

The Impact of the Advisory Opinion on Israel's Future Policy: International Relations Perspective

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I INTRODUCTION

The recent International Court of Justice (ICJ) advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹ stirred widespread interest in the international community and in Israel. The Opinion includes judicial statements regarding controversial questions that lie at the heart of the Israeli-Palestinian dispute, such as the legal status of the West Bank and the Palestinians' right of self-determination. Following a brief survey of the central legal rules arising from the Court's Opinion, the article will examine the expected impacts of the Opinion on Israel's future policy regarding the separation barrier's route and the West Bank.

The challenging question posed to scholars of international law and international relations is to what extent Israel will (or will not) comply with the judicial statements included in the Advisory Opinion. The following discussion will address some of the central factors that affect the prospects of compliance. To answer this vital question of compliance, the article will employ three major theories of international relations: the realist, liberal, and constructivist approaches. As elaborated below, each of these theoretical perspectives offers a different conception of international law, and a different set of variables for analyzing the prospects of breach or compliance with international rules. This article suggests that a multifaceted investigation may meaningfully clarify the factors involved in the complex question regarding Israel's future compliance with the Advisory Opinion.

II THE ADVISORY OPINION: PRINCIPAL FINDINGS

In a resolution adopted on 8 December 2003² the United Nations General Assembly (GA) decided to request the ICJ 'to urgently render

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¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, [2004] I.C.J. Rep. 131, online: <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>.

² *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, GA Res. 10/14, UN GAOR, 10th Special Sess., Supp.No.1, UN Doc. A/RES/ES-10/14 (2003).

an advisory opinion on the following question: What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?’³

On 9 July 2004, after receiving written statements from forty-nine states and international organizations and after conducting a public hearing, the ICJ issued its Advisory Opinion. The Advisory Opinion consists of three major parts: (1) Issues relating to the ICJ jurisdiction and the question of judicial propriety.⁴ The Court concluded that it has jurisdiction and decided to comply with the General Assembly’s request;⁵ (2) Issues regarding the legality of the construction of the separation barrier in the territories indicated by the GA;⁶ (3) Issues relating to the legal consequences of the violations of international law found by the Court.⁷ This Section focuses on the second and third parts of the Opinion.

The Legal Status of the Territories Seized by Israel in 1967

The Court noted that the Advisory Opinion concerns only the parts of the separation barrier being built in the territories mentioned in the GA resolution and not the barrier’s sections within Israel’s territory.⁸ The ICJ further noted that the armistice demarcation line that was fixed in 1949 along the West Bank and in Jerusalem, by virtue of the Armistice Agreement between Israel and Jordan (the ‘green line’), was apparently of provisional character.⁹ Still, the territories occupied by Israel in 1967 (‘the occupied territories’), situated east of the green line, including East Jerusalem, are considered occupied territories in which Israel has the status of occupying power under international humanitarian law.¹⁰

³ *Ibid.*

⁴ Advisory Opinion, *supra* note 1 at paras 13-65 (paras 14-42: jurisdiction; paras 43-65: judicial propriety).

⁵ Judge Buergenthal alone was of the opinion that the Court should have exercised its discretion and declined to render the Opinion. See Advisory Opinion, *supra* note 1, Declaration of Burgenthal J.

⁶ *Ibid.* at paras. 66-143.

⁷ *Ibid.* at paras. 144-60.

⁸ *Ibid.* at para. 67.

⁹ *Ibid.* at para. 72.

¹⁰ This conclusion is largely based on the rules of customary international law (*ibid.* at para. 78) and several UN Security Council resolutions adopted after 1967 (*ibid.* at para. 75).

The Application of International Humanitarian Law

The ICJ stated that the *Regulations Respecting the Laws and Customs of War on Land* annexed to the *Fourth Hague Convention of 1907* (the Hague Regulations) are considered customary law, and thus applicable in the occupied territories.¹¹ Section III of the Hague Regulations, which concerns 'Military authority over the territory of the hostile State,' is particularly relevant to these territories. The applicability of the 1949 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention) in the occupied territories is a more disputable issue. Israel argued that the Fourth Geneva Convention is not applicable *de jure* to the occupied territories (although it applied the Convention's humanitarian provisions on a *de facto* basis).¹² The Israeli government maintained that the Fourth Geneva Convention was applicable only in occupied territories that were legally held by a High Contracting Party *prior* to the occupation, and that the relevant territory had not previously fallen under legal Jordanian sovereignty.¹³ The ICJ rejected this position and stated that as long as territories were occupied over the course of an armed conflict, the prior status of occupied territories is not relevant to the applicability of the Fourth Geneva Convention.¹⁴

The Application of International Human Rights Conventions

The official Israeli position denies 'that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights ... are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.'¹⁵ The ICJ found that international human rights law remains in force during times of armed conflict (in parallel to international humanitarian law) and thus

¹¹ *Ibid.* at para. 89.

¹² *Ibid.* at paras. 90 and 93. Although Israel did not refer to substantive legal questions in its written statement to the court (which was limited to issues of jurisdiction and judicial propriety), and did not present oral arguments in the public hearing, the ICJ relied on various sources in which the Israeli official position was expressed, including a report of the Secretary General of the UN regarding the construction of the separation barrier.

¹³ This legal position is largely based on the language of the second paragraph of common Article 2 of the four Conventions of 12 August 1949 that states that: 'The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.'

¹⁴ Advisory Opinion, *supra* note 1 at para. 101.

¹⁵ *Ibid.*, citation from Annex I of the report of the Secretary General.

rejected the Israeli argument.¹⁶ The Court stated that Israel has exercised effective jurisdiction in these territories for over thirty-seven years and concluded that Israel is bound to apply the international human rights conventions that it had ratified¹⁷ to these territories.

The Israeli Settlements in the West Bank and the Separation Barrier's Route

The ICJ noted that '...the route of the wall as fixed by the Israeli Government includes within the "Closed Area" [the area lying between the Green Line and the barrier] ... some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent ... that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements.'¹⁸ The Court mentioned Article 49(6) of the Fourth Geneva Convention that provides: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'¹⁹ The Court referred also to Security Council resolutions declaring the illegality of these Israeli settlements.²⁰ The ICJ concluded that the establishment of Israeli settlements in the occupied territories (including East Jerusalem) constitutes a breach of its obligations under international law.²¹

In light of this conclusion, and the route chosen for the separation barrier, the Court expressed its concern that 'the route of the wall will prejudice the future frontier between Israel and Palestine'²² and that 'Israel may integrate the settlements and their means of access,'²³ in which case 'it would be tantamount to *de facto* annexation.'²⁴ Furthermore, the ICJ found that the construction of the separation barrier and its associated regime, by affecting the

¹⁶ *Ibid.* at para. 106.

¹⁷ Specifically, the ICJ referred to the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR]; the *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force January 3, 1976) [ICESCR]; and the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990) [CRC].

¹⁸ Advisory Opinion, *supra* note 1 at para. 119.

¹⁹ *Ibid.* at para. 120.

²⁰ SC Res. 446 (22 March 1979); SC Res. 452 (20 July 1979), and SC Res. 465 (1 March 1980), mentioned in the Advisory Opinion, *supra* note 1 at para. 120.

²¹ *Ibid.*

²² *Ibid.* at para. 121.

²³ *Ibid.*

²⁴ *Ibid.*

demographic composition of the Occupied Territories, constitute in and of themselves contravention of Article 49(6) of the Fourth Geneva Convention and of the abovementioned Security Council resolutions.²⁵

The Palestinian People's Right to Self-Determination

The ICJ observed that 'the existence of a "Palestinian people" is no longer in issue.'²⁶ The Court then pointed out that as a result of the route chosen for the separation barrier, there is 'a risk of further alterations to the demographic composition of the Occupied Palestinian Territory.'²⁷ Thus, the ICJ concluded that the construction of the barrier 'severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.'²⁸

Violations of International Humanitarian Law

The ICJ found, according to the information submitted to it, that the destruction or requisition of properties involved in the construction of the separation barrier is carried out in a manner that contravenes the Hague Regulations and the Fourth Geneva Convention.²⁹ According to the Court's opinion, these illegal activities could not be justified as being absolutely necessary by military exigencies.³⁰

Violations of International Human Rights Law

According to information submitted to it, the ICJ found that 'the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves... imposed substantial restrictions on the freedom of movement'³¹ of the Palestinian inhabitants, which is guaranteed under Article 12, paragraph 1, of the ICCPR.³² The Court also noted that the construction of the barrier and its associated regime involve confiscations and destruction of agricultural land;³³ separation between Palestinians and their agricultural lands, water sources and means of subsistence; as well as difficulties to access health services and educational establishments.³⁴ Hence, the Court concluded that the construction of the barrier and its associated regime impede the exercise

²⁵ *Ibid.* at para. 122 (see also para. 132).

²⁶ *Ibid.* at para. 118.

²⁷ *Ibid.* at para. 122.

²⁸ *Ibid.*

²⁹ *Ibid.* at para. 132. The Court referred to Articles 46 and 52 of the Hague Regulations and to Article 53 of the Fourth Geneva Convention.

³⁰ *Ibid.* at para. 135.

³¹ *Ibid.* at para. 133.

³² *Ibid.* at para. 134.

³³ *Ibid.* at para. 133.

³⁴ *Ibid.*

by the local population of the right to work, health, education and adequate standard of living as proclaimed in the ICESCR and in the CRC.³⁵

The Court found that none of the qualifying clauses or provisions for derogation in the relevant human rights conventions might be invoked by Israel. It stated that it is not convinced that the barrier's route, as chosen by Israel, was necessary to attain its security objectives. Consequently, the Court concluded that the above human rights infringements could not be justified by the requirements of national security or public order.³⁶

The Freedom of Access to Holy Places

The ICJ drew attention to the fact that several international instruments relating to the historical territory of Israel / Palestine and the Arab-Israeli conflict contain provisions regarding the need to ensure freedom of access to the holy places and the free exercise of worship.³⁷ It concluded that Israel is bound to ensure access to the holy places that came under its control during the 1967 War.³⁸

Self-Defence and 'Necessity'

The ICJ stated that Israel cannot invoke Article 51 of the *Charter of the United Nations* since the relevant Palestinian attacks are not imputable to a state, as required by Article 51.³⁹ The Court also stated that Israel could not invoke certain Security Council resolutions that recognize states' right to employ self-defence measures against terrorist attacks.⁴⁰ The Court explained that Israel exercises control over the occupied territories and this 'situation is thus different from that contemplated by Security Council resolutions.'⁴¹ Judges Kooijman, Higgins, and Burgenthal criticized these statements.⁴² The Court noted that the invocation of a state of 'necessity' is recognized under customary international law only on an exceptional basis, and it is 'not convinced

³⁵ *Ibid.* at para. 134.

³⁶ *Ibid.* at paras. 136-7.

³⁷ *Ibid.* at para. 129. The instruments that were mentioned in the Court's Opinion are: the 1878 Treaty of Berlin, the 1922 Mandate for Palestine, the 1947 GA Resolution 181 II (the partition resolution), the 1949 Armistice Agreement between Jordan and Israel, and the 1994 Peace Treaty between Israel.

³⁸ *Ibid.* at para. 149.

³⁹ *Ibid.* at para. 139.

⁴⁰ SC Res. 1368 (12 September 2001), and SC Res. 1373 (28 September 2001).

⁴¹ Advisory Opinion, *supra* note 1, at para. 139.

⁴² Advisory Opinion, *ibid.* Separate Opinion of Higgins J, at paras. 33-5; Separate Opinion of Kooijmans J, at paras. 35-6; Declaration of Buergenthal J, at paras. 5-6.

that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.⁴³

The Legal Consequences for Israel, other States, and the UN

The above findings led the Court to conclude that since the construction of the barrier is contrary to Israel's international obligations, Israel's responsibility is engaged under international law,⁴⁴ it is bound to comply with its international obligations,⁴⁵ and it must 'cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem.'⁴⁶ Furthermore, Israel is bound to dismantle 'those parts of that structure situated within the Occupied Palestinian Territory...'⁴⁷, repeal or render ineffective all legislative and regulatory acts adopted with a view to construction of the wall and establishment of its associated regime,⁴⁸ and to make reparation for the damage caused to all the natural or legal persons concerned.⁴⁹

The ICJ observed that the above-mentioned violation of the Palestinians' right to self-determination, as well as breaches of international humanitarian law, concern obligations *erga omnes*, and that all states can be held to have a legal interest in their protection.⁵⁰ These statements (that were disputed by Kooijmans and Higgins JJ)⁵¹ led the Court to the conclusion that all states are under an obligation 'not to recognize the illegal situation resulting from the construction of the wall' in the territories,⁵² 'not to render aid or assistance in maintaining the situation created by such construction,'⁵³ and 'to see to it that any

⁴³ *Ibid.* at para. 140.

⁴⁴ *Ibid.* at para. 147.

⁴⁵ *Ibid.* at para. 149.

⁴⁶ *Ibid.* at para. 151.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at para. 152.

⁵⁰ *Ibid.* at para. 155. On the *erga omnes* nature of the obligation to respect the right to self-determination in more details, see *ibid.* at para. 156. On the *erga omnes* nature of obligations under international humanitarian law, see *ibid.* at paras. 157-8.

⁵¹ Judge Kooijmans rejected most of the Court's findings regarding the obligations of other states. See *ibid.*, Separate Opinion of Kooijmans J, at paras. 37-51. See also Separate Opinion of Higgins J, at paras. 37-9 stating that the obligations of other states in this regard have nothing to do with the definition of certain norms of international law as *erga omnes*.

⁵² *Ibid.* at para. 159.

⁵³ *Ibid.*

impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.’⁵⁴ The ICJ also found that all States Parties to the Fourth Geneva Convention are bound ‘to ensure compliance by Israel with international humanitarian law as embodied in that Convention.’⁵⁵

III THE IMPACT OF THE ADVISORY OPINION ON ISRAEL: THE PROSPECTS OF COMPLIANCE

The above Court’s judicial statements regarding different aspects of the Israeli presence in the West Bank and the legality of the separation barrier raise the issue of effectiveness. The major question in this context is: to what extent will Israel (or will not) comply with the judicial statements included in the Advisory Opinion? The following discussion addresses only some of the central factors that are likely to influence the prospects of compliance.

Before addressing this challenging question of compliance, it is important to address two preliminary questions. First, from a strictly legal perspective, the underlying character of advisory opinions in general⁵⁶ points out that this Opinion does not bind Israel (nor any other state). Still, as elaborated above, the Advisory Opinion includes judicial statements regarding Israel’s legal obligations under international law. Thus, the more precise question is *not* whether Israel will comply with the Advisory Opinion, but rather whether it will comply with its legal obligations under international law as stated by the Court in this Opinion? Second, it is clear that the answer to the above question regarding compliance is not necessarily binary: full compliance or complete non-compliance.⁵⁷ In light of the legal, factual, and political

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ See, M. Pomerance, ‘The Advisory Role of the International Court of Justice and its “Judicial” Character’ in A.S. Muller, D. Raic & J.M. Thuranszky, eds., *The International Court of Justice: Its Future Role After Fifty Years* (The Hague: Nijhoff, 1997) 271 at 285 *et seq.*; B. Simma, ed., *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002) at 1181-2; S. Rosenne, *The World Court* (Dordrecht: Nijhoff, 1995) at 106-10; M.N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 1000-1; D. J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998) at 1035-6; P. Malanczuk, *Akerhurst’s Modern Introduction to International Law*, 7th ed. (London: Rutledge, 1997) at 289-90.

⁵⁷ On the measurement of compliance with international environmental law, see E. Brown-Weiss, ‘Rethinking Compliance with International Law’ in E. Benvenisti & M. Hirsch, eds., *The Impact of International Law on International Cooperation* (Cambridge: Cambridge University Press, 2004) 134.

context of this case, it is more reasonable to ask to *what extent* Israel will comply with the judicial statements included in this Advisory Opinion?

In fact, significant developments have already taken place in this context since the Advisory Opinion was delivered in July 2004. Israel has already revised the separation barrier's route and significantly reduced the barrier's incursion into the West Bank. The major decision was adopted by the Israeli government on 21 February 2005, and the new path significantly reduces the amount of land on the Israeli side of the border. The previously planned route would have placed fifteen to sixteen per cent of the West Bank on the Israeli side, and the new route narrows that amount about to about seven per cent.⁵⁸

The question of which factors are likely to affect compliance or non-compliance with the ICJ's judicial statements may be analyzed with different international relations theories. Different perspectives lead to different conceptions regarding the nature, goals, and implementation of international legal rules. Each of these approaches also offers a different set of variables for analyzing the prospects for breach or compliance with international norms. Due to space constraints, the following analysis employs only three major theories of international relations: the realist, liberal, and constructivist approaches.⁵⁹

⁵⁸ This decision was adopted simultaneously with the Israeli government's approval of the withdrawal of the Israeli settlers from the Gaza Strip and northern Samaria. See G. Myre, 'Sharon Wins Vote on Pullout from Gaza' *International Herald Tribune* (21 February 2005) A1; A. Benn, 'Government to Okay Key Issues on 'Super Sunday' *Haaretz* (18 February 2005), online: Haaretz.com <<http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=541832>>.

⁵⁹ Due to space constraints, the institutionalist approach is not included in this analysis. On this approach in international relations theoretical literature, see R.O. Keohane, 'International Institutions: Two Approaches' (1988) 32 *International Studies Quarterly* 379; R.O. Keohane & L.L. Martin, 'The Promise of Institutional Theory' (1995) 20 *International Security* 35; A.M. Slaughter, 'International Law and International Relations Theory: a Prospectus' in Benvenisti & Hirsch *supra* note 57 at 25-8.

1 The Realist Approach⁶⁰

The realist approach is widely considered the most influential theoretical tradition in international relations literature. The principal assumptions of the realist school are that the international system is based on nation-states as the principal actors; that states are egoistic and rational (they are interested in maximizing their own interests and seek to attain them through rational decision-making processes); and that international politics is essentially anarchic (lacking an overarching authority) and conflictual (characterized by struggle for power in an anarchic setting). Proponents of the realist stream perceive international law as an instrument whereby states seek to attain their interests (power, wealth, etc.). Facing common tasks that are not easily amenable to unilateral attainment, national decision-makers treat international rules as instruments for fulfilling these common objectives. Under this conception, international law merely reflects the interests of states (particularly the powerful ones) and it may be implemented through the balance of interests and power.

A significant part of the realist analysis of international law is devoted to the subject of compliance. In accordance with the realist approach, compliance with or violation of international norms is dependent upon a comparison of the expected outcomes resulting from these alternative courses of action. Consequently, numerous realist scholars contend that international law has little *independent* impact on state conduct. International rules are just expressions of power relationships, and they are likely to be ignored or changed when these relationships change. Thus, for instance, international treaties generally bind states to what they would have done anyway. The perception of international rules as instruments to solve shared problems has led many scholars to analyze the activities of states in the legal sphere as

⁶⁰ See J.E. Dougherty & R.L. Pfaltzgraff, *Contending Theories of International Relations: A Comprehensive Survey*, 5th ed. (New York: Longman, 1996) at 63-4; S. Burchill & A. Linklater, *Theories of International Relations* (New York: St. Martin's Press, 1996) at 67-92; B. Frankel, 'Restating the Realist Case' in Frankel, ed., *Realism: Restatement and Renewal* (London: Frank Cass, 1996) ix at xiv-xiv; K. Abbott, 'International Relations Theory, International Law, and The Regime Governing Atrocities in Internal Conflicts' (1999) 93 Am. J. Int'l Law 361 at 364-6; K.W. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 Yale J. Int'l L. 335 at 346-50; A. Arend, 'Do Legal Rules Matter? International Law and International Politics' (1998) 38 Va. J. Int'l L. 107 at 110-18; A.M. Slaughter, *supra* note 59 at 207-9; H. Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale L.J. 2599 at 2622. See also, B.A. Simmons, 'Compliance with International Agreements' (1998) 1 Annual Review of Political Science 75 at 79-80; J.C. Barker, *International Law and International Relations* (London: Continuum, 2000) at 70-9.

'collective action' problems. Consequently, theoretical tools developed in game theory have often been employed by scholars to analyze the prospects of cooperation and compliance in particular international settings.⁶¹

Realist analysis of the question of compliance with the judicial statements included in the Advisory Opinion attaches particular importance to the prospects of imposing sanctions on Israel in case of non-compliance. The above-mentioned Court's statements regarding the *erga omnes* nature of some of Israel's obligations and the resulting obligations for third states⁶² may lay the legal infrastructure for states that are capable of and interested in instituting some sanctions against Israel. The realist approach, however, does not consider such judicial statements as an independent factor and it focuses on the power and interests of key parties to impose such sanctions.

Some concerns regarding the risk of sanctions against Israel have been voiced by Israeli officials and journalists following the Advisory Opinion.⁶³ In light of the considerable power asymmetry relations between Israel and the Palestinians on the bilateral level, it is more reasonable to explore the prospects of sanctions by central external players in the global arena: the United States and the European Union (EU). The United States certainly has the necessary resources to impose harsh sanctions on Israel. The United States provides Israel significant financial, military and political assistance, and is also Israel's second largest trading partner.⁶⁴ The route of the separation barrier has been extensively discussed between Israel and the United States and the latter has expressed its objection to some of the barrier's segments. The principal concerns of the United States were expressed in regard to the deepest incursions into the West Bank territory (and particularly in the area of Ariel). On several occasions, the American Administration threatened that it would deduct the expenses involved in the barrier's construction from the loan guarantees it had extended to Israel.⁶⁵

⁶¹ See e.g. M. Hirsch, 'Game Theory, International Law, and Future Environmental Cooperation in the Middle East' (1999) 27 Den. J. Int'l L. & Pol'y 75; E. Benvenisti, 'Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resource Law' (1996) 90 Am. J. Int'l L. 384.

⁶² Advisory Opinion, *supra* note 1 at paras. 155-8.

⁶³ See, for instance, Y. Yoaz, 'Attorney General: Hague Fence Ruling may Lead to Sanctions Against Israel' *Haaretz* (20 August 2004), online: Haaretz.com <<http://www.haaretzdaily.com/hasen/objects/pages/PrintArticleEn/jhtml?itemNo=466870>>.

⁶⁴ See e.g. WTO Secretariat, 'Trade Policy Review: Israel' (13 August 1999) at para. 10, online: WTO <http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#bycountry>.

⁶⁵ On the US position regarding the separation barrier in detail, see K.

Although the United States has resorted to various sanctions against Israel in the past,⁶⁶ Israeli decision-makers are well aware that it is highly unlikely that non-compliance with the ICJ's statements will lead to American sanctions.⁶⁷

The EU 'demanded that Israel stops and reverses the construction of the Barrier inside the occupied Palestine territory ..., which is in contradiction to the relevant provisions of International law.'⁶⁸ The EU is Israel's largest trading partner,⁶⁹ and its increasing political influence in the global arena has been manifested, *inter alia*, in the unified vote of its twenty-five members in favour⁷⁰ of the General Assembly Resolution demanding Israel to abide with its obligations as pronounced in this Advisory Opinion.⁷¹

Michael & A. Ramon, *The Building of the Security (Separation) Fence around Jerusalem* (Jerusalem: Jerusalem Institute for Israel Studies) [forthcoming] at c. A, s. F; Y. Folman, *The Story of the Security Fence* (Jerusalem: Carmel, 2004) at 164-70.

⁶⁶ See e.g. A. Ben-Zvi, *The United States and Israel: The Limits of the Special Relationship* (New York: Columbia University Press, 1993) at 123-37.

⁶⁷ See e.g. S. Shamir, 'The Target: Sanctions Against Israel' *Haaretz* (19 September 2004) B4. On the US position in that regard, see also W. Hoge, 'Remove the Wall, Israel is told by the UN' *New York Times* (21 July 2004), online: *New York Times* <<http://www.nytimes.com/2004/07/21/international/middleeast/21nati.html?pagewanted=>>; G. Crouch & G. Myre, 'Major Portion of Israeli Fence is Ruled Illegal' *New York Times* (10 July 2004), online: <<http://www.nytimes.com/2004/07/21/international/middleeast/10BARR.html?pagewanted=>>.

⁶⁸ See e.g. EU, Press Release 11105/04, '2597th Council Meeting, General Affairs and External Relations, Brussels, 12-13 July 2004' (12-13 July 2004). On the EU position in that regard, see also Michael & Ramon, *supra* note 65 at c. A, s. F.

⁶⁹ On the trade relations between Israel and the EU, see M. Hirsch, 'The 1995 Trade Agreement between the European Communities and Israel: Three Unresolved Issues' (1996) 1 *European Foreign Affairs Review* 87; P. Malanczuk, 'The Legal Framework of the Economic Relations between Israel and the European Union' in A. Kellermann, K. Siehr & T. Einhorn, eds., *Israel Among Nations* (The Hague: Kluwer, 1998) 263; G. Harpaz, 'EU-Israel and the European Neighbourhood Policy: Legal and Economic Implications' (2004) 31 *Legal Issues of Economic Integration* 257.

⁷⁰ On the vote of the EU member states and Israel's reaction, see S. Shamir, 'Israel to Sideline EU after UN Vote on Security Fence' *Haaretz* (22 July 2004), online: *Haaretz.com* <<http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=454469>>.

⁷¹ *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, GA Res. 10248 A/ES-10/L.13/Rev.I, 20, July 2004, online: Permanent Mission of Israel to the United Nations <http://www.israel-un.org/gen_assembly/pal_issues/res10ess_21jul04.htm>.

The EU has already resorted to some trade measures against Israel⁷² in the context of the latter's control over the West Bank and Gaza Strip.⁷³ The bitter dispute that erupted between these parties related to the question of whether goods produced in the Israeli settlements in the West Bank and Gaza Strip are entitled to the trade benefits provided for in the 1995 trade agreement between Israel and the EU.⁷⁴ The EU decided that these products are not eligible for preferential treatment under the 1995 Agreement.⁷⁵ The EU is not likely to impose direct economic sanctions against Israel with regard to the ICJ's Opinion but Israel's policy regarding the separation barrier and the occupied territories may affect EU willingness to strengthen its trade relations with Israel.⁷⁶ Thus, the realization of Israel's long-term aim to expand and deepen economic cooperation with the EU may be influenced by various political factors, including Israeli policy regarding

⁷² On some sanctions (with minor practical effect) imposed by the EC on Israel in 1982, see I. Greilsammer, 'Reflections on the Capability of the European Community to Play an Active Role in an International Crisis: The Case of the Israeli Action in Lebanon' in I. Greilsammer & J.H.H. Weiler, eds., *Europe and Israel: Troubled Neighbors* (Berlin: Gruyter, 1988) 285 at 291-2.

⁷³ On the EU involvement in the Israeli-Palestinians relations, see B. Soetendorp, 'The EU's Involvement in the Israeli-Palestinian Process: The Building of a Visible International Identity' (2002) 7 *European Foreign Affairs Review* 283-295.

⁷⁴ For a legal analysis of this dispute, see M. Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments?: The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip' (2003) 26 *Fordham Int'l L.J.* 572.

⁷⁵ See, Notice to Importers 'Imports from Israel into the Community' (2001) Official Journal of the European Communities (2001/C 328/04); EU, Communication from the Commission to the Council and the European Parliament, 'Implementation of the Interim Agreement on Trade and Trade-related Matters Between the European Community and Israel' SEC (1998) 695. On the resolution of this dispute, see G. Harpaz, 'The Dispute over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip' (2004) 38 *Journal of World Trade* 1049.

⁷⁶ This assessment is reinforced by the EU statements following the Advisory Opinion. Thus, for instance, the EU recently indicated that it intends to offer Israel economic benefits in exchange for relieving the restrictions on the Palestinians. EU officials stated that 'the extent of the EU's economic cooperation with Israel will be equivalent to the extent of Israel's political cooperation with the EU' (Ora Coren, 'EU to Offer Israel Benefits for Easing Palestinians' Lives' *Haaretz* (20 March 2005), online: <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=554352>). This and other statements issued by the EU since the Advisory Opinion have not included threats of sanctions regarding the implementation of the Court's Opinion by Israel.

the separation barrier and the Palestinians.⁷⁷

To sum up, a realist analysis of the current circumstances indicates that the prospects that the US or the EU will impose sanctions against Israel because of the separation barrier's route are not significant.⁷⁸ In the absence of significant and credible threats of sanctions imposed by the major powers, or some other significant inducement to comply, realist analysis indicates that Israel should not be expected to comply with the judicial statements included in the Advisory Opinion. This observation is certainly valid for the short range.⁷⁹ As to the medium and long range, Israeli steps regarding the separation barrier and the West Bank may affect EU willingness to expand and deepen its economic relations with Israel. However, the EU position regarding its economic ties with Israel depends on additional and even more important political factors (such as the EU's role in the negotiations between Israel and the Palestinians or a settlement of the dispute between the latter parties).

2 The Liberal Approach⁸⁰

Liberal theory accepts some of the basic assumptions of the realist

⁷⁷ Israel's policy regarding the separation barrier and the West Bank may also affect its efforts to become a member of the OECD. On Israel's efforts to join the OECD, see Nechemia Strasler, 'Nethanyu Argues Case to Join OECD' *Haaretz* (4 October 2004), online: [Haaretz.com <http://www.haaretez.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=484490>](http://www.haaretez.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=484490); Nechemia Strasler, 'Nethanyu Pledges: Israel will be a Member of the OECD within Two Years' *Haaretz* (5 October 2004) C-2.

⁷⁸ Sanctions may be imposed also by the UN Security Council but the current reluctance of the US and EU to resort to sanctions in this context indicates that the prospect for such organized sanctions are not significant.

⁷⁹ It is important to note that the realist analysis takes into account not only Israel's activities regarding the separation barrier but also other developments in the Middle East and in the global arena that influence the central parties' power and interests. Thus, when these circumstance change, a realist analysis may yield different assessments regarding Israel's compliance with the Opinion.

⁸⁰ On the liberal approach, see T. Dunne, 'Liberalism' in J. Baylis & S. Smith, eds., *The Globalization of World Politics* (Oxford: Oxford University Press, 1997) at 147; S. Burchill, 'Liberal Internationalism' in S. Burchill & A. Linklater, eds., *Theories of International Relations* (New York: St. Martin's Press, 1996) at 28; A. Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) *Int'l Org.* 513; Abbott, *supra* note 60 at 366-9; A.M. Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 *Colum. L. Rev.* 1907; A.M. Slaughter, *supra* note 59 at 226-39; A.M. Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Relations* 503; Dougherty & Pfaltzgraff, *supra* note 60 at 62; Koh, *supra* note 60 at 2617-18, 2633.

approach and generally posits that states act in accordance with their conceptions of national interest. Unlike realists who view international politics as essentially conflictual, liberals assume that peace (and cooperation) is the normal state of affairs, and that war is both unnatural and irrational. Under this conception, wars are created by militaristic and undemocratic governments for their own vested interests. Liberals agree that states act to promote their interests, but they stress that these preferences are shaped in response to the preferences of *domestic groups and individuals* within each state. States and other political institutions represent some subset of domestic society. Thus, the distinctive aspects of the liberal approach are the focus on state-society relations and the view that the fundamental actors in international politics are members of domestic society.

The underlying argument of the liberal approach is that a state's behaviour in the international sphere is significantly influenced by the type of political regime that prevails within it. A significant body of liberal literature explores the links between democratic governance and peaceful relations, and between the rule of law within a state and the prospects of compliance with international norms. Non-liberal governments are seen as the major of causes of international conflicts and insecurity. Liberal states have representative governments, independent and professional judiciaries dedicated to the rule of law, and they secure civil and political rights. The progressive translation of liberal-democratic principles into the international realm is viewed as desirable, as this offers the best prospects for a peaceful world order. The liberal approach, and particularly the neo-liberal institutionalist strand, emphasizes the important role of non-state actors in world politics. It particularly highlights the role of international institutions (both governmental and non-governmental) that increasingly implement functions that states cannot perform alone.

International law is perceived by the liberal approach as a purposive system of law that is designed to attain common ends, such as international justice, peace, democracy, and human rights. Compliance with international law depends to a significant extent on the domestic structure of the relevant state. Generally, relations between liberal states (states within the 'zone of law') are more governed by international law, while relations involving non-liberal states (states within the 'zone of politics') are more prone to be governed by political considerations.

Liberal analysis of the prospects of Israel's compliance with the judicial statements included in the Advisory Opinion focuses on the domestic structure and actors that operate within Israel; both public institutions and interest groups. Liberal investigation emphasizes that Israel is a democratic state, characterized by the rule of law, and an

independent judiciary.⁸¹ These significant factors generally enhance the prospects of compliance with international norms.

The Israeli courts system, and particularly the Supreme Court, is widely viewed as an independent and professional judiciary that is committed to the rule of law.⁸² Consequently, the application of international law by Israeli courts is of major importance in regard to Israel's compliance with international rules pronounced by the ICJ in this Opinion. Following the courts of the United Kingdom,⁸³ Israel's Supreme Court has established that rules of international customary law are automatically incorporated into the municipal legal system, unless they are unambiguously inconsistent with statutes enacted by the Knesset (the Israeli parliament).⁸⁴ Non-customary treaties are not accepted into the Israeli legal system unless they are incorporated by legislation.⁸⁵ Where Israeli legislation is open to alternative interpretations, domestic courts apply the 'presumption of compatibility' between Israeli and international law, and prefer the interpretation that is consistent with the state's obligations under international law (both treaty and customary law).⁸⁶

The above Israeli jurisprudence regarding the applicability of international customary law in the Israeli legal system, the independent, professional status of the Israeli judiciary, and the significant impact of the ICJ's advisory opinions on the formation of international customary law, indicate that it is likely that the ICJ's statements regarding customary rules will gradually influence Israel's future court decisions. The Court's advisory opinions are of consultative character and they

⁸¹ See e.g. online: Freedom House, Freedom in the World: Israel <<http://www.freedomhouse.org/research/freeworld/2004/countryratings/israel.htm>>.

⁸² On the growing public status of Israel's Supreme Court, see G. Barzilai, 'Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective' (1999) 5 *Israel Affairs* 15.

⁸³ On the United Kingdom's law regarding the application of international law in municipal courts, see Shaw, *supra* note 56, at 128-43.

⁸⁴ See e.g. *Steinberg v. Attorney General* CA 5/51 (1951), 5 P.D. 1061. For a detailed analysis of Israel's jurisprudence on the application of international rules in the Israeli legal system, see R. Lapidoth, 'International Law within the Israel Legal System' (1990) 24 *Isr.L.Rev.* 451.

⁸⁵ See e.g. *Custodian of Absentee Property v. Samarah et al.* CA 22/55 (1956), 10 P.D. 1825; *Affu et al. v. Commander of the I.D.F Forces in the West Bank* (1988), HCJ 785/87, 845/87, 27/88, 42(2) P.D. 4. See also Lapidoth, *supra* note 84 at 459.

⁸⁶ See e.g. *Sheinbein v. Attorney General* CA 6182/98 (1999), 53(1) P.D. 625; *John Doe et al v. Minister of Defence* CFH 7048/97 (2000), 53(1) P.D. 721 at 742-3, 768; *Michael Frudenthal v. The State of Israel* CA 11196/02 (2003), 57(6) P.D. 40.

generally⁸⁷ bind neither the General Assembly nor the involved states.⁸⁸ Still, these opinions are often considered as an authoritative statement of the law, and past experience shows that they have considerable impact on the evolution of international law.⁸⁹ The influence of these opinions derives from the authoritative role of the Court as the principal judicial organ of the UN, the fact that they are rendered at the end of judicial proceedings,⁹⁰ and that the Court is bound in these proceedings by the rules of international law.⁹¹ It is noteworthy that a significant portion of the Advisory Opinion on the separation barrier relates to international customary law (particularly with regard to international humanitarian law) and, as discussed above, such international rules are generally incorporated into the Israeli legal system.

Israel's Supreme Court has already been involved in the delimitation of the barrier's route. In the *Beit Sourik Village* judgment,⁹² which had been rendered just nine days prior to the ICJ ruling, the Supreme Court scrutinized the legality of the separation barrier under Israeli and international customary law. While affirming the government's position that the separation barrier's route does not necessarily have to follow the Green Line,⁹³ the Supreme Court ruled that the Military Commander's authority must be properly balanced

⁸⁷ It is possible, however, that the constituent documents of certain international organizations or some other international convention provide that future advisory opinions will bind the relevant parties (compulsive opinions). See Simma, *supra* note 56 at 1181-2, 1188.

⁸⁸ *Ibid.*; Rosenne, *supra* note 56 at 106-10; Pomerance, *supra* note 56 at 285 *et seq.*, Shaw, *supra* note 56 at 1000-1; Malanczuk, *supra* note 56 at 289-90. See also Advisory Opinion, *supra* note 1 at paras. 60-2.

⁸⁹ See e.g. Shaw, *supra* note 56 at 1001-4; Pomerance, *supra* note 56 at 289; Harris, *supra* note 56 at 1035-6; M. Shahabuddeen, *Precedent In The World Court* (Cambridge: Cambridge University Press, 1996) at 71.

⁹⁰ See *Statute of the International Court of Justice*, 26 June 1945, 59 Stat. 1031, T.S. 1945 No. 993, 3 Bevans 1153 (entered in force 24 October 1945) at Article 68.

⁹¹ Simma, *supra* note 56 at 1182, 1188; P. Sands & K. Klein, *Bowett's Law Of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001) at 364; Shaw, *supra* note 56 at 1004-5; Harris, *supra* note 56 at 1035; Malanczuk, *supra* note 56 at 289.

⁹² *Beit Sourik Village v. The Government of Israel*, HCJ 2056/2004 (2004) [*Beit Sourik Village*], online: <http://62.90.71.124/Files_ENG/04/560/020/a28/04020560.a28.pdf>. On this decision and its relationship with the ICJ's Advisory Opinion, see Y. Shany, 'Capacities and Inadequacies: A Look at the Two Separation Barrier Cases' (2005) 38 *Isr.L. Rev.* 230.

⁹³ *Beit Sourik Village*, *supra* note 92 at para. 30. The court also ruled that the Military Commander has authority to order the seizure of private land for security purposes, including the construction of the separation barrier (*ibid.* at para. 32).

against the rights, needs and interests of the local population. The Court's influential President, Aharon Barak, pronounced that the essential need to balance Israel's security interests and local Palestinian needs⁹⁴ stems from 'both international law and fundamental principles of Israeli administrative law.'⁹⁵ Following a careful examination of the barrier's route and its impact on the Palestinian population, the Supreme Court ruled that a considerable portion of the route discussed in this litigation resulted in disproportionate harm to the local population. Consequently, the Supreme Court ruled that 30 of the 40 kilometres in question should be modified in order to avoid unnecessary hardship to the local Palestinian population.⁹⁶

While it is likely that international customary rules pronounced by the ICJ will gradually influence Israeli law and the executive branch's activities, the impact of the Advisory Opinion on Israel's case-law regarding East Jerusalem and the separation barrier therein are expected to be much more modest. The above Israeli legal rule regarding the inapplicability of international customary law in cases of inconsistency with unambiguous domestic statutes is of significance to the ICJ's pronouncements regarding East Jerusalem. The long-standing dispute over the legal status of East Jerusalem is certainly one of the most formidable stumbling blocks to the achievement of a durable peaceful solution to the Israeli-Palestinian conflict.⁹⁷ The ICJ's statements regarding the status of East Jerusalem as occupied territory are clearly inconsistent with Israeli legislation that applies Israeli law, jurisdiction and administration to this area.⁹⁸ Consequently, the ICJ's

⁹⁴ *Ibid.* at paras. 34-5. The Court specifically referred to Regulation 46 of the 1907 Hague Regulations and to Article 27 of The Fourth Geneva Convention.

⁹⁵ *Ibid.* at para. 39.

⁹⁶ *Ibid.* at para. 86.

⁹⁷ For a survey of the various legal positions on the status of Jerusalem under international law, see M. Hirsch, D. Housen-Couriel & R. Lapidoth, *Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem* (Dordrecht: Kluwer-Nijhoff, 1995) at 15-21; M. Eisner, 'Jerusalem: An Analysis of Legal Claims and Political Realities' (1994) 12 *Wis. Int'l L.J.* 221 at 238-60; L. Kletter, 'The Sovereignty of Jerusalem in International Law' (1981) 20 *Colum. J. Transnat'l L.* 319 at 330-56.

⁹⁸ See *Law and Administration Ordinance* (Amendment No. 11), Laws of the State of Israel, vol. 21, 5727-1966/7 at 75; *Municipal Ordinance* (Amendment No. 6), Laws of the State of Israel, vol. 21, 5727-1967 at 75-6. Israeli courts that discussed the impact of these enactments on the Israeli law concluded that East Jerusalem constitutes part of the territory of Israel. On these enactments and their interpretation by Israeli courts, see R. Lapidoth, *Commentary on Basic Law Jerusalem Capital of Israel* (Jerusalem: Sacher Institute for Legislative and Comparative Law, the Hebrew University, 1999) at 49-56; Hirsch, Housen-Couriel & Lapidoth, *supra* note

statements regarding the status of East Jerusalem as occupied territory and the separation barrier therein are not expected to be incorporated into the Israeli legal system.⁹⁹

Legal review of the Israeli executive branch is not carried out by the judiciary alone but also by the state's Attorney General. The Attorney General functions as both chief prosecutor and the executive's highest legal officer ('legal advisor to the government'). This officer is institutionally affiliated with the Ministry of Justice, but is not subject to the instructions of the Minister of Justice or the government. The Attorney General's legal opinions bind all governmental ministries.¹⁰⁰ Following the ICJ's Advisory Opinion, the Attorney General urged that the Israeli government 'thoroughly consider' formally applying the Fourth Geneva Convention to the territories seized in 1967.¹⁰¹ This position seems to deviate from Israel's long-term policy¹⁰² regarding the legal status of these territories under international law.¹⁰³

To sum up, the liberal approach¹⁰⁴ emphasizes that Israel is a democratic state, characterized by the rule of law and an independent judiciary. This factor, together with Israeli courts' jurisprudence regarding the incorporation of international customary law into the domestic legal system, indicate a likelihood that a significant part of the international customary rules pronounced by the Court will gradually be

97, at 22-4.

⁹⁹ On the impact of the Advisory Opinion on the future negotiations between Israel and the Palestinians over East Jerusalem, see M. Hirsch, 'The Legal Status of Jerusalem and the International Court of Justice's Advisory Opinion on the Separation Barrier' (2005) 38 *Isr. L. Rev.* 298.

¹⁰⁰ See e.g. E. Gordon, 'How the Government's Attorney Became Its General' *Azure* 5758 (Summer 1998) 75, online: <http://www.azure.org.il/download/magazine/1157az4_gordon.pdf>; E. Hamon, *Criminal Procedure in Israel—Some Comparative Aspects, in Comparative Law of Israel and the Middle East* (Washington, DC: Lerner Law Books, 1971) at 657, 661-2.

¹⁰¹ A. Benn, 'AG Urges Sharon to Consider Adopting Geneva Convention' *Haaretz* (24 August 2004), online: [Haaretz.com](http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=468472) <<http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=468472>>.

¹⁰² On this position, see E. Benvenisti, *The International Law of Occupation* (Princeton, NJ: Princeton University Press, 1993) at 109-13.

¹⁰³ This recommendation of the Attorney General was criticized by the Ministry of Foreign Affairs' Legal Division. See A. Benn, 'Ministry of Foreign Affairs: Legal Advisor Mazuz Overestimates the Impact of the Hauge Ruling' *Haaretz* (23 August 2004) A-10. See also A. Benn, 'Oslo Olives' *Haaretz* (2 September, 2004) 4.

¹⁰⁴ The issue of the Court's legitimacy in the Israeli public may also be of relevance for liberal analysis; see Section III(3).

incorporated into the Israeli legal system and affect the executive's activities. Some of the limits to the ICJ's influence are manifested with regard to the legal status of Jerusalem and the separation barrier therein.

3 The Constructivist Approach¹⁰⁵

Social constructivism emerged in the late 1980s and it largely developed as a critique of the realist tradition in international relations literature. The constructivist approach is largely consistent with the sociological perspective. Wendt posits the constructivist's basic claim that the international system is not composed only of distribution of material capabilities (such as military and economic resources) but is also made of social relationships. The critical components of the international social structure include shared understandings, expectations, and knowledge. This socially constructed structure influences the interests, identity and behaviour of the relevant actors. Unlike the realist approach, social constructivism does not take the parties' interests, preferences and strategies as given. Rather, these important motivations to behaviour are constructed in a socially interactive process.

The social constructivist theory emphasizes the dynamic aspect of social concepts (including interests and preferences). Acceptable social behaviour and values may be changed through a cognitive evolutionary process. Under this approach, decision-makers are motivated by impersonal social factors such as values, norms and cultural practices, rather than by a calculation of material interests. Legal obligations are perceived in this context as social standards of appropriate behaviour that operate in an inter-subjective framework. Thus, state behaviour is subjectively interpreted by other states, and judgment of whether a particular state's conduct constitutes compliance or violation does not involve only an objective assessment but also an

¹⁰⁵ A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 3; Anthony Arend, *supra* note 60 at 125-40; E. Adler, 'Cognitive Evolution: A Dynamic Approach for the Study of International Relations and Their Progress' in E. Adler & B. Crawford, eds., *Progress in Postwar International Relations* (New York: Columbia University Press, 1991) 43; M. Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996), at 1-13; M. Finnemore & K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *Int'l Org.* 887; Barker, *supra* note 60 at 82-4; Simmons, *supra* note 60 at 86-8; S. Guzzini, 'A Reconstruction of Constructivism in International Relations' (2000) 6 *European Journal of International Relations* 147; J. Bruneau & S. Toope, 'International Law and Constructivism' (2000) 39 *Colum. J. Transnat'l L.* 19 at 38-42; V.P. Shannon, 'Norms are What States Make of Them' (2000) 44 *International Studies Quarterly* 293; F. Schimmelfennig, 'International Socialization in the New Europe: Rational Action in an Institutional Environment' (2000) 6 *European Journal of International Relations* 109.

inter-subjective appraisal.

States' decision-makers learn the prevailing norms in their group and the expectations of appropriate behaviour through the process of 'socialization'. International socialization refers to the process that is directed toward a state's internalization of the constitutive beliefs, norms, and practices institutionalized in its international environment. International socialization is accomplished through state emulation of other successful states, which are praised for conforming to prevailing norms, or condemned for deviating from them. Occasionally, the 'peer group' exerts its influence by diplomatic measures, economic pressure, or even by social isolation.

Constructivist analysis of the prospects of compliance with the judicial statements included in the Advisory Opinion focuses on the social role of the Court in the international community, its influence in shaping international norms, and the influence of Western states' positions on Israel's long-term policy. The influence of the Court's advisory opinions on the evolution of international law does not derive from formal rules of international law but rather from the Court's social status in the international community. As discussed above,¹⁰⁶ though the ICJ's advisory opinions are not legally binding, they have significant impact on states' behaviour. These decisions often carry moral and political weight, and they affect international public opinion as well as legitimacy. Consequently, the Court's advisory opinions are widely considered as an authoritative statement of the law¹⁰⁷ and they frequently set social standards of appropriate international behaviour. Under the constructivist approach,¹⁰⁸ the ICJ may be perceived as an agent of international socialization.¹⁰⁹

The solid majority upon which the Advisory Opinion on the separation barrier is based, as well as the Court's reliance on resolutions of international organs, may support the constructivist argument that judicial statements included in the Opinion will influence international public opinion, as well as positions of states and international institutions. Most of the legal statements included in the Opinion rely

¹⁰⁶ See Section III(2).

¹⁰⁷ See e.g. Shahabuddeen, *supra* note 89 at 71.

¹⁰⁸ On the legitimacy of the ICJ, see T. Broude, 'The Legitimacy of the ICJ's Advisory Competence in the Shadow of the Wall' (2005) 38 *Isr. L. Rev.* 189. On the normative influence of the ICJ in the international community, see also A. Kacowicz, 'The Normative Dimension of International Relations and the Advisory Opinion of the ICJ on the Separation Barrier' (2005) 38 *Isr. L. Rev.* 348.

¹⁰⁹ On international institutions as 'agents of socialization', see M. Hirsch, 'The Sociology of International Law' (2005) 55 *U.T.L.J.* 891.

on a majority of fourteen-to-one judges¹¹⁰ and a significant portion of these pronouncements are supported by the resolutions of the UN Security Council and the General Assembly.

From this perspective, the significance of the Court's declaration that some obligations violated by Israel are of *erga omnes* nature (which are the concern of all states)¹¹¹ does not lie in the fact that this statement may induce some states to impose sanctions on Israel but rather in the implicit message of social exclusion that it may convey to the international community.

Sociologists have long shown that individuals' attitudes are significantly affected by the positions and actions of other individuals belonging to their 'reference group'. This group constitutes a point of reference for individual decision-making because the individual attaches special value to the beliefs and behaviour of the members of this group. People need not necessarily have to be members of the group to which they refer.¹¹² States' policy makers are also affected by international reference groups. Generally, Israel's principal reference group is 'the Western club' that includes the developed states in Western Europe and North America. Cultural and social ties between Israel and the United States, as well as the EU are of major importance for the Israeli public and decision-makers.¹¹³

This social influence of international reference groups indicates that the position of states belonging to the Western group regarding the recent Advisory Opinion is of significance to Israeli decision makers, even if it is not translated into concrete sanctions. Though numerous Western states expressed significant doubts on whether the barrier's dispute should be brought to the ICJ, virtually all of them either opposed or expressed serious reservations regarding the building of the barrier outside Israel's territory (and particularly with regard to the significant incursions into the West Bank territory).¹¹⁴ This position was manifested, for instance, in the unanimous vote of the EU—twenty-five member states in favour of the General Assembly resolution demanding

¹¹⁰ Advisory Opinion, *supra* note 1 at para. 163.

¹¹¹ *Ibid.* at para. 155.

¹¹² C.M. Renzetti & D.J. Curran, *Living Sociology*, 2nd ed. (Boston: Allyn and Bacon, 2000) at 141-2; N. Abercrombie, S. Hill & B.S. Turner, eds., *The Penguin Dictionary of Sociology*, 4th ed. (London: Penguin, 2000) at 291.

¹¹³ On the European-Israeli cultural relations, see E. Ahiram & A. Tovias, 'Introduction' in E. Ahiram & A. Tovias, eds., *Wither EU-Israeli Relations? Common and Divergent Interests* (Frankfurt am Main: Peter Lang, 1995) 1 at 11 *et seq.*

¹¹⁴ For a detailed survey of states' positions regarding the barriers' barrier, see Michael & Ramon, *supra* note 65 at c. A, s. F; Folman, *supra* note 65 at 164-70.

that Israel abide by its obligations as pronounced in the Advisory Opinion.¹¹⁵ Under the constructivist approach, the opposition to the barrier's route in the West Bank, which is prevalent among the members of Israel's reference group, is likely to affect the positions of Israeli decision makers as well as domestic groups within Israel.

Constructivist analysis of compliance with international decisions depends also on the particular institution's legitimacy within the relevant social group.¹¹⁶ Some of the ICJ's sweeping pronouncements that seem to ignore or underestimate Israel's security needs decreased the Court's legitimacy vis-à-vis the Israeli public. This is particularly prominent with regard to the Court's statement that Israel is not entitled to invoke its right to self-defence under Article 51 of the *Charter of the United Nations* against terrorist attacks launched from the West Bank,¹¹⁷ and the Court's pronouncement that *all parts* of the separation barrier in the West Bank are not necessary to attain Israel's security objects.¹¹⁸ The latter sweeping statement does not follow any investigation of the particular factors involved in any segment of the barrier (for example, the extent of the deviation from the 'green line' or the harm incurred to the local population in a particular area). These sweeping pronouncements undermined the Court's legitimacy and generated alienation toward its Opinion among significant groups¹¹⁹ in the Israeli public.¹²⁰

On the other hand, the judgment of Israel's Supreme Court in the *Beit Sourik Village* case showed more sensitivity to Israel's security

¹¹⁵ GA Res. of 20 July 2004, *supra* note 71. The US voted against this Resolution and Canada abstained.

¹¹⁶ Parallel literature in international law and international relations underscores the importance of legitimacy as a factor that intensifies or weakens the sense of obligation towards international norms. See, T.M. Franck, *The Power Of Legitimacy Among Nations* (Oxford: Oxford University Press. 1999) at 3; Simmons, *supra* note 60, at 87-89.

¹¹⁷ Advisory Opinion, *supra* note 1 at para. 139.

¹¹⁸ *Ibid.* at para. 137.

¹¹⁹ The issue of the Court's legitimacy in the Israeli public may also be of relevance for liberal analysis (that focuses on the position of domestic groups).

¹²⁰ The participation of Elaraby J in the ICJ proceedings also reduced the Advisory Opinion's legitimacy in Israel. Israel sought to disqualify Elaraby J and invoked Article 17(2) of the ICJ Statute, arguing that his participation raises an unacceptable appearance of bias. This request was rejected by the Court. See *Legal Consequences of the Construction of the Wall in the Occupied Territory* (Request for Advisory Opinion), I.C.J. Order (30 January 2004), online: <http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20040130.PDF>. For a criticism of this ruling, see M. Pomerance, 'A Court of "UN Law"' (2005) 38 *Isr. L. Rev.* 134.

needs and the Israeli government immediately accepted it as a legitimate and binding decision.¹²¹ While the Supreme Court stated that the building of the separation barrier was motivated by security concerns,¹²² it also ruled that thirty of the forty kilometres of the barrier's route discussed in this case are illegal under Israeli and international law.¹²³

To sum up, constructivist analysis indicates that for the long range, Israel will be significantly influenced by the judicial statements included in the Advisory Opinion. The authoritative status of the ICJ in the international community, its significant influence on the development of international norms and the unfavourable position of Israel's reference group regarding the barrier's route are likely to exert normative pressure on Israel to comply with many of the Court's legal statements. On the other hand, some of the Court's sweeping pronouncements against Israel decreased its legitimacy in the eyes of the Israeli public and reduce the prospects of Israel's compliance with the Advisory Opinion. Overall, it is important to emphasize that the social processes invoked by the constructivist approach are generally undertaken in a slow, gradual, manner.

IV CONCLUSIONS

The preceding sections analyze some of the central factors that are likely to influence Israel's compliance or non-compliance with the legal statements included in the Advisory Opinion. This examination is certainly not exhaustive and additional factors should be taken into account before reaching any definitive conclusion regarding the prospects of compliance with the ICJ Opinion. Still, this analysis traces the broad contours of the major international relations theoretical approaches to the issue of compliance in the separation barrier dispute.

Realist analysis indicates that the prospect of meaningful compliance with the judicial pronouncements included in the Advisory

¹²¹ See e.g., the statements issued by Israel's Ministry of Foreign Affairs following the Supreme Court's decision and the ICJ's Advisory Opinion ('Israel's High Court of Justice Ruling on the Anti-Terrorist Fence' (30 June 2004), online: Israel Diplomatic Network <<http://securityfence.mfa.gov.il/mfm/web/main/missionhome.asp?MissionID=45187&>>; Israel Ministry of Foreign Affairs 'ICJ Advisory Opinion on Israel's Security Fence—Israeli Statement' (9 July 2004), online: Israel Ministry of Foreign Affairs <<http://www.mfa.gov.il/mfa/about%20the%20ministry/mfa%20spokesman/2004/>>; S. Shamir, 'Sharon to Convene Ministers Sunday to Discuss ICJ Ruling' *Haaretz* (11 July 2004), online: *Haaretz.com* <<http://www.haaretzdaily.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=449631>>.

¹²² *Beit Sourik Village*, *supra* note 92 at paras. 28-9

¹²³ *Ibid.* at para. 86.

Opinion is not significant (at least in the short term). The relevant major powers, the United States and EU, are not likely to issue credible threats or impose sanctions against Israel in this context. As for the medium and long range, Israeli steps in this sphere may affect EU willingness to upgrade its economic relations with Israel. The EU position regarding future relations with Israel also depends upon a variety of broader political and economic factors.

Liberal analysis indicates that a significant part of the international customary rules pronounced by the ICJ are likely to be incorporated gradually into the Israeli legal system, and will affect the Israeli executive branch. This approach emphasizes that Israel is a democratic state with a strong and independent judiciary. The fact that the ICJ often has significant influence on the evolution of customary rules, and that Israeli courts and Attorney General often incorporate international customary law into the domestic legal system, enhance the prospects that the customary rules stated by the Court will gradually be accepted by Israel. This conclusion does not apply to the legal status of Jerusalem and the barrier therein.

Constructivist analysis indicates that for the long range, judicial statements included in the Advisory Opinion will significantly influence Israel. The authoritative status of the ICJ in the international community, as well as the positions undertaken by states that belong to Israel's 'reference group', are likely to exert normative pressure on Israel to comply with the Court's legal statements. The ICJ's rejection of Israel's right to self-defence in this context and its sweeping ruling regarding the illegality of all parts of the separation barrier decrease its legitimacy in the eyes of the Israeli public and reduce the prospects of compliance.

The combined results of these analyses indicate that the prospects of compliance with the judicial statements included in the Advisory Opinion are modest for the short range and more significant over the medium and long terms. As for the latter ranges, the two major actors that are likely to enhance the influence of the ICJ's judicial statements in the Israeli legal system are Israel's Supreme Court and the Attorney General. The constructivist approach indicates that the legal standards pronounced by the ICJ in this Opinion will significantly influence these domestic actors. The scant legitimacy of the ICJ among significant groups within the Israeli society, the authoritative status of these two central actors within Israel, and the fact that these actors attach significant importance to international customary law, place them in a unique position to mediate between the international and the domestic legal systems. These factors indicate that a significant portion of the ICJ's judicial statements can be expected to be accepted gradually

by Israel *via* the medium of domestic legal institutions.¹²⁴

As recently stated by a commentator in the Israeli press:

The state has undergone an upheaval regarding the legal status of the fence in international law. The biggest blow did not come from the Hague but rather from the High Court's ruling on Beit Surik, which disqualified a 30 kilometer section of the fence and dictated humanitarian criteria and the precedence of international law in planning the fence... . The Justice Ministry [with which the Attorney General is institutionally affiliated] took the message to heart and began a detailed examination of every kilometer of the fence, subjecting it to the new rules. But most importantly, the security establishment and the political echelon have internalized the understanding that international law is a central player in this field.¹²⁵

It is important to note that each of the theoretical perspectives discussed above underlines different aspects of the process of compliance with international norms. International law scholars should not necessarily subscribe to a single international relations perspective. As illustrated in this case, frequently, it is only a multifaceted investigation that can meaningfully clarify the various factors that are involved in the complex issue of compliance with international law.

¹²⁴ On the considerable influence of Israel's Supreme Court decisions and the position of the Attorney General on the revised barriers' route (set out in February 2005), see A. Benn, 'Israel's New Frontier' *Haaretz* (25 February 2005) B2.

¹²⁵ Y. Yoaz, 'State Readies Opinion on Hague Ruling' *Haaretz* (5 January 2004), online: *Haaretz.com* <<http://www.haaretz.com/hasen/objects/ages/rintArticleEn.jhtml?itemNo=523078>>. On the impact of Israel's Supreme Court ruling and its Attorney General on the Israeli government, see Section III(2), *supra*.