

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

INTERNATIONAL COURT OF JUSTICE
9 July General List No. 131 (2004)

Author's Note: As discussed in §9.4 of this book, this is an “advisory opinion.” Unlike an ICJ “contentious” case, it does not resolve a claim brought by one State against another. Instead, the UN General Assembly requested the court’s opinion on the legal status of Israel’s construction of a wall, in response to suicide bombings originating from the Palestinian territories.

The Court’s footnotes and certain citations to authority are omitted, as are most of the Separate Opinions of various judges (some of which will surface in the §9.4 treatment of the court’s advisory opinion jurisdiction).

Court’s Main Opinion:

1. . . . *The General Assembly,*

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice . . . to urgently render an advisory opinion on the following question:

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

6. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided . . . that those two international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements . . . and take part in the hearings.

18. Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General

Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

19. The . . . General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, . . . as a result of negative votes by a permanent member [US], of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory. By a letter of 31 March 1997, the Chairman of the Arab Group then requested “that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled ‘Uniting for Peace’” [textbook §3.3] with a view to discussing “Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory.” . . . Resolution ES-10/2 was adopted . . . ; the General Assembly thereby expressed its conviction that:

the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security,

and condemned the “illegal Israeli actions” in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory. . . .

. . . .

21. On 27 October 2003, the General Assembly adopted [a] resolution, by which it demanded that “Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law.” . . .

22. Meanwhile, . . . the Security Council adopted resolution 1515 (2003), by which it “*Endorse[d]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict”. The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations. That resolution

Call[ed] on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security.

Neither the “Roadmap” nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

68. The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law. . . . It will therefore make this determination before dealing with the consequences of the construction.

69. To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

70. Palestine was part of the Ottoman Empire. At the end of the First World War, a class “A” Mandate for Palestine was entrusted to Great Britain by the League of Nations . . . [textbook Problem 2.A] . . . , which provided that:

Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which “*Recommends* to the United Kingdom . . . and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition” of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. By resolution 62 (1948) of 16 November 1948, the Security Council decided that “an armistice shall be established in all sectors of Palestine” and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the “Green Line” owing to the colour used for it on maps; hereinafter the “Green Line”). Article III, paragraph 2, provided that “No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . .” It was agreed in Article VI, paragraph 8, that these provisions would not be “interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties”. It was also stated that “the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto”. The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the “Withdrawal of Israel armed forces from territories occupied in the recent conflict”, and “Termination of all claims or states of belligerency”.

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions “the principle that acquisition of territory by military conquest is inadmissible”, condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that: “all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status”. Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the “complete and united” capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that “all legislative and administrative measures and actions

taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void”. It further decided “not to recognize the ‘basic law’ and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”.

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States “with reference to the [Green Line] boundary definition under the Mandate as is shown in Annex I (a) . . . without prejudice to the status of any territories that came under Israeli military government control in 1967”. Annex I provided the corresponding maps and added that, with regard to the “territory that came under Israeli military government control in 1967”, the line indicated “is the administrative boundary” with Jordan.

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law . . . (hereinafter “the Hague Regulations of 1907”), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate [including the West Bank] were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above [including the Israeli law uniting Jerusalem, and designating it the capitol of Israel], have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. . . .

80. The report of the Secretary-General states that “The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank ...”

Furthermore, on 1 October 2003, the Israeli Cabinet approved a full route, which, according to the report of the Secretary-General, “will form one continuous line stretching 720 kilometres along the West Bank”.

81. . . . As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun. . . .

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

- (1) a fence with electronic sensors;
- (2) a ditch (up to 4 metres deep);
- (3) a two-lane asphalt patrol road;
- (4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
- (5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. “Depth barriers” may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as . . . parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. . . . In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli

settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the part of the West Bank lying between the Green Line and the wall as a “Closed Area”. Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law [applicable to individuals during an armed conflict] and human rights instruments [protecting individuals from arbitrary action by their own government]. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to 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.

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States” (hereinafter “resolution 2625 (XXV)”), in which it emphasized that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” . . .

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which “Every State

has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights [text§11.2] reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter. . . .

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907 [described in para. 78]. . . . Since then, however, the International Military Tribunal of Nuremberg has found that the “rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war”. . . . The Court considers that the provisions of the Hague Regulations have become part of customary law [binding nations without a treaty] , as is in fact recognized by all the participants in the proceedings before the Court.

. . .

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. . . .

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. . . .

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore

be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that:

the Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail.

. . .

97. Moreover, the Court would observe that the ICRC [Red Cross], whose special position with respect to execution of the Fourth Geneva Convention must be “recognized and respected at all times” by the parties pursuant to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that “the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem”.

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. . . .

99. The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that “all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War . . . should be complied with by the parties involved in the conflict”.

. . .

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

The military operations of the [Israeli Defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 . . . and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.

. . .

102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.

110. . . . In 2003 in face of Israel's consistent position, to the effect that "the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .", the Committee reached the following conclusion:

in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application.

[T]he Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .". That Convention is therefore applicable within the Occupied Palestinian Territory.

114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

115. In this regard, Annex II to the report of the Secretary-General, entitled "Summary Legal Position of the Palestine Liberation Organization", states that "The construction of the Barrier is an attempt to annex the territory contrary to international law" and that "The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination." . . . *Inter alia*, it was contended that: "The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force." In this connection, it was in particular emphasized that "The route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli settlements" illegally established on the Occupied Palestinian Territory. It was further contended that the wall aimed at "reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination".

116. For its part, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure. It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that “[the fence] does not annex territories to the State of Israel”, and that Israel is “ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement”. Israel's Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added: “As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way.”

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of “the inadmissibility of the acquisition of territory by war”. Thus in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed that:

the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement [*sic*] of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem.

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. . . .

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the “Closed Area” (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is

apparent from an examination of the map mentioned in paragraph 80 above that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." That 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.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of [Geneva Convention] Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices "have no legal validity". It has also called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention and:

to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories.

. . .

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

121. 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 (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

123. The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.

124. . . .

Section III of the Hague Regulations [“humanitarian” law] includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to “take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country”. Article 46 adds that private property must be “respected” and that it cannot “be confiscated”. Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

127. The International Covenant on Civil and Political Rights [“human rights” law] also contains several relevant provisions. . . .

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

Mention must also be made of Article 12, paragraph 1, which provides: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into Article 62 of the Treaty of Berlin of 13 July 1878. The Mandate for Palestine given to the British Government on 24 July 1922 included an Article 13, under which:

All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory . . .

Article 13 further stated: “nothing in this mandate shall be construed as conferring . . . authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed”.

In the aftermath of the Second World War, the General Assembly, in adopting resolution 181 (II) on the future government of Palestine, devoted an entire chapter of the Plan of Partition to the Holy Places, religious buildings and sites. Article 2 of this Chapter provided, in so far as the Holy Places were concerned:

the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens [of the Arab State, of the Jewish State] and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum.

Subsequently, in the aftermath of the armed conflict of 1948, the 1949 General Armistice Agreement between Jordan and Israel provided in Article VIII for the establishment of a special committee for “the formulation of agreed plans and arrangements for such matters as either Party may submit to it” for the purpose of enlarging the scope of the Agreement and of effecting improvement in its application. Such matters, on which an agreement of principle had already been concluded, included “free access to the Holy Places”.

This commitment concerned mainly the Holy Places located to the east of the Green Line. However, some Holy Places were located west of that Line. This was the case of the Room of the Last Supper and the Tomb of David, on Mount Zion. In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, “Each party will provide freedom of access to places of religious and historical significance.”

. . .

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. . . .

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank's most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus grows and hothouses upon which tens of thousands of Palestinians rely for their survival.

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region" and adds that "Many fruit and olive trees had been destroyed in the course of building the barrier." The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall "cuts off Palestinians from their agricultural lands, wells and means of subsistence". . . .

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that "According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks." . . .

At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region.

. . .
135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances. . . .

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition

in . . . the Fourth Geneva Convention were rendered absolutely necessary by military operations.

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.

138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence . . .”. More specifically, Israel’s Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that “the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter”. . . .

139. Under the terms of Article 51 of the Charter of the United Nations:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. . . .

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. . . . However, the Court will not need to consider that question. In the light of

the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

. . . .

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding . . . that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem.

. . . .

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. . . .

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

. . . .

162. The Court . . . considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize

that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides The “Roadmap” approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

163. For these reasons,
The Court,

. . .

(3) *Replies* in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

. . .

against: *Judge Buergenthal* [US];

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

. . .

against: *Judge Buergenthal*;

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

. . .

against: *Judge Buergenthal*;

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

...

against: *Judges Kooijmans, Buergenthal;*

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

...

against: *Judge Buergenthal.*

...

DECLARATION OF JUDGE BUERGENTHAL

1. Since I believe that the Court should have exercised its discretion and declined to render the requested advisory opinion, I dissent from its decision to hear the case. My negative votes with regard to the remaining items of the *dispositif* should not be seen as reflecting my view that the construction of the wall by Israel on the Occupied Palestinian Territory does not raise serious questions as a matter of international law. I believe it does, and there is much in the Opinion with which I agree. However, I am compelled to vote against the Court's findings on the merits because the Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case.

...

5. Whether Israel's right of self-defence is in play in the instant case depends, in my opinion, on an examination of the nature and scope of the deadly terrorist attacks to which Israel proper is being subjected from across the Green Line and the extent to which the construction of the wall, in whole or in part, is a necessary and proportionate response to these attacks. As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not.

...

SEPARATE OPINION OF JUDGE ELARABY

. . .

The establishment of “a just and lasting peace”, as called for in Security Council resolution 242, necessitates the full implementation of the corresponding obligations by the two parties. The Advisory Opinion should herald a new era as the first concrete manifestation of a meaningful administration of justice related to Palestine. It is hoped that it will provide the impetus to steer and direct the long-dormant quest for a just peace.

SEPARATE OPINION OF JUDGE OWADA

. . .

31. It is to my mind important in this context that the issue of mutual resort to indiscriminate violence against civilian population should be looked at. Without going into the question of what is the causal relationship between the tragic acts of mutual violence resorted to by each of the parties and the question of whether the so-called terrorist attacks by Palestinian suicide bombers against the Israeli civilian population should be blamed as constituting a good enough ground for justifying the construction of the wall, I believe it is beyond dispute that this tragic circle of indiscriminate violence perpetrated by both sides against innocent civilian population of each other is to be condemned and rejected as totally unacceptable. While it is true that this is not an issue expressly referred to as part of the specific question put to the Court, I believe it should only be natural that this factor be underlined as an important segment of the Opinion of the Court in dealing with the issue of the construction of the wall. This point to my mind is of particular relevance from the viewpoint that the Court should approach the subject-matter in a balanced way.

Notes & Questions

1. Paragraph 72 indicates that the 1949 Israel-Jordan “Green Line” is, essentially, *not* carved into stone. If the 2004 ICJ was concerned about this case’s Palestinian Wall constituting an annexation by Israel, would it have been better for the court to consider the Green Line as the legal boundary? On the other hand, could a court resolve this boundary demarcation—in an advisory opinion, where the court does not have Israel appearing as a litigant in the proceedings?

2. As you will study in Chapter 10 on Use of Force: (a) “International Humanitarian Law” governs what State X does, in relation to people located in State Y; and (b) “International Human Rights Law” governs State X’s internal relations with people located in State X. Why did the ICJ apply human rights law—

such as the International Covenant on Civil and Political Rights—to the Palestinian territory (east of the Green Line)?

3. Paragraphs 116 (and Judge Buergenthal’s opinion) speak to Israel’s claim that its sole purpose for the Wall is not to annex territory, but to “combat terrorist attacks launched from the West Bank.” Was Israel being unreasonable in choosing this device, as opposed to other military alternatives? Given the decades of misery endured by both sides to this conflict—as noted in the various opinions in this case, is it likely that this Wall will remain a “temporary measure?”

4. Commencing with para.138, the Court addresses Israel’s reliance on its right of self-defense, pursuant to Article 51 of the UN Charter (the scope of which will be addressed in detail, in §10.2 of this book). The ICJ denied this claim, because of the threat emanating from *within* territory long-controlled by Israel. In Iraq, the US is facing “Jihadists” who are crossing over Iraq’s porous borders to aid the insurgents. All of whom want the US to leave Iraq. The US says that it has turned over “full” sovereignty to Iraq. US and Iraqi military and civilian personnel are dying every day. Could the US properly build a “Palestinian Wall” around *Bagdad’s* Green Line, to protect key US individuals and installations within that zone? Would this be a better or a worse case under the ICJ’s decision, for such a “temporary measure” to “combat terrorist attacks” launched from outside of Iraq?

5. Shortly after this case was decided, the UN General Assembly approved a resolution, that overwhelmingly demanded that Israel abandon this separation barrier and compensate affected Palestinians (150 in favor, 6 against, and 10 abstentions). The Secretary-General was asked to compile a registry of claims to facilitate carrying out this judgment. The Palestinian observer to the UN hailed the outcome of the ICJ decision as “magnificent.” Israel’s representative lamented the Court’s failure to appreciate that “If there were no terrorism, the anti-terrorism fence—that has proven to enhance the security of Israeli citizens—would not have been built.” See W. Hoge, Remove Wall, Israel is told by the U.N., NYT on the Web (July 21, 2004). The ICJ’s response will be “magnificent,” only if *both* sides have much to gain from its removal.

6. A few days before the ICJ’s July 9, 2004 ruling, the Israeli Supreme Court ruled that the barrier was legal—whether built inside or outside of the 1967 Arab-Israeli War’s borders. It did order a change in route, however. In August 2004, the Supreme Court ordered the government to produce a statement that would assess the ramifications of the ICJ’s ruling. See S. Erlanger, Israeli Court Orders Assessment of West Bank Barrier, NYT on the Web (Aug. 20, 2004).