 21-25; CHENG, *supra* note 121, at 96.

126. H.C. 2056/04, *Beit Sourik Vill. Council*, at 14-16.

127. *Id.* at 21-26.

128. *Id.* at 14-16 (citing H.C. 393/82, *Jam’iat Ascan Elma’almoon Eltha’ooniah Elmahduda Elmaoolieh v. Commander of the IDF Forces in the Area of Judea & Samaria*, at 794).

129. *Id.* at 16-17.

temporary status prohibited the commander from making permanent decisions involving political borders, especially with regard to the route of the separation fence extending past the Green Line.¹³⁰ The High Court ruled that under article 52 of the Hague Regulations, the needs of the army could not, in a reasonable interpretation, include national security needs in light of Zionist ideology.¹³¹

Nevertheless, the High Court emphasized that it could not “slip into the shoes’ of a deciding military official” to substitute his or her discretion with the High Court’s discretion in a security matter.¹³² It stated that a court could only examine a military decision in light of all the facts to determine whether the military commander utilized means to achieve security that were reasonable under the circumstances.¹³³ The High Court ruled that, because the petitioners had not carried the heavy burden of proving that the Council for Peace and Security had the militarily correct route for the security fence, the court could not justify, from a military perspective, interfering in the decision of the military commander for the route.¹³⁴ Thus, according to the court, the Israeli military commander made a reasonable military assessment.¹³⁵

The court’s “point of departure” in analyzing segments of the security fence was that the Israeli government’s decision to construct the barrier was based on security considerations.¹³⁶ The High Court determined that the orders given for different segments of the barrier¹³⁷ were well-founded from a military standpoint.¹³⁸ However, it analyzed each segment under the proportionality test of international and Israeli administrative law.¹³⁹ The High Court then proceeded to analyze the route of the barrier in relation to the proportionality of military considerations to humanitarian considerations.¹⁴⁰

130. *Id.* at 15-16.

131. *Id.* at 15 (citing Hague Regulations, *supra* note 73, art. 52; H.C. 390/79 Dvikat v. Gov’t of Israel, at 17).

132. *Id.* at 27 (quoting H.C. 1005/89, *Aga v. Commander of the IDF Forces in the Gaza Strip Area*, at 539).

133. *Id.* (quoting H.C. 1005/89, *Aga*, at 539).

134. *Id.* at 29.

135. *Id.*

136. *Id.* at 26.

137. *Id.* at 30, 36, 38, 40, 43 (citing Order Nos. Tav/104/03, Tav/103/03, Tav/84/03, Tav/107/30, Tav/107/03, Tav/108/03, Tav/109/03, Tav/110/03). The petition regarding Tav/105/03 was denied as certain routes of the segment were changed, reducing the injury to cultivated lands. *Id.* at 30. The court did not directly deal with Tav/110/03 because the village concerned was not a party to the petition. *Id.* at 43.

138. *Id.* at 30-44.

139. *Id.* at 23, 30-44.

140. *Id.* at 43.

The High Court acknowledged that international law recognizes proportionality as a general principle.¹⁴¹ As a component relevant to the laws of war, proportionality is an element in the principle of self-defense granted to states under article 51 of the U.N. Charter.¹⁴² The court acknowledged that proportionality is based on the principle that belligerents do not possess unlimited choices in the means by which they respond to the acts of an enemy.¹⁴³ Proportionality, the High Court pointed out, requires that a balance be struck between the goals of military necessity and the protection of civilians' rights.¹⁴⁴

Relating the basis for the proportionality doctrine in international law, the High Court noted how the doctrine is set out in Protocol I of the Geneva Convention (Protocol I).¹⁴⁵ The Protocol severely limits the extent of a belligerent's conduct in hostilities.¹⁴⁶ A military force is required to determine whether an operation would lead to "excessive damage to civilian lives and/or objects in comparison to the objectives sought."¹⁴⁷ The High Court admitted that, when applied to a military action, however, the concept of proportionality is complex and inevitably results in differences of opinion.¹⁴⁸

The High Court also noted that the Hague Regulations and the Geneva Convention have strongly influenced the customary rules of belligerent occupation.¹⁴⁹ Under the Hague Regulations, an enemy's property cannot be seized or destroyed unless it is "imperatively

141. *Id.* at 21-24 (citing THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 65 n.178 (1989); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 219, 230-34 (1994) (discussing concept of proportionality in the context of the use of force)).

142. *See id.* (citing Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 403 (1993) (citing U.N. CHARTER art. 51)).

143. H.C. 2056/04, *Beit Sourik Vill. Council*, at 21-26.; Gardam, *supra* note 142, at 391.

144. H.C. 2056/04, *Beit Sourik Vill. Council*, at 21-22; Gardam, *supra* note 142, at 412.

145. H.C. 2056/04, *Beit Sourik Vill. Council*, at 14; *see* Olivera Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?*, 23 LOY. L.A. INT'L & COMP. L. REV. 329, 330 (2001) ("Protocol I to the Geneva Conventions sets out the basis of the proportionality doctrine."); Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (entered into force Dec. 7, 1978) [hereinafter Protocol I].

146. *See* Protocol I, *supra* note 145.

147. Medenica, *supra* note 145, at 369.

148. H.C. 2056/04, *Beit Sourik Vill. Council*, at 24; *see also* Gardam, *supra* note 142, at 405.

149. H.C. 2056/04, *Beit Sourik Vill. Council*, at 13-14, 18-21. The High Court of Justice of Israel has utilized the Hague Regulations as an expression of customary law in its past decisions. *Id.* at 21. It has called for the direct implementation of the Geneva Convention and has taken the humanitarian provisions under the Convention into consideration in its rulings regarding the Israeli military's actions in occupied territories. *Id.*

demanded by the needs of war.”¹⁵⁰ Article 46 of the Hague Regulations requires that private property be respected and prohibits the confiscation of private property.¹⁵¹ However, article 52 permits governmental requisition of property under authority of the military commander upon need of the army of occupation.¹⁵² The Geneva Convention requires that local inhabitants be humanely treated and protected against all acts of violence while it allows for measures for control and security as made necessary by war.¹⁵³ It also prohibits the destruction of property in an occupied territory by the occupying power unless there is an absolute military necessity.¹⁵⁴ The High Court thus stressed that a military commander exercising authority under belligerent occupation under these rules has the obligation to refrain from actions that will injure local inhabitants.¹⁵⁵

The High Court utilized three subtests in applying the principle of proportionality under Israeli law.¹⁵⁶ The first subtest states that the objective must be related to the means.¹⁵⁷ The test requires that the means used by the administrative body lead rationally to the objective set out.¹⁵⁸ The second subtest requires that the means used cause the least possible injury, while still achieving the exact same objective.¹⁵⁹ If the same objective could be met under a less injurious means, then proportionality does not exist.¹⁶⁰ The third subtest mandates that the damage committed against the individual(s) by the means utilized to achieve the objective be

150. Hague Regulations, *supra* note 73, art. 23(g).

151. *Id.* art. 46.

152. *Id.* art. 52.

153. Geneva Convention, *supra* note 76, arts. 3-4.

154. *Id.* art. 53; *see generally* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 20 (2d ed. 1998).

155. H.C. 2056/04, *Beit Sourik Vill. Council*, at 19-21 (citing H.C. 4764/04, *Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip* (Draft), at <http://www.imra.org.il/story.php3?id=21004>).

156. *Id.* at 23-24 (citing NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 25 (1996); JURGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 687 (1992); Segal, *The Cause of Action of Disproportionality in Administrative Law*, HAPRAKLIT 50 (1990); Zamir, *The Administrative Law of Israel Compared to the Administrative Law of Germany*, 2 MISHPAT U'MIMSHAL 109, 130 (1994)).

157. *Id.* at 24 (citing SCHWARZE, *supra* note 156, at 687 (referring to measures “suitable for the purpose of facilitating . . . the pursued objective”); EMILIOU, *supra* note 156, at 26-28 (referring to the “principle of suitability”)).

158. *Id.*

159. *Id.* (citing SCHWARZE, *supra* note 156, at 687 (referring to measures “necessary in . . . that the authority concerned has no other mechanism at its disposal which is less restrictive of freedom”); EMILIOU, *supra* note 156, at 29-31 (referring to the “principle of necessity”)).

160. *Id.*

in proper proportion to the gain achieved by the particular means.¹⁶¹ In this third test, the administrative act is examined “vis-à-vis an alternate act” with a comparatively lesser benefit.¹⁶² When a certain reduction in the benefit gained from applying the alternate means “ensures a substantial reduction in the injury caused by the . . . act,” the original means is deemed disproportionate.¹⁶³ All three of these tests must be satisfied simultaneously for an act to be deemed proportionate.¹⁶⁴

The High Court then resorted to applying the three-part proportionality test to determine whether the injury to the local inhabitants created by the fence in each segment was proportionate to the military security objective.¹⁶⁵ Applying the first subtest, the court examined whether there was a rational connection between the separation fence’s objective and the fence’s route.¹⁶⁶ It determined that, since the fence had passed the test of military reasonableness, there existed a rational connection between the security objective of the fence and the route proposed and utilized by the military commander.¹⁶⁷

In applying the second subtest, which requires the use of the least injurious means in order to accomplish the objective, the High Court determined that, although the alternate route proposed by the Council for Peace and Security caused less injury, it did not satisfy the security objective of the fence as well as the military commander’s proposed route.¹⁶⁸ Whereas the Council’s proposed route could supply security, the presumption that the military commander’s route was rational and reasonable withstood the proposal for an alternative route that did not supply the same presumed amount of security.¹⁶⁹

The High Court then proceeded to apply the third subtest.¹⁷⁰ According to this test, the High Court had to determine “whether the injury caused to the local inhabitants . . . [stood] in proper proportion to the security benefit from the security fence in its chosen route.”¹⁷¹ It

161. *Id.* (citing SCHWARZE, *supra* note 156, at 687 (referring to a “measure disproportionate to the restrictions which it involves”); EMILIOU, *supra* note 156, at 32-37 (referring to “principle of proportionality *stricto sensu*”).

162. *Id.*

163. *Id.*

164. *Id.* at 25.

165. *Id.* at 25-26, 29, 33-34, 36-44.

166. *Id.* at 33, 37, 39, 42 (examining each of the military’s orders for each segment of the separation fence).

167. *Id.*

168. *Id.* at 31, 33, 37, 39, 42.

169. *Id.* at 33-43.

170. *Id.* at 33.

171. *Id.*

reasoned that the route of the fence undermined the “delicate balance” between the military commander’s obligations to preserve security and that of providing for the human rights and needs of the local inhabitants.¹⁷² The High Court emphasized the military commander’s dual obligations of security and protection of the local inhabitants’ well-being.¹⁷³ The High Court emphasized that the rights bestowed on the inhabitants under humanitarian international law had been violated in a severe and acute way.¹⁷⁴ The High Court also noted that the gap between the security provided by the military commander’s position and the security provided by the Council’s alternate route was minute, and international law and Israeli administrative law mandated that every possible effort be made to make sure that the injury suffered would be proportionate.¹⁷⁵ The High Court ruled that the route was not proportionate because the severe injury suffered by the local inhabitants stood in stark disproportion to the slight security advantage that the military commander’s route provided over the Council’s proposed route.¹⁷⁶

As a remedy to those whose lands would still be seized under all of the segment orders, the High Court ordered land compensation to all the inhabitants affected and monetary compensation if there were no substitute lands available.¹⁷⁷ The High Court noted that the injury caused by the fence did more than affect property and access to lands.¹⁷⁸ Rather, the injury struck at the “fabric of life” for local inhabitants.¹⁷⁹ Consequently, the High Court ruled that a “renewed examination of the route of the fence” must be made to address the disproportionate and severely injurious effects of the proposed military route for the segments not yet built.¹⁸⁰

V. ANALYSIS

A. *Who Seemed to “Get It Right”?*

In addition to achieving legitimacy and persuasiveness to a court’s conclusion, proper application of international law is instrumental in

172. *Id.* at 34.

173. *Id.*

174. *Id.* at 35.

175. *Id.* at 35, 39, 41, 42, 44.

176. *Id.*

177. *Id.* at 43-44.

178. *Id.* at 44.

179. *Id.*

180. *Id.*

effectuating justice, fairness, and clarity for both sides of the conflict. Although both the ICJ advisory opinion and the High Court of Justice of Israel decision concluded that the security fence is illegal, the analysis and reasoning utilized by the two courts differed strikingly. Both of the decisions make important points about the role of international human rights law, including the Geneva Convention. Nevertheless, each court had a divergent approach to the issues of belligerent occupation, self-defense, and the role of terrorism regarding the legality of the construction of the wall. First, this Comment considers how each court exercised its jurisdiction in assessing Israel's actions.

B. A Stretching Exercise of Jurisdiction

The ICJ extended broad discretion to the General Assembly when it permitted a request for an advisory opinion on the narrow issue of the barrier under the wide-ranging subject matter of the Israeli-Palestinian conflict, the basis for convening the Tenth Emergency session.¹⁸¹ The ICJ was probably legally justified in exercising its discretion to accept a request from the General Assembly, but it broadened the procedural scope under which it would accept a request for an advisory opinion.¹⁸² It was under this already broadened procedural scope that the ICJ ignored Israel's requests for the ICJ to decline to render an opinion for reasons of propriety.¹⁸³ The ICJ seemed to disingenuously proclaim that the purpose behind rendering an opinion was solely for the General Assembly to exercise its functions and that the opinion was not intended to address any specific state or entity.¹⁸⁴ This proclamation came although the ICJ, later in its advisory opinion, warned Israel to make reparations for the damage arising from its unlawful conduct and required other States not to recognize Israel's actions regarding the wall or to render aid or assistance on the illegal construction.¹⁸⁵ Political pressure from the Palestinian Authority to encourage the ICJ to render an opinion,¹⁸⁶ even though condemnable acts of terrorism are tolerated and encouraged by some Palestinians, made the ICJ's decision not to decline a request for reasons of impropriety less persuasive. In addition to the broad discretion the ICJ exercised in rendering its advisory opinion on the

181. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, at 1, 12 (July 9), <http://www.icj-cij.org>.

182. *Id.* at 16-19.

183. *Id.* at 21-24.

184. *Id.* at 28.

185. *Id.* at 59-61.

186. Semple, *supra* note 42.

separation fence, the ICJ showed little deference in its advisory opinion to the Israeli security concerns.¹⁸⁷

In an ironically contrasting exercise of jurisdiction, the High Court of Justice of Israel, a national court, allows non-Israeli residents of the Occupied Territories to have standing in Israeli courts to bring claims against the Israeli government and its military and civilian agencies.¹⁸⁸ This is the first time in the history of belligerent occupation that individuals in an occupied territory have been granted the right of appeal to the highest court of the occupant.¹⁸⁹ It is under this unprecedented, extensive exercise of jurisdiction that the High Court of Justice of Israel ultimately granted remedies to Palestinian inhabitants concerning the security fence.¹⁹⁰ Nevertheless, having considered the jurisdiction under which each court issued a decision, it is also important to analyze how each court framed the context of issues surrounding the construction of the barrier.

C. Which Frame Fits Best?

The ICJ began its analysis by concluding that whatever Israel's statements concerning the purpose behind the construction and route of the wall, the wall achieved de facto annexation, which is illegal under international law.¹⁹¹ Without conducting a thorough analysis of the intentions behind Israel's reasons for constructing the wall, the ICJ essentially deduced that, because the wall is in proximity to settlements it is "tantamount to de facto annexation."¹⁹² No significant mention was made of the circumstances under which Israel has held and continues to hold control of the Occupied Territories.¹⁹³ Neither was there substantive mention of the number of terrorist attacks and the death and injuries that have resulted from them.¹⁹⁴

The High Court of Justice of Israel, on the other hand, first established the conditions under which the government of Israel administers the Occupied Territories.¹⁹⁵ The High Court put the matter of Israel's actions in the most appropriate legal context—belligerent

187. H.C. 2056/04, *Beit Sourik Vill. Council*, at 44.

188. *Id.*

189. Curtis, *supra* note 2, at 482.

190. H.C. 2056/04, *Beit Sourik Vill. Council*, at 44.

191. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, at 47 (July 9), <http://icj-cij.org>.

192. *Id.*

193. *See generally id.*

194. H.C. 2056/04, *Beit Sourik Vill. Council*, at 2; Curtis, *supra* note 2, at 457, 482.

195. H.C. 2056/04, *Beit Sourik Vill. Council*, at 2-6.

occupation.¹⁹⁶ The High Court recognized that Israel's only justification under international law for its occupation of the Occupied Territories is self-defense from imminent armed attacks such as those exercised against it by its Arab neighbors during the 1967 War.¹⁹⁷ It emphasized that as a belligerent occupant, Israel's authority over the Occupied Territories was temporary pending a peace treaty.¹⁹⁸ The High Court acknowledged that, according to international law, whatever actions the government of Israel took were of a temporary nature and have no bearing on future borders.

The High Court then warned the Israeli government that military commanders have no authority to draw political borders and that absolutely no actions taken in the Occupied Territories could be fueled by Zionist ideology.¹⁹⁹ One could argue that the High Court was merely paying "lip service," but arguments that Israel's intentions are to annex territory are not persuasive. If and when a peaceful solution arises, Israel cannot claim the supposed annexed territory from the security fence. This is because of Israel's clear statements regarding its intentions not to annex, and more importantly, because such acquisition of territory is widely held as internationally illegal.²⁰⁰

The ICJ only briefly mentioned Israel's administration of the Occupied Territories, and perhaps it had good reason to shy away from utilizing the label of belligerent occupancy. Scholars comment on the need to change the rules of belligerent occupation because of the duration of occupations like that of Israel in the Palestinian territories.²⁰¹ With prolonged occupation comes a more scrutinized view of the rights of the occupant over the territory and its inhabitants. Nevertheless, this does not rationalize ignoring the defensive and security goals that initiated Israel's occupation of the Occupied Territories and which Israel claims continue to obligate it to occupy.²⁰² Referring to the history of the Occupied Territories and the commencement of Israel's occupation, the

196. *Id.* at 13.

197. *Id.* at 14.

198. *Id.* at 15.

199. *Id.*

200. David J. Ball, *Toss the Travaux? Application of the Fourth Geneva Convention to the Middle East Conflict—A Modern (Re)Assessment*, 79 N.Y.U.L. REV. 990, 998-1002 (2004) (discussing Israel's status as belligerent occupant in the Occupied Territories); Roberts, *supra* note 120, at 44.

201. David P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1573-74 (1985).

202. H.C. 2056/04, *Beit Sourik Vill. Council*, at 2-6.

ICJ made no mention of Israel's reasons for initiating occupation²⁰³—a defensive measure responding to an imminent attack by Israel's neighbors in 1967. Israel's occupation has been extensive, and with it comes the further responsibility accorded a belligerent occupant, something the High Court of Justice of Israel stressed.²⁰⁴ The ICJ's contrasting minimization of the issue of belligerent occupancy rendered its initial approach less persuasive.

D. Finding Illegality in a More Persuasive Manner

The ICJ proceeded to use its conclusion of de facto annexation in its argument that Israel was interfering in another territory in violation of article 2 of the U.N. Charter.²⁰⁵ The ICJ argued that Palestine's self-determination was being impeded.²⁰⁶ The ICJ further emphasized that international treaties which Israel has not signed but which have nonetheless become customary law imposed obligations on Israel to respect areas "outside its national territory."²⁰⁷ The ICJ then cited a lengthy list of violations by Israel until it finally arrived at the Israeli argument for self-defense, which it then dismissed.²⁰⁸

The High Court of Justice of Israel, however, after conceding to the Israeli government the military necessity for the security fence in the context of the belligerent occupation, applied the principle of proportionality in assessing the legality of Israel's actions.²⁰⁹ The High Court went a step further in its analysis than the ICJ and sought to rule on humanitarian concerns in the context of self-defense so as not to deny or ignore the legitimate security concerns expressed by the Israeli government concerning the impact of terrorism on Israel's civilian population. By analyzing the effects of each segment of the security fence's route on Palestinian inhabitants, the High Court did not call into focus the security objectives, but rather the extreme injury to Palestinian inhabitants. In a more persuasive manner, the High Court utilized the international principle of proportionality, albeit under Israeli law, in declaring Israel's actions illegal, so as not to deny Israel's legitimate security concerns regarding terrorism.

203. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, at 5-7 (July 9), <http://icj-cij.org>.

204. H.C. 2056/04, *Beit Sourik Vill. Council*, at 13.

205. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, at 35-36 (citing U.N. CHARTER art. 2).

206. *Id.* at 47.

207. *Id.* at 47-54.

208. *Id.* at 54-56.

209. *See generally* H.C. 2056/04, *Beit Sourik Vill. Council*, at 2-44.

The High Court also found that it did not have to deny legitimate security concerns regarding terrorism in deeming the Israeli government's construction and route of the barrier illegal. This approach by the High Court seemed to address the concern Judge Higgins, a respected international law scholar, had about the obligations of both the occupier and of those wishing to free themselves from occupation to protect civilians under humanitarian law.²¹⁰ By framing the construction and route of the barrier under belligerent occupation and analyzing Israel's self-defense claims under the principle of proportionality,²¹¹ the High Court of Justice of Israel was able to provide the more balanced opinion that Judge Higgins desired. Palestinian obligations to curb terror were addressed in the High Court decision, albeit indirectly, by the belligerent occupation status accorded to the issue of the barrier and by the concession the High Court made to the Israeli arguments of military necessity.²¹² Further, Israeli obligations to abide by international standards of human rights were addressed through the proportionality analysis.²¹³ The High Court's manner in addressing the obligations on both sides was not the most internationally legally precise manner, but it nevertheless provided a more comprehensive analysis on obligations by both sides than did the ICJ in its advisory opinion. Not having framed the issues under the context of both Palestinian suffering and Israeli security concerns over illegal Palestinian terrorism, the ICJ did not seem to adequately rebut Israel's defenses of military exigency and necessity.²¹⁴ Judge Buergenthal felt that the ICJ's "shallow, formalistic approach" ignored the issues of military necessity and proportionality, which he viewed to be at the heart of the dispute.²¹⁵ He appropriately noted in his declaration that, by failing to note or give consideration to the illegality of the terrorist attacks, the ICJ weakened its credibility and ultimately failed to adequately serve the humanitarian needs of the Palestinian people.²¹⁶ The ICJ alluded briefly to considering Israel's security concerns for its citizens only after largely condemning and dismissing

210. See generally Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (Higgins, J., concurring), at 5, <http://www.icj-cij.org>.

211. See *supra* Part IV.B.

212. H.C. 2056/04, *Beit Sourik Vill. Council*, at 21-22.

213. *Id.*

214. See *supra* Part V.C.

215. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (Buergenthal, J., Declaration), at 1, <http://www.icj-cij.org>.

216. *Id.*

Israel's construction of the barrier.²¹⁷ It avoided utilizing the label of terrorism.²¹⁸ The ICJ in its advisory opinion seemed to resort to the "unevenhanded formalism" Judge Higgins warned of in her separate opinion.

E. "Formalism of an Unevenhanded Sort"

The ICJ's "unevenhanded formalism" was most evident in its analysis of Israel's self-defense arguments. The ICJ considered the Israeli construction of the wall as "tantamount to de facto annexation" of another's territory, the equivalent of illegal intervention in another's territory, and an instrument that impinged on the self-determination of a separate legal entity.²¹⁹ But yet, for purposes of self-defense, the ICJ deemed Palestine a component of Israel.²²⁰ The ICJ seemed to disingenuously state that, because the threats to Israel came from the Occupied Territories under Israeli control, the Security Council resolutions condemning terrorism could not apply for purposes of self-defense.²²¹

Judge Higgins appropriately noted in her separate opinion that the ICJ was unpersuasive in declaring that an occupying power lost the right to defend its citizens from armed attacks merely because the armed attacks arose from the occupied territory itself.²²² This was especially ironic as the ICJ elsewhere in its advisory opinion had emphasized that the occupied territory was not annexed but was "other than Israel."²²³ Judge Higgins noted that Palestine could not function as a separate entity and enjoy an invitation to proceedings before the court while yet claiming that it is a part of Israel and, thereby, not subject to self-defense claims.²²⁴ This was a "formalism of an unevenhanded sort,"²²⁵ and responsibility should have been assigned for the groups sent to kill innocent Israeli civilians.

217. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, at 57, <http://www.icj-cij.org>.

218. *Id.*

219. *Id.* at 47.

220. *Id.* at 56.

221. *Id.*

222. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (Higgins, J., concurring), at 5.

223. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, at 1.

224. Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (Higgins, J., concurring), at 5.

225. *Id.*

VI. CONCLUSION

This is the destiny of a democracy—she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties.²²⁶

One could argue that the reason the ICJ may have been more sympathetic in its legal analysis is that Palestine cannot enjoy the privileges of a nation-state to adequately protect the interests of its people. The plight and suffering of Palestinians merit attention and action. The ICJ perhaps felt that since so many in the international community found Israel's actions so egregious, broad discretion in rendering an advisory opinion and only a minimal analysis of Israel's intentions and security concerns were appropriate. However, the ICJ lost sophistication as a primary organ of the United Nations and as one of the premier interpreters of international law in allowing Palestine to enjoy quasi-recognition as a state without requiring of it the obligations and responsibilities that recognition as a state among the nations of the world entails. The ICJ's dismissal of Israel's self-defense claims ultimately surfaced as shallow and unpersuasive.

The High Court of Justice of Israel provided a more legally appropriate solution. With objectivity and an adherence to international law despite domestic pressure, the High Court's decision was delivered convincingly because of its more balanced treatment of both sides of the conflict. The High Court, a domestic court, was able to analyze the issues in the context of international law without dismissing the concerns on each side of the conflict. By framing issues in the context of belligerent occupation, the High Court was able to address the security concerns of the Israeli government. The High Court was, by the same token, able to address Palestinian property rights and human rights by utilizing the principle of proportionality and by requiring Israel to abide by treaties and customary international law. By contrast, without addressing any of Israel's concerns about terrorism, the ICJ was quick to deem Israel's actions *de facto* annexation and swift to catalog Israel's violations of international law. This seemed to leave the impression that the ICJ yielded to political pressures rather than conducting a thorough and adequate legal analysis of the issues in the midst of an ever-present

226. H.C. 2056/04, *Beit Sourik Vill. Council*, at 44-45.

Israeli skepticism and reservations about the UN role in the Israeli-Palestinian conflict.

The High Court of Justice of Israel, an organ of democracy, exemplified adherence to the law in the face of domestic political pressures by bringing down the injustices of the barrier. With the recent democratic election of Mahmoud Abbas,²²⁷ the Palestinians have a new opportunity to achieve the statehood they have always desired. But with the privileges of statehood and democracy come the responsibilities of adherence to law. The ICJ, as a respected UN organ, failed to emphasize these responsibilities in its advisory opinion. The world hopes that the Palestinians as members of a democracy will be able to bring down the ever-present barrier of terrorism and unbridled violence.

227. John W. Anderson, *Abbas Seeks Revival of 'Road Map' Peace Plan; Palestinian Makes Appeal at Swearing-In*, WASH. POST, Jan. 16, 2005, at A1.