

Another Brick in the Wall: Between Israeli Law and the ICJ's Advisory Opinion

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Legal Deterrence

On 30 June 2004, nine days before the publication of the International Court of Justice's (ICJ) Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (OPT's), the Israeli Supreme Court published its decision regarding the construction of the Wall in the Jerusalem area.

In an unprecedented manner, the Supreme Court's decision in the *Beit Sourik*² case was published simultaneously in Hebrew and English on the Supreme Court's website. Had it not been for the imminent release of the ICJ's Advisory Opinion, it seems doubtful that arrangements would have been made for a synchronized English translation.

The *Beit Sourik* judgment relates to a 40km section of the Wall in the Jerusalem area. The Supreme Court declared that most of the Israeli government's proposed route was invalid because it violated the principle of proportionality. However, on 9 July 2004, the ICJ, in a 14 to 1 majority opinion, determined that the construction of the Wall in territory occupied by Israel in 1967 was illegal, and that Israel should dismantle any sections of the Wall in the OPT's and compensate Palestinians who suffered damage as a result of such construction.

The State of Israel refused to appear before the ICJ in this matter,³ but it submitted a document disputing the ICJ's jurisdiction to examine this issue. This document also set out Israel's reasoning for the construction of the Wall, stating that it was motivated solely by security considerations.

In a subsequent petition submitted to the Supreme Court relating to the Wall,⁴ the State was requested to submit its response to the ICJ's Advisory Opinion. On 23 February 2005, the State submitted its response rejecting the Advisory Opinion primarily on the basis that the ICJ did not have in its possession the appropriate factual foundation to review this matter. The State further noted in its response that it would abide by the Supreme Court's ruling in the *Beit Sourik* case, which was binding on it.⁵

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² HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel* (30 June 2004).

³ Israel has developed the bizarre practice of refusing to cooperate with key UN agencies and subsequently accusing the same agencies of demonstrating an imbalanced approach in their reports. A comparison may also be drawn with the declaration of the State's representative during a Supreme Court hearing held on 26 October 2004 concerning Israel's home demolition policies in the OPT's. See Dan Izenberg "Barak: Israel Should Rethink Demolitions", *Jerusalem Post*, 27 October, 2004.

⁴ HCJ 4825/04, *Mohammad Khaled Alayan v. The Prime Minister* (case pending).

⁵ It should be noted that the *Beit Sourik* decision was met with general dissatisfaction by Israeli governmental officials when it was originally published. A short time later, the very same judgment was used by the Israeli government to rebuff international criticism regarding construction of the wall in the West Bank. See Hana Greenberg, "Supreme Court Decision Will Delay the Construction of the Wall for Three Months", *YNET*, 30 June 2004; Tal Rosner, "The AG Reprimanded Reserve Colonel Dani Tirza Who Said Supreme Court Ruling was a Critical Mistake", *YNET*, 1 July 2004. The Israeli Prime Minister, Ariel Sharon, acknowledged positive elements in the Supreme Court ruling in the context of the imminent publication of the Advisory Opinion by the ICJ, stating "Due to the status of the Supreme Court and its President, Justice Aharon Barak, in the world its rulings will assist us in the Hague. They provide a legal response [for arguments raised against Israel]." See Diana Behor-Nir, "Sharon: Supreme Court Ruling Will Assist in Hague," *YNET*, 4 July 2004. Two months

In this short article, I wish to focus on some of the problematic legal reasoning contained in both the *Beit Sourik* ruling and the State's response to the ICJ's Advisory Opinion.

Occupiers without Occupation: The Status of the Fourth Geneva Convention in Israeli Law

The Geneva Conventions of 1949, particularly the Fourth Geneva Convention, significantly developed the law which is applicable during periods of occupation or armed conflict. The Fourth Geneva Convention focuses on the status of Protected Persons in an Occupied Territory, their rights, and the obligations of the Occupying Power towards them. Thus, for example, Article 27 of this Convention stipulates the duty of the Occupying Power to respect, at all times, basic fundamental rights of Protected Persons. The Article declares:

Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.⁶

later, Sharon changed direction and suggested that the Supreme Court justices should visit Mount Herzl cemetery should they raise queries regarding the route of the Wall: "Next time, if you are asked by the Supreme Court justices about the considerations which led you to include all of the towns in Gush Etzion inside the fence – I suggest that you direct them to Mount Herzl and the graves of Gush's martyrs, murdered by an Arab mob during the war of liberation. The justices' visit will help them understand our decision." See "Sharon Directed the Supreme Court Justices to Mount-Herzl", *YNET*, 9 September 2004. Also, compare Sharon's statements of July 2005 regarding expansion of the Ariel settlement, which he considers as an integral part of Israel. Including Ariel within Israeli territory necessitates its inclusion on the Israeli side of the Wall, which results in the Wall being routed deep into the OPT's. According to Sharon, "I came to see how it is possible to expand the city and strengthen the bloc as I do for other blocs [of settlements – M.D.]. This bloc will forever be part of Israel and retain territorial contiguity with it." See Diana Behor-Nir & Yitzhak Ben Hourin, "Sharon in Ariel: I Came to Examine How to Expand the Bloc," *YNET*, 21 July 2005. Contrast these statements with the clear statement of the UN Special Rapporteur, Professor John Dugard, in his March 2005 report: "Increasingly, the Wall is coming to be seen as the new border between Israel and Palestine instead of the Green Line. The fact that the course of the Wall follows the ruling of the Israeli High Court in the *Beit Sourik* case is seen as giving legitimacy to the new "boundary". In 2003 the Special Rapporteur warned that the Wall constituted "a visible and clear act of territorial annexation under the guise of security" (E/CN.4/2004/6, para. 6). At the time, this warning was dismissed with scorn by many as an exaggeration. Today, it is fast becoming accepted wisdom." See John Dugard, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967*, 3 March 2005, paragraph 14.

⁶ In the official commentary relating to this Convention, drafted by Jean S. Pictet of the International Committee of the Red Cross, the crucial importance of Article 27 is clearly emphasized. This Article represents an upgrading of the rights of Protected Persons during periods of occupation and/or armed conflict. Article 27 is a foundation for the entire 'Geneva Law'. Pictet states in this context: "Article 27, placed at the head of Part III, occupies a key position among the Articles of the Convention. It is the basis of the Convention, proclaiming as it does the principles on which the whole of 'Geneva Law' is founded. It proclaims the principle of respect for the human person and the inviolable character of the basic rights of individual men and women." See Jean S. Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilians in Times of War*, (Geneva, International Committee of the Red Cross, 1958), 200-201. The end of Article 27, contains a qualification of the right enshrined in the Article: "However, the parties to the conflict may take such measures of control and security in regard to Protected Persons as may be necessary as a result of the war." Regarding the possibility of taking measures that are at odds with the protection conferred

The status of the Fourth Geneva Convention of 1949 in the Israeli legal system is unclear. Under Israeli law, this Convention is not binding on the State because it falls within the category of treaty law. Despite the fact that it is a treaty which Israel has signed and ratified, it does not necessarily bind the organs of the State in their conduct within the scope of the Convention. In order for the provisions of the Fourth Geneva Convention to be binding on the State of Israel, the Supreme Court has held that it would be necessary for the Knesset to enact legislation incorporating its provisions into Israeli law.⁷

In contrast, customary international law, meaning legal norms that have existed in the international arena for many years in relation to which there is widespread acceptance of their customary nature, are binding on Israel without any need for incorporation through domestic legislation.⁸ For example, Israeli law acknowledges the Hague Regulations of 1907 as customary international law binding on Israel in this way.

However, the State of Israel does not absolutely reject the Fourth Geneva Convention before the Israeli courts. In fact, a consistent pattern can be discerned whereby the State declares before the Supreme Court that it shall abide by the "humanitarian provisions" of the Fourth Geneva Convention, and the Supreme Court therefore determines that it is unnecessary to consider the Convention's status under Israeli law. The Supreme Court reaches this conclusion on the basis that the State has declared its willingness to abide by the Convention's "humanitarian provisions" without committing itself regarding the applicability of the Convention to the territory in question. This was expressed in the *Beit Sourik* decision as follows:

The question of the application of the Fourth Geneva Convention has come up more than once in this Court...The question is not before us now, since the parties agree that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review.⁹

In its response to the ICJ's Advisory Opinion, the State repeats that, "the State of Israel has committed to act, *de facto*, in accordance with the humanitarian provisions of the Fourth Geneva Convention in the territories held by it and under its control."¹⁰ The basis of this approach is Israel's desire not to acknowledge the territories under its control as Occupied Territories. Israel's official position is that the Fourth Geneva Convention is not applicable in the West Bank, Gaza Strip and East Jerusalem because this territory is not the territory of a state party to the Fourth Geneva Convention.¹¹

by this provision, Pictet observes that, "What is essential is that the measures of constraint they adopt should not affect the fundamental rights of the persons concerned. As has been seen, those rights must be respected even when measures of constraint are justified." *Ibid*, p. 208

⁷ See HCJ 785/87, *Affo v. IDF Military Commander in the West Bank*, PD 32(2) 4, 38.

⁸ *Ibid*.

⁹ Para. 23 of the Judgment. Israel has not signed the two Additional Protocols to the Geneva Conventions of 1977. The Supreme Court does not consider the provisions of these Protocols in its reasoning.

¹⁰ Para. 179 of the State's Response.

¹¹ Israel has also annexed East Jerusalem in defiance of the international community's clear opposition. See UN Security Council resolutions 252 of 21 May 1968; 267 of 3 July 1969; 271 of 15 September 1969; 476 of 30 June 1980; and 478 of 20 August 1980. The ICJ concluded in its Advisory Opinion the *de jure* applicability of the Fourth Geneva Convention in the West Bank and East Jerusalem: "...the Court considers 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. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that

What are these "humanitarian provisions" contained in the Fourth Geneva Convention? What is special about these provisions which distinguishes them from other provisions in the same Convention that are not "humanitarian provisions"? What are the legal consequences of a self-declared commitment to some provisions of the Fourth Geneva Convention, the "humanitarian provisions", assuming that it is possible to distinguish between different provisions of a Convention the basic purpose of which is humanitarian? Is it possible to argue that provisions in the Convention which are not "humanitarian" cannot be relied upon by Israel to legitimize its actions when it has not committed itself to be bound by them in contrast to the "humanitarian provisions" of the Convention? Could there be a provision in the Fourth Geneva Convention which includes both a humanitarian dimension that Israel has committed itself to abide by and also a non-humanitarian dimension that Israel cannot rely on to legitimize its actions?¹²

Assuming that a distinction may be drawn between "humanitarian provisions" of the Fourth Geneva Convention and other provisions of the Convention, one could argue that any provision which does not benefit Protected Persons, as defined in the Convention, is not a "humanitarian provision". Therefore, provisions that permit, even if only as an exception, infringements of the rights of Protected Persons under the Fourth Geneva Convention would constitute "non-humanitarian provisions" of the Convention which Israel does not consider as binding upon it. In other words, according to Israel, such provisions of the Fourth Geneva Convention are not applicable to it.

Israel's creation of a category of "humanitarian provisions" under the Fourth Geneva Convention necessarily produces another category of "non-humanitarian" provisions of the Convention. This dichotomy undermines Israel's justification, based on provisions of the Fourth Geneva Convention,

conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories." See par. 101 of the Advisory Opinion. The discussion concerning the applicability of the Fourth Geneva Convention to Israel's actions could be unnecessary considering its character as customary international law. See International Court of Justice, Advisory Opinion: *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 79; M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," 42 *Virginia Journal of International Law*, 81, 115-16, (2001).

¹² These questions have yet to be discussed by analysts of international humanitarian law, particularly those who deal with the application and violation of these laws by the State of Israel. Thus, for example, in a recent article by David Kretzmer which deals with the *Beit Sourik* decision and the ICJ Advisory Opinion regarding the construction of the Wall, there is no discussion of the unusual status of the Fourth Geneva Convention in Israeli law resulting from the mutual understanding between the Attorney General and the Supreme Court. See David Kretzmer "The Advisory Opinion: The Light Treatment of International Humanitarian Law," 99 *American Journal of International Law*, 88 (2005). At the beginning of his article, Kretzmer claims that the difficult legal issues considered by the Supreme Court have never been debated in any other legal forum in the world, either locally or internationally. It would appear that there is some exaggeration in this statement, especially if we take into account discussion of the Turkish government's violations of the rights of the Kurds that has taken place at the European Court of Human Rights. Kretzmer's statement is all the more problematic when one compares the decisions delivered in the two judicial forums. In addition, irrespective of his declaration that the purpose of the article is to advance respect for international humanitarian law, the author proposes a very wide interpretation of the Fourth Geneva Convention and particularly Paragraph 64(2) which concerns the obligations of the occupying power and its authority to change the existing law in the occupied territory either to comply with its obligations under the Convention, or for the purpose of protecting the security of the occupying power. According to Kretzmer, this provision can be interpreted broadly, suggesting that an occupying power can do more than simply amend the existing law in an occupied territory. This interpretation is designed to support his principled claim that a wall can be built in an occupied territory. The author's proposal exceeds even the State of Israel's official interpretation of the Fourth Geneva Convention by changing it from an apparently "humanitarian provision" into a "non-humanitarian provision". *Ibid*, p. 101.

for constructing the Wall in general and in Occupied Territory in particular. Thus, for example, both the Supreme Court decision in *Beit Sourik*¹³ and the State's subsequent response to the ICJ's Advisory Opinion, refer to Article 53 of the Fourth Geneva Convention as a source for the legal justification of construction of the Wall in an Occupied Territory. This Article contains a general prohibition on the destruction of property and an exception to this rule which permits such destruction if "such destruction is rendered absolutely necessary by military operations." Article 53 of the Fourth Geneva Convention stipulates that:

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

This provision of the Fourth Geneva Convention contains two aspects: a "humanitarian" aspect, namely the protection of property, including that of Protected Persons, from destruction; and, a "non-humanitarian" or militaristic aspect, namely, the possibility of destroying property, including that of Protected Persons, as an exception to the rule.

Following this logic, the "humanitarian aspect" of Article 53 is binding on the Israeli authorities, however, the "non-humanitarian" aspect, the applicability and validity of which Israel has not recognized, is not acknowledged under Israeli law. Thus, arising from Israel's self-declared distinction between applicable "humanitarian" and inapplicable "non-humanitarian" provisions of the Fourth Geneva Convention, Israel cannot rely on Article 53 as legal authority for constructing the Wall in an Occupied Territory.

Forever Temporary: The Absolute Discretion of Military Commanders

In the *Beit Sourik* case, the Supreme Court once again reinforced the discretion of military commanders whose decisions and actions are being challenged. Based on the Supreme Court's approach, it is difficult or even impossible to contest the discretion of a military commander who declares before the Court that his decisions or actions are based on military considerations and that the action that is being challenged is "temporary" in nature,¹⁴ even where the measure is of an extraordinary character and involves a huge financial investment, as is the case regarding the construction of the Wall.

Further, it seems that after the decision in *Beit Sourik*, it will not assist a petitioner to put forward evidence from a retired senior military officer. The Supreme Court has determined, in an unquestioning manner, that it will always prefer the discretion of a military commander in office because of the responsibility that he carries with his position.¹⁵ Considering these determinations, the possibility of arguing against the discretionary decision-making of a military commander is effectively negated. A military commander's affidavit supported by a governmental decision, even if too often the latter contradicts public statements by the government, will always obtain the stamp of approval of the Supreme Court. The Court will not examine the conduct of a military commander

¹³ Para. 35 of the Judgment.

¹⁴ Para. 28 of the Judgment.

¹⁵ Para. 47 of the Judgment. It should be noted that the military experts who gave evidence on behalf of the petitioners did not argue for construction of the Wall on the Green Line. Rather, they agreed that it could and should be constructed within the OPT's. The Supreme Court rejected their position in favour of the discretion of the Israeli military which advocated the construction of the Wall deeper into occupied territory.

in a wider context than his affidavit and there is no way to challenge his credibility due to the lack of cross-examination of witnesses in the Supreme Court.

Thus, it is not surprising that for many years, the Supreme Court has legitimized numerous and patent breaches of international humanitarian law committed by the Israeli government which were explained as being only "temporary". These actions were always based on the infallible discretion of a military commander and ultimately resulted in confiscation of land of Protected Persons through actions such as building settlements, by-pass roads and military bases.¹⁶

Although the Fourth Geneva Convention recognizes the discretion of a military commander in an Occupied Territory to pursue actions that necessarily infringe the rights of Protected Persons, this discretion is the exception and not the rule. The general rule is a prohibition on violations of basic rights of Protected Persons in accordance with the Fourth Geneva Convention. The conclusion is that the discretion of a military commander should be examined in the context of the prohibitions imposed on him under international humanitarian law. There should be a presumption that there is a high probability that the military commander is acting outside the exception granted in the Fourth Geneva Convention. Pictet emphasized the high probability of exploitation of this type of exception in the context of comments on the exception within Article 53 of the Fourth Geneva Convention. This exception allows the destruction of property where such destruction is rendered absolutely necessary by military operations. Pictet stresses in this regard:

...it will be for the Occupying Power to judge the importance of such military requirements. It is therefore to be feared that bad faith in the application of the reservation may render the proposed safeguard valueless; for unscrupulous recourse to the clause concerning military necessity would allow the Occupying Power to circumvent the prohibition set forth in the Convention.¹⁷

The Intolerable Abuse of Exceptions

The Supreme Court determined in the *Beit Sourik* case that Article 53 of the Fourth Geneva Convention of 1949 and Article 23(g) of the Hague Regulations of 1907 constitute a legal basis for the construction of the Wall in the West Bank. The Supreme Court has held in this regard that:

Regarding the central question raised before us, our opinion is that the military commander is authorized – by international law applicable to an area under belligerent occupation – to take possession of land, if this is necessary for the needs of the army. See Articles 23(g) and 52 of the Hague Convention; Article 53 of the Fourth Geneva Convention.¹⁸

Contrary to the Israeli Supreme Court, the ICJ has concluded that Article 23(g) of the Hague Regulations is not applicable in the context of the West Bank, since its context is offensive military operations during an armed conflict, under the heading of "Means of Injuring the Enemy, Sieges and Bombardments." The ICJ has determined in relation to this point that:

With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with "Means of Injuring the Enemy, Sieges, and Bombardments." Section III deals with military authority in

¹⁶ See judgments cited in para. 32 of the Judgment.

¹⁷ Pictet, p. 302.

¹⁸ Para. 32 of the Judgment.

occupied territories. Only section III is currently applicable in the West Bank and Article 23(g) of the Regulations, in Section II, is thus not pertinent.¹⁹

Israel insists upon the applicability of Article 23(g) of the Hague Regulations and relies on the Supreme Court's unreasoned statement in the *Beit Sourik* case:

...This Regulation does not prohibit the construction of the barrier even if it requires dispossessing land, since it is necessarily required for the purposes of blocking the terror attack. Therefore, in the respondent's opinion, Israel is authorized to construct the barrier under the law of war, even if it requires dispossession of private land, because constructing the barrier meets the requirements established under Article 23(g). This was also held in the *Beit Sourik* case.²⁰

In its response to the Advisory Opinion, the State criticizes the factual basis of the Advisory Opinion including the facts that led the ICJ to determine that the Second Section of the Hague Regulations was not applicable in the context of constructing the Wall in the West Bank. However, in the State's response, one notices that its definition of "armed conflict with the Palestinians" is very wide and includes "large scale riots". This definition puts the State's conclusions as to the laws applicable to it in serious doubt, and it also undermines the validity of the State's commitment to the "humanitarian provisions" of the Fourth Geneva Convention, not to mention the grave danger to Protected Persons in Occupied Territory arising from this definition. According to the State:

Thus, the armed conflict with the Palestinians has many forms ranging from large scale rioting to committing suicide bombings and launching missile attacks on populated areas in Israel and in Gaza.²¹

Both the Supreme Court in the *Beit Sourik* decision and the State in its response to the Advisory Opinion of the ICJ do not explain how the construction of the Wall can be reconciled with the State's obligations under Article 53 of the Fourth Geneva Convention. They do not emphasize the fact that the rule in this Article prohibits the destruction of property, including that of Protected Persons, and that only the exception of absolute military necessity during military operations could allow such destruction of property, and even this exception is subject to numerous requirements under international humanitarian law.

However, beyond the issue of the primary status of the prohibition in Article 53 of the Fourth Geneva Convention, which is not stressed by either the Supreme Court or the State, there is a serious legal problem in their reliance on Article 53 to justify the construction of the Wall. This problem has two dimensions. Firstly, the exception in Article 53 which allows the destruction of property in an Occupied Territory by an Occupying Power stipulates that such destruction is only

¹⁹ Para. 124 of the Advisory Opinion.

²⁰ Para 490-491 of the State's Response.

²¹ Para 56 of the State's Response. The State also argued that the construction of the Wall should be considered from a wider perspective. From its viewpoint, construction of the Wall will actually benefit the Palestinian population: "the barrier decreases the need for military actions near the cities and the need for actions such as encirclement or blockade. Following construction of the barrier, there was a decline in the need to impose encirclements on Palestinian cities on border areas, such as Jenin. Similarly, there was a decrease even in the need for many roadblocks within the Occupied Territories, and hence a decision was made to limit the number of blockades". See Paragraph 94 of the State's Response. The State's Response does not state that the body which pressed most heavily for the erection of the Wall, Israel's General Security Service, the Sha'bak, simultaneously demanded the continued conduct of military activities deep into the OPTs.

possible where it is "rendered absolutely necessary by military operations." The exception is therefore limited to the context of military operations. Including the construction of the Wall within the concept of "military operations" will unreasonably expand the meaning of that term and will render meaningless the fact that this is an exception to a basic rule, the main purpose of which is to protect the property of Protected Persons. The assumption that the concept of "military operations" is not limited to operational military activity of the Occupying Power leads to the conclusion that any construction carried out by it justifies damaging the property of Protected Persons based on the discretion of a military commander, and without a duty to compensate the Protected Persons whose Property was damaged. Indeed, the fact that Article 53 does not include an option to compensate Protected Persons for damage to their property reinforces the narrow scope of the exception which is limited to operational military activities.

Secondly, the possibility for the Occupying Power to damage property in an Occupied Territory, including the property of Protected Persons, is based on absolute military necessity. This means that mere military necessity is not enough. The fact that the military necessity must be "absolute" leads to the conclusion that there must be a short passage of time between the absolute military necessity and the action which damages property in an Occupied Territory. Evidently, the construction of the Wall required planning and building over a long period of time. There is no doubt, therefore, that the construction of the Wall in an Occupied Territory does not meet the condition of "absolute" military necessity in Article 53 of the Fourth Geneva Convention.

It is very doubtful whether Article 52 of the Hague Regulations of 1907 could legally justify the construction of such a wall in an Occupied Territory.²² The possibility of requisitioning property under this Article is limited to the "needs of the army of occupation." Indeed, one cannot stretch the interpretation of this Article beyond basic "needs" of the army of occupation, in the strict sense of the word. For example, if this Article was interpreted as permitting the requisitioning of land for the benefit of citizens of the Occupying Power present in an Occupied Territory, it would render meaningless the absolute prohibition in Article 49(6) of the Fourth Geneva Convention which forbids the transferring of citizens of an Occupying Power to an Occupied Territory. Such a wide interpretation of the "needs of the army of occupation" for the purposes of Article 52 would make it possible for the Occupying Power to acquire ever increasing amounts of land in an Occupied Territory based on the needs of its citizens who had been transferred there illegally as opposed to the needs of the military itself.²³

Further, it seems that Israel cannot resort to Article 52 of the Hague Regulations of 1907 as a legal justification for construction of the Wall as a result of Israel's declared rationale for the Wall.²⁴ According to the Israeli military, the Wall is intended as a temporary security measure to block

²² Article 52 of the Hague Regulations of 1907 stipulates that, "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

²³ See para. 64 of the State's Response, which proclaims that "the barrier is supposed to protect also the Israeli living in Judea and Samaria [the West Bank – M.D.], as well as other important infrastructure such as streets, electric cables, and more. Thus parts of it are in Judea and Samaria."

²⁴ According to the State, in para. 4 of its Response, the Wall is established as "a temporary security measure to block the attack [of terror – M.D.]". It adds, in para. 6, that "most of the barrier passes, for security reasons, in Judea and Samaria but it passes also in Israel." Compare this with the protection granted to civilian property by Articles 52 and 54(2) of the First Protocol to the Geneva Conventions of 1977.

terrorist attacks. However, it appears that Article 52, which is contained in the Third Section of the Hague Regulations entitled "Military Authority over the Territory of the Hostile State," does not allow the requisitioning of land for this declared purpose. The purpose of the provisions in the third Section of the Hague Regulations is to protect a population whose territory is occupied by a foreign state and this Section constitutes the basis for the more detailed regime of protection of civilians during occupation set out in the Fourth Geneva Convention of 1949. Thus, for example, Article 43 of the Hague Regulations of 1907, which is also included in the Third Section of the Hague Regulations, stipulates the duty of the occupant to act as if it were the legitimate authority of the population under occupation:

Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Similarly, Article 46 of these Regulations, which is also included in the Third Section, proclaims the duty of the occupant to respect the basic fundamental rights of the civilian population. In fact, this is the foundation for Article 27 of the Fourth Geneva Convention. This provision even emphasizes the prohibition on confiscating private property:

Art. 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Another Article in the Hague Regulations deals with the rationale for the construction of the Wall as declared by Israel. Article 23(g), which is contained in the Second Section of the Regulations entitled "Means of Injuring the Enemy," allows as an exception only, damage to and even destruction of private property if "imperatively demanded by the necessities of war." As previously mentioned, the ICJ determined that Article 23(g) is not applicable in the context of constructing the Wall in the West Bank.²⁵ Further, Israel cannot rely on Article 23(g) and Article 52 of the Hague Regulations at the same time to justify damage to the property of Palestinian civilians. Article 52 of the Hague Regulations deals with administering the territory which is under the military's control during an occupation – it does not deal with combat or other operational military activity in such territory. Thus, the factual circumstances in which Article 52 becomes applicable, are not those invoked by Israel.²⁶

International Human Rights Law

The ICJ reserved a significant portion of its Advisory Opinion to examining violations, resulting from the construction of the Wall, of the rights of the Palestinian population pursuant to international human rights law, particularly the International Covenant on Civil and Political Rights (1966), the

²⁵ Even if Article 23(g) applies in the present context, it should be interpreted similarly to Article 53 of the Fourth Geneva Convention, especially regarding the need for proximity in time between the military necessity and the destruction of property.

²⁶ For the same reasons, reliance on Article 52 of the Hague Regulations of 1907 undermines another argument presented by Israel; that of self defense based on Article 51 of the UN Charter. Another difficulty with the latter argument is evident. In order for a state to resort to self defense actions under Article 51 of the UN Charter, it must be attacked by another state. Israel has argued both for the lack of jurisdiction of the ICJ as well as the inapplicability of the Fourth Geneva Convention based on the stateless status of the Palestinians.

International Covenant on Economic, Social and Cultural Rights (1966) and the International Convention on the Rights of the Child (1989), all of which were ratified by Israel in 1991.²⁷ Relying on reports of UN Special Rapporteurs and UN Committees, the ICJ concluded that rights contained in these treaties had been violated. According to the ICJ:

...to sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child.²⁸

In the *Beit Sourik* decision, the Supreme Court did not discuss the violation of any rights guaranteed by international human rights law. It appears, at least according to the President of the Supreme Court, Justice Aharon Barak, that these rights are not applicable in Occupied Territories.²⁹ Also, Israel's response to the ICJ Advisory Opinion states that international human rights treaties are not applicable in territories occupied by Israel in 1967.³⁰

Israel further argues in its response to the ICJ Advisory Opinion that the interaction between rights guaranteed under international human rights treaties and under international humanitarian law restricts the former category of rights. For example, in relation to the right not to be arbitrarily deprived of one's life under Article 6 of the International Covenant on Civil and Political Rights (1966), Israel argues that this right is not absolute, as evidenced by the inclusion of the word "arbitrarily", and what amounts to the arbitrary deprivation of life must be determined in accordance with international humanitarian law. According to the State, international humanitarian law allows, under certain conditions, the killing of innocents, and therefore it necessarily limits the prohibition under the aforementioned Article 6. The State does not put forward any provision of international humanitarian law that allows the killing of innocents, nevertheless the assertion is made as if it is self-explanatory:

...Article 6 of the above-mentioned Covenant [International Covenant on Civil and Political Rights (1966) – M.D.] prohibits the "arbitrary" deprivation of the right to life. The question of the arbitrariness of the taking of life will be examined in accordance with the principles of humanitarian law, which allows the taking of a life under certain conditions, including the lives of innocents.³¹

It seems that Israel's approach is based on the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 8 July 1996. It is not a coincidence that the State does not expressly

²⁷ Para. 123 – 137 of the Advisory Opinion.

²⁸ Para. 134 of the Advisory Opinion. It should also be noted that, in a minority opinion, Justice Buergethal stated that Israel is obliged to respect rights set out in the human rights conventions, including in the OPT's: "I share the court's conclusion that international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territories and must be faithfully complied with by Israel there."

²⁹ See Aharon Barak, *A Judge in a Democratic Society* (Haifa: University of Haifa & Keter), pp. 147-148 (2004) (Hebrew).

³⁰ Para. 497 of the State's Response.

³¹ Para. 507 of the State's Response.

cite this as the source of its approach - a clear attempt to avoid recognizing an ICJ Advisory Opinion as having any authoritative status. Also, in the same Advisory Opinion, the ICJ confirmed the applicability and validity of international human rights law in times of war in a clear and explicit manner:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.³²

The similarity between the State's analysis of the relationship between international human rights law and international humanitarian law and the ICJ's analysis is in fact superficial³³. While both Israel and the ICJ acknowledge that international humanitarian law does not exclude the applicability of international human rights law but affects its substance, unlike Israel, the ICJ does not reach the conclusion that international humanitarian law allows the killing of innocents - not even "under certain conditions."³⁴

Conclusion

While the eyes of the international community are focused on the disengagement plan of the Israeli government in Gaza, which in most likelihood will not end the occupation there, Sharon and his government continue relentlessly to build both the Wall and settlements in the West Bank, thus necessarily violating basic fundamental rights of the Palestinian population there.

Israel has rejected the ICJ's Advisory Opinion regarding the Wall. It has no intention of abiding by it. One of Israel's arguments against the Advisory Opinion relates to the allegedly flawed factual basis grounding the ICJ's Opinion. Although, today, the factual situation differs from that presented to the ICJ these altered facts would not lead to a different conclusion from that reached by the ICJ: the Wall is constructed deep within Palestinian territory and at the expense of the rights of Protected Persons under international humanitarian law.³⁵

³² Para. 25 of the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996.

³³ Note that Israel's official position is to deny the applicability of international human rights law in an occupied territory or during periods of armed conflict outside its territory.

³⁴ It is not clear what has inspired this legal acrobatics in Israel's legal interpretation. See, however, Yuval Yoaz, "The Honorable International Court Does Not Know What It's Talking About," *Haaretz*, 6 March 2005. It is reported that, "Israel has left no stone unturned re the Advisory Opinion – 'rightly so' said Professor Yoram Dinstein, an internationally renowned expert on international law, who assisted the Attorney General's Office in drafting the document [Israel's Response to the Advisory Opinion – M.D]."

³⁵ Compare this with the description of the UN Special Rapporteur, Professor John Dugard, in his 3 March 2005 report, para. 13: "The Special Rapporteur visited Barta'a ash Sharqiya in the "closed zone". Its 4,000 residents have main access through only one gate, Reikan, to the West Bank; the gate at Um Al Rihan is limited to schoolchildren residing near to the gate. (The Special Rapporteur was denied passage through the

The Israeli Supreme Court's decision in *Beit Sourik* is not a substitute for the conclusions of the ICJ. At best, the State is invoking the proportionality argument enshrined in the Supreme Court's decision and yet is still blatantly violating the rights of Protected Persons. At worst, the Supreme Court's ruling grants infallibility to the discretion of the military commander, making it almost impossible to challenge such discretion in the context of the Israeli legal system.

The decision to bring the question of the illegality of the construction of the Wall before an international tribunal was a positive and much needed development. Without the procedure before the ICJ, it is very doubtful that the Israeli Supreme Court would have reached its decision in *Beit Sourik*. The implementation of the ICJ's Advisory Opinion will depend on continued activism against the Wall – such activism faces two immense challenges in these complicated times: increasing international awareness of the injustices of the occupation and intensifying the struggle against its most potent symbol – the Wall.

latter gate). This has seriously curtailed access to health services, education, basic consumer goods, food and water in the West Bank. To add insult to injury, Barta'a ash Sharqiya's only olive mill was destroyed in 2004 despite a court injunction and difficulties are placed in the way of marketing its olive harvest by restrictions placed on the transportation of olives into Israel or the West Bank."