

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

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

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

*By Ardi Imseis**

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

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

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

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

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

Palestinian people to self-determination), and to make good any damage flowing from those breaches; and that all states are obliged not to recognize the illegal situation resulting from the construction of the wall, not to render aid or assistance in maintaining the situation created by its construction, and to see that any impediment to the exercise by the Palestinian people of its right to self-determination caused by that construction is brought to an end.

Nevertheless, the advisory opinion is not without its shortcomings, some serious and others less so, but still important enough to warrant special attention. The most serious in relation to the Court's findings on IHL concern what I view to be a flawed interpretation of Article 6 of the Fourth Geneva Convention, which, if taken as an accurate interpretation of the law, would lead to very negative consequences for the Palestinian civilian population in the OPT and quite possibly for other civilian populations subject to prolonged foreign military occupation. More generally, as will be demonstrated, while the Court reached sound legal conclusions on most questions of IHL, its inexplicable unwillingness to offer exhaustive and compelling reasons for those conclusions—which in many cases exist in abundance—will undoubtedly cast a cloud over its findings, particularly for those of us who held greater expectations of what the Court might have achieved.

I. APPLICABILITY OF THE FOURTH GENEVA CONVENTION

Since 1967 the State of Israel has held the OPT in a state of belligerent occupation. During this unusually prolonged foreign military occupation, successive Israeli governments have refused to acknowledge the status of the OPT as occupied, preferring instead to view it as “disputed” and therefore not subject to the law of belligerent occupation. As I have written elsewhere,³ at the heart of this body of law are two core principles. First, belligerent occupation represents a temporary condition during which the role of the belligerent occupant is limited merely to that of the de facto administrative authority whose legal duty is to maintain the situation existing in the occupied territory *ex ante*.⁴ Second, belligerent occupation does not yield any right of sovereignty to the belligerent occupant over the occupied territory. This second principle is an affirmation of the fundamental principle of modern public international law prohibiting the acquisition of territory through the threat or use of force (and it constitutes the main reason behind Israel's longstanding insistence that the OPT is “disputed” as opposed to occupied).

Elsewhere in this *Agora* is a brief treatment of the longstanding debate between Israel and the rest of the international community on the applicability to the OPT of the Fourth Geneva Convention, the principal international treaty governing the law of belligerent occupation.⁵ The sheer

³ See Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65 (2003). The law of belligerent occupation is governed in large part by Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, and annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, as well as the 1949 Fourth Geneva Convention. Various aspects of the law of belligerent occupation are also codified in specific provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 3, and the Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, 37 ILM 999 (1998), *corrected through Jan. 16, 2002*, at <<http://www.icc-cpi.int/>> [hereinafter Rome Statute].

⁴ While the belligerent occupant may amend local legislation in occupied territory, it may do so only to the extent reasonably required to provide for the protection of the local civilian population and the security of its armed forces. Although the law of belligerent occupation, particularly as codified in the Fourth Geneva Convention, has progressively attempted to strike a balance between the rights of the occupier and those of the occupied, its “overriding aim” is to “ensure that claims of military exigency do not result in the violation of basic political and human rights of the civilians under military occupation.” UNITED NATIONS COMMITTEE ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE, THE QUESTION OF THE OBSERVANCE OF THE FOURTH GENEVA CONVENTION OF 1949 IN GAZA AND THE WEST BANK INCLUDING JERUSALEM OCCUPIED BY ISRAEL IN JUNE 1967, at 1 (1979) [hereinafter QUESTION OF THE FOURTH CONVENTION]; *see also* text at note 34 *infra*.

⁵ Geoffrey R. Watson, *The “Wall” Decisions in Legal and Political Context*, 99 AJIL 6, 12 (2005); *see also* Imseis, *supra* note 3, at 93–101. For a list of the other main treaties governing the law of belligerent occupation, *see supra* note 3. While the Supreme Court of Israel has held since 1988 that the 1907 Hague Regulations apply to the OPT because they form part of customary international law, it has consistently maintained that the Fourth Geneva Convention is not justiciable in Israeli courts because it constitutes treaty law as opposed to customary law, and has not been formally incorporated into Israeli municipal law by an act of the Israeli Knesset.

weight of international opinion against Israel's position that it does not apply de jure to the OPT is prodigious, and includes the considered views of the UN Security Council, the UN General Assembly, the UN Commission on Human Rights, the International Commission of Jurists, and the International Committee of the Red Cross.⁶ In light of Israel's long-held position on the issue, one high point of the advisory opinion is the Court's affirmation that the "Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties," and its specific finding that the Convention is applicable to the OPT, since Israel and Jordan were both parties to the Convention when hostilities erupted between them in 1967.⁷

Arguably, however, one low point of this portion of the ruling is the quality of reasoning offered by the Court in reaching its conclusion. In setting out Israel's legal position on the subject, the Court (relying on a report of the secretary-general)⁸ recalled merely that

Israel does not agree that the Fourth Geneva Convention "is applicable to the occupied Palestinian Territory", citing "the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt" and inferring that it is "not a territory of a High Contracting Party as required by the Convention".⁹

In fact, and as amply covered in the literature, Israel's position is more detailed than the Court relates (and, incidentally, does not assert that Egypt ever annexed any part of the OPT as stated in the secretary-general's report—a telling, but finally insignificant, error in the evidentiary record).¹⁰ Israel's position is based in part on a unique interpretation of paragraph 2 of common Article 2 of the Fourth Geneva Convention.¹¹ Asserting that the object and purpose of the law of belligerent occupation is to protect the rights of the ousted sovereign holding valid legal title, Israel argues that because Jordan and Egypt were not the legitimate sovereigns in the OPT prior to 1967, that territory cannot be said to constitute the "territory of a High Contracting Party" under paragraph 2 of common Article 2, thus rendering the Fourth Geneva Convention totally inapplicable.¹² Israel further argues that it possesses better title to the OPT than Jordan or Egypt, based on a curious notion of "defensive conquest." Because it came into control of

⁶ QUESTION OF THE FOURTH GENEVA CONVENTION, *supra* note 4, at 11–12. For a demonstrative list of relevant Security Council and General Assembly resolutions to this effect, see Imseis, *supra* note 3, at 97 n.283 & 98 n.285.

⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, para. 101 (Int'l Ct. Justice July 9, 2004), 43 ILM 1009 (2004) [hereinafter *Advisory Opinion*].

⁸ In noting the Court's reliance on the report of the secretary-general, I do not wish to be taken as criticizing it for failing to take notice of other "unofficial" Israeli positions on the subject not reflected therein. On the evidentiary question, I am in full agreement with the views expressed in the separate opinion of Judge Kooijmans, where he stated that

Israel's argument that the Court does not have at its disposal the necessary evidentiary material, as this is to an important degree in the hands of Israel as a party to the dispute, does not hold water. The Court has to respect Israel's choice not to address the merits, but it is the Court's own responsibility to assess whether the available information is sufficient to enable it to give the requested opinion. And, although it is a matter for sincere regret that Israel has decided not to address the merits, the Court is right when it concludes that the available material allows it to give the opinion.

Advisory Opinion, *supra* note 7, Separate Opinion of Judge Kooijmans, 43 ILM at 1065, para. 28 [hereinafter *Kooijmans Opinion*].

⁹ *Advisory Opinion*, *supra* note 7, para. 90.

¹⁰ Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13, at 8, UN Doc. A/ES-10/28 (2003), available at < <http://www.icj-cij.org> >. *But see* comments in note 8 *supra*. In fact, Egypt only administered and did not annex the Gaza Strip. For Israel's position on the applicability of the Fourth Geneva Convention to the OPT, see JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 177–78, 209 n.2 (1981); Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968); Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1971 ISR. Y.B. HUM. RTS. 262. For critiques of that position, see W. THOMAS MALLISON & SALLY V. MALLISON, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 252–62 (1986); Richard Falk & Burns Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 132, 132 (Emma Playfair ed., 1992) [hereinafter *ADMINISTRATION*]; Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967–1988*, in *id.* at 25.

¹¹ This point is briefly touched on by Watson, *supra* note 5, at 12.

¹² *See* STONE, *supra* note 10, at 177–78, 209 n.2; Blum, *supra* note 10; Shamgar, *supra* note 10.

the OPT in 1967 through what it considered a defensive war against Jordan and Egypt, neither of which held valid legal title to that territory, Israel maintains that this control is tantamount to perfect legal title that cannot be characterized as belligerent occupation.¹³ Of course, the fragility of Israel's position is easily exposed when one takes account of the fact that the word "territory," as used in common Article 2 of the Fourth Geneva Convention, was intended by the framers of the Convention to connote "in addition to *de jure* title, a mere *de facto* title."¹⁴ Otherwise, the belligerent occupant could evade the obligations imposed by the Convention by contesting the validity of the title of the ousted power to the territory.¹⁵ Furthermore, Israel's claim of better title based on "defensive conquest" must fail because it offends the principle of the inadmissibility of the acquisition of territory through the threat or use of force. This conclusion is consistent with the demise in international law and practice of the right of conquest, defensive or otherwise, and the contemporaneous emergence of the law of belligerent occupation based on the maintenance by the occupying power of a provisional state of affairs pending a final peace.

Although the Court relates that Israel's position is based on a flawed interpretation of Article 2 of the Convention, it nowhere rebuts that interpretation on its merits and does not deal at all with Israel's claims of "defensive conquest." Instead, the Court concludes that there is "no need for any enquiry into the precise prior status of " the OPT because the second paragraph of Article 2 is "directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable."¹⁶ However correct this interpretation, it would not have required any great effort for the Court to have provided a rebuttal of Israel's position on the merits, and it would definitely have made it more difficult for Israel to reject the Court's findings on the point. Although the opinion is just as technically correct as it otherwise would have been, by choosing not to engage Israel's argument on its substance, the Court ultimately deprived the General Assembly of a more fully reasoned opinion that would have bolstered its primary conclusions on the proper interpretation of Article 2.

II. ARTICLE 6 OF THE FOURTH GENEVA CONVENTION

The most serious substantive error committed by the Court on IHL issues concerns its interpretation of Article 6 of the Fourth Geneva Convention relating to the beginning and end of its application to occupied territories. This interpretation is contained in paragraph 125 of the opinion and for ease of argument bears recalling in full. In discussing which provisions of the Fourth Geneva Convention are applicable to the construction of the wall in the OPT, the Court stated:

A distinction is also made in the Fourth Geneva Convention between provisions applying during *military operations leading to occupation* and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

"The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after *the general close of military operations*; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the

¹³ QUESTION OF THE FOURTH GENEVA CONVENTION, *supra* note 4, at 4–6; see also *The Colonization of the West Bank Territories by Israel: Hearing Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary*, 95th Cong. 35 (1978) (statement of Yehuda Blum).

¹⁴ MALLISON & MALLISON, *supra* note 10, at 254.

¹⁵ *Id.* at 255.

¹⁶ Advisory Opinion, *supra* note 7, para. 95.

functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.”

Since the *military operations leading to the occupation* of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.¹⁷

Thus, the Court reads Article 6 to mean that the whole of the Fourth Geneva Convention no longer applies to the OPT, but only those articles therein enumerated. Notwithstanding the importance of these articles—which include protections for the civilian population against annexation (Art. 47), transfer (Art. 49), unemployment (Art. 52), destruction of property not rendered absolutely necessary by military operations (Art. 53), and obstruction of relief schemes (Art. 59)—the Convention contains a plethora of other protections, including important mechanisms for their enforcement, that the Court’s interpretation renders nonapplicable as a matter of treaty law.¹⁸ These include Articles 55 and 56, regarding the duty of the occupying power to ensure the population’s “food and medical supplies” and “medical and hospital establishments,” respectively. More important, they also include Articles 146 and 147. Article 147 affirms the right of civilian persons to be protected against, inter alia, willful killing, torture or inhuman treatment, deportation, willful causing of great suffering, and extensive destruction and appropriation of property not justified by military necessity. Article 146 classifies these acts as “grave breaches,” considered war crimes at international law,¹⁹ and obliges all high contracting parties to enact legislation penalizing the commission of such breaches, to search for and prosecute or extradite any individuals suspected of committing or ordering the commission of such breaches, and to penalize those suspected of committing other violations of the Convention not amounting to grave breaches.

The problem with the Court’s interpretation of Article 6 is its misguided focus on “military operations leading to occupation.” Article 6 in fact provides that insofar as occupied territories are concerned, application of the Convention “shall cease one year after the general close of military operations,” not on the “general close of military operations *leading to the occupation*,” as asserted by the Court. Article 31 of the Vienna Convention on the Law of Treaties provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁰ On its face, the ordinary meaning of the terms of Article 6 reveals that it is concerned with the existence or nonexistence of military operations per se as the test governing the continued applicability of the whole of the Convention in such circumstances. It does not encumber itself with additional qualifiers on the existence of military operations that would necessarily circumscribe (in this case, temporally circumscribe) the applicability of the Convention *in toto*, such as “leading to the occupation.”

This reading of the Fourth Geneva Convention accords with general principles of international law on belligerent occupation, in particular the distinction between the role the occupying power assumes upon commencement of an occupation as the military authority in the occupied

¹⁷ *Id.*, para. 125 (emphasis added).

¹⁸ I emphasize “as a matter of treaty law” because to the extent that any of these other protections form part of customary international law, Israel is still bound by them. Having said that, one should not discount the importance of establishing the applicability of these protections under treaty law, a separate and distinct source of international law with legal implications quite different from those associated with custom. As noted by Professor Brownlie, “even if norms of treaty origin crystallize as new principles or rules of customary law, the customary norms retain a separate identity even if the two norms appear identical in content.” IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 14 (6th ed. 2003).

¹⁹ Rome Statute, *supra* note 3, Art. 8; see also Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704, annex, Art. 2 (1993), *reprinted in* 32 ILM 1192 (1993); Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, Arts. 3, 4 (Nov. 8, 1994), *reprinted in* 33 ILM 1602 (1994).

²⁰ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 31, 1155 UNTS 331.

territory, authorized to execute military operations in accordance with international law (e.g., the Israeli military in the OPT), and its role as the governing/civilian authority in the occupied territory, required to exercise ordinary “functions of government” for the civilian population, such as taxation and road construction (e.g., the office of the Israeli Coordinator of Government Activity in the Territories, formerly the Israeli Civil Administration in the OPT).²¹ Article 6 of the Fourth Geneva Convention thus aims to ensure that insofar as the occupying power ceases to function in its capacity as the military authority, it shall still be bound by the enumerated provisions in its capacity as the governing/civil authority (“to the extent that such Power exercises the functions of government in such territory”).²² That the drafters of the Convention expressly indicated that these provisions would apply only insofar as the occupying power acts in its capacity as governing/civil authority, makes clear that they were cognizant of the difference between that role and the one exercised by an occupying power as military authority. Therefore, to the extent that the occupying power engages in military operations (i.e., acts in its capacity as military authority) in the occupied territory, the whole of the Convention shall apply. This must be as true one year after the general close of military operations as it is thirty-eight years after the general close of military operations.²³ Were it otherwise, namely, were it the case, as asserted by the Court, that the Convention shall cease to apply one year after the general close of military operations *leading to the occupation*, the occupying power would be in a good position to argue that the whole Convention, subject to Article 6, would thereafter not be applicable, even if subsequent military conflict were to break out.²⁴ This interpretation would lead to the absurd result of depriving the civilian population of the full range of protections afforded under IHL.

The point is perhaps best illustrated by example. In the context of the OPT, the Court’s interpretation would have permitted the nonapplicability of the whole of the Fourth Geneva Convention during the Arab-Israeli war of October 1973 and, more recently, Israel’s “Operation Defensive Shield” in the West Bank of March 2002 and its “Operation Rainbow” in the Gaza Strip of May 2004, as these operations took place one year after the general close of military

²¹ The existence of the Palestinian Authority (PA) created through the Oslo Accords is irrelevant as a matter of public international law on this point. Israel’s status as the occupying power in the whole of the OPT was not extinguished by the Oslo Accords, which expressly provided that the “two Parties view the West Bank and the Gaza Strip as a single territorial unit, the integrity of which will be preserved during the interim period.” Agreement on the Gaza Strip and the Jericho Area, Isr.-PLO, May 4, 1994, Art. XXIII(6), 33 ILM 622 (1994). Further, under the law of belligerent occupation, so long as the occupying power retains effective control over the occupied territory, as has Israel, its status as belligerent occupant does not end. See 1907 Hague Regulations, *supra* note 3, Art. 42. This status remains unchanged even when the belligerent occupant evacuates parts of the territory, so long as it is able “at any time” to reassume control over those parts. Trial of Wilhelm List and Others, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 56 (1949). On this point, the ICJ was clear in its opinion that the whole of the OPT “remain[s] occupied territories and Israel has continued to have the status of occupying Power,” noting that “[s]ubsequent events in these territories”—including the establishment of the Palestinian Authority—“have done nothing to alter this situation.” Advisory Opinion, *supra* note 7, para. 78.

²² Fourth Geneva Convention, *supra* note 1, Art. 6.

²³ Indeed, this interpretation is supported by the International Committee of the Red Cross (ICRC) *Commentary* on Article 6 of the Fourth Geneva Convention. In considering the meaning of the words “general close of military operations,” the *Commentary* notes that

[i]n the opinion of the Rapporteur of Committee III, the general close of military operations was “when the last shot has been fired.” There are, however, a certain number of other factors to be taken into account. When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation or simply on “debellatio”. *On the other hand, when there are several States on one or both of the sides, the question is harder to settle. It must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned.*

ICRC, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 62 (Jean Pictet gen. ed., 1958) (footnotes omitted), available at < <http://www.icrc.org> > [hereinafter ICRC COMMENTARY].

²⁴ To underscore the point: the possible outbreak of subsequent military conflict is here central. While one would think that such an outbreak would either revive or renew the legal state of affairs that existed prior to the “general close of military operations,” triggering the complete applicability of the Convention, the Court’s unilateral application to that test of the qualifying language “leading to the occupation” renders this line of approach unfeasible because it has the effect of limiting the test temporally. Of course, this limiting language does not exist in Article 6, and based on the ordinary meaning of the terms of that article, no such limitation can be imputed. See text at note 20 *supra*.

operations *leading to the occupation* of the OPT. In these and many other similar events during the thirty-eight-year occupation, Israeli armed forces have by their own admission engaged in “military operations” in the OPT, including the use of tanks, helicopter gunships, heavy artillery, and battalions of combat troops, resulting in extensive civilian death and destruction of property, much of it in violation of various grave breach provisions in Article 147 of the Convention.²⁵ The vast majority of these operations necessarily took place one year after the general close of military operations leading to the occupation, which began in July 1967. On the Court’s interpretation of Article 6 of the Convention, therefore, none of these military operations would have triggered its reapplication in full.

Quite possibly, the Court’s interpretation of Article 6 was driven by the fact that the Fourth Geneva Convention was never intended to govern situations of prolonged foreign military occupation of the sort that has persisted in the OPT since 1967. It is well to recall that belligerent occupation itself is meant to be temporary and provisional pending a final peace agreement. It necessarily follows that the law designed to govern in such circumstances might not have been fashioned in contemplation of situations of inordinately long duration.²⁶ In this context, the Court may have read its temporal limitation into the “general close of military operations” language contained in Article 6 on the assumption that, given the inherently provisional nature of belligerent occupation, there can be only one such “general close of military operations” and it must be that which “leads to the occupation,” as it were. In my opinion, while this view might seem to accord with the traditional understandings of the concept of belligerent occupation, it cannot reasonably be applied in the context of Israel’s prolonged foreign military occupation. As noted above, because of the sheer length of the occupation and the continued conflict in the region, countless military operations have taken place in the OPT, only one of which can actually be said to have led to the occupation of that territory (1967). Leaving aside the lack of any such qualification in Article 6 (which, as noted, is enough to cast doubt on the Court’s interpretation), it would be patently unfair, not to say wholly incongruous with the object and purpose of the law of belligerent occupation, to limit the Convention’s full applicability to the OPT because of the great passage of time following the general close of military operations leading to its occupation. This is particularly the case where, during the course of that passage of time, renewed military operations have resulted in serious violations of the rights of the civilian population, including grave breaches under Article 147. Surely, any good faith interpretation of the Convention

²⁵ According to Professor John Dugard, the UN special rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, “the Israel Defence Forces (IDF) have carried out intensified military incursions into the Gaza Strip” during the course of which

Israel has engaged in a massive and wanton destruction of property. Bulldozers have destroyed homes in a purposeless manner and have savagely dug up roads, including electricity, sewage and water lines. In Operation Rainbow, from 18 to 24 May 2004, 43 persons were killed and a total of 167 buildings were destroyed or rendered uninhabitable. These buildings housed 379 families (2,066 individuals). These demolitions occurred during one of the worst months in [the Gaza town] Rafah’s recent history. During May, 298 buildings housing 710 families (3,800 individuals), were demolished.

Dugard also pointed out that the construction of the wall in the OPT has less to do with security than with the “incorporation of settlers within Israel,” the “confiscation of Palestinian land,” and the “encouragement to Palestinians to leave their lands and homes by making life intolerable for them.” UN Commission on Human Rights, Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967, UN Doc. A/59/256, at 2, 3 (2004) (interim report).

²⁶ This view finds some support in the ICRC *Commentary* on the Fourth Geneva Convention. In explaining the rationale of the 1949 Diplomatic Conference in declaring in Article 6 that the Convention shall cease one year after the general close of military hostilities in occupied territory, the *Commentary* notes that

[i]n 1949, the delegates naturally had in mind the cases of Germany and Japan. It was finally laid down, therefore, that in occupied territory the Convention would be fully applicable for a period of one year, after which the Occupying Power would only be bound by it in so far as it continued to exercise governmental functions. . . . One year after the close of hostilities, the authorities of the occupied State will almost always have regained their freedom of action to some extent; communications with the outside world having been re-established, world public opinion will, moreover, have some effect.

ICRC COMMENTARY, *supra* note 23, at 62–63.

based on its object and purpose of protecting civilian persons in time of war must take this crucial factor into account.

In the context of Israel's construction of the wall, the significance of this factor was not lost on Judge Nabil Elaraby, who noted in his separate opinion that "[t]he pattern and the magnitude of the violations committed against the non-combatant civilian population in the ancillary measures associated with constructing the wall, are, in my view, '[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' (Fourth Geneva Convention, Art. 147)."²⁷ Judge Elaraby further submitted "that the Court should have contributed to the development of the rules of *jus in bello* by characterizing the destruction committed in the course of building the wall as grave breaches."²⁸ While I agree with his point, I find inexplicable his failure to take issue with the majority's misinterpretation of Article 6 of the Convention, which effectively renders the grave breach regime contained in Article 147 (not to mention the articles not enumerated in Article 6) inapplicable to the OPT as a matter of treaty law.²⁹ If his concern was so great as to warrant, at least in part, a separate opinion on the need to characterize certain measures ancillary to Israel's construction of the wall as grave breaches, why would he not expressly disagree with the Court on its findings on Article 6? As no explanation can be found in the text of the opinion, one can only conclude that this was simply another instance of poor reasoning in the opinion, albeit by only one member of the Court. The unfortunate upshot, of course, is that the majority's flawed reading of Article 6 of the Fourth Geneva Convention remained unchallenged, in effect undermining the protection of civilian persons in time of war and thus frustrating the very object and purpose of the Convention.

III. MILITARY NECESSITY

The concept of military necessity is axiomatic to the very idea that laws should exist that regulate the conduct of war. It is a customary principle of IHL that is perhaps best understood in relation to the associated customary principles of humanity and chivalry.³⁰ The three concepts have been defined as follows:

Military Necessity: Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied.

Humanity: The employment of any kind or degree of force not required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited

Chivalry: Dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden.³¹

²⁷ Advisory Opinion, *supra* note 7, Separate Opinion of Judge Elaraby, 43 ILM at 1081, para. 3.3 [hereinafter Elaraby Opinion].

²⁸ *Id.*

²⁹ See *supra* note 18.

³⁰ DOCUMENTS ON THE LAWS OF WAR 10 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter DOCUMENTS].

³¹ U.S. DEP'T OF THE NAVY (jointly with U.S. Marine Corps & U.S. Coast Guard), THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 5-1 (NWP 1-14M, 1995), *quoted in* DOCUMENTS, *supra* note 30, at 10; see also Falk & Weston, *supra* note 10, at 136 (noting that "[i]n our modern era of mechanized and automated warfare, the principle of chivalry . . . is said to have diminished in its distinctiveness relative to the principle of humanity" (footnotes omitted)).

At its most fundamental level, IHL is the product of striking a careful balance between each of these related concepts.³² As a consequence, “arguments of military necessity cannot be used as pretexts for evading applicable provisions of the law,” on the theory that “such laws have, in any case, been developed with consideration for the concept of military necessity” from their inception.³³ The sole exception to this general rule, and therefore the only instance in which military necessity may be invoked, is where the law expressly provides for its use in the text of a specific rule, and even then it is to be construed strictly against the more general principle of humanity, which “infuses all the law of occupation” and “is to be a guide to [its] interpretation.”³⁴ Accordingly, under the law of belligerent occupation (and IHL in general) military necessity cannot relate to anything other than the security interests of the military forces of the occupying power.³⁵ In addition, its proper invocation must satisfy specific legal tests that take into account the principle of proportionality, discussed in greater detail below.³⁶

Unfortunately, the issue of military necessity was another area of the ICJ’s opinion where the Court arrived at the right conclusion, but through less than convincing reasoning. In fact, unlike the previous examples thus far outlined, the Court surprisingly offers no substantive reasoning to support its finding that Israel’s construction of the wall cannot be justified by military necessity. Instead, it begins its analysis by simply identifying four specific provisions of IHL that in its view are relevant to the construction of the wall—Article 46 of the 1907 Hague Regulations,³⁷ and Articles 47, 49, and 53 of the Fourth Geneva Convention³⁸—and concludes, only in respect of the last, that military necessity cannot properly be invoked. The brevity of this portion of the ruling justifies its quotation in full:

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

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which “the security of the population or imperative military reasons so demand.” This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception “where such destruction is rendered absolutely necessary by military operations.”

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

³² DOCUMENTS, *supra* note 30, at 10.

³³ *Id.*

³⁴ Alain Pellet, *The Destruction of Troy Will Not Take Place*, in ADMINISTRATION, *supra* note 10, at 169, 196.

³⁵ *Id.* at 198.

³⁶ Falk & Weston, *supra* note 10, at 136.

³⁷ Article 46 of the 1907 Hague Regulations, *supra* note 3, provides that “[p]rivate property cannot be confiscated.”

³⁸ Article 47 of the Fourth Geneva Convention, *supra* note 1, provides:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Article 49, in part, prohibits “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . regardless of their motive”; it also provides that “the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.” Article 53 provides that “[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons . . . is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.³⁹

On the basis of this passage, and after considering various provisions of relevant international human rights conventions, the Court concludes that “[t]he 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 [that] the infringements resulting from that route cannot be justified by military exigencies.”⁴⁰ “The construction of such a wall,” according to the Court, “constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law”⁴¹

Although the test for military necessity is firmly established in IHL, the Court inexplicably failed to demonstrate why it took the view that the wall in its present form, with its attendant destructions and appropriations of civilian property, could not be justified by military exigencies. Thus, the Court did not seize the opportunity to contribute to the substantive development of the law on military necessity—a complex, yet known concept with massive implications going well beyond the OPT, as best illustrated by the current situation in Iraq. Based on relevant customary and conventional principles of IHL, the test for military necessity is composed of a five-pronged analysis, in which the onus of proof is borne by the party invoking it.⁴² Because the test is cumulative, failure of any single branch would render the invocation of military necessity unlawful.⁴³

The first branch of the test requires one to ascertain whether the impugned measure violates an absolute prohibition under IHL.⁴⁴ If it does, military necessity cannot be invoked to justify such a violation. Because absolute prohibitions are typically drafted in unqualified terms, this branch of the test affirms the general rule stated above that military necessity may only be invoked where the law expressly provides for its use as an exception to a specific rule. In the context of the wall being built in the OPT, the Court found, *inter alia*, that its “planned route would incorporate in the area between the [1949 armistice, or] Green Line and the wall more than 16 per cent of the territory of the West Bank,” including “[a]round 80 percent of the settlers” living in the OPT.⁴⁵ On these facts, the Court found that “the wall gives expression *in loco* to the illegal measures taken by Israel” through the establishment and maintenance of civilian colonies in the OPT.⁴⁶ Owing to the absolute prohibition imposed by IHL on an occupying power from transferring parts of its civilian population into the territory it occupies (Art. 49, Fourth Geneva Convention), the Court could have reasonably concluded that Israel’s construction of the wall in the OPT fails to satisfy the first branch of the test for military necessity.

The second branch of the test requires one to determine whether the occupying power is facing an actual state of necessity.⁴⁷ If not, military necessity cannot be resorted to. The state of necessity “varies according to circumstances” and includes imminent threats to the occupying power (e.g., attacks about to occur) or present needs of its forces (e.g., medical equipment, food, or water).⁴⁸ This branch of the test requires that the state of necessity refer “only to situations that

³⁹ Advisory Opinion, *supra* note 7, para. 135.

⁴⁰ *Id.*, para. 137.

⁴¹ *Id.*

⁴² These principles have been authoritatively set forth by the International Humanitarian Law Research Initiative (IHLRI) of the Harvard Program on Humanitarian Policy and Conflict Research (HPCR). HPCR, *The Separation Barrier and International Humanitarian Law: Policy Brief 6* (July 2004), available at < <http://www.ihlresearch.org/> > [hereinafter Harvard Brief]. IHLRI is a network of internationally renowned experts on IHL engaged in research, policy, and training activities on the laws of armed conflict. IHLRI was launched by Harvard in 2002 in cooperation with the Swiss Department of Foreign Affairs, as depository of the Geneva Conventions, and the ICRC. It is designed to complement and support ongoing international efforts in the development and reaffirmation of international humanitarian law. For more on the initiative, see its Web site *supra*.

⁴³ Harvard Brief, *supra* note 42, at 6.

⁴⁴ *Id.*

⁴⁵ Advisory Opinion, *supra* note 7, para. 122.

⁴⁶ *Id.*

⁴⁷ Harvard Brief, *supra* note 42, at 6.

⁴⁸ *Id.*

are *within* the occupied territory, and facing the occupying power in the course of occupation.”⁴⁹ The Court did find that “Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population” and that it “has the right, and indeed the duty, to respond in order to protect the life of its citizens.”⁵⁰ It also found, however, that the measures taken by Israel in response “are bound nonetheless to remain in conformity with applicable international law.”⁵¹ On that score, since the wall is in large part being built within the OPT and is purportedly aimed at protecting not only Israeli military interests, but also Israeli civilian settlers living in illegal Israeli colonies, the Court would have had grounds enough to dismiss the wall in its current form as failing this element of the military necessity test. As stated above, military necessity can operate only to protect the security interests of the occupying power’s military forces, and then only within the occupied territory.⁵² An attempt to extend the concept of military necessity to protect the interests of Israeli colonies and their civilian inhabitants would offend this general principle, not to mention the well-established maxim, as noted by Judge Elaraby, “that an illegal act cannot produce legal rights—*ex injuria jus non oritur*.”⁵³

The third branch of the test requires determining whether the impugned measure is the most adequate and effective response to meet the existing threat.⁵⁴ If not, military necessity cannot be invoked by the occupying power. This prong is based on the principle that “military necessity can cover only measures that objectively can achieve their purpose.”⁵⁵ On the basis of the facts before it, the Court could have found that Israel had not exhausted “all available options to achieve its security objectives without inflicting such widespread harm to the Palestinian population and communities” within the OPT.⁵⁶ For instance, in finding that “some parts of the [wall] complex are being built, or are planned to be built, on the territory of Israel itself,” the Court could also have logically found that Israel could have built the whole of the wall along the 1949 armistice line or within its own sovereign territory.⁵⁷ Alternatively, Israel could have increased the effectiveness of its military checkpoints and more effectively guarded the

⁴⁹ *Id.*

⁵⁰ Advisory Opinion, *supra* note 7, para. 141.

⁵¹ *Id.*

⁵² In his contribution to this Agora, David Kretzmer takes an approach quite at odds with this general principle, one that accords more with the wider breadth afforded the concept of military necessity by the Israeli Supreme Court than is legally warranted, *see infra* note 71. In discussing the ICJ’s consideration of the connection between the illegality of Israeli colonies and the illegality of the wall’s route, Kretzmer takes the position that “a theory that posits that the fact that civilians are living in an illegal settlement should prevent a party to the conflict from taking any measures to protect them would seem to contradict fundamental notions of international humanitarian law.” David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AJIL 88, 93 (2005). Elsewhere, he opines that it is not “self-evident” that the “protection of civilians in illegal settlements” through the construction of the wall in the OPT could not “legitimately be regarded as a measure taken on grounds of military necessity.” *Id.* at 94. Finally, he notes that it might be “conceivable, for example, that in some sections [of the wall’s route in the OPT] topographical factors made the chosen route the best possible one for building a barrier to prevent terrorists from infiltrating into Israel in an area where many terrorists had done so in the past.” *Id.* at 100. While I share Professor Kretzmer’s concern about the ICJ’s “light treatment” of IHL in the advisory opinion, I must disagree with his approach to the scope of military necessity. As noted above, in respect of territories occupied, military necessity cannot relate to anything other than the security interests of the military forces of the occupying power and then only within the occupied territory. The purpose of this limited scope is to ensure that military necessity is not resorted to by the occupying power as a catch-all justification for harsh acts taken against protected persons, acts that objectively bear no connection to the bona fide military interests of that power. These acts include such things as colonization, deportation, and collective punishment (e.g., home demolitions), practices that have unfortunately been marked features of Israel’s prolonged occupation of the OPT. The strictly limited scope of the military necessity principle, of course, is important not least because its maintenance helps safeguard the overarching principle of humanity, which must remain the edifice of IHL and inform it throughout. Although the assertion that military necessity cannot be employed to protect civilian colonies in occupied territory would seem to contradict the principle of humanity (as intimated by Kretzmer), the better view, I think, would be to maintain the strict prohibition of Article 49(6) of the Fourth Geneva Convention on the transfer of civilians by the occupying power into occupied territory, thereby avoiding a slippery slope by which the exceptional justification might evolve into a competing (even overarching) norm.

⁵³ Separate Opinion of Judge Elaraby, *supra* note 27, para. 3.1.

⁵⁴ Harvard Brief, *supra* note 42, at 7.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Advisory Opinion, *supra* note 7, para. 67.

area around the 1949 armistice line or “seam zone,” as has been argued by the Israeli human rights organization B’Tselem.⁵⁸ B’Tselem based this finding on official Israeli documents indicating that most suicide bombers that had attacked targets inside Israel had crossed into the country through Israeli military checkpoints, where “they underwent faulty and shoddy checks.”⁵⁹

The fourth branch of the test requires one to ascertain whether the military advantage gained by the impugned measure outweighs the damage done to the population. In other words, is the measure proportionate?⁶⁰ This element is central to the concept of military necessity, for even when the occupying power can successfully demonstrate that a state of military necessity existed and that the measure in question was the most adequate and effective in meeting the threat, if the measure nonetheless has a disproportionate effect on the civilian population, the occupying power must find an alternative measure that, although less effective, will better protect that population’s interests.⁶¹ On the basis of its own findings of fact, the Court could reasonably have found that the effect of Israel’s wall on the protected civilian population of the OPT was not proportionate to its stated goal. These include the Court’s findings that the wall would establish a “Closed Area” between it and the 1949 armistice line requiring approximately 237,000 residents of this area to obtain a permit from the Israeli military authorities simply to remain in, enter into, or exit from their lands;⁶² that whole “Palestinian population areas” would be “encircled” by the wall,⁶³ since Israeli-controlled “access gates” to these areas are “few in number” and “unpredictably” operated, creating “enclaves” that impose “substantial restrictions” on freedom of movement for hundreds of thousands;⁶⁴ that the wall would have “serious repercussions for agricultural production” in the OPT, aggravating “food insecurity” as attested to by the creation of “25,000 new beneficiaries of food aid” in the area;⁶⁵ and that the wall has also “led to increasing difficulties” for the protected civilian population “regarding access to health services, educational establishments and primary sources of water.”⁶⁶

The fifth and final branch of the test for military necessity requires one to determine whether the impugned measure was adopted after due consideration of all the interests involved and by the proper authority.⁶⁷ If this inquiry into due process and mitigation is not undertaken, military necessity may not be invoked. Of all the branches of the test, this one is probably where Israel’s case is strongest. Had Israel made submissions to the Court on the merits, it could have argued that the staged and semipublic manner of the planning and construction of the wall allowed the civilian population of the OPT “adequate warning and ample opportunities to redress some of the harm that resulted,” including “the right to appeal to the Israeli High Court.”⁶⁸ In point of fact, on June 30, 2004, the Supreme Court of Israel, sitting as the High Court of Justice, ruled on the legality of a portion of the wall on a petition brought by Palestinians challenging land seizure orders issued by the Israeli authorities for its construction.⁶⁹ Ironically,

⁵⁸ B’TSELEM, BEHIND THE BARRIER: HUMAN RIGHTS VIOLATIONS AS A RESULT OF ISRAEL’S SEPARATION BARRIER (Mar. 2003), cited in Harvard Brief, *supra* note 42, at 13.

⁵⁹ *Id.*, quoted in Harvard Brief, *supra* note 42, at 13.

⁶⁰ Harvard Brief, *supra* note 42, at 7.

⁶¹ *Id.*

⁶² Advisory Opinion, *supra* note 7, paras. 84–85.

⁶³ *Id.*, paras. 83–84.

⁶⁴ *Id.*, para. 133. For instance, the Court recalled the report of the UN special rapporteur on human rights as noting that “Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m.” *Id.* (quoting UN Commission on Human Rights, Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967, UN Doc. E/CN.4/2004/6, at 7 (2003)).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Harvard Brief, *supra* note 42, at 7.

⁶⁸ *Id.* at 10.

⁶⁹ HCJ 2056/04, Beit Sourik Village Council v. Israel (June 30, 2004), 43 ILM 1099 (2004) [hereinafter *Beit Sourik*]. *Beit Sourik* is covered by Watson, *supra* note 5, at 19–21.

whereas the ICJ failed to undertake an analysis of the wall against the test for military necessity, the Israeli High Court decision in *Beit Sourik* included a lengthy analysis of military necessity and proportionality,⁷⁰ albeit under a set of unique and finally inaccurate assumptions that stretch the accepted limits of military necessity under international law.⁷¹

Importantly, the need to engage in such an analysis was not lost on all members of the Court. In his separate opinion, Judge Pieter Kooijmans noted that while he agreed with the Court's finding that "the measures taken by Israel cannot be justified by military exigencies" under relevant principles of IHL, in his opinion,

the construction of the wall should also have been put to the proportionality test, in particular since the concepts of military necessity and proportionality have always been intimately linked in international humanitarian law. . . . [I]t is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test. The route chosen for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect⁷²

In the context of the law on self-defense, Judge Rosalyn Higgins expressed a similar opinion, noting that "even if it [the wall] were an act of self-defence, properly so called, it would need to be justified as necessary and proportionate."⁷³ She further stated that "[w]hile the wall does seem to have resulted in a diminution of attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained."⁷⁴ Thus, whereas the Court was correct in concluding that the wall in its present form, with its associated destructions and expropriations of civilian property, could not be justified by military exigencies, it should have engaged in a full analysis of the test for military necessity in support of its finding. Had it done so, not only would it have been better able to discharge its judicial function of developing substantive law in this area, but it also would have substantially enhanced the quality and credibility of its findings.

IV. RESPONSIBILITY OF THIRD STATES

Another important aspect of the Court's opinion concerns its ruling on the legal consequences of Israel's construction of the wall for third-party states. In this respect, the Court held that "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."⁷⁵ In addition, the Court held that all states parties to the Fourth Geneva Convention have an obligation, "while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."⁷⁶ This ruling was based on the Court's determination that "the obligations violated by Israel" through the construction of the wall and its associated régime included "certain obligations *erga omnes*," including "the obligation to respect the right of the Palestinian people

⁷⁰ *Beit Sourik*, *supra* note 69, paras. 36–85.

⁷¹ For instance, the Israeli High Court has defined military necessity to include not only the military interests of the occupation forces, but also the security of the State of Israel itself. H.C.J. 606/78, *Ayoub v. Minister of Defense*, 33(2) P.D. 113, *cited in* Harvard Brief, *supra* note 42, at 9. Likewise, the High Court has ruled that the security of Israeli civilians within both Israel and the OPT is covered by military necessity. H.C.J. 4219/02, *Yusef Muhammed Gusein v. Commander of IDF Forces*, *cited in* Harvard Brief, *supra*, at 9.

⁷² Kooijmans Opinion, *supra* note 8, para. 34.

⁷³ To be sure, Judge Higgins took the opinion that "non-forcible measures," such as the building of a wall, do not fall within Article 51 of the UN Charter "as that provision is normally understood." Advisory Opinion, *supra* note 7, Separate Opinion of Judge Higgins, 43 ILM at 1058, para. 35.

⁷⁴ *Id.*

⁷⁵ Advisory Opinion, *supra* note 7, para. 163.

⁷⁶ *Id.*

to self-determination, and certain of its obligations under international humanitarian law.”⁷⁷ The Court recalled common Article 1 of the Fourth Geneva Convention, whereby “[t]he High Contracting Parties undertake to respect and to ensure respect” for the Convention “in all circumstances,” and concluded on that basis 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.”⁷⁸

While I agree with the Court that all states parties to the Fourth Geneva Convention have an obligation to ensure compliance by Israel with international humanitarian law as embodied in that Convention, thereby affirming the long-prevailing interpretation of common Article 1,⁷⁹ I have difficulty with the Court’s failure to elaborate what this duty entails beyond the dual “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.” The Court’s reasoning leaves outstanding the question of the scope of common Article 1; namely, what measures may or may not be taken by a third state to satisfy its solemn duty to “ensure respect” by other states of their obligations under IHL? In terms of positive duties, it is “controversial which measures each State victim of such a violation may take under the law of State responsibility.”⁸⁰ Some have suggested that the same “measures may be taken which general international law offers to the victim of a violation of a treaty to ensure respect of that treaty.”⁸¹ Others, including myself, have argued that insofar as a state commits grave breaches of IHL under Article 147 of the Fourth Geneva Convention, third states may (and in some circumstances, must) individually or collectively resort to more serious enforcement mechanisms such as economic sanctions, universal jurisdiction, the International Criminal Court, the ICJ, and the creation of ad hoc international criminal tribunals.⁸² Unfortunately, state practice on common Article 1 is “not rich enough to determine the upper limits of how a State may ‘ensure respect’” for the Fourth Geneva Convention.⁸³ Likewise, in respect of the lower limits, “it is only certain that a State violates Article 1” of the Convention “if it encourages or assists violations by another State.”⁸⁴ This is to be read in conjunction with Article 16 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, which provides:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

⁷⁷ *Id.*, para. 155. With respect to these IHL obligations, the Court recalled its advisory opinion *Legality of the Threat or Use of Nuclear Weapons*, where it held 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.” *Id.*, para. 157 (quoting *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226, 257, para. 79 (July 8)).

⁷⁸ *Id.*, para. 158.

⁷⁹ The ICRC *Commentary* on the Fourth Geneva Convention offers the following explanation in respect of the meaning of common Article 1:

[I]n the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.

ICRC COMMENTARY, *supra* note 23, at 16. *But see* text at notes 88–89 *infra*.

⁸⁰ MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 231 (1999).

⁸¹ *Id.*

⁸² As noted earlier, most of these measures (especially universal jurisdiction) are intricately linked to the duty of high contracting parties to the Fourth Geneva Convention, codified in Article 146, to enact legislation penalizing the commission of grave breaches, to search for and prosecute or extradite any individuals suspected of committing or ordering the commission of such breaches, and to penalize those suspected of committing other violations of the Convention not amounting to grave breaches. *See* Imseis, *supra* note 3, at 127–37. *See generally* UNITED NATIONS, INTERNATIONAL MEETING ON THE CONVENING OF THE CONFERENCE ON MEASURES TO ENFORCE THE FOURTH GENEVA CONVENTION IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING JERUSALEM (No. 99-35892, 1999).

⁸³ SASSÒLI & BOUVIER, *supra* note 80, at 231.

⁸⁴ *Id.*

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.⁸⁵

Given the ambiguous scope of common Article 1, the opinion of the Court would have been considerably enhanced through a more comprehensive analysis and thoughtful exploration of the question of third-state legal obligations under IHL.

This was a primary concern of Judge Kooijmans, the only member of the Court to dissent from its finding on the legal obligations of third states. In explaining his dissent, particularly in relation to the Court's finding that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall," Judge Kooijmans noted that he had "great difficulty" in "understanding what the duty not to recognize an illegal fact involves."⁸⁶ Recalling General Assembly Resolution ES-10/13 of October 21, 2003, in which "144 States unequivocally have condemned the construction of the wall as unlawful," he wondered what more these states were "supposed to do in order to comply with this obligation" and concluded that the "duty not to recognize amounts . . . to an obligation without real substance."⁸⁷ While Judge Kooijmans did not apply this argument to the Court's more specific finding on the obligation of third states not to render aid or assistance in maintaining the situation created by Israel's construction of the wall (a finding he supported), he did take issue with the Court's ruling on the scope of the common Article 1 duty of states to "ensure respect" for the Fourth Geneva Convention. Although he acknowledged that the ICRC has "from an early moment . . . taken the position that common Article 1 contains an obligation for all States parties to ensure respect by other States parties," he took the contrarian view that the *travaux préparatoires* of the Convention "do not support that conclusion" and that this duty was "mainly intended to ensure respect of the conventions by the population as a whole."⁸⁸ He then made the following concluding statement, which demonstrates the extent to which the Court's reasoning on this point left something to be desired:

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 statement of positive law. Since the Court does not give any argument in its reasoning, I do not feel able to support its finding.⁸⁹

Irrespective of where one stands on the scope of the common Article 1 duty to "ensure respect" for the Fourth Geneva Convention, or on the substantive meaning to be given to the Court's ruling that all states are under an obligation not to recognize the illegal situation resulting from the construction of the wall, the existence of legal debate and ambiguity surrounding these questions seems sufficient to warrant criticism of the Court's relatively terse rulings on this point.

The best evidence of this conclusion is the confusion currently reigning among members of the international donor and aid community operating in the OPT who are struggling to determine,

⁸⁵ Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, Art. 16, UN Doc. A/56/10 (2001). The commentary to the articles notes that "Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter." *Id.* at 155. In the context where a third state might provide humanitarian aid or assistance to the Palestinian civilian population in the OPT, either through an international aid agency or the Palestinian Authority, but not directly through the government of the State of Israel, one might be inclined to interpret Article 16 as inapplicable, even where such aid or assistance might help maintain the illegal situation resulting from the construction of the wall. However, since Israel, as the occupying power in the OPT, assumes under the law of belligerent occupation the overall responsibility for the provision of such aid and assistance to the Palestinian civilian population, it stands to reason that Article 16 does apply *mutatis mutandis*.

⁸⁶ Kooijmans Opinion, *supra* note 8, para. 44.

⁸⁷ *Id.*

⁸⁸ This position seems untenable given the exclusively state-centric nature of the duties contained in the 1949 Geneva Conventions. *Id.*, paras. 47-48.

⁸⁹ *Id.*, para. 50.

in practical terms, the scope of the Court's determination concerning the duty of third states with respect to Israel's construction of the wall. The devastating humanitarian consequences of the wall have necessarily spawned measures by the international donor and aid community aimed at offsetting and countering its effects on the Palestinian civilian population. These "mitigation measures," as they are known, have focused on such things as repairing infrastructure damaged by the wall's construction, providing cash aid and food assistance to needy families surrounded by the wall, and introducing employment-generating schemes for those whose access to the local labor market has been cut off.⁹⁰ The types of questions that have arisen include whether international funding for the construction of new health clinics, road networks, or other public infrastructure to service Palestinian areas cut off by the wall would violate third-state duties under IHL. As noted in a recent Palestinian Authority study on the impact of the wall:

The international donor community is attuned to the political sensitivities associated with the wall and mitigation measures to offset and counter its impacts; concerns surround the perception that mitigation creates secondary wall infrastructure—infrastructure that would not have been necessary in the absence of the wall—while furthering the overall objectives of the [government of Israel] in the OPT.⁹¹

Members of the international donor and aid community are now concerned that by supporting the creation of such "secondary wall infrastructure," they may be engaging in activity that violates relevant principles of IHL.

In this context, the Court would have done well to draw a clear distinction between the obligation not to "render aid or assistance in maintaining the situation" created by the construction of the wall, and the provision of humanitarian aid or assistance to Palestinians who are affected by that construction. This shortcoming was implicitly recognized by Judge Kooijmans, who noted that he "would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall."⁹² In this connection, the Court could have relied on its advisory opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*.⁹³ There, the Court found that states were under a legal obligation to "refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to paragraph 125," which provided that "[i]n general, the non-recognition of South Africa's administration of the Territory *should not result in depriving the people of Namibia of any advantages derived from international co-operation*."⁹⁴ Thus, by failing to thoroughly examine the scope of common Article 1 of the Fourth Geneva Convention and to offer sound argumentation in support of its findings, having due regard to the practical difficulties of delivering international humanitarian aid and assistance in the OPT, the Court missed yet another opportunity to contribute to the substantive development of a highly important area of public international law.

V. CONCLUSION

All jurists will be familiar with the oft-cited axiom articulated by Lord Justice Hewart in *Rex v. Sussex Justices; Ex parte McCarthy*: "[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."⁹⁵ That justice must "be seen to be done" is a fundamental principle upon which

⁹⁰ See generally Palestinian National Authority, Ministry of Planning Policy Research Unit, *The Annexation and Expansion Wall: Impacts and Mitigation Measures* (May 31, 2004), available at <http://www.psgateway.org/download/1872/Wall_report.doc>.

⁹¹ *Id.*, Executive Summary.

⁹² Kooijmans Opinion, *supra* note 8, para. 45.

⁹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ REP. 16 (June 21).

⁹⁴ *Id.*, paras. 119, 125 (emphasis added).

⁹⁵ *Rex v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256, 259; see also *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 564–75 (1980).

its administration in most, if not all, major legal systems of the world is based. It is rooted in a multiplicity of age-long traditions, and informs a great many rules of legal procedure and substance that are aimed at engendering public confidence in the integrity of the legal process, a key aspect of which is the existence of a competent and impartial judiciary capable of demonstrating the cogency and correctness of its findings. This is no less the case with respect to the administration of justice on the international plane. Article 56 of the ICJ Statute provides that any judgment of the Court "shall state the reasons on which it is based."⁹⁶ Likewise, Article 107 of the Rules of Court states that in rendering an advisory opinion, the Court shall provide "the reasons in point of law" in support of its findings.⁹⁷ Cursory though they may be, these rules are to be understood as reaffirmations of the principle of open justice and of the need for the judicial function to be guided by the imperative of rendering rational, coherent, and convincing reasons in support of its findings, based on a careful consideration of material facts and the sound application of relevant legal principles to those facts.

The ICJ's treatment of IHL in its advisory opinion on the legal consequences of the construction of a wall in the OPT leaves much to be desired in the way of fulfilling this judicial imperative. In addition to the Court's flawed interpretation of Article 6 of the Fourth Geneva Convention, whose effects bear serious consequences for civilian persons subject to prolonged foreign military occupation, its failure to provide adequate analysis in support of its findings on the applicable law in the OPT, the principle of military necessity, and the legal duties of third states with respect to Israel's construction of the wall renders the opinion less convincing than it otherwise could or should have been. To be sure, with the exception of its ruling on Article 6, the Court was correct in its findings on IHL issues. That said, it was incumbent upon the Court, as the highest judicial authority in the international community, to exhaustively and persuasively display the basis for those findings, as General Assembly requests that it render advisory opinions are based on the strength of that very authority.⁹⁸ As put in its Resolution 1731 (XVI) of December 20, 1961, by which the General Assembly requested an advisory opinion on the interpretation of Article 17(2) of the UN Charter, the Assembly expects the Court to furnish it with "authoritative legal guidance" in rendering advisory opinions.⁹⁹ Moreover, being the "only judicial body which applies generally binding international law without limitation to a defined treaty system or the restrictions of a specialized legal field," the ICJ "is therefore in a better position than any other judicial institution to contribute through its case law to the development of general international law."¹⁰⁰ Despite having had ample opportunity to do so, particularly as concerns the concept of military necessity and the scope of common Article 1 of the Fourth Geneva Convention, the Court failed to engage in any real and substantial exercise of this function.

In the final analysis, the advisory opinion was highly important in setting forth and affirming general legal principles and duties regarding not only Israel's construction of the wall in the OPT, but also its prolonged occupation of that territory and continued frustration of the right of the Palestinian people to self-determination. From the perspective of the positive development of public international law, however, the opinion does not stand out as a particularly major achievement of the Court or its role, as expressed in the words of Judge Abdul Koroma, as "the supreme arbiter of international legality."¹⁰¹

⁹⁶ ICJ STATUTE Art. 56; *see also* Rules of the International Court of Justice, *as amended* Dec. 5, 2000, Art. 95. This principle applies to advisory proceedings by virtue of Article 102, paragraph 2, of the Rules of Court, which provides that in such proceedings "[t]he Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable." *Id.*, Art. 102.

⁹⁷ ICJ, Rules of Court, *supra* note 96, Art. 107.

⁹⁸ UN CHARTER Arts. 92, 96; *see also* 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1146 (Bruno Simma ed., 2d ed. 2002).

⁹⁹ GA Res. 1731 (XVI) (Dec. 12, 1961); *see also* Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ REP. 151, 155-56 (July 20).

¹⁰⁰ THE CHARTER OF THE UNITED NATIONS, *supra* note 98, at 1146.

¹⁰¹ Advisory Opinion, *supra* note 7, Separate Opinion of Judge Koroma, 43 ILM at 1056, para. 10.