

## A Sacred Trust of Civilization

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In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>1</sup> the International Court of Justice (hereinafter, 'the Court' or 'the ICJ') reminds us that Palestine—'certain communities, formerly belonging to the Turkish Empire'—was once a class 'A' mandate entrusted to Great Britain by the League of Nations. The Court also reminds us that the Pact of the League once described 'the well-being and development of ... peoples (under mandates) as forming "a sacred trust of civilization."' "

The expression is obviously dated, if quaint, but I believe it neatly encapsulates many of the contradictory facets of the problem that the Court was asked to weigh upon: colonization, then and now; moving out of colonization; international institutions; the depth of history; the international community's old and ongoing interest in the area; the special responsibilities that may arise as a result; the idea of *a* trust, but also the larger problem *of* trust; the sacredness of trust, that of civilization, of whatever passes for the civilizing mission; not to mention the sacredness of the many Holy sites that dot the area and, perhaps, the sacredness of human life and rights.

In this article, I want to see the advisory opinion as the latest in a long history of attempts by the international community—as the modern version of what used to be described as civilization—at honouring that trust. What can international law bring to the region? Is international law part of the problem or the solution? How does the opinion reflect on the evolution of international law?

More specifically, I want to argue that the Court's advisory opinion is at the intersection of three 'stories'.

The first story is that of international law, of the century-old ambition of regulating inter-state relations by means of law, and of the purported transmutation of international law into a law also encompassing a fundamental concern for human rights and well being. Within that story, it stands for a rather late development whereby attempts are being made at increasingly throwing the mantle of law at issues traditionally considered as belonging to high politics. Specifically, the opinion is part of an institution's unfolding story—the ICJ's—from a Court relatively marginalized in the international sphere, to one historically at a stage where it feels emboldened to have the audacity of its ambitions. Within that story, the opinion is part of a discreet subplot:

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<sup>1</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [9 July 2004] I.C.J. Rep. 131.

that of the growing use of advisory opinions, perhaps as a means by some states and civil society to circumvent the traditional limitations of dispute settlement.

The second story is that of what may broadly be characterized as the evolution of the Middle East from the tutelage of western interference and influence into an area gradually absorbing the shocks of nationalism, modernization, and globalization. Within that story, it is of course about the creation of Israel, the immensely complicated situation that ensued, the right of the Palestinians to have their own state, three wars, an attempt at peace, the temporary failure of that peace process, and the attempts to put it back on track. Within that last story it is more specifically about the intifada, terror attacks, the brutality of maintaining law and order, and, finally, the building of a wall.

The third story is one of walls, fences, barriers, barricades, enclosures, and ramparts. Because our era began with the spectacular collapsing of a wall, we are often tempted to think that ours is a world that has done away with walls. In fact, exactly the opposite may be true. The globalized world is a world that we can only meaningfully call borderless because that borderlessness is in a very real sense defined by walls: gated communities, firewalls, the Mexican-US border, stadium fences, 'fortress Europe', the Green zone, G5 meetings. Walls are part of a very long chain that highlights their role as a permanent feature of territorial politics since ancient times: the Roman *limes* designed to hold back the Barbarians or the Chinese Great wall come to mind. Of course, this wall is not just *any* wall and it is not to be mistaken with a border for example, but it is also part of the overall story of how walls separate and define people.

How the Court would find its way round these three interwoven stories would determine how its success would be evaluated. In this article, I want to concentrate on the issue of merits. This is partly because of space constraints and also simply because once the Court has decided in favour of admissibility the merits of a case become its most significant legacy.

From the outset, it is worth stressing that there was no easy answer to the issues at stake. Not only are we dealing with one of the most protracted and intractable conflicts in the world today, but more importantly for our purposes, we are dealing with very complex and dynamic areas of the law. In addition, we are dealing with highly emotionally charged issues that affect the lives of numerous people and have caused a tremendous amount of suffering on both sides.

In this light, the opinion deserves two types of comments, some relating to process and some relating to outcome.

## I THE PROCESS: WERE THE ARGUMENTS ON BOTH SIDES GIVEN A FAIR SCRUTINY?

The assumption is often that the outcome of the Court's opinion—the answer to the question of whether the wall is legal or not—is the most important issue. Process, however, is at least as important as outcome, and what matters is not simply what result the Court arrives at but in what way it does so. That will determine not only the general usefulness of the Court's opinion for international law, but also whether the outcome is credible and legitimate.

In that respect, it is worth saying from the outset that however much one may otherwise agree with the Court's conclusions, the Court has reached these in a way that is sometimes—and I have weighed these words carefully—almost shockingly one-sided. It is not simply that volume-wise the Israeli case occupies comparatively very little place, but that there is no serious legal engagement with the Israeli theses backing the construction of the wall. The Court, in particular, only seems to be aware of what the Israeli argument is indirectly, through the Secretary General's reports.<sup>2</sup> Israel's arguments on the basis of self-defence are treated—and dismissed—in one paragraph.<sup>3</sup>

Politically, part of the blame for this lies in Israel's own refusal to present arguments on the merits. To believe in judicial proceedings at all is to believe that actually presenting arguments and pleading one's case can make a substantial difference. It may be that the Court would have still found the wall illegal, but the mixture of publicity and attention that a defence *in loco* of the Israeli case would have attracted, would have made it more difficult for the Court to do so in as unilateral a manner as it did.

The biggest blame, however, lies in the Court itself. Although the Court was not helped by Israel's failure to present arguments on the substance, the Court was in no way limited to the evidence or arguments presented in Court and could have conducted its own research. Since lack of information was obviously not the issue, the fact that the Israeli position is not seriously discussed is particularly worrying. The inability to take the Israeli argument at its best and tackle it head-on can only weaken the credibility and legitimacy of the Court's opinion. Whatever point the Court was trying to make would have been reinforced by a more thorough treatment of the argument in favour of the wall, if only to better reject that argument.

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<sup>2</sup> *Ibid.* at para. 138.

<sup>3</sup> *Ibid.* at para. 139.

## **II THE SUBSTANCE: SELF-DETERMINATION, SELF-DEFENCE, OR HUMAN RIGHTS?**

The question that inevitably arises, therefore, is whether the Court might have arrived at a different opinion had these arguments been taken into account seriously and at their best. I cannot reconstruct entirely what the opinion would have been had this been the case. The only thing I can do here is point at some of the big tensions that underlie the opinion and try and see what problems would have arisen had these been brought to light rather than pushed in the background.

One of the great but insufficiently acknowledged issues raised by the request was under what branch of international law it should be analyzed. Was this an issue of the law on the use of force? Of self-defence? Was it about terrorism? Self-determination? Was the applicable law international human rights or the laws of war? Or a mixture of any of the above? My contention is that the Court is often good on the details once it has decided what is the broadly applicable framework, but not very good at articulating how these broad headings relate to each other.

### **The Wall as an Issue of Self-Determination**

One of the issues dominating the Court's reasoning is that of self-determination. I strongly suspect that this is in fact the single most important problem from the point of view of those who requested the Opinion, rather than simply the fate of those Palestinians affected by the wall.

There is no doubt under international law about the Palestinian peoples' right to self-determination. The precise way in which the wall affects that right, however, is a more complex issue. There are two problems with the wall, which are in my opinion insufficiently distinguished by the Court: the way it affects self-determination in the present, and the way it may affect self-determination in the future.

The easiest case is that the wall affects the Palestinian's right to self-determination in the present. It is effectively reducing the hold of the Palestinian Authority—as the embodiment of at least the Palestinian peoples' aspiration to self-determination—on its 'territory' and potentially excluding some Palestinians from that authority. The territory 'behind' the wall does not thereby come under Israeli sovereignty, but it is also certainly less within the control of the Palestinian Authority than the rest of Palestinian territory. Thousands of Palestinians are caught between the Green Line and the wall. More important than the wall itself is the fact that it is accompanied by a change in the legal regime applicable to this portion of Palestinian territory.

However, the most worrying dimension of the wall from the point of view of those who asked the opinion is probably not that. In the

present, the wall is only really making a bad situation (occupation) worse, but since there is arguably very little self-determination going on in the first place, it is unclear that it makes a huge difference. The real problem lies in the way the wall may be affecting prospects for self-determination *in the future*, and specifically the way in which it might be used to create a *fait accompli* to annex Palestinian territory.

This is a tricky issue. Here the Court is asked to pronounce itself on an ongoing, fluid, and evolving situation. On the one hand, Israeli officials assert that the wall is only a temporary device for the purposes of ensuring security. On the other hand, there is a legitimate fear that the wall might turn into a device to capture more territory. Although the Court says that it ‘cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine,’ it wisely falls short of saying that this is already and effectively what the wall does.<sup>4</sup> To have done so would have involved improper judicial speculation and so the Court’s prudence seems welcome. To not do so, however, condemns the law to a certain irrelevance. In effect, this is the question on which much if not all else hangs, and the failure to answer it reveals the law as a curiously bad guide to the fundamental significance of the wall. Law’s need for certainties in the present is completely at odds with politics need to take action on the basis of the risks that cast a shadow over the future.

### **The Wall as an Issue of Self-Defence**

The Court deals with the question of self-defence last as if it were a side-issue. The problem is that if a self-defence claim is available, then the entire nature of the case is changed. It is hard to argue that if Israel is in fact exercising a right of self-defence then it cannot build a wall. I fail to see why Madame Judge Higgins is ‘unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood.’<sup>5</sup> Surely if a State can adopt forcible measures to repel an attack then it should be allowed—indeed encouraged—to use non-forcible measures for the same purpose.

The crucial issue therefore is whether Israel can claim a right of self-defence to protect itself against terrorist attacks. The Court dismisses the possibility on the ground that the attack (if any) is not coming from a state. It is indeed the traditional understanding of Article 51 that it applies predominantly to attacks coming from states. The complexity of the issue here arises because of the ambiguous status of Palestine. I have particular sympathy, however, for what Judge Higgins’s described as ‘formalism of an unevenhanded sort’ and the idea

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<sup>4</sup> *Ibid.* at para. 121.

<sup>5</sup> Separate Opinion of Judge Higgins, *supra* note 1, at para. 35.

that ‘... Palestine [is] sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable.’<sup>6</sup>

The problem, moreover, is that the Security Council, in its resolutions 1368<sup>4</sup> and 1373<sup>5</sup> adopted in 2001, recognized the possibility that terrorist attacks might trigger an action in self-defence. The Court recognizes this but affirms that the Security Council does not recognize self-defence against territories that a State has control over. Mr Judge Kooijmans tries to argue that the right to self-defence is ‘a rule of international law and thus relates to international phenomena,’ which the situation at hand presumably is not.<sup>7</sup> But it is not clear how the fact that Israel occupies Palestine makes this less of an international situation—indeed one might think that to describe it as a non-international situation runs counter to some of the other arguments that the Court is trying to make about self-determination and occupation. In the end, it is hard to escape the impression that a ‘quasi-international’ situation, one involving a state and a quasi-state with a degree of autonomy, might warrant self-defence.

I think that a right to self-defence can nonetheless be excluded in this case, but not on the rather flimsy ground that this is not an international situation. The real problem, I would argue, lies with the tension that exists between a hypothetical right to self-defence in this case and, for example, the laws of occupation (the same argument could be made vis-à-vis human rights). If the laws of occupation are applicable, then these embody their own self-contained regime regarding the use of force. According to the *Hague Regulations* and the *Fourth Geneva Convention*, the occupying power is entitled and even has an obligation to restore law and order. Crucially, however, this means that the occupying power *is entitled to do no more than that*, so that its powers are closer to those of a police force than to a military engaged in active hostilities. The idea that Israel could at once be constrained by its obligation as an occupying power to not exercise force more than to maintain law and order, and unleash force in the exercise of its right to self-defence, thus, is one that is deeply contradictory. My impression is that claiming the right to self-defence in a situation governed by the laws of occupation would be a classic case of using a *jus ad bellum* argument to free oneself of *jus in bello* strictures, and as such blatantly illegal.

### **The Wall as an Issue of International Humanitarian Law**

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<sup>6</sup> *Ibid.* at para. 34.

<sup>4</sup> UN Doc. S/RES/1368 (2001).

<sup>5</sup> UN Doc. S/RES/1373 (2001).

<sup>7</sup> Separate Opinion of Judge Kooijmans, *supra* note 1, at para. 35.

**and/or International Human Rights**

Rather than self-determination or self-defence, the real issue—and the one that forms the bulk of the Court's opinion—seems to be one of violations of international humanitarian law and international human rights. The Court finds that the wall violates both and I do not take issue with its specific findings under each of these headings.

There is a problem, however, with applying the laws of occupation and international human rights simultaneously. It is clear that there is some significant degree of overlap between those two branches of international law so that some of the basic guarantees afforded to protected persons under international humanitarian law substantially overlap with those considered to be non-derogable rights in major international human rights instruments. This 'convergence' discourse has become the politically correct leitmotiv among many international lawyers. But there should be a difference between saying that international humanitarian and international human rights law share fundamentally common aims, and the further step taken by the Court, which is to uncritically assume that both apply jointly and simultaneously.

It is true that there is a real ambiguity about which body of law is primarily applicable, in particular because of the exceptional duration of the occupation in Palestine. That ambiguity, however, should be dealt with and resolved, not muddled by arguing that both branches of law apply simultaneously.

The problem is that there are more obvious tensions between both bodies of law than the talk about natural 'complementarity' suggests. Because occupation is a fairly exceptional situation, the laws of war grant substantially more leeway to the occupying power than international human rights do to a state in the normal exercise of its sovereignty. Although we have already seen that the responsibility to ensure public order probably allows the occupying state to do significantly less than it would be able to do in the exercise of its right to self-defence in terms of use of force, the *Hague Regulations* and *Fourth Geneva Convention* also implicitly relieve the occupier of some of what would be its obligations if human rights were fully applicable. For example, the laws of occupation require that the occupier take care of the welfare of the occupied territory, not that it guarantee all economic and social rights; the laws of occupation prohibit deportation, they do not impose on the occupier an obligation to guarantee freedom of movement.

Note that this is not simply a 'deficiency' of the laws of war to be remedied whenever useful by applying more 'progressive' human rights provisions to fill the gaps. It is very much a regime willed by the international community to deal with the particular circumstances of occupation.

Conversely, if we are effectively in a situation where human rights are applicable, then I think that human rights should be applicable exclusively and in their entirety, and should not be 'impoverished' or 'downgraded' by simultaneously applying the much less demanding regime of the laws of occupation. In other words, I don't think a State should be allowed to escape its human rights obligations, by arguing that it is merely an occupier. Adding human rights on top of the laws of occupation is therefore a recipe for normative confusion with the occupying state finding itself in the impossible situation of being bound both by the relatively minimalist obligations of the laws of war and the maximalist obligations of international human rights.

The better view, therefore, is that a given situation is either predominantly regulated by the laws of war or by international human rights. The Court quotes with approval its own idea expressed in the *Opinion on the Legality of the Use of Nuclear Weapons* that, at least for the purposes of assessing the scope of certain rights, the laws of war are the *lex specialis* of human rights<sup>8</sup> but never really treats them as such. It would have helped had the Court been much more explicit about which body of law is the principal one applicable, rather than in effect treating each body as interchangeably the *lex specialis* of the other, or as two equals.

The argument for the applicability of the laws of war has to be, quite simply, that the situation in Palestine is effectively one of occupation. It is a pity that the question put to the Court by the General Assembly assumes that this is the case. Notwithstanding, this is not a hugely contentious issue. Israel has long made the somewhat specious contention that Palestine could not be occupied because it was not part of the territory of a 'High Contracting Party' to the Geneva Conventions. The Court refuses to entertain this kind of formalism and simply notes that, in accordance with the laws of war, '... territory is considered occupied when it is actually placed under the authority of the hostile army.'<sup>9</sup> The fact that Israel itself has obliged for a long time by saying that it will *de facto* apply the *Fourth Geneva Convention* (even though it does not strictly consider itself bound by it) is of course helpful.

However, my impression is that the Court could have steered away from the issue of the laws of occupation altogether. The logic of imposing minimal obligations on an occupying power was that, under the *Hague Regulations*, occupation was meant as transitory and short term (at most a year). But a regime designed for the protection of civilians by ensuring that the occupying power does not interfere with

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<sup>8</sup> *Supra* note 1 at paras. 105-6.

<sup>9</sup> *Ibid.* at para. 78.



the political life of the country on the short term can turn against its beneficiaries if it perpetuates itself and becomes the permanent law of the land. There is a sort of estoppel logic trying to surface behind this: namely, the idea that a State should not be allowed to profit from its own long term illegal occupation by claiming for its benefit the continued applicability of the comparatively less stringent regime.

The real issue, therefore, is whether beyond a certain duration occupations should not cease to be governed by the laws of war altogether and instead, for example, be 'normalized' through the application of international human rights. The Court hints at this when, in arguing for the applicability of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),<sup>10</sup> it notes in passing that the occupation has lasted thirty-seven years but this is the only place in the opinion where it does so and it does not treat it as a decisive argument.

Note, however, that the argument unfolds quite differently depending on whether one is dealing with civil and political rights on the one hand, or economic, social, and cultural ones on the other. Each of these has significantly different repercussions on the way one construes the situation in the territories.

The case that the *International Covenant on Civil and Political Rights* (ICCPR)<sup>11</sup> is applicable is the most compelling. Article 2 of the ICCPR indicates that a State party is bound by it vis-à-vis individuals who are 'subject to its jurisdiction' and occupation arguably involves exercise of jurisdiction. There is a steady stream of cases by the European Court of Human Rights<sup>12</sup> and the Human Rights Committee that confirm that point. Israel clearly exercises jurisdiction over most of the West Bank, and at least over those parts of the territories where it is constructing the wall.

However, comparatively few civil and political rights—freedom of movement is one—are violated in this case and the Court seems to rely primarily on the applicability of the ICESCR. Although there is a progressive case for this, it is also a significantly more contentious proposition than the Court makes it to be. The Court makes clever use of the fact that Israel has, in its report to the Economic and Social Rights Committee, provided statistics on the economic and social rights of settlers in the occupied territories, as evidence that Israel itself has implicitly recognized the applicability of the ICESCR.<sup>13</sup> This at least

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<sup>10</sup> GA Res. 2200A (XXI), 21 UN GAOR, Supp. No. 16 at 49, UN Doc. A/6316 (1966) [ICESCR].

<sup>11</sup> GA Res. 2200A (XXI), 21 UN GAOR, Supp. No. 16 at 52, UN Doc. A/6316 (1966) [ICCPR].

<sup>12</sup> *Loizidou v. Turkey*, 15318/89 [1996] E.C.H.R. 70 (18 December 1996).

<sup>13</sup> *Supra* note 1 at para. 110.

makes the case that the occupying power cannot discriminate between its nationals and other nationals in the territory under occupation.

One aspect of the applicability of economic and social rights to the occupation zone that is uncontentious is that the occupier should refrain from measures deliberately infringing the rights of the population under its jurisdiction. But there is a more insidious danger with considering that the ICESCR is applicable to which the Court, concentrated as it is on a formal analysis of the law devoid of strategic thought about political consequences, is oblivious. In addition to an obligation to abstain from certain behaviour ('negative' obligations), a state bound by the ICESCR also has a 'positive' duty to promote the exercise and enjoyment of the relevant rights. In a paradoxical way, although applicability undeniably increases Israel's burden of obligations, this is also something that could endow Israeli occupation with a certain legitimacy, throw doubts on the proper status of Palestine, and even confuse the allocation of responsibilities between Israel and the Palestinian authority. One can see how Palestinians might not particularly want Israel to take a proactive stance towards the 'progressive realization' of their right to employment or health, simply on account of the fact that these constitute a violation of their right to self-determination in the first place. Even a benevolent occupation will have its strong opponents, and the occupation of Iraq shows that there are numerous ways in which one can think one is benevolent and not be perceived as such. This is a case where, even if international human rights are principally applicable, they should be read 'in light of' the laws of occupation's restrictive thrust, and where the aspiration to enforce rights should not lead to counterproductive results.

### **What Role for Weighing?**

Having said that, one cannot help having the impression that if destruction of property or/and the right to freedom of movement and (mostly) economic and social rights are in the balance on the one hand, and the fight against a dangerous terrorist threat on the other, then some measure of balancing between these two competing goals should at least have been contemplated more actively by the Court. Indeed, this is one area where process (the insufficient taking into account of Israeli arguments) affects substance. Israel cannot claim the existence of a 'public emergency which threatens the life of the nation' in the territories partly because it has never done so in the terms prescribed by the Covenantants and partly because it does not recognize the applicability of human rights in the area in the first place. But short of such a 'macro-derogation', Israel can still rely on various micro-limitations contained in the relevant articles. Freedom of movement, for instance, can be

limited 'in order to protect national security or public order.'<sup>14</sup> As to economic and social rights, they may be limited in so far as such limitation is 'for the purpose of promoting the general welfare in a democratic society.'<sup>15</sup>

This should at least have been cause for thought. The Court's reasoning is at its weakest in those passages where it simply dismisses the possibility of a complex balancing act 'on the basis of information available to it'<sup>16</sup> without enlightening us in any way as to its reasoning. Although saying that the construction of the wall is 'for the purpose of promoting the general welfare in a democratic society' would seem a bit far-fetched and indirect, that is only because the context implicitly envisaged by the ICESCR (one, supposedly, of a society at peace happily embarking on a steady course of social improvement) is so starkly different. But perhaps if one can justify negative encroachments on the basis of promoting welfare, then one can justify similar encroachments for the comparatively more urgent goal of dealing with a significant terrorist threat. Again, these issues would have been better argued than virtually ignored.

### III BREAKING THE WALL INTO ITS CONSTITUENT ELEMENTS

But perhaps the real problem with the Court's opinion and the way it ends up being excessively framed in 'either/or' terms is that it puts itself in a difficult situation in the first place by treating the wall as a unit. The Court can be partly forgiven for doing so since this is what Israeli planners themselves (along with much of the media, for example) have been doing. It is also, most crucially, what the General Assembly did, in an interesting case of a question suggesting the answer.

But, as a result, the Court also arguably failed to make the most interesting distinction, that which would have treated certain parts of the wall differently depending on how and why they affected the rights of Palestinians, in relation to how and why they protected Israel from attacks. The key distinction, it is contended, should have been between specific segments of the wall that have a considerable additional impact on Palestinian lives and those that essentially do not change anything to the (admittedly deplorable) situation already in existence.

A wall that would circle a settlement, for example, would not significantly change the existing situation. The effect on self-determination would be the same as if there was no wall. Clearly the Palestinian authority does not exercise any control on the settlements. The Palestinians are already effectively deprived of freedom of

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<sup>14</sup> ICCPR, *supra* note 11, article 12.3.

<sup>15</sup> ICESCR, *supra* note 10, Article 4.

<sup>16</sup> *Supra* note 1 at para. 136.

movement when it comes to these. Indeed, I do not think that the Palestinians particularly resent not being allowed freedom of movement within the settlements inasmuch as they resent the very existence of the settlements.

The real problem in this case is, again, very much restricted to the illegal occupation. The wall provides nothing but a fairly neutral intervening variable. One might argue that because the settlements are illegal in the first place, then any attempt at protecting them, by a wall or otherwise, is illegal as well. But I don't think international law attaches such a consequence to the illegality of occupation. The illegality of the settlements is one problem, and their protection is another. Just because the settlements are illegal does not make it legal for terrorists to target Israeli civilians. In the same way that it is illegal for Israel to occupy the occupied territories in the first place under general international law, but legal for it to maintain law and order within them under the laws of war, it is legal for Israel to protect the lives of the population in the settlements, even as those are most definitely illegal under international law.

What the above suggests is that the interesting point about the wall is quite often that it is not a very interesting point at all. If the wall is merely adding a layer of concrete to what is an already illegal settlement, then the problem is not the wall but the settlement. The better issue to have been put before the Court would have been that of the legality of the settlements.

The situation becomes much more difficult when the wall essentially cuts through territory whose status has thereby become changed, such as when the wall becomes a further and distinct element of rampant colonization. In effect, the problem is when the wall, regardless of the fact that it has been adopted on the grounds of security, is already *de facto* further encroaching on the hold of the Palestinian authority, further limiting the Palestinian's freedom of movement and further destroying Palestinian property. In that instance, the case that the wall is illegal will be much stronger because the wall has a considerable net effect on the ground. It would have been helpful to make that distinction.

## CONCLUSION

So what of the three 'stories' that I presented in the introduction? Is the Court's Advisory Opinion up to the 'sacred trust of civilization'?

As far as the "international" story is concerned, the Opinion will probably be remembered as a landmark for the Court. It certainly gave the Hague judges a unique opportunity to render an opinion on one of the burning issues of our time. Whether or not that was an opportunity lost for international law, is less clear. As such, the Advisory Opinion is certainly part of a trend whereby the Court is

emboldened to take a stance on issues even in the face of high politics. Some of the relevant questions are explored in depth, but I have also argued that the Court is at times insufficiently sophisticated in how it deals with the tensions that may arise between different branches of the law. The Opinion could have been one of the first great, authoritative and much needed pronouncements in the post 9/11 world on how the demands of fighting against terrorism should be weighed against human rights concerns. By behaving as if terrorism is not really part of the picture, the Court weakens its case and the impact of its Opinion.

When it comes to the second story, that of Palestine, Israel, and the peace process, it is probable that the Advisory Opinion will turn out to have been little more than a drop in an ocean. It is a pronouncement that speaks to legal consciences in a process where lawyers invariably take second seats to politicians, soldiers and diplomats. It is true that the Opinion cannot but have reinforced the camp of those who thought that there are at the very least very significant human rights and humanitarian concerns about a wall that splits families and deprives workers of their livelihood. But the Opinion was largely ignored by Israeli authorities. The decision by the Israeli Supreme Court on the same matter, for example, has had a much more significant impact. In the end, and from a regional perspective, the Opinion should be seen as little more than one of innumerable episodes in which the parties to the conflict have sought to attract or deflect attention for or from their claims.

Finally, what of our third story, that of walls? The Opinion forces us to examine critically the very negative impact that walls can have on the wellbeing of people who are affected by it. However the Opinion does not go far enough in my view in that it fails to explore how walls may also be part of complex political equations in profoundly intractable situations. This fails to take seriously the realist argument that walls may be deplorable generally, but that some walls may simply be a necessary evil. By failing to take on such arguments from *within* the law, the Court leaves it wide open for them to be made outside the law, presumably as the question of whether the law makes any sense in exceptional circumstances, or even whether it should be respected at all when it stands in the way of political priorities that are presented as entailing issues of survival.

So what, finally, of the 'sacred trust of civilization'? These days, civilization is everywhere and nowhere, and certainly not always where one would expect it to be. By the same token, 'civilization', or what used to (and occasionally still does) claim to pass for it, has a huge historical responsibility for the fate of the region. Was bringing international law to bear on this particular issue a service rendered to the area, a good way of 'discharging the trust'? It is important to note that for once international law was not so much imposed from outside

as brought in by those who claimed to suffer locally from its violation. The Court accepted the challenge and its Opinion will at least have served to remind us that, whatever the complexities of the peace process, certain fundamental principles should not be lost sight of. Even if had it been more balanced, however, an ICJ advisory opinion should never be considered remotely the end of the matter.

The fate of the wall is intimately linked to the fate of the peace process, regardless of the opinion of the World Court. It is only if the international community remains deeply convinced of this, that what is left of the trust may one day be upheld.