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**THE ISRAEL SECURITY BARRIER AND THE ROLE
OF THE ICJ IN UPHOLDING INTERNATIONAL
HUMANITARIAN LAW**

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ABSTRACT

THE ISRAEL SECURITY BARRIER AND THE ROLE OF THE ICJ IN UPHOLDING INTERNATIONAL HUMANITARIAN LAW

The Arab-Israeli conflict remains one of the most intractable and long standing international disputes. In the Spring of 2002, the Israeli government began construction of a contentious barrier in parts of the West Bank and Jerusalem that runs close to the 1949 cease-fire "Green Line", but mostly on land occupied by Israel in 1967. On October 1, 2003, the Israeli Cabinet approved a significant expansion of the barrier project, which would intrude on roughly 15% of West Bank territory to surround Israeli settlements. In response to a question asked to it by the UN General Assembly on the legal implication of the barrier, the International Court of Justice on July 9, 2004 ruled in its advisory opinion that the barrier violated international law and that Israel must compensate those adversely affected by its construction. This paper seeks to analyze the ICJ advisory opinion and inspect the various sources of international humanitarian law used by the court to render its opinion declaring the Israeli barrier illegal. It will also, in the context of this particular opinion observe the role of the International Court of Justice in the development and advancement of international humanitarian law on the ground.

KEYWORDS: Arab-Israeli Conflict, Israeli Security Barrier, International Law, International Humanitarian Law, Role of the International Court of Justice.

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1. THE ISRAEL SECURITY BARRIER AND THE ROLE OF THE ICJ IN UPHOLDING INTERNATIONAL HUMANITARIAN LAW

In the Spring of 2002, the Israeli government began construction of a contentious barrier in parts of the West Bank and Jerusalem that runs close to the 1949 cease-fire "Green Line", but mostly on land occupied by Israel in 1967. On October 1, 2003, the Israeli Cabinet approved a significant expansion of the barrier project, which would intrude on roughly 15% of West Bank territory to surround Israeli settlements.¹ It is projected to be three and half times long as Israel's internationally recognized border and cuts through Palestinian villages, dividing families in the process.² In response to a question asked to it by the UN General Assembly on the legal implication of the barrier, the International Court of Justice on July 9, 2004 ruled in its advisory opinion that:

Having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it...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.³

This paper shall analyze the ICJ advisory opinion and inspect the various sources of international humanitarian law used by the court to render its opinion declaring the Israeli barrier illegal. It will also, in the context of this particular opinion observe the role of the International Court of Justice in the development and advancement of international humanitarian law on the ground.

The International Court of Justice, under Article 38 is allowed to use the following as sources of international law: "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law (and) the general principles of law recognized by civilized nations."⁴ On the question of the Israeli security barrier, the UN General Assembly's question saw the ICJ being made to decide on several matters including whether Israel's claimed right of self-defense took precedence over the burdens imposed on Palestinians affected by the actual and planned route of the fence

¹ 'ICJ Advisory on Israeli Security Fence,' *The American Journal of International Law*, 98, 2 (April 2004): 361.

² Jimmy Carter, *Palestine- Peace not Apartheid* (London: Simon and Schuster, 2006): 190.

³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* <http://www.icj.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf> Accessed 1 April 2007.

⁴ *Statute of the International Court of Justice* <<http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>> Accessed 2 April 2007.

and whether the right of self-defense can be invoked with regard to Israeli West Bank Settlements.⁵

The Israeli government's position was that the barrier "is intended solely as a temporary, nonviolent defensive measure to guard against suicide and other attacks against Israel and Israelis," and that it will be adjusted or dismantled if so required as part of a political settlement.⁶ Furthermore, it had declared that it was not bound by relevant provisions in international humanitarian law because it considers the West Bank and Gaza 'disputed' and not 'occupied' territory. The Court rejected this and other arguments made by Israel taking recourse in two instruments of International Humanitarian Law, namely the Regulations annexed to the Fourth Hague Convention of 1907 and the Fourth Geneva Convention of 1949. The Court used the Hague Convention in establishing in paragraph 78 that "in Article 42 of the Regulations...territory is considered occupied when it is actually placed under the territory of the hostile army...the territories situated between the Green Line and the former eastern border of Palestine...were occupied in 1967...All these territories remain occupied territories and Israel has continued to have the status of occupying Power."⁷ Furthermore, it reasoned that even though Israel was not a party to the Hague Convention of 1907, it was bound by it as the Court considered the provisions of the Regulations as having become part of customary law applicable to all parties. Hence, it took interesting legal reasoning by the Court in using a customary law as reflected by a Convention as a source for determining that Israel was indeed bound by Occupation Law.

Having established that the West Bank was occupied by Israel, the Court also used the Fourth Geneva Convention directly as a source of international law, arguing that since Israel had ratified it on 6 July 1951, it was hence a state party to the treaty and bound by it. The court noted in Article 49(6) of the Convention that "the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies."⁸ The court used this Article to reinstate its long held position that the Israeli settlements in the Occupied Territories had been established in flagrant violation of international law. The Court extended this principle to the barrier, contending that "the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent... it would be tantamount to *de facto* annexation." The Court also determined that as Article 49(6) was designed to prevent demographic change in occupied territory, the wall also presents a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall due to the departure of Palestinian populations from certain areas as a direct result of its construction. Consequently, the Court found Israel's action

⁵ Ruth Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense,' *The American Journal of International Law*, 99,1 (January 2005): 53.

⁶ Written Statement of the Government of Israel on Jurisdiction and Property (Jan 30, 2004), Advisory opinion, <<http://www.icj-cij.org>> Accessed 2 April 2007.

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* <http://www.icj.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf> Accessed 2 April 2007: para 78.

⁸ *Fourth Geneva Convention* <<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5>> Accessed 2 April 2007.

in breach of the Palestinian people's right to self determination, a general principle of international law.⁹

Subsequently, the Court used a vast number of UN reports to determine that the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have further imposed substantial restrictions on the freedom of movement of inhabitants in the Occupied Palestinian Territory, had serious repercussions for agricultural production and in many ways cuts off water resources for the Palestinians. It also leads to increasing difficulties for the Palestinians regarding access to health services, educational establishments and primary sources of water.¹⁰ The court found all these effects and potential effects of the wall in violation of Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention which forbade individual or forcible transfers of populations in or out of the territory, restricting employment and destruction of property and permitted freedom of passage for essential goods and services respectively in occupied territories.¹¹

The Court also referred to Articles 43, 46 and 52 of the Hague Regulations as 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.¹² It finds that the construction of the wall and its associated régime are contrary to these relevant provisions of the Hague Regulations of 1907 and of the Fourth Geneva Convention.¹³

In October 2003, Israeli Ambassador to the UN stated Dan Gillerman stated that "the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter."¹⁴ Besides using relevant provisions of international humanitarian law as espoused in the Hague and Geneva Conventions in its opinion, the International Court of Justice also based its judgment on a rejection of two principles of international law: the principle of military necessity and the principle of self defense, invoked by Israel to justify its construction of the security barrier.

The principle of self defense has its origins in customary law, but was explicitly enunciated in Article 51 of the UN Charter which affirmed "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"¹⁵In the Court's opinion, it stated that Article 51 of the Charter recognized an

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* <http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf> Accessed 2 April 2007: para 122.

¹⁰ *Ibid.*: para 133.

¹¹ *Ibid.*: para 136.

¹² *Ibid.*: para 124.

¹³ *Legal Consequences of the Construction of a Wall on Occupied Palestinian Territory*. ICJ Press Release 2004/28. <http://www.icj-cij.org/icjwww/ipresscom/ipress2004/ipresscom2004-28_mwp_20040709.htm> Accessed 2 April 2007.

¹⁴ Sean Murphy, 'Self Defense and the Israeli Wall Advisory Opinion,' *The American Journal of International Law*, 99, 1 (Jan 2005): 62.

¹⁵ *Charter of the United Nations*. <<http://www.un.org/aboutun/charter/>> Accessed April 3, 2007.

inherent right of self defense in the case of armed attack by **one State against another state**. Since the ICJ has found the West Bank to be occupied territory and because Israel itself argues that the threat it seeks to curb through the construction of the barrier originates **within** and not **outside** this territory, the ICJ believes that Article 51 of the Charter has no relevance in this case.¹⁶ This interpretation has been widely criticized as a simplistic and incorrect interpretation of Article 51 of the Charter and will be discussed later in the context of the role of the Court in the development of international humanitarian law.

The principle of military necessity has its origins from the Lieber Code of 1862 that states in Article 14 that "military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."¹⁷ Today, it is considered as a principle whose role is to limit military action and the destruction of war and serve as a significant legal restraint on the same until more specific rules or customs of war are established.¹⁸ The Court found against Israel in its evaluation of the barrier, determining that it is neither convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives nor that the wall is the only means to safeguard Israel's interests against the "peril provoked".¹⁹ While acknowledging that Israel has to face "indiscriminate and deadly acts of violence against its citizens," it maintained that measures it takes to safeguard against this must be in conformity with international law.²⁰ The wall and the route chosen would "gravely infringe on a number of rights of the Palestinians... (and that) infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order."²¹

Thus, in its opinion, the ICJ determined that Israel could neither rely on a state of military necessity nor a right of self defense to preclude the wrongfulness of its construction of the barrier in violation of international humanitarian law as espoused in the Geneva and Hague Conventions.

The advisory of the International Court of Justice on this matter seems precise and unambiguous in finding the Israeli separation barrier illegal in international law, using a mixture of customary international law, general international legal principles and international convention. Yet, its opinion has come under scathing criticism from some quarters not just because of its verdict but also because of the legal reasoning employed. The dismissal of Israel's self defense argument was met with scathing criticism because its interpretation gave no reason as to why Article 51 of the Charter restricted the right of self defense to one that was dependent upon armed attack by

¹⁶ *Legal Consequences of the Construction of a Wall on Occupied Palestinian Territory*. ICJ Press Release 2004/28. < http://www.icj-cij.org/icjwww/ipresscom/ipress2004/ipresscom2004-28_mwp_20040709.htm> : para. 139 Accessed 2 April 2007.

¹⁷ War Department, Special Orders, No. 399, Dec. 17, 1862: para. 5.

¹⁸ Burrus Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity,' *The American Journal of International Law*, 92, 2 (April 1998): 231.

¹⁹ *Legal Consequences of the Construction of a Wall on Occupied Palestinian Territory*. ICJ Press Release 2004/28. < http://www.icj-cij.org/icjwww/ipresscom/ipress2004/ipresscom2004-28_mwp_20040709.htm> : para. 133. Accessed 2 April 2007.

²⁰ *Ibid.*; para 141.

²¹ *Ibid.*; para 137.

another state.²² As Judge Higgins of the court mentioned in her separate concurring opinion, "it might have been expected that an advisory opinion would have contained a detailed analysis..." as to why Israel could not invoke Article 51.²³ As this was not forthcoming, it would have been better for the court to have avoided the Article 51 analysis altogether and ruled that it need not be considered as Israel had violated *jus in bello* principles in its construction of the security barrier.

In conclusion, the landmark ICJ advisory opinion on the Israeli Security barrier was sound on some parts of its interpretation of international criminal and humanitarian law but weak in other parts. Customary international law as reflected in the Hague Convention of 1907 and treaty law of the Geneva Conventions was employed with some finesse by the Court, which found that the security barrier and its results and expected results clearly violated several provisions of humanitarian and occupation law.

It is interesting to note at this point that despite an inability for the Court to enforce its decision and ensure that Israel dismantle the barrier and provide compensation, it still plays an important role in the development of international law. In the peculiar case of Israel-Palestine, it is difficult to hold individuals to account for violations of international humanitarian law, particularly on the Israeli side, because of the politics involved. Israel is not a party to the International Criminal Court and the sheer politics of the situation will ensure that the Security Council will never refer the situation in the Occupied Territories to the ICC. Similar 'Great Power' politics has also ensured that there have been no international ad-hoc tribunals set up in the territories. The International Court of Justice, in response to a question asked to it by the General Assembly acting under Article 96 of the Charter, is the only international legal body able to study the facts of this case and deliver a verdict in an impartial manner. The fact that its opinion will not immediately help ease the suffering of the Palestinian people as a result of the barrier should not detract from the potential of the opinion to influence the politics of the situation on the ground. Whilst the Israeli government rejected the opinion as politically motivated, subsequent decisions by the Israeli Supreme Court in 2004 and 2005 ordered that the barrier be rerouted in several instances. The Israeli Supreme Court affirmed many of the ICJ's positions in its opinions in the *International Legality of the Security Fence and Sections near Alfei Menashe and Beit Sourik Village Council vs. The Government of Israel* cases. The Supreme Court confirmed that the West Bank was being held by the State of Israel in "belligerent occupation", that the Hague Regulations and Geneva Conventions applied there, that the fence could not be used as a means to create facts on the ground and annex territory and that several parts of the fence violated the principle of "proportionality" when weighing up military necessity and humanitarian considerations of the Palestinians.²⁴ Importantly, the Court stated with some clarity that it "shall give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion."²⁵ This is clear evidence of the Court's tacit admission that it was in some way influenced by

²² Sean Murphy, 'Self Defense and the Israeli Wall Advisory Opinion,' *The American Journal of International Law*, 99, 1 (Jan 2005): 63.

²³ *Ibid.*,: 76.

²⁴ *International Legality of the Security Fence and Sections near Alfei Menashe*, Israel High Court Ruling Docket H.C.J. 7957/04.

²⁵ *Ibid.*,: para. 72.

international law invoked by the ICJ in ruling some parts of the barrier illegal. In this sense, the ICJ has some level of impact in terms of its advisory opinions influencing changes on the ground.

Despite the positive role played by the ICJ in this case, it must also be mentioned that the looseness of the legal reasoning employed in its rejection of the self defense argument made by Israel has detrimental effects on the 'power' of the court. The ICJ's advisory opinions are non binding and "states are willing to yield power to an international court of fifteen individuals only when they believe that the court's findings reflect higher levels of deliberation... (worthy of a) 'supreme arbiter of international legality.'"²⁶ The lack of deep reasoning shown when dismissing the validity of Article 51 in this opinion is a folly that may undermine states' respect for the court if repeated with regularity. In sum, the advisory opinion of the ICJ on the Israeli security barrier's legality is illustrative of both the strengths and weaknesses of the ICJ. On one hand, its use of sound legal arguments based on principle, custom and treaty law can influence realities on the ground and advance humanitarian and international criminal law in situations where politics ensure that no other international tribunal can do the same. On the other hand, it also illustrates how the delicate nature of 'power' wielded by the ICJ ensures that it is only as strong as the strength of legal reasoning it employs in its opinions. Flawed interpretation, bias or insufficiently developed legal reasoning could easily lead to a loss of respect by states. Without an enforcing mechanism, such a loss of respect would lead to the ICJ being cast aside and being unable to fulfil its considerable potential as a vehicle for the application, development and advancement of international humanitarian law.

²⁶ Sean Murphy, 'Self Defense and the Israeli *Wall* Advisory Opinion,' *The American Journal of International Law*, 99, 1 (Jan 2005): 76.

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