

## Smoke, Mirrors and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall

By Iain Scobbie\*

*There is no security without law. Satisfying the provisions of the law is an aspect of national security.*

-- President Barak, Israel High Court of Justice  
*Beit Sourik Village Council v. Govm of Israel* (30 June 2004)

### A. Introduction

One of the consequences of the method the International Court of Justice employs to draft its pronouncements is that, at times, its reasoning is less candid than one might desire. The Court's advisory opinion on *the Legal consequences of the construction of a wall in the Occupied Palestinian Territory of 9 July 2004*<sup>1</sup> provides a clear example. To reach unanimity, or near unanimity, on the points decided, one can only assume that the judges bargained hard over the discursive normative component of the Opinion. In places, the Court's reasoning is sparse, as Judge Higgins noted in relation to the Court's finding that Israel has breached international humanitarian law:

It might have been expected that an advisory opinion would have contained a detailed analysis, by reference to the texts, the voluminous academic literature and the facts at the Court's disposal...Such an approach would have followed the tradition of using advisory opinions as an opportunity to elaborate and develop interna-

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<sup>1</sup> The text of the Opinion, and the representations made to the Court during the course of the proceedings, with the exception of Israel's submission that Judge Elaraby should be disqualified (see the Court's 30.01.04 Order on the composition of the Court, and Opinion para.8), may be found on the Court's website ([www.icj-cij.org](http://www.icj-cij.org)). For a concise summary of the Opinion, with comments on its significance, see Akram SM and Quigley J, *A reading of the International Court of Justice advisory opinion on the legality of Israel's wall in the Occupied Palestinian Territories*, at [www.palestinecenter.org](http://www.palestinecenter.org). The Court itself also issued press releases, which summarised the content of the Opinion, see ICJ Communiqué 2004/28 and Summary 2004/2. These are also available on the Court's website.

tional law.<sup>2</sup>

Judge Higgins' observation holds true beyond the confines of the Court's discussion of this issue. It is, however, equally true that the Opinion contains well-reasoned conclusions on important points of principle, such as Israel's obligation to observe humanitarian and human rights law in the Occupied Palestinian Territory.

### **B. The Anatomy of the Opinion**

Before considering the drafting process, however, it is as well to recall both the question posed for the Court's Opinion by the General Assembly in resolution ES-10/14 and the *dispositif* of the Opinion to indicate its rough anatomy. The question posed provided:

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?

In its *dispositif*, the Court:

1. unanimously, found that it had jurisdiction to give the advisory opinion;<sup>3</sup>
2. by 14-1 (Buergenthal), decided to comply with the request for an advisory opinion;
3. replied to the question posed by the General Assembly as follows:
  - A. by 14-1 (Buergenthal), Israel's construction of the wall<sup>4</sup> in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

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<sup>2</sup> Separate opinion of Judge Higgins, para.23.

<sup>3</sup> The judges taking part in the Opinion were President Shi; Vice-President Ranjeva; and Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma and Tomka.

<sup>4</sup> The term to be used to refer to the barrier/fence/wall was a matter of some controversy in the proceedings. In its written statement, Israel contended (para 2.7) that:

B. by 14-1 (Buergenthal), Israel is under an obligation to terminate its breaches of international law: it is under an obligation to cease “forthwith” the construction of the wall in the Occupied Palestinian Territory, dismantle existing parts situated there, and repeal or render ineffective all related legislative or regulatory acts;

C. by 14-1 (Buergenthal), Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory;

D. by 13-2 (Buergenthal and Kooijmans), all States are under a duty not to recognise the illegal situation resulting from the construction of the wall and also not to render aid or assistance in maintaining the situation resulting from its construction; all States parties to 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War also have an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in Geneva Convention IV;

E. by 14-1 (Buergenthal), the UN, and especially the General Assembly and Security Council, “should” consider what further action is required to bring to an end the illegal situation arising from the construction of the wall “taking due account of the present Advisory Opinion”.

These voting figures, to an extent, give a false impression of what the Court as a whole actually decided. Judge Buergenthal cast negative votes against the merits findings in the *dispositif* because he thought that the Court did not have before it adequate factual information to decide these questions properly,<sup>5</sup> and that accordingly the Court should have exercised its discretion and declined to entertain the

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The use of the term “wall” in the resolution requesting an opinion is neither happenstance nor oversight. It reflects a calculated media campaign to raise pejorative connotations in the mind of the Court of great concrete constructions of separation such as the Berlin Wall, intended to stop people escaping tyranny. The reality, however, is different.

On this the Court commented (para.67):

The Court also refers to the “wall, and its associated régime” in the Opinion to designate the structure and its associated roads and ditch. See para.82. To maintain consistency with the Court, the term “wall” shall be used in this paper.

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<sup>5</sup> Declaration of Judge Buergenthal, paras.1 and 10.

case.<sup>6</sup> Nevertheless, the points on which Judge Buergenthal agreed with the Court are as, if not more, significant than those issues to which he formally entered his dissent. He expressly agreed with much of the content of the Opinion, in particular, that international humanitarian law, including Geneva Convention IV, and international human rights law are applicable in the Occupied Palestinian Territory;<sup>7</sup> that the Palestinian people have a right of self-determination which must be fully protected;<sup>8</sup> and that Israeli settlements in the Occupied Palestinian Territory are unlawful as they breach Geneva Convention IV, Article 49.6.<sup>9</sup> The importance of this cannot be over-emphasised. On the fundamental points of principle that structure the legal framework of the relationship between Israel and Palestine, the Court was unanimous.

Conversely, there are significant issues indicated in the body of the Opinion on which the Court did not issue a formal ruling. Other issues canvassed in the representations made to the Court were completely ignored. It can only be a matter of speculation why the Court chose not to determine these issues. Perhaps rulings on these matters might have threatened to disrupt the near unanimity recorded in the *dispositif*, or the Court might have thought that they were extraneous to the economy of its answer, or that they might prove to be explosively contentious in the political reception of the Opinion. For instance, one may well wonder whether EU member States, and others, would have voted in favour of General Assembly resolution ES-10/18 (20 July 2004),<sup>10</sup> which, *inter alia* called upon Israel to implement the Opinion, had it contained formal findings that Israel and the States parties to Geneva Convention IV should undertake criminal prosecutions of Israeli officials for grave breaches of the Convention under Article 147.<sup>11</sup> Judge Elaraby, for one, regretted that the Court chose not to do so.<sup>12</sup>

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<sup>6</sup> An analysis of the Court's assertion of competence in these proceedings is beyond the scope of this paper. For a discussion of some of these issues, written before the Opinion was delivered, see Scobbie I, *Legal consequences of the construction of a wall in Occupied Palestinian Territory: request for an advisory opinion. An analysis of issues of competence and procedure*, at [www.soas.ac.uk/lawpeacemideast](http://www.soas.ac.uk/lawpeacemideast). A revised version of this paper will appear in due course.

<sup>7</sup> Declaration of Judge Buergenthal, para.2.

<sup>8</sup> *Id.* at para.4.

<sup>9</sup> *Id.* at para.9.

<sup>10</sup> Adopted 150-6: 10 abstentions. The States casting negative votes were Australia, the Federated States of Micronesia, Israel, the Marshall Islands, Tuvalu and the United States.

<sup>11</sup> In paras.145 and 146 of the Opinion, the Court noted that it had been argued that prosecutions for grave breaches could take place as a consequence of the construction of the wall, but it makes no further reference to this. Prosecutions for grave breaches were raised as a possible consequence by, for instance, France (written statement para.42) and Ireland (written statement para.2.8). The Court's silence on this

### C. Killer Whales in the Hague

This illustrates the point that to conceive any pronouncement of the International Court as monolithic is to commit the logical fallacy of composition: members of a group may, and often do, reach the same conclusion for different reasons. The International Court is a collegiate court whose pronouncements amalgamate the views of its bench of judges. It has no collective mind, but rather the minds of fifteen judges, all of whom contribute to the drafting of the Court's pronouncements. This is essentially a bargaining process between the judges, which aims to gain a majority for an agreed text. Unlike the deliberative practice of many, if not most courts, the structure of this process is transparent: it is set out in the *Resolution concerning the Internal Judicial Practice of the Court* adopted in 1976.<sup>13</sup> There have also been numerous commentaries on the Court's deliberative and drafting process, including some written by judges,<sup>14</sup> and by senior members of the Registry.<sup>15</sup> The bargaining inherent in the drafting of the Court's pronouncements can result in texts that are less candid than they could be, cast in "laconic and elliptic drafting,"<sup>16</sup>

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question, of course, does not preclude the possibility of prosecutions should the requirements of Article 147 be met. Indeed, Article 146 makes this an obligation for the High Contracting Parties.

<sup>12</sup> Separate opinion of Judge Elaraby, para.3.3.

<sup>13</sup> This is posted on the Court's website ([www.icj-cij.org](http://www.icj-cij.org)). To compare the 1976 resolution with the Court's previous practice, see G. Guyomar, *La révision par la CIJ de la résolution visant la pratique interne de la Cour en matière judiciaire*, 22 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 116 (1976); G. GUYOMAY, COMMENTAIRE DU REGLEMENT DE LA COUR INTERNATIONALE DE JUSTICE ADOPTÉE LE 14 AVRIL 1978: INTERPRÉTATION ET PRATIQUE 75 *et seq* (1983); R.B. Lillich and G.E. White, *The deliberative process of the International Court of Justice: a preliminary critique and some possible reforms*, 70 AMERICAN JOURNAL OF INTERNATIONAL LAW 28 (1976); and S. ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT 225 *et seq.* (1983).

<sup>14</sup> For instance, A. Gros, *La recherche du consensus dans les décisions de la Cour internationale de Justice*, in VÖLKERRECHT ALS RECHTSORDNUNG INTERNATIONALE GERISCHTSBARKEIT MENSCHENRECHTE: Festschrift für Herman Mosler (R. Bernhardt *et al* eds., 1983) 351; R.Y. Jennings, *The internal judicial practice of the International Court of Justice*, 59 BRITISH YEARBOOK OF INTERNATIONAL LAW 31 (1988); R.Y. Jennings, *The collegiate responsibility and authority of the International Court of Justice*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 343 (Y. Dinstein ed., 1989); M. Lachs, *Le juge international à visage découvert (les opinions et le vote)*, in II ESTUDIOS DE DERECHO INTERNACIONAL: HOMENAJE AL PROFESOR MIAJA DE LA MUELA 939 (A. Mostaza eds., 1979); S. Oda, *The International Court of Justice viewed from the bench (1976-1983)*, 244 RECUEIL DES COURS 9 (1993-VIII) 126; S. Petren, *Forms of expression of judicial activity*, in II THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 455 (L. Gross ed., 1976).

<sup>15</sup> For instance, E. Hambro, *The reasons behind the decisions of the International Court of Justice*, 7 CURRENT LEGAL PROBLEMS 212 (1954).

<sup>16</sup> *Id.* 223.

and expressing only the lowest common denominator of judicial opinion.<sup>17</sup> It has been said that the first draft of a pronouncement produced for adoption by the Court:

suffers the fate of a whale attacked by a school of killer-whales which tear big chunks of flesh from its body. Sometimes only a skeleton is left for the second reading.<sup>18</sup>

The nature of the drafting process means that the pronouncement – in the present case, the advisory opinion – is not the product of a single mind, but of fifteen. Even if a judge, or judges, dissent from the majority view, their objections will nonetheless exert an influence on the formulation of the majority's text.<sup>19</sup> Further, if a judge dissents from the majority – whether from its conclusion or from its reasoning in whole or in part – he, or she, may write a separate or dissenting opinion which is appended to the Court's Opinion.<sup>20</sup> These individual opinions are often more cogently argued than that of the Court, simply because they are the product of a single mind or of a small group of like-minded judges, as opposed to the more diffuse expression of the consensus reached by the majority. Accordingly:

the judgment [or advisory opinion] can...be amended so as to deal specifically with arguments and comments made in separate opinions. But it also means that a draft separate or dissenting opinion can also target a particular part of the draft judgment. If the drafting committee and/or the Court considers the attack to be so cogent as seriously to weaken or even destroy that part of the draft judgment, it gives itself time and opportunity to amend that part of the draft, or maybe to dispense with it altogether, thus removing the target that has been damagingly at-

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<sup>17</sup> Lachs employs the phrase "un dénominateur commun." See, Lachs, *supra* note 14 at 949. Hambro employs the perhaps more optimistic "highest common factor." See, Hambro, *supra* note 15 at 222.

<sup>18</sup> Petren, *supra* note 14 at 450-451.

<sup>19</sup> For an alleged example of this, see E. Hambro E, *Dissenting and individual opinions in the International Court of Justice*, 17 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT 229, 247 (1956-57); E. Hambro, *The Ihlen declaration revisited*, in GRUNDEPROBLEME DES INTERNATIONALEN RECHTS: Festschrift für JEAN SPIROPOULOS 227 (DS Constantopoulos *et al* eds., 1957).

<sup>20</sup> Article 57 of the Statute of the Court provides:

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

For commentary, see, e.g., S. ROSENNE, III THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 1579 *et seq.* (3<sup>rd</sup> ed. 1997); I. HUSSAIN, DISSENTING AND SEPARATE OPINIONS AT THE WORLD COURT (1984).

tacked...[S]ome of the most cogent and effective passages in separate opinions or dissents may never see the light of day, because they have, at an earlier stage, fully accomplished their work in modifying the judgment itself. Indeed, where an argument on its merit has enjoyed this kind of success, an emasculated remnant in the form of a somewhat lame passage of the judgment without any immediate apparent object may well be what eventually meets the eye of the attentive student of the *Reports* and probably puzzles him to understand its intent.<sup>21</sup>

It is simply the case that the need to search for judicial consensus brings with it the ever-present potential consequence that the Court's pronouncements sometimes lack candour and transparency.

#### D. Assertions and Absent Arguments

The *Wall* advisory opinion is a case in point, which is perhaps problematic in such a wide-ranging and significant Opinion. In some places, much rests on little more than assertion rather than on reasoned argument. For instance, the – admittedly unexceptional – finding that the Palestinian people have the right to self-determination is reached rather abruptly. The Court simply asserts that “[a]s 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,” and then notes that Israel recognised the Palestine Liberation Organisation as “the representative of the Palestinian people” in an exchange of notes of 9 September 1993. It continued:

The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its ‘legitimate rights’...The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions.<sup>22</sup>

On the other hand, more detailed justification is given for issues, which were more contentious, such as the rejection of the Israeli Government's denial that Geneva Convention IV applies *de iure* to the Occupied Palestinian Territory.<sup>23</sup>

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<sup>21</sup> Jennings, *supra* note 14 at 349-350.

<sup>22</sup> Opinion, para.118.

<sup>23</sup> See Opinion, paras.90-101. The position of the Government of Israel contradicts that of the Israel Supreme Court, sitting as the High Court of Justice, in cases involving the Occupied Territory, which has held Geneva Convention IV to be applicable, but not justiciable as it has not been incorporated into Israeli law. The Court noted the position of the Israel High Court in para.100, and also, in para.93, that when the IDF took control of the West Bank, the military commander assumed all governmental powers and issued an order that made proceedings before military courts subject to Geneva Convention IV.

Nevertheless, in places the meagreness of discursive justification causes the Opinion to appear devoid of any discernable elaboration of the rules and principles of international law at issue. For instance, in the section, which considers the legal consequences for third States of the internationally wrongful acts arising from Israel's construction of the wall,<sup>24</sup> the Court simply opines:

With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' ...", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996(I)*, p.257, para.79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.<sup>25</sup>

This ruling is a prelude to the Court's conclusion that third States are under a duty not to recognise "the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory."<sup>26</sup> Yet it is difficult, if not impossible, for those of us not blessed with psychic abilities to determine the specific import of this ruling on the normative status of specific rules of humanitarian law. Which of these rules have *erga omnes* status – does this category include, for instance, the provisions for civilian internees' recreation in Article 94 of Convention IV?

There are also, to use former President Jennings' phrase, more than a few "emasculated remnants" whose import might puzzle the reader. For instance, in its discussion of the legality of the wall under the 1907 Hague Regulations, the Court asserts:

With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with "means of injuring the

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This order was subsequently revoked, as the IDF view that the Territory was occupied was incompatible with the expansionist stance adopted by many Israeli politicians. See D. KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 32-35 (2002), and Chapter Two generally.

<sup>24</sup> Opinion, paras.154-160.

<sup>25</sup> Opinion, para.157.

<sup>26</sup> Opinion, para.159. Judge Higgins argued that the invocation of *erga omnes* obligations to justify the conclusion that a duty of non-recognition exists was superfluous and, in particular, that the claimed *erga omnes* nature of rules of humanitarian law was irrelevant in this connection – see her separate opinion at paras.37-39.

enemy, sieges, and bombardments". Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and Article 23(g) of the Regulations, in Section II, is thus not pertinent.<sup>27</sup>

This, again, is an unexceptional ruling,<sup>28</sup> but an explanation of the relevance of Article 23(g) is absent. A simple reference to the Secretary-General's Report prepared pursuant to General Assembly resolution ES-10/13 would have clarified this point. Annex I sets out the summary legal position of the Government of Israel on the wall, and para.2 provides:

Israel's Parliament has not incorporated the Hague Regulations into domestic legislation; however, Israeli authorities have relied on article 23 (g) of those Regulations, which permits the seizure of property if demanded by the necessities of war.<sup>29</sup>

The Israel High Court has also relied, *inter alia*, on Article 23.g to justify the acquisition of land for the construction of the wall. In *Beit Sourik Village Council v Government of Israel and Commander of the IDF Forces in the West Bank*, President Barak ruled:

our opinion is that the military commander is authorized – by the international law applicable to an area under belligerent occupation – to take possession of land, if this is necessary for the needs of the army. See articles 23(g) and 52 of [the Regula-

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<sup>27</sup> Opinion, para.124.

<sup>28</sup> For instance, the Special Criminal Court of the Hague *In re Fiebig* (1949) ruled that:

it was evident that the provisions of Section II remained in operation so long as there was still active war between the invading forces and the forces of the invaded country, a period which ends with a capitulation or an armistice... After such a capitulation or armistice, while the war may continue elsewhere, it is Section III and no longer Section II which regulates the rights and obligations of the invader as Occupant.

(16 ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 487 at 489). This relationship between the two Sections has also been affirmed by publicists (*see, e.g.*, C.C. HYDE, III INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1892-93 (2d rev. ed. 1951); L. OPPENHEIM, II INTERNATIONAL LAW: A TREATISE -- DISPUTES, WAR AND NEUTRALITY 412-417 (H. Lauterpacht ed., 7<sup>th</sup> ed. 1952) 412-417; G. SCHWARZENBERGER, II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS,-- THE LAW OF ARMED CONFLICT 266 (1968)) and by the ICRC Commentary to Article 53 of Geneva Convention IV, *in* COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 301 (J. Pictet ed., 1958). The Court's practice, however, makes it unlikely that it would refer expressly to the judgment of the Hague court, specific publicists, or the Pictet commentary.

<sup>29</sup> A/ES-10/248, Annex I, p.8, para.2.

tions annexed to] the Hague Convention [IV]; article 53 of the Fourth Geneva Convention.<sup>30</sup>

In the light of the Court's advisory opinion, Israel's reliance on Article 23.g has authoritatively been declared to be no longer legally tenable, but it should not be ignored that there are points of agreement between the two courts with regard to the wall. Both agree, for instance, that the Hague Regulations and Geneva Convention IV apply to the Occupied Palestinian Territory, and that the Palestinian inhabitants have the right to freedom of movement.<sup>31</sup>

#### E. Judge Kooijmans Dissents

Criticisms of the cogency of aspects of the Court's reasoning were made in some of the separate opinions lodged by individual judges, particularly by Judges Higgins and Kooijmans. For example, both raise concerns about the Court's handling of self-defence, and Judge Kooijmans' explanation of his dissent from paragraph 3.D of the *dispositif* repudiates its determination of obligations incumbent on third States. Although he thought that the question posed by the General Assembly did not require the Court to examine this matter, he conceded that this did not prevent it:

from considering the issue of consequences for third States once that act has been found to be illegal but then the Court's conclusion is wholly dependent upon its reasoning and not upon the necessary logic of the request. It is, however, this reasoning that in my view is not persuasive...I find the Court's conclusions as laid down in subparagraph (3)(D) of the *dispositif* rather weak; apart from the Court's finding that States are under an obligation "not to render aid or assistance in maintaining the situation created by [the] construction [of the wall]" (a finding I subscribe to) I find it difficult to envisage what States are expected to do or not to do in actual practice. In my opinion a judicial body's findings should have a direct bear-

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<sup>30</sup> HCJ 2056/04 (30 June 2004): opinion of President Barak, para.32: available at [www.court.gov.il](http://www.court.gov.il). This case considered whether the Commander of the Israel Defence Forces in the West Bank was legally authorised to construct the wall and, if so, whether certain sections of its route were lawful. President Barak noted that the parties' arguments had concentrated on the second issue, to the extent that the question of the wall's legality "did not receive full expression in the arguments before us" (para.25). On the basis of these arguments, the Israel High Court ruled that the petitioners had not demonstrated that the wall was unlawful (paras.26-32), and then proceeded to address the legality of its route in the areas is issue. Given the date of this judgment, it is probable that the International Court could not take it into account as the text of its Opinion would, by then, be in an advanced if not final form.

<sup>31</sup> For these findings by the Israel High Court, see Beit Sourik Village Council, paras.23 (applicable law) and 60 (freedom of movement).

ing on the addressee's behaviour; neither the first nor the last part of operative subparagraph (3)(D) meets this requirement.<sup>32</sup>

The criticism that findings should have a direct bearing on the addressee's behaviour is, perhaps, unduly stringent. Given the exigencies of the drafting process, particularly in proceedings like the instant where the point submitted for decision is open-ended, the only practically possible outcome might be for the Court to declare broad and relatively abstract legal rulings. It is probably easier for the Court to reach agreement to state detached legal principles rather than the precise consequences their application might have.

Further, even in contentious cases, the Court is loathe to dictate courses of conduct to States when the methods of compliance with its rulings are essentially at the parties' discretion. For instance, the *Haya de la Torre* case<sup>33</sup> was essentially an attempt by the parties to the earlier *Asylum* case<sup>34</sup> to obtain guidance as to how that judgment should be implemented. The Court had found that the diplomatic asylum extended to Mr Haya de la Torre by Colombia in its embassy in Lima was unlawful and should be terminated. In *Haya de la Torre*, the Court noted that its judgment in the *Asylum* case:

confined itself...to defining the legal relations which the Havana Convention had established between the Parties. It did not give any directions to the Parties, and entails for them only the obligation of compliance therewith. The interrogative form in which they have formulated their Submissions shows that they desire that the Court should make a choice amongst the various courses by which the asylum should be terminated. But these courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on conditions of practicability or of political expediency; it is not part of the Court's judicial

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<sup>32</sup> Separate opinion of Judge Kooijmans, para.1: paragraph breaks suppressed: see also paras.37-51. Paragraph 3.D of the *dispositif* provides:

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 with Israel with international humanitarian law as embodied in that Convention.

<sup>33</sup> ICJ Reports, 1951, 71.

<sup>34</sup> ICJ Reports, 1950, 266.

function to make such a choice.<sup>35</sup>

Accordingly, it is not surprising that the advisory opinion gave no tangible guidance regarding the practical consequences that the unlawful situation engenders, or the material steps that should be taken in response, by third States whose particular circumstances could not be foreseen by the Court. It was enough that the Court declare the duty of non-recognition and leave it to States to decide how to implement this in their specific relationship with Israel.

More cogent is Judge Kooijman's criticism of the Court's determination that States parties to Geneva Convention IV have an obligation to ensure that Israel complies with its provisions. He thought this conclusion difficult to accept.<sup>36</sup> In para.158 of the Opinion, the Court baldly declared:

The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

As Judge Kooijmans notes, no discursive justification was given for this finding and, drawing on the work of Professor Kalshoven,<sup>37</sup> that the *travaux préparatoires* do not support the imposition of an obligation on States, not party to a given conflict, to ensure that hostile States comply. Rather, the initial rationale for the inclusion of the "ensure respect" clause was as an undertaking by the High Contracting Parties that they guaranteed that their populations, and not simply State organs, officials and armed forces, would adhere to the requirements of the Convention.<sup>38</sup> He concluded:

Although I certainly am not in favour of a restricted interpretation of common Article 1, such as may have been envisaged in 1949, I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a state-

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<sup>35</sup> ICJ Reports, 1951, 79.

<sup>36</sup> Separate opinion of Judge Kooijmans, para.46.

<sup>37</sup> F. Kalshoven, *The undertaking to respect and to ensure respect in all circumstances: from tiny seed to ripening fruit*, 2 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3 (1999).

<sup>38</sup> Separate opinion of Judge Kooijmans, para.47.

ment of positive law. Since the Court does not give any argument in its reasoning, I do not feel able to support its finding. Moreover, I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic demarches.<sup>39</sup>

Judge Kooijmans' criticism of the technical presentation of this finding is well-founded: it is simply asserted rather than reasoned. Nevertheless, in contemplating that the only positive action States parties may take to ensure respect for Convention IV lies in diplomatic *démarches*, Judge Kooijmans appears to be unduly restrictive.

To confine ourselves initially to the text of Convention IV, it is at least arguable that its provisions for the prosecution of grave breaches placed on all High Contracting Parties by Article 146 and 147 is an element of the common Article 1 duty to "ensure respect". Yet, as we have seen, the Court consciously chose not to reaffirm this specific obligation in the text of the Opinion. Further, Article 148 of the Convention can also be seen as fleshing out the "ensure respect" obligation. This provides:

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches referred to in the preceding Article.

These provisions, however, provide only very circumscribed parameters to the "ensure respect" obligation. The Court axiomatically meant to give this duty a greater scope, unrelated to the criminal repression of infractions, but extending to the humanitarian guarantees afforded to protected persons by the Convention.

In this connection, it must be recalled that of the 192 High Contracting Parties to the 1949 Geneva Conventions, 161 are also parties to 1977 Additional Protocol I,<sup>40</sup> Article 1.1 of which reiterates the "ensure respect" obligation. Additional Protocol I, however, also provides in Article 89 that:

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

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<sup>39</sup> Separate opinion of Judge Kooijmans, para.50.

<sup>40</sup> Ratification statistics are available on the Swiss Government's website at <[www.eda.admin.ch/eda/f/home/foreign/intagr/train/iprotection.html](http://www.eda.admin.ch/eda/f/home/foreign/intagr/train/iprotection.html)>.

The provisions of Additional Protocol, as such, bind only its States parties but, nevertheless, Article 89 mandates remedial action which they must take when faced not merely with “serious” breaches<sup>41</sup> of the Protocol but also of the 1949 Conventions. As such it assigns specific content to their “ensure respect” obligation under common Article 1 of the Geneva Conventions. Moreover, it is possible that this should be construed as having a wider import as the terms of Article 89 were modelled on those of Article 56 of the UN Charter:

All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.

Article 55, *inter alia*, aims at ensuring “universal respect for, and observance of, human rights and fundamental freedoms for all” as these are necessary for “peaceful and friendly relations among nations”. The ICRC Commentary notes that the scope of the co-operation envisaged by Article 89 of the Protocol is limited to observance of the Conventions and Protocol, but that this aim is consonant with those of the United Nations – “Acting for the protection of man, also in time of armed conflict, accords with the aims of the United Nations no less than does the maintenance of international peace and security.”<sup>42</sup>

Further, when the “ensure respect” obligation, whether under common Article 1 of the 1949 Conventions or Article 1.1 of Additional Protocol I, is discharged in response to a prior breach committed by another State, its implementation must be in accordance with the law of State responsibility, but:

La question du type de mesures que chaque État, ainsi habilité et obligé de réagir, peut prendre en conformité avec le droit de la responsabilité de l’État pour fait internationalement illicite reste controversée.<sup>43</sup>

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<sup>41</sup> As the ICRC *Commentary* notes, “The meaning of the words ‘in situations of serious violations of the Conventions or of this Protocol’ was not elucidated during the Conference” but, by comparing the terms of Article 89 with Article 90, concludes that it “refers to conduct contrary to these instruments which is of a serious nature but which is not included as such in the list of ‘grave breaches.’” See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1033, paras. 3588-3592 (Y. Sandoz, C. Swinarski, and B. Zimmermann eds., 1987).

<sup>42</sup> See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 41 at 1034, paras.3595-3596 (quotation at para. 3596).

<sup>43</sup> M. SASSOLI AND A. BOUVIER, UN DROIT DANS LE GUERRE? 282 (2003). See *id.* at 282-284 generally. For exegeses of common Article 1, see COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, *supra* note 28 at 16; L. Condorelli and L.B. de Chazournes LB, *Quelques remarques à propos de l'obligation des États de «respecter et faire respecter» le droit international humanitaire «en toutes circonstances»,* in STUDIES AND ESSAYS IN HONOUR OF JEAN PICTET 17 (C. Swinarski ed., 1984); U. Palwankar, *Measures available to States for fulfilling their obligation to ensure respect*

It is possible that considerations pertaining to the implementation of this obligation lie behind the Court's otherwise oblique assertion of the *erga omnes* nature of the rules of international humanitarian law in para.157 of the Opinion.<sup>44</sup> Article 48.1 of the 2001 International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts provides:

Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- a. the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- b. the obligation breached is owed to the international community as a whole.

Further, Article 54 provides that any State entitled to invoke the responsibility of another under Article 48.1 may "take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached". This is a circumscribed provision, as State practice "is limited and rather embryonic."<sup>45</sup> In particular, the International Law Commission underlined that:

the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognised entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead Chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international

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*for international humanitarian law*, 298 INTERNATIONAL REVIEW OF THE RED CROSS 9 (1994), available at <[www.icrc.org](http://www.icrc.org)>; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 41 at 35-37. See generally, H.P. Gasser, *Ensuring respect for the Geneva Conventions and Protocols: the role of third States and the United Nations*, in EFFECTING COMPLIANCE 15 (H. Fox and M. Meyer eds.,1993). See also M. SASSÖLI AND A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 231-232 (1999).

<sup>44</sup> It should be recalled that Judge Higgins (separate opinion, para.39) thought that the invocation of the *erga omnes* nature of violations of humanitarian law in para.157 of the Opinion was "irrelevant."

<sup>45</sup> International Law Commission, commentary to Article 54, para.3 (reproduced in J. CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 302 (2002)).

law.<sup>46</sup>

Leaving to one side the question whether the existence of the “ensure respect” obligation could empower High Contracting Parties to take, in addition to any lawful action, otherwise unlawful action against a State, which is in breach of the Geneva Conventions and justify these as counter-measures, Palwankar observes that:

one of the most important means at States' disposal, at the international level, is precisely the United Nations. Moreover, any effective attempt by a State to ensure respect for international humanitarian law, especially in the event of massive violations, would be difficult, if not impossible, without the political support of the community of States, and the United Nations is one of the most widely used vehicles for such support in the contemporary world. This is implicitly recognized in Article 89 of Additional Protocol I.<sup>47</sup>

Accordingly, the precise modalities of the implementation of the duty to “ensure respect” are not limited to diplomatic *démarches*: collective action through the UN, or indeed other international organisations, remains a distinct possibility.

Regardless of the potential implications of common Article 1 for High Contracting Parties to Geneva Convention IV, the Court's elaboration of this obligation leaves much to be desired. Surely justification could have been provided simply by invoking customary rules of treaty interpretation as these are expressed in Article 31.3.a-b of the 1969 Vienna Convention on the Law of Treaties? This provides:

There shall be taken in account, together with the context:

- a. any subsequent agreement between the parties in regarding the interpretation of the treaty or the application of its provisions;
- b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

Arguably both exist regarding the “ensure respect” provision.

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<sup>46</sup> International Law Commission, commentary to Article 54, para.6 (reproduced in J. CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 302 (2002)).

<sup>47</sup> Palwankar 1994, text following n.12.

Numerous conflicts have impelled multitudinous unilateral calls by High Contracting Parties – in other words, diplomatic *démarches* – that the provisions of the Geneva Conventions should be observed by the hostile parties. Moreover, collective measures consonant with the interpretation of common Article 1 affirmed by the International Court have been taken repeatedly. For instance, preambular paragraph 9 of Resolution XXIII (Human rights and armed conflict) adopted by the Tehran International Conference on Human Rights on 12 May 1968 provided:

States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.<sup>48</sup>

Moreover, in relation to the observance by Israel of Convention IV in the Occupied Palestinian Territory, such calls have been made, repeatedly and virtually unanimously, by the principal UN political organs. For instance, operative paragraph 4 of General Assembly resolution 33/113A (18 December 1978), which was adopted by 140-1-1 abstention:<sup>49</sup>

*Urges once more* all States parties to [Geneva Convention IV] to exert all efforts in order to ensure respect for and compliance with the provisions thereof in all the Arab territories occupied by Israel since 1967, including Jerusalem.<sup>50</sup>

Similarly, to give but two further examples, in resolutions adopted regarding the first *intifadah*, both the Security Council (unanimously) and the General Assembly (141-2-3 abstentions) called upon the High Contracting Parties to Geneva Convention IV, in accordance with their obligations under common Article 1, to ensure respect for the Convention by Israel in the Occupied Palestinian Territory.<sup>51</sup> Final-

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<sup>48</sup> This resolution is available on the international humanitarian law database maintained on the ICRC website – <[www.icrc.org/ihl](http://www.icrc.org/ihl)>.

<sup>49</sup> The United States voted in favour of this resolution, *see* 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1575, 1581 (1980).

<sup>50</sup> The final preambular paragraph of this resolution made express reference to common Article 1, providing:

*Taking into account* that States parties to [Geneva Convention IV] undertake, in accordance with article 1 thereof, not only to respect but also to ensure respect for the Convention in all circumstances.

<sup>51</sup> Security Council resolution 681 (20 December 1990) and General Assembly resolution 45/69 (6 December 1990), adopted 141-2 (Israel; the United States) with 3 abstentions (Costa Rica; Dominica; Honduras).

ly, in the Declaration adopted by Conference of High Contracting Parties to the Fourth Geneva Convention on 5 December 2001, the participating States expressly affirmed this obligation.<sup>52</sup> These are all examples of subsequent practice engaged in by virtually all the High Contracting Parties to Geneva Convention IV, which indicate their interpretative understanding of their obligations under common Article 1. As such, by virtue of Article 31.3.b, this practice is probative, and serves to demonstrate the proper interpretation of that obligation.

Furthermore, Article 1.1 of 1977 Additional Protocol I, which “supplements the Geneva Conventions of 12 August 1949 for the protection on war victims,”<sup>53</sup> reiterates the Conventions’ common Article 1 obligation, providing:

The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

On this, the ICRC *Commentary on the Additional Protocols* recalls the position expressed in its Commentaries on the 1949 Conventions that common Article 1 requires that the High Contracting Parties should not only apply the Conventions themselves “but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.”<sup>54</sup> The Commentary on the Additional Protocols notes that this interpretation was not contested by States parties and that:

the Diplomatic Conference [which led to the adoption of Additional Protocol I] fully understood and wished to impose this duty on each Party to the Conventions, and therefore reaffirmed it in the Protocol as a general principle.<sup>55</sup>

Consequently, it is at least arguable that the re-inclusion of the “ensure respect” obligation in Additional Protocol I constitutes a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” in terms of Article 31.3.b of the 1969 Vienna Convention. It must be conce-

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<sup>52</sup>This declaration is posted at <<http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc.html>>.

<sup>53</sup> 1977 Additional Protocol I, Article 1.3: it must be noted that Israel is neither a signatory nor party to Additional Protocol I.

<sup>54</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 41 at 36, para. 42. For the relevant passage regarding Convention IV, *see* COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, *supra* note 28 at 16..

<sup>55</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 41 at 36, para. 43-44..

ded that Israel is neither a signatory nor party to Additional Protocol I, but surely this interpretative agreement must bind – at the very least – its 161 States parties in their application of the 1949 Geneva Conventions. This constitutes the overwhelming majority of the 1949 Conventions' 192 States parties.

One can only speculate why the Court did not include in its Opinion some argumentation along these lines which would, perhaps, have relieved some of the misgivings felt by Judge Kooijmans regarding the validity of the Court's statement of the "ensure respect" obligation. It does not, however, fully address his concern that "a judicial body's findings should have a direct bearing on the addressee's behaviour". Be that as it may, determination of the precise modalities of the implementation of the duty to "ensure respect" appear to raise similar considerations to those identified by the Court in *Haya de la Torre*. The specific measures adopted by States must be dependent on "conditions of practicability or of political expediency" which lie beyond the Court's judicial function.

#### **F. Israel's Plea of Self-defence**

Judge Kooijmans, as well as Judge Higgins, also criticised the Court's analysis of Israel's claim that it was acting in self-defence in constructing the wall. This is a more serious matter than the absence of justification for the "ensure respect" obligation because it goes to matters of substance, which have wide-reaching implications. These have a two-fold nature. Within the narrow context of the Opinion, self-defence is an issue, which raises the question of whether there exist circumstances that preclude the wrongfulness of Israel's action. Beyond the confines of the Opinion, however, the question of self-defence is much more significant: it concerns the legal framework governing the conduct of Israel in its administration of the Occupied Palestinian Territory.

After ruling that Israel's construction of the wall constitutes an international delict, the Court continued:

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 and Security Council resolutions 1368 (2001) and 1373 (2001)". More specifically, Israel's Permanent Representative to the United Nations asserted...that...the Security Council resolutions referred to..."have clearly recognized the right of States to use force in self-defence against terrorist attacks", and therefore surely recognized the right to use non-forcible measures to that end (A/ES-10/PV.21, p.6).<sup>56</sup>

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<sup>56</sup> Opinion, para.138.

A well-founded plea of self-defence would preclude the wrongfulness of Israel's acts,<sup>57</sup> but the Court rejected this claim fairly abruptly. Recalling the terms of Article 51, it argued that this recognised "an inherent right of self-defence in the case of an armed attack by one State against another State". It noted that Israel did not claim that the attacks against it were imputable to another State. Further, Israel exercised control over the Occupied Palestinian Territory, and had itself claimed that the threat to which the wall was a response arose in that territory. The Court ruled that this meant that the situation was therefore different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and thus Israel could not invoke these resolutions to support its claim that it was acting in self-defence. Therefore the Court concluded that Article 51 of the Charter was irrelevant in this case.<sup>58</sup>

It must be acknowledged that the Court's rejection of the relevance of self-defence is weak. It may have been that the Court was hampered by Israel's refusal to make representations on the merits of the case, but this cannot account fully for the meagre justification offered by the Court. This ruling has been rapidly rejected by some States. For instance, in explaining its member States' votes in favour of General Assembly resolution ES-10/18 on 20 July 2004, the European Union noted that the Opinion largely coincided with its position on the legality of the wall, but:

The European Union will not conceal the fact that reservations exist on certain paragraphs of the Court's Advisory Opinion. We recognize Israel's security concerns and its right to act in self-defence.<sup>59</sup>

It has also attracted criticism from Judges Higgins and Kooijmans. While both accepted the accuracy of the Court's ruling that self-defence under Article 51 contemplates an attack by one State upon another as a matter of positive international law, both also expressed misgivings.

Judge Kooijmans thought that this ruling was "beside the point", and ignored the "new element" introduced by resolutions 1368 and 1373 - namely, the Security Council's characterisation of acts of international terrorism as threats to internatio-

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<sup>57</sup> This is re-affirmed in Article 21 of the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>58</sup> Opinion, para.139.

<sup>59</sup> Bulgaria, Romania, Turkey and Croatia (EU candidate States), Albania, Bosnia and Herzegovina, Macedonia, Serbia and Montenegro (potential candidates for EU membership) and Iceland (as a member of the European Economic Area) aligned themselves with this statement made on behalf of EU member States.

nal peace and security which would authorise it to act under Chapter VII of the Charter:

This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.<sup>60</sup>

For her part, Judge Higgins noted that the text of Article 51 does not state that an armed attack justifying self-defence must emanate from a State, but rather that this requirement arose from the Court's judgment in the *Nicaragua* case.<sup>61</sup> Although she conceded that this must "be regarded as a statement of the law as it now stands," Judge Higgins retained her reservations about the rationality of this position.<sup>62</sup> Given the contemporary instigation of acts of terrorism by non-State actors, it does seem odd that the Court should restrain self-defence within a Statist paradigm. Nevertheless, this issue need not detain us. There are surer grounds on which to reject self-defence as irrelevant.

Judge Kooijmans concurred with the second part of the Court's reasoning: that resolutions 1368 and 1373 refer to international terrorism as constituting threats to international peace and security. He concluded that these resolutions "therefore have no immediate bearing on terrorist acts originating with a territory which is under the control of the State which is also the victim of these acts", and therefore Israel could not invoke Article 51.<sup>63</sup> Judge Higgins is undoubtedly correct when she classified this aspect of the Court's reasoning as "formalism of an unevenhanded sort." She commented:

I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory – a territory which it has found not to have been annexed and is certainly "other than" Israel.<sup>64</sup>

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<sup>60</sup> Separate opinion of Judge Kooijmans, para.35.

<sup>61</sup> See *Military and paramilitary activities in and against Nicaragua case: merits judgment*, ICJ Reports, 1986, 14 at 103, para.195.

<sup>62</sup> Separate opinion of Judge Higgins, para.33. Judge Higgins' objections to the ruling in the *Nicaragua* case are set out in R. HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 250-251 (1994).

<sup>63</sup> Separate opinion of Judge Kooijmans, para.36.

<sup>64</sup> Separate opinion of Judge Higgins, para.34.

This statement possibly contains an elision of legal categories – a belligerent occupant's right to protect its civilians does not entail that it acts in self-defence in terms of Article 51 of the Charter. Judge Higgins nevertheless dismissed the possibility that Israel could invoke self-defence to justify its construction of the wall as this would require Israel to demonstrate that this measure was both a necessary and proportionate response to threat posed: Israel had not furnished this explanation. This is not a burden of persuasion specific to the proceedings before the Court, but rather a general requirement:

elementary principles of interpretation preclude a construction which gives to a State resorting to an alleged war in self-defence the right of ultimate determination, with a legally conclusive effect, of the legality of such action.<sup>65</sup>

Further, Judge Higgins observed that she remained “unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood.”<sup>66</sup> This conclusion is clearly supported by both the development of the prohibition on the use of force in international relations and by the logic of the UN Charter.<sup>67</sup> Self-defence is universally regarded as one of the two exceptions to the prohibition on the use of force provided by the UN Charter. As Dinstein points out, the right of self-defence was juridically meaningless when States could have recourse to force at will. Only with the advent of restraints on the use of force did self-defence become relevant as a legal justification for resort to force: “The evolution of the idea of self-defence in international law goes ‘hand in hand’ with the prohibition of aggression.”<sup>68</sup> Dinstein categorises self-defence as a variant of self-help, but as the only variant that authorises the use of force:

Self-help under international law may be displayed in a variety of ways. In the first place, an aggrieved State may resort to non-forcible measures, such as severing diplomatic relations with another State...Additionally, legitimate self-help in the relations between States may take the form of forcible measures, in which case these measures must nowadays meet the requirements of self-defence. Occasion-

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<sup>65</sup> Oppenheim-Lauterpacht 1952 187-188.

<sup>66</sup> Separate opinion of Judge Higgins, para.35.

<sup>67</sup> See, e.g., , para.1 of the International Law Commission's *Commentary to Article 21* of its 2001 Articles on Responsibility of States for Internationally Wrongful Acts: Crawford 2002 166; and Randelzhofer A, *Commentary to Article 51*, in Simma B(Ed), *The Charter of the United Nations: a commentary* (Oxford UP: Oxford: 2002, 2nd edn) 789, para.3.

<sup>68</sup> Y. DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 161 (3<sup>rd</sup> ed. 2001) (citation omitted).

ally, international legal scholars regard the concepts of self-help and self-defence as related yet separate. However, the proper approach is to view self-defence as a species subordinate to the genus of self-help. In other words, self-defence is a permissible form of "armed self-help."<sup>69</sup>

Any measures short of force cannot therefore be classified as amounting to self-defence undertaken in pursuit of Article 51 of the UN Charter. If these measures involve a breach of the acting State's international obligations then, *prima facie*, they must purport to be countermeasures in accordance with Article 22 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which provides:

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State...

In the context of the instant Opinion, it must be recalled that States are not at liberty to take whatever action they think fit as countermeasures. Article 50 of the International Law Commission's Articles provides that countermeasures must not impair, *inter alia*, obligations for the protection of fundamental human rights or other obligations under peremptory norms of international law (such as self-determination).<sup>70</sup> Consequently, given the Court's determination that the wall impairs the enjoyment of various human rights owed to the Palestinian population<sup>71</sup> and, *a fortiori*, the finding that the construction of the wall "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right,"<sup>72</sup> Israel cannot not invoke the doctrine of countermeasures as a justification exculpating it from responsibility for the construction of the wall.

In any event, claims that self-defence may be invoked to justify the construction of the wall constitute legal nonsense, and dangerous nonsense at that. The Court ruled that the very act of the construction of the wall violated Israel's obligations under international humanitarian law regarding the respect that is due to property

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<sup>69</sup> *Id.* at 160 (citations omitted).

<sup>70</sup> In its *Commentary to the 2001 Articles*, the International Law Commission expressly identified "the obligation to respect the right of self-determination" as a peremptory norm – see *Commentary to Article 40*, para.5: Crawford 2002 246-247.

<sup>71</sup> Opinion, para.134.

<sup>72</sup> Opinion, para.122.

rights in occupied territory – in particular, Article 46 of the 1907 Hague Regulations, and Article 53 of Geneva Convention IV.<sup>73</sup> This stands in contrast to the consequential, or derivative, violations of human rights norms that arise from the adverse consequences visited upon the Palestinian population of the Occupied Palestinian Territory as a result of the existence of the wall. Simply to state the proposition that measures taken in self-defence may exculpate a State from responsibility for violations of international humanitarian law is to demonstrate both the fallacy and danger at the heart of the Israeli argument. It is to claim that the law designed to restrain the exercise of force does not apply when force is being exercised. This surely cannot be correct.

This issue has ramifications beyond the Opinion. To claim to be entitled to act in self-defence is to claim authorisation for the use of armed, and deadly, force to attain military ends. Both the International Court and the Israeli High Court have ruled that Israel is the occupying Power of the Occupied Palestinian Territory. In order to protect its civilian population from the threats posed by terrorist attacks, Israel is undoubtedly entitled to take legitimate security measures. This is arguably authorised by the fundamental provision governing the legitimate powers of an occupying Power. Article 43 of the 1907 Hague Regulations provides:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This is amplified in Article 64 of Geneva Convention IV, para.2 of which provides:

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members

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<sup>73</sup> Opinion, para.132. Article 46 of the Hague Regulations provides, in part, “Private property cannot be confiscated”. Article 53 of Convention IV provides:

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

The Court further ruled that the requirements of the final clause of Article 53 had not been met, and noted that Article 46 contained no qualifying provision – see Opinion, para.135.

and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

An elision between legitimate security concerns and self-defence is embedded in the Israeli argument. This should be rejected, and the proper paradigm employed in Israel's relationship with the Palestinian population of the Occupied Palestinian Territory which, after all, comprises individuals entitled to the protections guaranteed by Geneva Convention IV. Public order should be maintained primarily by police action rather than resort to military force. As the Israel High Court ruled in *Beit Sourik Village Council*:

The law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and her citizens. However, it imposes conditions on the use of this authority. This authority must be properly balanced against the rights, needs, and interests of the local population.<sup>74</sup>

### G. Smoke and Mirrors

Stage magicians are sometimes said to use smoke and mirrors to convince audiences of the magic of their tricks. At times, the text of the *Wall advisory opinion* gives the impression that the Court's conclusions are as unreal. Magicians must hide the mechanics of their tricks as these, if exposed, would dispel the illusion. Similarly, by looking beyond the text presented, the Court's conclusions on the whole can be seen to have weight, although one may well wonder about the extent of the deprecations inflicted on its justificatory reasoning by killer whales during the drafting process.

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<sup>74</sup> HCJ 2056/04 (30 June 2004): opinion of President Barak, para.34.