

Case Notes

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), International Court of Justice, 9 July 2004

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On 9 July 2004, the International Court of Justice (the ‘ICJ’ or ‘Court’) issued its Advisory Opinion on the legal consequences arising from Israel’s construction of a barrier (the ‘Wall’) separating portions of the West Bank from Israel. The Court unanimously upheld its jurisdiction to issue this opinion and by fourteen votes to one, proceeded to conclude that Israel’s construction of the Wall in the Occupied Palestinian Territory had violated numerous international obligations incumbent upon Israel. Further, the Court indicated *inter alia* that the establishment of Israeli settlements in Occupied Palestinian Territory (settlements of which the Wall was designed to enclose) had occurred in violation of international law. According to the Court, Israel was obligated to cease any further construction, dismantle any segments of the Wall already constructed, and make reparation for any damage flowing from its violations. Because a number of the obligations breached by Israel were owed *erga omnes* — to the international community as a whole — all States were obligated to refrain from aiding Israel in its violations. On 20 July 2004, the United Nations General Assembly voted 150–6 to endorse the ICJ’s Opinion.¹

1. Background

This proceeding concerned a request made by the United Nations (UN) General Assembly, contained in resolution ES–10/14 of 8 December 2003,² which read as follows:

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?

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1 *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, GA RES ES–10/15, UNGAOR, 10th special sess, 27th Plen Mtg, UN Doc A/RES/ES–10/15 (2004). Israel, the United States, Australia, the Marshall Islands, Micronesia and Palau voted against. Cameroon, Canada, El Salvador, Nauru, Papua New Guinea, the Solomon Islands, Tonga, Uganda, Uruguay and Vanuatu abstained.

2 *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, GA RES ES–10/14, UNGAOR, 10th special sess, 23rd Plen Mtg, UN Doc A/Res/ES–10/14 (2003).

After deciding that it would comply with the request, the ICJ allowed the submission of written statements from forty-four UN member States, the United Nations, the League of Arab States and the Organisation of the Islamic Conference. The submissions made by Israel and the United States were directed towards the question of jurisdiction. None of the submissions argued in favour of the legality of the Wall.

2. *Jurisdiction*

The Court commenced by rejecting Israel's contention that, given the Security's Council's active engagement with the situation in the Middle East, the UN General Assembly had acted *ultra vires* under the Charter by issuing the request.³ Even though the Security Council had issued a number of resolutions dealing with the 'Palestinian question' and the Middle East more generally, none of these resolutions had dealt specifically with the Wall itself. As a result, this was not a matter with which the Security Council could be said to be 'actively involved'. Moreover, a request for an advisory opinion was not a 'recommendation' of the General Assembly with regard to a dispute or situation, as referred to in Article 12(1) of the UN Charter,⁴ and notwithstanding the Security Council's responsibility for international peace and security conferred by Article 24 of the Charter, this 'responsibility' was not necessarily exclusive to the Security Council.⁵

Further, the Court rejected Israel's claims that the request of the General Assembly was tainted by procedural irregularities. In the Court's determination, the Tenth Emergency Special Session of the General Assembly at which the request was adopted had been duly reconvened and was entitled to address the issues contained in the request.⁶ The Court could find no rule preventing the Tenth Emergency Special Session from being convened while the regular session of the General Assembly was in progress. It was not relevant that the Security Council had not previously considered a draft resolution proposing the request of an advisory opinion in relation to Israel's construction of the Wall.⁷

Finally, the Court refused to accept that the request posed no 'legal question' on which it might advise by virtue of its politically charged nature and its vagueness. The request submitted by the General Assembly did raise a 'legal question', as required by Articles 96 and 65 of the Statute of the Court.⁸ It raised legal issues and was therefore susceptible to characterisation as a 'legal question'.⁹

3 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, International Court of Justice, 9 July 2004 at 24 and 42.

4 *Id* at 25.

5 *Id* at 26.

6 *Id* at 31.

7 *Id* at 31.

8 *Statute of the International Court of Justice*, annexed to the *Charter of the United Nations*, opened for signature 26 June 1945, CTS 7 (entered into force 24 October 1945).

9 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n3 at 40–41.

It was irrelevant that the question posed was ‘political’ in nature.¹⁰ The fact that a legal question contained political features would not be sufficient ‘...to deprive it of its character as a ‘legal question’ or to ‘...deprive the Court of a competence expressly conferred on it by its Statute’. Nor was the abstract nature of the question liable to deprive the Court of its jurisdiction. The Court was entitled to ‘give an advisory opinion on any legal question, abstract or otherwise’.¹¹

3. *Applicable Law*

The Court then considered which rules of international law would be applicable in determining the issues raised by the question before the Court. First, it concluded that under customary international law, Israel had, since 1967, retained the status of occupying power in the territories located between the Green Line¹² and the former eastern boundary of Palestine originally fixed by Mandate.¹³

Numerous rules of customary international law, treaty law and various resolutions of the UN General Assembly and Security Council were deemed relevant to the issues under consideration. Of particular import was General Assembly resolution 2625 (XXV) of 1970, which had set out two important principles of customary international law: the illegality of the acquisition of territory resulting from the threat or use of force and the right of peoples in non-self-governing territories to self-determination.¹⁴ The ICJ had previously recognised the latter as an obligation owed *erga omnes*,¹⁵ which in view of the importance of the rights involved, conferred on all States a legal interest in its protection.

The Court then considered the relevant provisions of international humanitarian law (‘IHL’), concluding that both the Fourth Hague Convention¹⁶ and the Fourth Geneva Convention¹⁷ (both of which enshrined principles of customary law and were therefore binding on non-parties such as Israel) would apply to Israel’s occupation of the Palestinian Territory.¹⁸ Israel had contended that it could not be bound by the Fourth Geneva Convention in the Occupied

10 Id at 41.

11 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 232.

12 Following the hostilities of 1948–1949, the armistice demarcation line between Israeli and Arab forces was fixed by a general armistice agreement between Israel and Jordan, from then on referred to as the ‘Green Line’. During its armed conflict with Jordan in 1967, Israel occupied the territories located between the Green Line and the former eastern boundary of Palestine.

13 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n3 at 78. Palestine, as part of the Ottoman Empire, was at the end of the First World War made the subject of a class ‘A’ mandate entrusted by the League of Nations to Great Britain on 24 July 1922.

14 Id at 87 and 156.

15 Id at 88. *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep102 29.

16 *Convention Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907 36 Stat 2277 (entered into force 26 January 1910).

17 *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949 75 UNTS 287 (entered into force 21 October 1950).

18 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n3 at 100–101.

Palestinian Territory because, pursuant to Article 2, paragraph 2 of that Convention, the Convention would only apply to the occupation of territories falling under the sovereignty of a High Contracting Party (as defined in the Convention). Since the Occupied Palestinian Territory did not fall under the territory of any party (including Jordan), the Convention could have no application to these circumstances.¹⁹ The Court disagreed. The authoritative interpreter of the Geneva Conventions, the International Committee of the Red Cross, had on numerous occasions acknowledged the applicability of the Geneva Conventions to the situation in the Occupied Palestinian Territory. Israel's view was unfounded — IHL was applicable in these circumstances.

The Court then considered provisions of international human rights law, which it found to be applicable. Israel had previously contended that the International Covenant on Civil and Political Rights (ICCPR)²⁰ and other international human rights treaties could not apply during times of war, since they were designed to protect citizens from their own governments during times of peace, without any extraterritorial application in the context of armed conflict. Examining the object and purpose of the relevant conventions and their preparatory work, the Court concluded that they were intended to have extraterritorial application.²¹ International human rights law was therefore applicable.²²

However, while both IHL and human rights law were applicable to these circumstances, the Court emphasised that IHL would retain the status of *lex specialis*.²³

4. *Violations*

A number of violations of international humanitarian law and human rights law were held to have arisen from the Wall's construction. The Wall had imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory.²⁴ Agricultural production had also suffered severe repercussions, and access to health services, educational establishments and primary water sources had become increasingly difficult to obtain.²⁵ These constituted grave infringements of the rights of Palestinians living in the Occupied Palestinian Territory; and the specific course chosen for the Wall was not essential to the attainment of Israel's security objectives.²⁶

For the Court, the illegality of the Wall's establishment was closely tied to the illegality of Israel's policy of establishing settlements in the Occupied Palestinian Territory. Israel's settlements had been established in breach of Article 49,

19 *Id* at 90.

20 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

21 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n3 at 106.

22 *Ibid*.

23 *Ibid*.

24 *Id* at 133.

25 *Ibid*.

paragraph 6 of the Fourth Geneva Convention, which prohibits an occupying power from deporting or transferring parts of its own civilian population into the territory it occupies.²⁷ Support for the policy's illegality could also be drawn from the Security Council's views, pursuant to which the policy and practice of establishing settlements had 'no legal validity' and constituted a 'flagrant violation' of the Geneva Conventions.²⁸

Despite Israel's assurances that as a temporary measure, the Wall's establishment did not amount to annexation, the Court concluded that the construction would establish a *fait accompli* that could well become permanent.²⁹ The outcome would be tantamount to *de facto* annexation.³⁰

Moreover, the route chosen for the Wall would give expression in loco to Israel's policy of illegal settlements in the occupied territories and East Jerusalem, already deplored by the Security Council.³¹ It would further alter the demographic composition of the Occupied Palestinian Territory because it would contribute towards the departure of Palestinian populations from certain areas.³²

The Wall would also severely impede the exercise by the Palestinian people of its right to self-determination. Its construction was therefore a breach of Israel's obligation (owed *erga omnes*) to respect that right. Judge Koroma, in a separate opinion, emphasised that the Wall's construction would forestall the establishment of a Palestinian State, which would itself impede the realisation of the right of self-determination.

5. *Exceptions to Responsibility*

The Court then considered whether certain military exigencies could be taken into account to preclude Israel's responsibility for the violations identified. In particular, it considered whether the exception to Article 49(1) of the Fourth Geneva Convention, which prohibits deportation and the forcible transfer of populations except in circumstances where 'the security of the population or imperative military reasons so demand', could apply to alleviate Israel of responsibility in these circumstances.³³ The Court thought not. That exception, it held, could not apply to Article 49(6), which prohibits an occupying power from transferring segments of its own population into the territories that it occupies.³⁴

26 Ibid. Israel was found to be in violation of Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention, above n17; Articles 43, 46, 49 and 52 of the Hague Regulations, above n16; Articles 6, 7, 10, 11, 12, 13 and 14 of the ICCPR; and Articles 16, 24, 27 and 28 of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, UN Doc A/44/49 (entered into force 2 September 1990).

27 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n3 at 135.

28 SC Res 452, UNSCOR, 2159th mtg (1979); and SC Res 465, UNSCOR, 2203rd mtg (1980).

29 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n3 at 121.

30 Ibid.

31 Id at 122.

32 Id at 115.

33 Id at 126.

Nor would the exception to responsibility for the destruction of property, contained in Article 53 of the Fourth Geneva Convention apply. That exception could only apply in circumstances where ‘... such destruction is rendered absolutely necessary by military operations’.³⁵ Yet the Court was not convinced that the destruction of property carried out by Israel in these circumstances could be deemed absolutely necessary for the purpose of military operations.³⁶

Nor were any exceptions contained in the ICCPR applicable. In particular, Article 9, which allows some constraints to be placed on the freedom of movement, still requires the measures adopted to be reasonably adapted to legitimate ends, such as the maintenance of national security. The measures adopted also had to be reasonably proportionate to the achievement of those ends. The measures adopted by Israel were not proportionate and were not reasonably adapted to legitimate ends. As a result, no exception could apply to relieve Israel of its responsibility.³⁷

Moreover, the route chosen for the Wall was not, in the Court’s opinion, necessary to secure Israel’s security objectives. The route chosen gravely infringed the rights of Palestinians and Israel’s security objectives did not permit invocation of an exception to the prohibition on the infringement of these rights.³⁸

The circumstances faced by Israel were also different, the Court remarked, from those contemplated by Security Council resolutions 1368 (2001)³⁹ and 1373 (2001),⁴⁰ adopted in the wake of the attacks against the World Trade Centre on 11 September 2001. This was the case because the threat that Israel regarded as justifying the construction of the Wall originated within, and not outside territory over which it exercised control. Since Israel did not recognise Palestine as a foreign state, it could not rely on those resolutions to justify its grave infringements of the rights of Palestinians.⁴¹

Finally, the Court concluded that the inherent right to self-defence contained in Article 51 of the UN Charter had no relevance to these proceedings because Israel had not claimed that the attacks against it were attributable to a foreign State. As Israel did not recognise Palestinian statehood it was unable to rely on the right of self-defence, which a majority of the Court found arose only between States.⁴²

34 Id at 135.

35 Id at 126.

36 Id at 135.

37 Ibid.

38 Id at 137.

39 SC Res 1368, UNSCOR, 4370th mtg, UN Doc S/RES/1368 (2001).

40 SC Res 1373, UNSCOR, 4385th mtg, UN Doc S/RES/1373 (2001).

41 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n3 at 138.

42 Id at 139–142. Judge Buergenthal disagreed on this point, indicating that the language of Article 51 does not make the exercise of the right of self-defence dependent on the occurrence of a state-sponsored armed attack. Judge Higgins disagreed with the Court for similar reasons. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Separate Opinion of Judge Higgins), above n3 at 33–35 and (Separate Declaration by Judge Buergenthal), above n3 at 5–6.

6. *Consequences for other States*

With the exception of Judges Higgins and Kooijmans, the Court viewed the consequences for other States as flowing from the *erga omnes* character of the obligations breached. These obligations included respect for the right of self-determination, already acknowledged as an obligation owed *erga omnes*⁴³ and certain 'intransgressible' rules of IHL.⁴⁴ Given that the Wall's construction was violating obligations owed by Israel *erga omnes*, all States had an obligation not to recognise the illegal circumstances resulting from the construction.⁴⁵ States were also under an obligation not to render aid or assistance in maintaining the situation created by the Wall's construction⁴⁶

7. *Consequences for the United Nations*

In light of the Court's findings, it was considered essential that the General Assembly should with urgent necessity 'redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy solution'.⁴⁷ It was now:

[u]p to the General Assembly to utilize [these] findings in such a way as to bring about a just and peaceful solution to...a conflict which has not only lasted for too long but has been the cause of enormous suffering to those directly involved and has poisoned international relations in general.

8. *Declaration of Judge Thomas Buergenthal*⁴⁸

In a separate Declaration, Judge Buergenthal queried the evidentiary basis for the majority's Opinion. The Court had not, in Judge Buergenthal's view, considered all relevant facts bearing directly on Israel's legitimate right of self-defence, military necessity and security needs.⁴⁹ The nature of terrorist attacks and their impact on Israel and its population had never been seriously examined by the Court.⁵⁰ The dossier provided to the Court by the United Nations (on which the Court had based its findings) barely touched on these issues. Evidentiary inadequacies were most clear in the Court's 'sweeping finding' that the Wall *as a whole* violated international law. Because this was not a contentious case, Israel had no obligation to '[prove] its claims',⁵¹ and the Court was not entitled to draw any adverse evidentiary conclusions from Israel's failure to provide relevant evidence. Judge Buergenthal did agree with the remaining judges on a number of

43 *East Timor (Judgment)*, above n15 at 29.

44 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, above n11 at 79.

45 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n3 at 157.

46 *Id* at 156–157.

47 *Id* at 161–162.

48 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Separate Declaration of Judge Buergenthal)*, above n3.

49 *Id* at 3.

50 *Ibid*.

51 *Id* at 10.

issues. It was true to say that both IHL and human rights law would apply to Israel's occupation of the Palestinian Territory and that the self-defence measures adopted by Israel had to comply with international law.⁵² Given the 'great hardship' to which the affected Palestinian population had been subjected in and around the enclaves created by segments of the Wall, there was serious doubt as to whether the Wall would satisfy the proportionality requirement and qualify as a legitimate measure of self-defence.⁵³ Notwithstanding these observations, the absence of sufficient factual information prohibited the Court from reaching its sweeping conclusions, Judge Buergenthal maintained.

9. Discussion

The exercise of a Court's advisory function has always been prone to attack from advocates of a constitutional separation of powers, for whom the prospect of an 'activist' judiciary is especially discomfiting.⁵⁴ It was unsurprising then that the United States reacted so strongly to the ICJ's decision with respect to jurisdiction, declining to make submissions on any matter other than jurisdiction and rejecting the Advisory Opinion upon its issuance.⁵⁵ In light of such sustained attacks on the Court's exercise of jurisdiction, the controversial subject matter and the urgency of the humanitarian situation at the centre of this proceeding, it was remarkable that the Court considered the question presented in the first place. Seven judges filed separate Opinions, all of which lent nuance to the issue of jurisdiction.⁵⁶ Yet the strength of the Court's ultimate conclusion — a unanimous finding — was nonetheless a remarkable outcome.

Though unanimity in judicial decision-making is not favourable in all circumstances, and dissenting judgments can have an important role to play in revealing political and legal nuance, the absence of consensus can produce substantial uncertainty. In the context of jurisdiction — in this instance, the authority to advise — the absence of certainty goes to the very heart of the Court's authoritativeness and legitimacy. A rare unanimous finding in this case has arguably produced the opposite effect, ushering in a new era of authoritativeness and substantiating the Court's role as a strong and independent arbiter of States' international obligations.

Nine days prior to the delivery of the ICJ Opinion in this matter, the Israeli Supreme Court concluded its own decision in a matter relating to the legality of the Wall's construction.⁵⁷ There, the Supreme Court levelled criticism at the Israeli

52 Id at 2.

53 Id at 9.

54 For a detailed summary of objections to the exercise of advisory functions by both the US Supreme Court and international courts, see Michla Pomerance 'The United States and the advisory function of the Permanent Court of International Justice' in Yoram Dinstein & Mala Tabory (eds), *International law at a Time of Perplexity; Essays in Honour of Shabtai Rosenne* (1989) at 567–592.

55 Department of State, United States of America, *US Opposes International Court Ruling on Israeli Wall*, Press Release, 16 July 2004.

56 Judges Higgins, Owada, Kooijmans, Koroma, Buergenthal, Elaraby, Al-Khasawneh and Buergenthal.

Government for its construction of the Wall and questioned why the ICJ's Opinion should not be taken as decisive of the Wall's legal status. Though it is impossible to gauge the extent to which the Supreme Court was affected in its decision-making by the impending Opinion of the ICJ, the possibility of some influence remains because the decision resulted in the removal and redirection of parts of the Wall, with the object of ceasing identified violations of Israel's international obligations. In a later decision, the Supreme Court indicated that the *Beit Sourik* decision and the ICJ's Advisory Opinion shared a common normative basis. Both had concluded that Israel holds the West Bank pursuant to the law of belligerent occupation. Both concluded that an occupier is not entitled to annex territory under its occupation; and that an occupier is bound by the Hague Regulations and the Fourth Geneva Convention. Finally, both concluded that the rights of Palestinian residents had been infringed. The two courts ultimately reached different conclusions as to the Wall's wholesale legality. The Supreme Court considered it a better strategy to examine the legality of the wall on a case-by-case basis, rather than identifying the entire construction as a breach of international law.⁵⁸

But despite these points of difference, and the limited lawmaking status of an Advisory Opinion, the Supreme Court nonetheless gave full, reasonable weight to the norms of international law developed by the ICJ in this instance. An Advisory Opinion was not binding on the parties – and did not constitute *res judicata* – but it still amounted to an interpretation of international law performed by the peak judicial body of the international system, and would inform the Supreme Court's deliberations accordingly. The possibility then remains: an ICJ Advisory Opinion, issued pursuant to a unanimous finding as to jurisdiction, may have persuaded a domestic court to compel its government to remedy breaches of international law. Such a development indicates in favour of a newfound authoritativeness, which ought to be welcomed by international lawyers.

Yet the unfortunate consequence of the Court's unanimity may have been the sacrifice of detail in areas where much guidance is still needed. Foremost was the Court's cursory treatment of obligations owed to the international community as a whole. Once again, the ICJ confirmed the existence of this class of international obligations, but once again, the Court declined to outline the procedural entitlements – if any – that might flow from the breach of such an obligation.

The 'essential distinction' between obligations owed to individual States and obligations owed to 'the international community as a whole' was first identified by the Court in the *Barcelona Traction Case* and has since been repeatedly affirmed.⁵⁹ What unifies these obligations is the common legal interest of all States in securing their protection. This common legal interest may flow from 'the importance of the rights involved', which explains why 'the outlawing of acts of

57 HC 2056/04, *Beit Sourik Village Council v Government of Israel* (June 30, 2004) available at: <<http://62.90.71.124/eng/verdict/framesetSrch.html>>.

58 *Zaharan Yunis Muhammad Mara'abe v The Prime Minister of Israel* (Unreported, Supreme Court of Israel, 15 September 2005) at 56, 57, 74.

59 *Barcelona Traction, Light and Power Company, Limited (Second Phase, Judgment)* [1970] ICJ Rep 32 at 33.

aggression and genocide', 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination',⁶⁰ and the 'self-determination of peoples'⁶¹ have been identified by way of example. Yet obligations of this character have resonance for other areas of public international law, and have been invoked in contexts such as environmental protection, especially in relation to common spaces such as the high seas, Antarctica and the deep seabed.

Given the Court's repeated acknowledgement of this class of obligations, their existence can no longer be doubted. Yet substantial uncertainty remains. What is the nature of the interest that all States have in ensuring the protection of these obligations? As noted, the *Barcelona Traction Case* and subsequent decisions of the Court have contemplated a *legal* interest, but the precise entitlements conferred remain elusive. For instance, if this interest is a legal interest, does the violation of an *erga omnes* obligation confer procedural entitlements on all member States of the international community, such as an entitlement to invoke the violating State's responsibility before the ICJ? And what of the available remedies; if every State is effectively 'injured' by the breach, on whose behalf should the obligation of reparation be performed, and what character should reparations take? If there exists no entitlement to invoke responsibility, nor any entitlement to reparations, then '*erga omnes*' status is presumably a superfluous characterisation.

The International Law Commission, in its Articles on State Responsibility,⁶² has addressed these matters substantially. Article 42 allows a 'specially affected' State to invoke the responsibility of another State that has breached an obligation owed to the international community as a whole. A 'specially affected' State is an injured state, entitled to the full range of remedies available under international law. Article 48 allows any state that is not injured to invoke the responsibility of a state that has violated an obligation owed to the international community as a whole. However, that State may only seek the performance of the obligation of reparation on behalf of the international community as a whole, or on behalf of the injured State.

These Articles substantially address the concerns of sceptics by transforming *erga omnes* obligations into a category of international obligations possessing of something more than mere symbolic resonance. The status of these Articles under customary international law, though uncertain, has been bolstered by two commendations by the General Assembly. Yet in its Opinion, the Court makes no reference to the Commission's important work.⁶³ Its only conclusion as to the effect of characterising these obligations as being owed *erga omnes* is that all States can be taken to have an interest in ensuring that Israel is not further aided in

60 Ibid.

61 *East Timor (Judgment)* 29.

62 International Law Commission (ILC) Draft, *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001.

63 The Court's only reference to the ILC Articles is in its discussion of exceptions to responsibility, where it refers to Articles 25 and 33: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n3 at 140.

its violations of international law. This is a political solution with neat symbolic consequences, but it fails to explain why it is that all States have a *legal* interest in securing the protection of *erga omnes* obligations. While it is pleasing that the Court has reaffirmed the existence of this category of obligations, important procedural questions remain unresolved.

Notwithstanding these shortcomings, the Opinion raises important questions concerning the relationship between IHL and human rights law. In recognising the simultaneous applicability of IHL and human rights law, the Court apparently contemplates the convergence of the two bodies of law. Traditionally, the two bodies have been viewed as discrete, with IHL informing the obligations of States during the course of international armed conflict, and international human rights law informing, in Israel's words, the conduct of States in relation to its own citizens during peacetime.⁶⁴ The two bodies of law also differ in the level of specificity with which they define obligations. The protections afforded by international humanitarian law are far more detailed and specific than the broad and general rights conferred under international human rights treaties, such as the ICCPR. For this reason, where the two bodies of law come into conflict, human rights obligations would generally give way to the *lex specialis* of IHL, as the Court concluded in this matter.

Yet the two bodies do not always conflict. They are in many respects complementary, leading some scholars to indicate in favour of their harmonisation with the object of conferring the most 'holistic' set of protections for the individual in the course of armed conflict.⁶⁵ Many critics of the 'convergence' theory have framed their concerns as an attack on the inadequacy of international human rights law — with its vague, general and ambiguous obligations — to protect individuals in a manner comparable to IHL, which confers highly detailed protections. At any rate, a residual concern has been the extent to which the parties to the relevant international human rights instruments ever intended these instruments to have extraterritorial application.⁶⁶

The impact of the Court's findings on the question of applicable law should not be understated. If the response of Michael J Dennis of the US State Department is anything to go by, the decision may have substantial consequences for the obligations owed by occupying powers, and to whom those obligations flow.⁶⁷ Certainly the resources required to afford United States citizens the human rights obligations owed by the United States under the ICCPR and other relevant instruments are substantial. The duplication of these resources to territories under

64 Id at 102.

65 Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection and Humanitarian Law' (2004) 86 *IRRC* 856; Allan Rossa & Theodora Meron 'Combating Lawlessness in Grey Zone Conflicts Through Minimum Humanitarian Standards' (1985) 89 *AMJIL* 2; Christine Cerna, 'Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies' in Frits Kalshoven & Yves Sandoz (eds), *Implementation of International Humanitarian Law* (1989).

66 Rossa & Meron, above n 64.

67 Michael Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *AMJIL* 119.

US occupation will place substantial economic strain on the US government and on other occupying powers. Though it was unclear whether the particular circumstances prevailing in this matter – in particular, Israel’s very longstanding occupation of the relevant territory – were relevant to determining the applicability of international human rights instruments, the Opinion on its face presents a substantial challenge to all occupying powers.

Of great interest is the extent to which relief procedures available under international human rights instruments will now be seen to apply in the context of armed conflict. Mechanisms of individual redress, available under human rights instruments, support the view confirmed recently by Justice Michael Kirby,⁶⁸ that a State’s obligations under human rights law are owed to individuals, rather than to other States. A person under the jurisdiction of a State party to the second Optional Protocol to the ICCPR may, after exhausting local remedies, communicate a complaint about the violation of his or her rights directly to the Human Rights Committee. Various regional human rights instruments confer similar entitlements.⁶⁹ IHL does not contemplate comparable mechanisms of individual redress, conforming to the traditional view that international law regulates the relationship between States, and denies the existence of individual legal personality. If indeed both human rights law and IHL are applicable to situations of international armed conflict and occupation; to what extent would such relief procedures be available to civilians during the course of armed conflict? Though this matter was not addressed, the Court appears to have left open the possibility of individual redress, notwithstanding the absence of similar procedural entitlements under IHL.

Upon its issuance, this Advisory Opinion was given a mixed reception. Certainly, a mixed reception was to be expected; the Opinion attempted to resolve an issue at the heart of a political maelstrom, and represented an early foray into controversial debates about the obligations of occupying powers and the self-defence entitlements of states in the face of terrorist activity. And it is true to say – perhaps as a result of contestation surrounding these issues – that the Court did fail to elucidate rules and principles in areas where much guidance is still needed. Yet notwithstanding these limitations, the Opinion precipitates a number of exciting developments in international humanitarian and human rights law, and leaves no lingering uncertainty as to the Court’s vision for these developments. Irrespective of any remaining weaknesses, this newfound authoritativeness ought to be welcomed.

68 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 213 ALR 688.

69 See for instance *American Convention on Human Rights*, OAS Treaty Series N 36, 1144 UNTS 123 (entered into force 18 July 1978) and *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (entered into force 3 September 1953).