3 Case study: Israeli settlements, the Separation Wall and displacement of civilians in the Occupied Palestinian Territory

Introduction: the practice of population transfer in situations of armed conflict

Population transfer is a common feature of armed conflict and, more specifically, of belligerent occupation. According to the 1993 UN report 'The human rights dimensions of population transfers', one of the principal devices used by an occupying power to extend control over a territory is to implant its own reliable population into the territory.[1] Eventually, the occupying power will allege that humanitarian concerns compel it to remain in the territory to extend its protection to the implanted civilian population.[2] The occupying authorities may also invoke territorial or ideological claims to justify the presence of their own civilians in the occupied territory. Settlement policies are usually coupled with the forced displacement of the original population, who may either become internally displaced within their own country, or become refugees across international borders.[3]

Occupying powers often resort to practices of population transfer in order to create facts on the ground, in a way that will irreversibly affect the situation in the occupied territory and play in their favour in case of future peace settlements. In addition, the UN 'population transfer' report observes that:

[1] UNCHR (Sub-Commission), 'The human rights dimensions of population transfer, including the implantation of settlers, Preliminary report prepared by Mr A. S. Al-Khasawneh and Mr R. Hatano' (6 July 1993) UN Doc. E/CN.4/Sub.2/1993/17, para. 35.
[2] *Ibid*.
[3] Meindersma, 'Population transfers in conflict situations', 1994, 38.

Population transfer has been conducted with the effect or purpose of altering the demographic composition of a territory in accordance with policy objectives or prevailing ideology, particularly when that ideology or policy asserts the dominance of a certain group over another.[4]

There are numerous instances of population transfer, including the Chinese policy of settling large numbers of ethnic Chinese in Tibet, following the occupation of the territory in 1951,[5] and the continuous arrival of Turkish settlers in northern Cyprus, ever since the invasion of Cyprus by Turkey in 1974 and the following partition of the island.[6] Contemporary international armed conflicts have not been spared by population transfers. Following the 1990 Iraqi invasion of Kuwait, the Iraqi authorities expelled Kuwaiti nationals from various areas of Kuwait and replaced them with Iraqi families brought in from Iraq, in order to establish their presence and create a fait accompli.[7] Furthermore, the second half of the twentieth century saw the rise of crueller, deadlier armed conflicts. Parties have increasingly been fighting along ethnic lines, and conflicts which started out as internal have become internationalized. With the emergence of inter-ethnic conflicts, forced displacements have become the primary aim, as opposed to the tragic consequence, of the war. The conflict in former Yugoslavia brought to light the appalling practice of 'ethnic cleansing', which entailed the forced removal of members of an ethnic group from designated territories and their subsequent

[4] UNCHR, Preliminary report on population transfer, para. 17.

[5] A. de Zayas, 'Ethnic cleansing: applicable norms, emerging jurisprudence, implementable remedies', www.alfreddezayas.com/Chapbooks/Ethn_clean.shtml (accessed 26 October 2011).

[6] Council of Europe (Committee on Migration, Refugees and Demography), 'Colonisation by Turkish settlers of the occupied parts of Cyprus', Report of the Rapporteur (2 May 2003) Doc. 9799, para. 32. The report was then endorsed by the Parliamentary Assembly of the Council of Europe in Recommendation 1608 (2003). See also A. de Zayas, 'The Annan Plan and the implantation of Turkish settlers in the occupied territory of Cyprus' (24 July 2005), www.alfreddezayas.com/Articles/cyprussettlers.shtml (accessed 26 October 2011).

[7] In a letter addressed to the Secretary-General, the Permanent Representative of Kuwait to the UN also added that the Iraqi authorities had forcibly taken over some homes which were in the process of construction by the public housing authority of the Kuwaiti Ministry of Housing and installed Iraqi immigrants. According to the Kuwaiti Representative, the object of these crimes was 'to bring about a comprehensive alteration of the demographic structure of Kuwait' (S/21843). The Security Council condemned the forced departure of Kuwaitis and the relocation of Iraqi population in Kuwait in Resolutions 674 of 29 October 1990 and 677 of 28 November 1990.

repopulation by members of a different ethnic group, for the purpose of creating an ethnically homogeneous territory.[8]

The 1949 Geneva Conventions expressly forbid the forced displacement of civilians and subsequent resettlement of the occupying power's own population in occupied territory.[9] Nevertheless, the exact content of the protection is subject to dispute, and diverging interpretations abound. The practice of population transfer is indeed one of the most controversial and debated issues, particularly with regard to the establishment of the settlements in occupied territory. In order to address these issues properly and thoroughly, this chapter will consist of a case study on one of the most notorious instances of population transfers: the continuing implantation of Israeli settlements into Occupied Palestinian Territory (OPT).

According to the BADIL Resource Center, 'Palestinian refugees and internally displaced persons (IDPs) are the largest and longest-standing case of displaced persons in the world today.'[10] At the end of 2008, there were an estimated 6.6 million Palestinian refugees and 427,000 internally displaced Palestinians, representing 67 per cent of the entire Palestinian population worldwide.[11] The majority of Palestinian refugees and IDPs were displaced as a result of the first Arab–Israeli war in 1948 and following the occupation of the West Bank, including East Jerusalem and the Gaza Strip in 1967.[12] Nowadays, internal displacement in the OPT has been the result of Israeli actions and policies, including military operations, house demolitions and land confiscation, in connection with a global settlement policy, which is being consolidated by the construction

[8] Meindersma, 'Population transfers in conflict situations', 37. For a detailed study on population transfers in the former Yugoslavia, see Meindersma, 'Population exchanges: international law and state practice – part 2', 1997.

[9] Geneva Convention IV, Art. 49(6).

[10] BADIL Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2008–2009* (December 2009), www.badil.org/index.php?product_id=119&page=shop.product_details&category_id=2&flypage=garden_flypage.tpl&option=com_virtuemart&Itemid=4&vmcchk=1&Itemid=4 (accessed 20 May 2011), p. ix.

[11] *Ibid*., pp. 56–7.

[12] *Ibid*. The so-called '1948 refugees' were displaced in the context of the 1948 Arab–Israeli War and the creation of the State of Israel and constitute the largest group of refugees (5.7 million). The second category of refugees comprises approximately 955,247 '1967 refugees', i.e. Palestinians who were displaced as a result of the 1967 Arab–Israeli War. In addition, Palestinian IDPs include approximately 335,000 Palestinians displaced from 1947 to 1949, who have remained in the area that became the State of Israel in 1948 and their descendants ('1948 IDPs'), and around 129,000 Palestinians displaced in the OPT since 1967.

of the Separation Wall in the West Bank.[13] The first part of this study will focus on the Israeli settlement policy, its implications for the Palestinian people, and the legal issues arising from such practice. Subsequently, the recent Advisory Opinion of the ICJ on the Separation Wall[14] will provide an unprecedented opportunity to examine the legality of settlements in a more general context.

Israeli settlements and displacement of Palestinian civilians

Israeli settlement policy in the OPT

Ever since the end of the Six-Day War in 1967 and the resulting occupation of part of the Palestinian Territory, Israel has been pursuing a policy of implantation of settlements in the West Bank, the Gaza Strip and occupied East Jerusalem. Israel aims, with the settlements, to create facts on the grounds that will predetermine the outcome of any negotiations by making Israeli withdrawal from the Palestinian territories politically unfeasible.[15] It has been argued that Israel hopes to prevent the emergence of a Palestinian state by breaking up the territorial contiguity of the OPT.[16] Every Israeli government since 1967 has actively pursued a policy of settlements in the OPT, though for differing reasons and through various means. Initially, government policy roughly followed the Alon Plan, which focused on security concerns and distinguished between areas densely populated by Palestinians, which would eventually be returned to Jordan, and strategic areas, which would remain under Israeli control.[17] However, from 1974, the right-wing religious movement Gush Emunim started applying pressure on the Israeli government to establish as many Jewish settlements as possible throughout 'the Land of Israel'.[18] When the

[13] BADIL Resource Centre for Palestinian Residency and Refugee Rights and the Norwegian Refugee Council/Internal Displacement Monitoring Centre, *Displaced by the Wall – Pilot study on forced displacement caused by the construction of the West Bank Wall and its associated regime in the Occupied Palestinian Territories* (September 2006), www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/D03CD0BE11176177C12571F5003523AD/$file/displaced%20by%20wall.pdf (accessed 20 May 2011), p. 15.

[14] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136.

[15] Kretzmer, *Occupation of Justice*, p. 75.

[16] UNCHR, 'Question of the violation of human rights in the Occupied Arab Territories, including Palestine, Report of the Special Rapporteur John Dugard' (6 March 2002) UN Doc. E/CN.4/2002/32, para. 24.

[17] Kretzmer, *Occupation of Justice*, p. 75.

[18] B'Tselem, 'Land grab – Israel's settlement policy in the West Bank' (May 2002), p. 14, www.btselem.org/Download/200205_Land_Grab_Eng.pdf (accessed 10 May 2011).

right-wing Likud Party came to power in 1977, it shared the same ideological and political ideas and thus undertook to accelerate the settlement programme and consolidate Israel's hold on Palestine. Settlement activities continued under each new government and throughout the negotiations of the Oslo Accord, and have been gaining in strength ever since.[19] In 2007, there were over 450,000 settlers living in 149 settlements in the West Bank, including East Jerusalem.[20] Approximately 57 per cent of the total settler population in the West Bank lived within a 10-kilometre radius of the old city of Jerusalem.

Displacement of civilians as a result of the settlements

The settlements have had disastrous consequences for the Palestinian people. Their freedom of movement has been seriously affected by the bypass roads linking the settlements to Israel and the numerous Israeli checkpoints and roadblocks. In 2001, it was estimated that some 900,000 Palestinians, or 30 per cent of the population of the occupied territories, were negatively affected by Israeli restrictions on freedom of movement.[21] Furthermore, there have been ongoing tensions between the Palestinians and the Israeli settlers. Settlers have reportedly committed numerous acts of violence against Palestinians and destroyed Palestinian agricultural land and property.[22] In the first ten months of 2008, the UN Office for the Coordination of Humanitarian Affairs (OCHA) recorded 290 settler-related incidents targeting Palestinians and their property, which resulted in 131 Palestinian deaths or injuries.[23] In 2007, Israeli human rights organizations B'Tselem and the Association for Civil Rights in Israel reported that settler violence, imposed curfews and the closing of shops and

[19] *Ibid*.

[20] OCHA, 'The humanitarian impact on Palestinians of Israeli settlements and other infrastructure in the West Bank' (July 2007), p. 12, www.ochaopt.org/documents/TheHumanitarianImpactOfIsraeliInfrastructureTheWestBank_ch1.pdf (accessed 14 April 2012).

[21] UNCHR, 'Question of the violation of Human Rights in the Occupied Arab Territories, including Palestine – update to the mission report of the Special Rapporteur Giorgio Giacomelli' (21 March 2001) E/C.N.4/2001/30, para. 36.

[22] UNCHR, 'Question of the violation of human rights in the Occupied Arab Territories' (6 March 2002), para. 25; Al-Haq, 'Waiting for justice: Al-Haq's 25th Anniversary Report' (2005), http://asp.alhaq.org/zalhaq/site/books/files/Annual%20Report%20Combo.pdf (accessed 18 May 2011).

[23] OCHA Special Focus, 'Unprotected: Israeli settler violence against Palestinians and their property' (December 2008), 1, www.ochaopt.org/documents/ocha_opt_settler_vilonce_special_focus_2008_12_18.pdf (accessed 13 May 2011).

businesses in the city centre of Hebron had led to the mass departure of Palestinians.[24]

The implantation of Israeli settlements in the OPT is closely connected to the displacement of Palestinians. In 1979, a Security Council Commission[25] addressed the consequences of the Israeli settlement policy on the local population and concluded that there was a correlation between the establishment of the settlements and the displacement of the Arab population.[26] It also reported that the Arab inhabitants still living in the territories, particularly the West Bank and Jerusalem, were subjected to continuous pressure to emigrate in order to make room for new settlers who, by contrast, were encouraged to come to the area.[27] The Commission thus concluded that the settlement policy was causing 'profound and irreversible changes of a geographical and demographic nature' in the occupied territories.[28]

Thirty years later, house demolitions and forced evictions, revocation of residency rights, confiscation of land and the construction of colonies and related infrastructures are still the main causes of internal displacement in the OPT since 1967.[29] At the end of 2008, the estimated number of internally displaced persons in the OPT reached 129,000.[30] While it is clear that the Israeli settlements in the OPT have adversely impacted on

[24] B'Tselem and the Association for Civil Rights in Israel, 'Ghost town: Israel's separation policy and forced eviction of Palestinians from the Center of Hebron' (May 2007) www.btselem.org/english/publications/summaries/200705_hebron.asp (accessed 13 May 2011); see also B'Tselem, 'Hebron, Area H-2: Settlements cause mass departure of Palestinians' (August 2003), www.btselem.org/Download/200308_Hebron_Area_H2_Eng.pdf (accessed 13 May 2011).

[25] The Commission was established by the Security Council in Resolution 446 (1979) to 'examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem'.

[26] UNSC, 'Report of the Security Council Commission established under Resolution 446 (1979)' S/13450 (12 July 1979), paras. 221–6. The Commission reported that since 1967, when the settlement policy started, the Arab population had been reduced by 32 per cent in Jerusalem and the West Bank. As to the Golan Heights, the Syrian authorities stated that 134,000 inhabitants had been expelled leaving only 8,000 (i.e. 6 per cent of the local population) in the occupied Golan Heights. The report added: 'The Commission is convinced that in the implementation of its policy of settlements, Israel has resorted to methods – often coercive and sometimes more subtle – which included the control of water resources, the seizure of private properties, the destruction of houses and the banishment of persons, and has shown disregard for basic human rights, including the right of the refugees to return to their homeland' (para. 222).

[27] *Ibid*., para. 223. [28] *Ibid*., para. 226.

[29] BADIL, *Survey of Palestinian Refugees and Internally Displaced Persons 2008–9*, p. 2.

[30] *Ibid*., p. 57. This figure includes 37,000 Palestinian refugees who suffered subsequent secondary forced displacement inside the OPT.

the local Palestinian population, the legal status of these settlements under international law is widely controversial.

The debate over the legality of the settlements in the OPT

The prohibition of transfer of the occupying power's own population in international law

By virtue of Article 49(6) of the Civilians Convention:

> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

According to the ICRC commentary, Article 49(6) was 'intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories'.[31] The exact scope of the prohibition is subject to contention. However, it is clear that the prohibition of population transfer, including the implantation of settlers into occupied territory, is absolute. Article 49(6) does not envisage situations where population transfer would be permitted for the security of civilian population or imperative military reasons.

The prohibition of population transfers may also be derived from a fundamental principle of the law of belligerent occupation, namely, the prohibition of permanent changes in occupied territory. International law imposes a general ban on the acquisition of a territory by force.[32] The annexation of a conquered territory is therefore prohibited by international law. Intrinsically linked with the prohibition of annexation is the basic rule that occupation does not confer sovereignty over the occupied territory. As a result, the occupying power only exercises temporary de facto authority.[33] It follows from this that all measures taken by the occupying power should affect only the administration of the territory.[34] The occupier must administer the territory, not only for his own military purposes, but also, as far as possible, for the public benefit of the

[31] Pictet, *Commentary* (1958), p. 282. [32] UN Charter, Art. 2(4).

[33] This principle is clearly expressed in Article 43 of the Hague Regulations, which states: 'The authority of the legitimate power having *in fact* passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country' [my italic].

[34] Gasser, 'Protection of the civilian population', p. 242.

inhabitants.[35] It has a duty to preserve a status quo in the territory and must refrain from creating permanent changes in the occupied territory. Accordingly, any movement of population, whether in or out of the occupied territory, which affects the population in such a way as to dramatically alter the demographic composition of this territory, must be regarded as a permanent change contrary to the fundamental principles of the law of belligerent occupation.

Furthermore, practices of population transfer clearly constitute breaches of international human rights law, including the right to freedom of movement, the principle of non-discrimination and the right of self-determination.[36] The right to self-determination is widely regarded as a customary rule of international law.[37] In addition, the ICJ has held that the right of peoples to self-determination was 'one of the essential principles of contemporary international law' and acknowledged its *erga omnes* character.[38] By virtue of this right, all peoples have the right to 'freely determine their political status and freely pursue their economic, social and cultural development'.[39] At the root of self-determination, is the right to exist as a people. Consequently, the forced movement of a people from its homeland and its dispersion around the world would necessarily constitute a violation of their right to self-determination.[40] In addition, as stated by the ICJ, the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.[41] However, the expression of the will of the peoples may be undermined by the massive implantation of settlers in a specified territory.[42]

The UN Security Council has repeatedly condemned attempts to alter the demographic composition of an occupied territory. For instance, in 1992, it called upon all parties 'to ensure that forcible expulsions of persons from the area where they live and any attempt to change the ethnic composition of the population anywhere in the former Socialist Republic

[35] Oppenheim, *International Law*, 1952, pp. 433–4.
[36] Meindersma, 'Population transfers in conflict situations', 60–72.
[37] Canadian Supreme Court, *Reference Re Secession of Quebec* 37 ILM 1342 (1998), para. 114.
[38] *East Timor* (*Portugal* v. *Australia*), Judgment, ICJ Reports 1995, 90, para. 29.
[39] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA 1514 (XV) of 14 December 1960, UN Doc. A/4684 (1961); *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV) of 24 October 1970, UN Doc. A/5217 (1970).
[40] Meindersma, 'Population transfers in conflict situations', 64.
[41] *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, para. 55.
[42] UNCHR, Preliminary report on population transfers, para. 36.

of Yugoslavia, cease immediately'.[43] In his 1997 final report on human rights and population transfers, the Special Rapporteur proposed a draft declaration for adoption by the Commission on Human Rights, which provided that:

> The settlement, by transfer or inducement, by the Occupying Power of parts of its own civilian population into the territory it occupied or by the Power exercising de facto control over a disputed territory is unlawful.[44]

It further stated that:

> Practices and policies having the purpose or effect of changing the demographic composition of the region in which a national, ethnic, linguistic, or other minority or an indigenous population is residing, whether by deportation, displacement, and/or the implantation of settlers, or a combination thereof, are unlawful.[45]

In light of the above considerations, and after careful examination of state practice, the ICRC found that the prohibition of transfers of populations into occupied territory was a customary rule of international law, applicable in international armed conflict.[46]

Israel's position on the legality of the settlements

Population transfers in occupied territory are prohibited under both Article 49 of the Fourth Geneva Convention and customary international law. The legal status of the Israeli settlements should therefore be relatively straightforward, and yet they have been the subject of a heated debate for over forty years, not least due to Israel's refusal to recognize the de jure applicability of the Fourth Geneva Convention to the OPT.[47] Israel's

[43] UNSC Res. 752 (15 May 1992) UN Doc. S/RES/752, para. 6; see also UNSC Res. 677 (28 November 1990), in which the Security Council condemns 'the attempts by Iraq to alter the demographic composition of Kuwait'.

[44] UNCHR, 'Human rights and population transfer – final report of the Special Rapporteur, Mr Al-Khasawneh' (27 June 1997) E/CN.4/Sub.2/1997/23, Annex II, Draft declaration on population transfer and the implantation of settlers, Art. 5.

[45] *Ibid*., Art. 6.

[46] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, Rule 130, p. 462.

[47] Israel's position is based on a 'missing reversioner' theory, first advanced by Professor Yehuda Blum, in 'The missing reversioner', 1968, 279. According to this theory, neither Jordan nor Egypt were 'legitimate sovereigns' in the West Bank and the Gaza Strip in 1967; these territories thus cannot be considered as 'the territory of a High Contracting Party' within the meaning of Article 2 of the Geneva Conventions. Israel has nevertheless declared its intention to respect de facto the 'humanitarian provisions' of the Convention in the occupied territories. However, it has never clarified which provisions of the Fourth Geneva Convention it regards as 'humanitarian'.

legal position has been criticized by most legal scholars[48] and has enjoyed very limited support outside its borders.[49] The UN Security Council,[50] the General Assembly[51] and the International Committee of the Red Cross[52] have consistently reaffirmed the applicability of the law of belligerent occupation, including the Fourth Convention, to the OPT.

As observed by Professors Brownlie and Goodwin-Gill, the Fourth Geneva Convention is not concerned with origins of conflict or the status of territory.[53] Article 2, which defines the scope of application of the Convention, indeed clearly stipulates that:

> The Convention shall . . . 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. [my italic]

In addition, Article 1 calls for respect of the Convention 'in all circumstances' and Article 4 provides that inhabitants of the occupied territory

[48] Dinstein dismissed the 'missing reversioner' theory as 'based on dubious legal grounds' ('Belligerent occupation and human rights', 1978, 107). See also Brownlie and Goodwin-Gill, 'The protection afforded by international humanitarian law to the indigenous population of the West Bank and the Gaza Strip', 2003; Meron, 'West Bank and Gaza', 1978, 108–19; Roberts, 'Prolonged military occupation', pp. 43–9.

[49] The de jure applicability of the Civilians Convention has in fact been recognized by most states, including the USA. In 1978, the US legal adviser indeed observed that: '[the principles of belligerent occupation] appear applicable whether or not Jordan or Egypt possessed legitimate sovereign rights in respect of those territories. Protecting the reversionary interest of an ousted sovereign is not their sole or essential purpose; the paramount purposes are protecting the civilian population of an occupied territory and reserving permanent territorial changes, if any, until the settlement of the conflict' ('Letter by Herbert J. Hansell, Legal Adviser of the US Department of State, 21 April 1978' (1978) *Digest of US Practice Intl. L.*, 1578).

[50] E.g. UNSC Res. 446 (22 March 1979), in which the Security Council 'affirms the applicability of the Fourth Geneva Convention and calls upon Israel, as the Occupying Power, to abide scrupulously by the Geneva Conventions'.

[51] E.g. UNGA Res. 35/122A (11 December 1980), in which the General Assembly 'reaffirms that the Geneva Convention relative to the protection of civilian persons in time of war, of 12 August 1949, is applicable to Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem'.

[52] ICRC (Official Statement) 'Conference of the High Contracting Parties to the Fourth Geneva Convention' (5 December 2001): 'In accordance with a number of resolutions adopted by the United Nations General Assembly and Security Council and by the International Conference of the Red Cross and the Red Crescent, which reflect the view of the international community, the ICRC has always affirmed the de jure applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including Jerusalem' (www.icrc.org/web/eng/siteeng0.nsf/htmlall/5fldpj?opendocument#2 (accessed 17 May 2011)).

[53] Brownlie and Goodwin-Gill, 'Protection afforded by international humanitarian law to the indigenous population of the West Bank and the Gaza Strip', para. 66.

shall be 'protected persons'.[54] There is therefore no doubt that the Fourth Geneva Convention applies to the whole of the OPT and that Israel, as the occupying power, has rights and duties towards the Palestinian population of the West Bank, the Gaza Strip and East Jerusalem. In particular, Article 49 of the Convention, which remains applicable in case of prolonged occupation,[55] expressly prohibits the forced displacement of Palestinians by the Israeli authorities, as well as the transfer of Israeli civilians, including the implantation of settlers, into the OPT. Israel has consistently argued that, despite the alleged inapplicability of the Fourth Convention, the implantation of settlements has complied with Article 49 of the Convention. In addition, Israel has also alleged that the requisition of Palestinian private lands for the establishment of settlements has been in conformity with its obligations under the 1907 Hague Regulations.

Requisition and destruction of property for security reasons

The establishment of Israeli settlements in the OPT has required the expropriation and destruction of many Palestinian private properties. However, the law of belligerent occupation attaches great importance to private and public property in occupied territory. Article 53 of the Fourth Geneva Convention prohibits the destruction, by the occupying power, of all property, real or personal, whether it is the private property of protected persons, state property, that of the public authorities or of social or cooperative organizations, except where such destruction is rendered absolutely necessary by military operations.[56] Moreover, under Article 46 of the Hague Regulations, private property cannot be confiscated.

Between 1967 and 1979, Israel's main justification for the expropriations and destructions of Palestinian properties was based on Article 52 of the Hague Regulations.[57] Israel alleged that it was justified in requisitioning privately owned Palestinian land, due to security considerations. During this period, almost 47,000 dunums of private land were requisitioned, most of which were intended for the establishment of

[54] *Ibid*.; see also Letter by the Legal Adviser of the US Department of State.

[55] In case of prolonged occupation, i.e. more than one year after the general close of military operations, Article 6 Geneva Convention IV stipulates that 'the Occupying Power shall be bound, for the duration of the occupation, to the extent that such power exercises the functions of government in such territory', by the humanitarian provisions of the Convention, including Article 49.

[56] Pictet, *Commentary* (1958), p. 301.

[57] Hague Regulations, Art. 52: 'Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.'

settlements.[58] Many Palestinians whose lands were being requisitioned 'for military needs' petitioned the Israeli Supreme Court against these measures. At first, the Court accepted the Israeli view and held that the requisitions of privately owned land and the establishment of civilian settlements thereupon actually served military and security needs and were therefore lawful, as long as they were temporary.[59]

It is very doubtful that the establishment of civilian settlements can be justified 'for the needs of the army of occupation'. Even if the settlements were really implanted for security reasons, doubts have been raised as to whether the settlements contribute to national security or whether they in fact undermine it.[60] Indeed, the presence of settlers is a major cause of tension in the area, and the settlers themselves are often at the origin of friction with the Palestinians.[61] In view of the mutual hostility between Palestinians and settlers, it would be difficult for Israel to maintain that the settlements are necessary to its national security.

Israel's policy of land confiscation stopped in 1979, following a landmark judgment by the Israeli Supreme Court, in the *Elon Moreh* case.[62] The case concerned the establishment of a civilian settlement at Elon Moreh, adjacent to the town of Nablus, on land privately owned by Arab residents.[63] Israel claimed that the establishment of the settlement in the area was required for security reasons. However, as opposed to previous cases, the Court also heard the arguments of settlers at the Elon Moreh site, who joined as respondents. The settlers rejected the argument that the settlement was being built on grounds of security, relying instead on

[58] B'Tselem, 'Land grab', p. 48. Note that 1 dunum = ¼ acre or 1,000 m^2.

[59] See the *Beth El* case, in which the Court found that Jewish settlements in occupied territories served actual and real security needs:

> It is indisputable that in occupied areas the existence of settlements – albeit 'civilian' – of citizens of the Occupying Power contributes greatly to the security in that area and assists the army in fulfilling its task. One need not be a military and defence expert to understand that terrorist elements operate with greater ease in an area solely inhabited by a population that is indifferent or sympathizes with the enemy, than in an area in which one also finds people likely to observe the latter and report any suspicious movement to the authorities. Terrorists will not be granted a hideout, assistance or supplies by such people. (HC 606/78, *Suleiman Tawfiq Oyyeb and others* v. *Minister of Defence and others* (*Beth El* case), 15 March 1979, repr. in (1985) II *Palestine Yearbook of International Law*, 134)

[60] Roberts, 'Prolonged military occupation', 67.

[61] Karp Report on the investigation of suspicious or criminal activity by Jewish settlers in the West Bank, repr. in (1984) I *Palestine Yearbook of International Law*, 185.

[62] HCJ 390/79, *Dweikat et al*. v. *Government of Israel et al*. 3 October 1979, translated in (1984) I *Palestine Yearbook of International Law*, 134.

[63] *Ibid*., 135.

ideological and religious claims.[64] The petitioners submitted an affidavit by a former army chief of staff, Lieutenant-General (Reserves) Bar-Lev, who also contested the security argument.[65] In light of the evidence before it, the Court had no choice but to conclude that the decision to establish a settlement at Elon Moreh was based primarily on political, rather than military considerations and that the settlement was intended to be permanent.[66] The Court therefore declared the requisition order illegal.

Use of public land for the establishment of the Israeli settlements

Following the *Elon Moreh* debacle, Israel had to find other ways to requisition land for the establishment of settlements in the OPT, mostly through the controversial manipulation of a 1858 Ottoman Land law, which applied in the West Bank at the time of occupation and enabled Israel to take possession of lands proclaimed as 'State land'.[67] With this method, approximately 40 per cent of the West Bank was declared state land[68] and consequently requisitioned by Israel, on the basis of Article 55 of the Hague Regulations, which provides that:

> The Occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

According to Israel's Ministry of Foreign Affairs, 'there is a positive duty which obliges the authority to take possession of public property in order to safeguard it pending final determination as to the status of the territory concerned'.[69] By asserting that the establishment of settlements is part of its obligations to temporarily administer Palestinian public property, Israel adopts a very broad interpretation of Article 55. As usufructuary, Israel has a right to enjoy the fruits of Palestinian public property, land

[64] *Ibid*., 141. [65] *Ibid*., 138.

[66] *Ibid*., 150: 'the decision to establish a permanent settlement intended from the outset to remain in its place forever – even beyond the duration of the military government which was established in Judea and Samaria – encounters a legal obstacle which is insurmountable, because the military government cannot create in its area facts for its military needs which are designed *ab initio* to exist even after the end of the military rule in that area, when the fate of the area after the termination of military rule is still not known'.

[67] B'Tselem, 'Land grab', p. 51. [68] *Ibid*.

[69] Israel MFA, 'Israel's settlements – their conformity with international law' (December 1996), www.mfa.gov.il/MFA/Government/Law/Legal Issues and Rulings/ISRAEL-S SETTLEMENTS - CONFORMITY WITH INTERNATION (accessed 17 May 2011).

and natural resources, such as water and oil, provided it doesn't alter the nature or substance of this property. In exercising its powers, the occupant may only create permanent changes in the occupied territory required by its own military needs or in the interests of the local population. Most of all, the occupant must not exercise its authority in order to further its own interests, or to meet the needs of its own population.[70] In this context, it is difficult to see how the construction of permanent settlements can be viewed as mere administration of Palestinian lands and enjoyment of their fruits. Indeed, the destruction of houses and olive trees, the irreversible alteration of the landscape, and the exodus of Palestinians from their lands are in complete contradiction to the rules of usufruct and the principles of the law of belligerent occupation, and therefore invalidate the Israeli argument.

Settlements in compliance with Article 49(6) of the Fourth Geneva Convention

While it rejects the de jure applicability of the Fourth Geneva Convention to the OPT, Israel has always maintained that its settlement policy nevertheless conforms to Article 49(6) of the Convention. The Israeli position is summarized as follows by Israel's Ministry of Foreign Affairs:

> The provisions of the Geneva Convention regarding forced population transfer to occupied sovereign territory cannot be viewed as prohibiting the voluntary return of individuals to the towns and villages from which they, or their ancestors, had been ousted . . . It should be emphasised that the movement of individuals to the territory is entirely voluntary, while the settlements themselves are not intended to displace Arab inhabitants, nor do they do so in practice.[71]

It should be pointed out that Israel's position has never been articulated in any proceedings, be it before the Israeli High Court or any other judicial body. The Israeli High Court has always refused to address the legality of settlements under the Fourth Geneva Convention. According to the Court, Article 49 does not reflect customary international law and may therefore not be relied upon before Israeli courts.[72] In addition, the Israeli government refused to participate in the proceedings before the ICJ in

[70] Cassese, 'Powers and duties of an occupant in relation to land and natural resources', 1992, p. 420.

[71] Israel MFA, 'Israeli settlements and international law' (May 2001), www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Settlements+and+International+Law.htm (accessed 17 May 2011).

[72] HC 698/80, *Kawasme et al*. v. *Minister of Defence et al*. (1980), 35(1) *Piskei Din* 617, English summary in (1981) 11 IYHR, 349, 350.

the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which addressed for the first time the question of the legality of the Israeli settlements. The Israeli arguments, based on statements by the Ministry of Foreign Affairs and opinions of Israeli academic writers, will nevertheless be analysed below.

Article 49(6) only prohibits forcible transfers

Israel's main argument is based on an alleged distinction between 'forcible transfers' of people and the 'voluntary' movement of individuals into occupied territory. Indeed, the Israeli Ministry of Foreign Affairs maintains that Article 49(6) 'was intended to deal with forced transfers of population like those which took place in Czechoslovakia, Poland and Hungary before and during the war'.[73] This argument is supported by Professor Yoram Dinstein, who contends that such voluntary settlements, if not carried out on behalf of the occupant's government and in an institutional fashion, are not 'necessarily illegitimate'.[74] However, it should be pointed out that, as opposed to the first paragraph of Article 49, which expressly prohibits 'forcible transfers' of population, there is no reference in paragraph 6 to any notion of force. Indeed, the provision only stipulates that the 'Occupying Power *shall not deport or transfer* parts of its own population into the territories it occupies' (my italic). It can therefore be argued that the word 'forcible' was intentionally omitted from the text of paragraph 6, thereby reinforcing the idea that, voluntary or not, all transfers of population into an occupied territory are prohibited under international humanitarian law.

Moreover, it is commonly agreed that even if voluntary movement into occupied territory was compatible with Article 49(6), Israel's settlement activity would not fit this definition.[75] Indeed, Israel's actions have contributed greatly, in one way or another, to the establishment and expansion of settlements in the occupied territories. Throughout the years, successive Israeli governments have offered various financial benefits and incentives to encourage Israelis to move to the OPT.[76] Such incentives include generous tax benefits, government housing subsidies, as well as

[73] Israel MFA, 'Israel's settlements – their conformity with international law'.

[74] Dinstein, 'Belligerent occupation and human rights', 124.

[75] Meindersma, 'Population transfers in conflict situations', 51; Roberts, 'Prolonged military occupation', p. 67; Benvenisti, *The International Law of Occupation*, 1993, p. 140.

[76] B'Tselem, 'By hook and by crook: Israeli settlement policy in the West Bank' (July 2010), 37–47, www.btselem.org/Download/201007_By_Hook_and_by_Crook_Eng.pdf (accessed 17 May 2011).

subsidized loans and grants for settlers to buy their houses.[77] These financial inducements are clear evidence of the Israeli government's implication in the settlements activity in the occupied territories, at variance with the Israeli claim that 'the movement of individuals to the territory is entirely voluntary'.

Many states hold the view that such an involvement is in contravention to the provisions of Article 49(6). In 1978, the US Legal Adviser of the Department of State stated that paragraph 6:

> seems clearly to reach such involvements of the occupying Power as determining the location of settlements, making land available and financing of settlements, as well as other kinds of assistance and participation in their creation. And the paragraph appears applicable whether or not harm is done by a particular transfer.[78]

This position is shared by the Palestine Liberation Organization (PLO), who argue that:

> [Article 49(6)] also sought to cover not only forcible transfers but also the case where the occupying power positively encourages settlement of its own people in the territory under occupation. If ever there was a case that fitted precisely the prohibition in the sixth paragraph of article 49, this must be the Israeli policy on colonies.[79]

Moreover, the 'transfer, *directly or indirectly*, by the Occupying Power of parts of its own population into the territory it occupies' (my italic) constitutes a war crime under the ICC Statute. The addition of the words 'directly or indirectly' marks a departure from the wording of Article 85(4)(a) of the Protocol I, from which Article 8(2)(b)(viii) is derived. According to a commentary on the Statute, the inclusion of 'indirect' in the article seems to indicate that the population of the occupying power need not necessarily be physically forced or otherwise compelled and that acts of inducement or facilitation may also fall under this war crime.[80] In 2002, the Office of the Legal Adviser to the Israeli Ministry of Foreign Affairs stated that, while Israel fully supported 'the goals of the Court and its desire to ensure

[77] OCHA, The humanitarian impact on Palestinians of Israeli settlements 2007, pp. 32–3; S. Hever, 'The economy of occupation, part 2: the settlements – economic cost to Israel' (July 2005), 7–8, Alternative Information Center, www.alternativenews.org/images/stories/downloads/socioeconomic_bulletin_02.pdf (accessed 17 May 2011).

[78] Letter of the US Legal Adviser of the Department of State concerning the legality of Israeli settlements in the occupied territories, 1577.

[79] PLO (Negotiations Affairs Department), 'Israeli colonies and international law', www.nad-plo.org/etemplate.php?id=264 (accessed 1 November 2011).

[80] Dörmann, *Elements of War Crimes*, 2002, p. 211.

that no perpetrator of heinous crimes goes unpunished', it had concerns that the Court would be subjected to political pressures and that its impartiality would be compromised.[81] Israel's main concern lay in the inclusion of the war crime of transfer of population into occupied territory:

> This particular offence represents neither a grave breach of the Fourth Geneva Convention, nor does it reflect customary international law. The inclusion of this offence, under the pressure of the Arab States, and the addition of the phrase 'directly or indirectly', is clearly intended to try to use the court to force the issue of Israeli settlements without the need for negotiation as agreed between the sides.[82]

As a result, Israel refused to ratify the ICC Statute and expressly stated its intention not to become a party to the Treaty.[83]

Finally, the Israeli claim that the settlements comply with Article 49(6) should be analysed with regard to the intended beneficiaries of the provision. Israeli academic writer Julius Stone claimed that one of the aims of the prohibition in Article 49(6) was 'to protect the inhabitants of the occupant's own metropolitan territory from genocidal or other inhuman acts of the occupant's government'.[84] In this regard, he added:

> Ignoring the overall purpose of Article 49, which would *inter alia* protect the population of the State of Israel from being removed against their will into occupied territory, it is now sought to be interpreted so as to impose on the Israel government a duty to prevent any Jewish individual from voluntarily taking residence in that area. For not even the most blinkered adversary of Israel could suggest that the individual Jews who (for example) are members of Gush Emunim groups, are being in some way forced to settle in Judea and Samaria (the West Bank)![85]

[81] Israel MFA (Office of the Legal Adviser), 'Israel and the International Criminal Court' (June 2002) www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/6/Israel and the International Criminal Court (accessed 17 May 2011).

[82] *Ibid*.

[83] On 28 August 2002, the UN Secretary-General, as depository, received a letter from the government of Israel, stating: 'In connection with the Rome Statute of the International Criminal Court . . . Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depository's status lists relating to this treaty' (American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Ratifications and Declarations, www.amicc.org/icc_ratifications.html (accessed 17 May 2011).

[84] Stone, 'Discourse 2: Jewish settlements in Judea and Samaria', in *Israel and Palestine: Assault on the Law of Nations*, 1981, p. 180.

[85] *Ibid*.

However, as rightly noted by Christa Meindersma, a discussion on the prohibition of population transfers into occupied territory should consider not only the voluntary movement of the settlers, but also and most importantly, 'the voluntariness on the part of the recipient population'.[86] Indeed the 'voluntary migration' argument completely overlooks the fact that it is the inhabitants of the occupied territory, and not the occupying power's own population, who are 'protected persons' under the Fourth Geneva Convention.[87] As nationals of the occupying power, Israeli settlers do not come within the meaning of Article 4 of the Convention. In addition, the drafters of the Convention adopted Article 49(6) with the clear intention of protecting the occupied population from colonization by the occupying power.[88] The fact that the Israeli government did not force its own citizens to move into the OPT is beside the point. The only significant matter is the fact that Israeli civilians came and settled on Palestinian land. That the movement of Israeli settlers on their land was voluntary is entirely irrelevant for the Palestinians. The harm caused to their land and their livelihood by the implantation of settlements remains the same.

The settlements are not intended to displace civilians

The Israeli Ministry of Foreign Affairs has argued that 'the settlements themselves are not intended to displace Arab inhabitants, nor do they do so in practice'.[89] First of all, it should be recalled that the Israeli settlements do, in fact, create displacement. The land expropriations and house demolitions involved in the construction of settlements, the violence resulting from the difficult cohabitation between Palestinians and settlers and the scarcity of resources all contributed to Palestinians having to leave their place of residence. In addition, this argument is irrelevant under Article 49(6). Indeed, this provision does not mention a motive for a transfer of population to take place and nothing in the commentary seems to suggest a possible limitation of the application of the article to a situation where the civilian population is displaced.[90] According to the US Legal Adviser, forced displacement is dealt with separately in the Convention and paragraph 6 would be redundant if limited to cases of displacement.[91] Displaced or not, Palestinians in occupied territories are still deeply affected by the Jewish settlements.

[86] Meindersma, 'Population transfers in conflict situations', 52.
[87] Benvenisti, *International Law of Occupation*, p. 140. [88] Pictet, *Commentary* (1958), p. 282.
[89] Israel MFA, 'Israeli settlements and international law'.
[90] Mallison and Mallison, 'Israeli settlements in the occupied territories', 1989–9, 119.
[91] Letter of the US Legal Adviser of the Department of State concerning the legality of Israeli settlements in the occupied territories, 1577.

Displacement is only one of several consequences of settlements, whose global objective is to alter the demographic composition of an occupied territory and create facts on the grounds. Accordingly, the purpose of Article 49(6) is not only to prevent population transfers, but more generally to preclude the occupying power from altering the demographic composition of the occupied territory, irrespective of whether or not displacements occur as a result.

Historical and ideological claims

Israel has also claimed that the existence of Jewish settlements in the OPT is a continuation of a long-standing Jewish presence.[92] Historical claims such as this one are generally encountered in the context of *jus ad bellum*, when states use or threaten to use force in order to take a territory that they consider rightfully theirs.[93] In this case, they argue that the prohibition against force as contained in Article 2(4) of the UN Charter does not apply, as the use of force is merely intended to recover part of their territory unlawfully occupied by another state. This argument was invoked by India in relation to Goa in 1961 and by Argentina in 1982, when it intended to 'recover' the Falkland Islands.[94] Similarly, Iraq attempted to justify its invasion of Kuwait on 2 August 1990 by claiming that Kuwait was historically part of Iraq and that it had only been separated as a result of British colonialism.[95] However, as rightly noted by Schachter, given the considerable number of territorial disputes throughout the world, if such a claim were accepted, it would considerably reduce the scope of the prohibition of the use of force. In fact, the international community has never recognized territorial claims as an acceptable exception to the prohibition of use of force.[96]

Likewise, just as territorial claims are rejected in the context of *jus ad bellum*, historical or ideological claims to a territory cannot be accepted in *jus in bello*. The recognition of transfers of population into occupied territory as a continuation of long-standing presence in that territory would not only be open to abuse but would also set a dangerous precedent, in contravention to the most basic principles of belligerent occupation. Moreover, this argument is once again irrelevant under Article 49(6) of the Fourth Convention, which makes no mention of a possible historical claim in support of the legality of settlements. Any historical or ideological claim

[92] Israel MFA, 'Israel's settlements – their conformity with international law'.
[93] Schachter, *International Law in Theory and Practice*, 1991, pp. 116–17. [94] *Ibid*.
[95] Greenwood, 'New world order or old?', 1992, 156.
[96] *Ibid*.; see, for instance, UNSC Res. 662 (9 August 1990) declaring the annexation of Kuwait by Iraq as 'null and void'.

that Israel or the Jewish people may have over the Palestinian territory has no legal validity under international humanitarian law.

Agreements between Israel and the PLO do not prohibit settlements

Finally, Israel asserts that the bilateral agreements between Israel and the Palestinians, namely the Oslo Accords,[97] contain no prohibition on the building or expansion of settlements. Article V(3) of the Declaration of Principles in particular provides that the issue of settlements is among a number of issues to be negotiated in the permanent status negotiations. Accordingly, Israel claims that there is no restriction on settlement activity during the interim period.[98] However, Article XXXI(7) of the Interim Agreement clearly states that:

> Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.

Watson thus argues that, while the Oslo Accords do not outlaw existing settlements, they impose serious restrictions on the creation of new settlements, especially in the West Bank and Gaza Strip.[99] Furthermore, the Fourth Geneva Convention expressly prohibits agreements between the parties to a conflict if they deprive protected persons from the protection of the Convention. As a general rule, Article 7 of the Convention states that 'no special agreements shall adversely affect the situation of protected persons, as defined by the present convention, nor restrict the rights which it confers upon them'. Article 47 reaffirms the applicability of this rule in occupied territory:

> Protected persons who are in Occupied Territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention . . . by any agreement concluded between the authorities of the Occupied Territories and the Occupying Power.

There is no doubt that most Israeli settlements in the occupied territories have been established in violation of the rights of the Palestinian population. Therefore, agreements between Israel and the Palestinians which

[97] Declaration of Principles on Interim Self-Government Arrangements, Israel–Palestine Liberation Organization (13 September 1993), 32 ILM 1525 (1993); the Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip, Israel–PLO (28 September 1995), 36 ILM 551 (1997).

[98] Israel MFA, 'Israel's settlements – their conformity with international law'.

[99] Watson, *The Oslo Accords*, 2000, p. 136.

would allow settlements in the OPT, or simply tolerate them pending a settlement of the conflict, violate the Fourth Geneva Convention.

International condemnation of the Israeli settlement policy

The international community as a whole has repeatedly and consistently condemned the Israeli settlement policy. The UN Security Council,[100] the General Assembly[101] and the Commission on Human Rights[102] have all denounced the settlements as contrary to international law. In 1979, the UN Security Council adopted a resolution of major importance, which has defined the UN position on the Israeli settlements ever since. In resolution 446, the Security Council determined that Israel's policy and practices of settlements had no legal validity and called on Israel, as the occupying power:

[100] UNSC Res. 446 (22 March 1979), Res. 452 (20 July 1979), Res. 465 (1 March 1980) and Res. 476 (30 June 1980). However, since 1980, any attempt by the Security Council to adopt a resolution condemning Israeli settlements has been consistently hampered by the US veto. See vetoed draft resolutions S/15895 of 2 August 1983, S/1995/394 of 17 May 1995, S/1997/199 of 7 March 1997 and S/1997/241 of 21 March 1997. More recently, the Obama administration made its first use of the US veto power by rejecting Draft Resolution S/2011/24. The proposed resolution, which was drafted by the Arab Group and adopted by fourteen members of the Security Council, including the UK and France, clearly condemned 'the continuation of settlement activities by Israel, the occupying Power, in the Occupied Palestinian Territory, including East Jerusalem, and of all other measures aimed at altering the demographic composition, character and status of the Territory, in violation of international humanitarian law and relevant resolutions' (E. Pilkington, 'US vetoes UN condemnation of Israeli settlements', *Guardian*, 19 February 2011, www.guardian.co.uk/world/2011/feb/19/us-veto-israel-settlement (accessed 17 May 2011).

[101] E.g. UNGA Res. 34/90 B (12 December 1979), Res. 36/147 C (16 December 1981), Res. 37/88 C (9 December 1982), Res. 38/79 D (15 December 1983). In addition, every year since 1997, the General Assembly adopts a resolution entitled 'Israeli settlements in the occupied Palestinian territory, including Jerusalem and the occupied Syrian Golan': e.g. UNGA Res. 52/66 (10 December 1997), Res. 56/61 (10 December 2001), Res. 59/123 (10 December 2004) and Res. 60/106 (8 December 2005), which states that: 'Israeli settlements in the Palestinian territory, including East Jerusalem, and in the occupied Syrian Golan are illegal and an obstacle to Peace and economic and social development.'

[102] E.g. UNCHR Res. 2005/6 (22 April 2005), which expresses grave concern at: 'the continuing Israeli settlements and related activities, in violation of international law, including the expansion of settlements, the expropriation of land, the demolition of houses, the confiscation and destruction of property, the expulsion of Palestinians and the bypass roads, which change the physical character and demographic composition of the occupied territories . . . and constitute a violation of the [Fourth Geneva Convention], and in particular article 49 of that Convention; settlements are a major obstacle to the establishment of a just and comprehensive peace and the creation of an independent, viable, sovereign and democratic Palestinian State.'

to abide scrupulously by the 1949 Fourth Geneva Convention, to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories.[103]

In 2001, the International Committee of the Red Cross expressed 'growing concern about the consequences in humanitarian terms of the establishment of Israeli settlements in the occupied territories, in violation of the Fourth Geneva Convention',[104] while the Conference of the high contracting parties to the Fourth Geneva Convention reaffirmed the illegality of the settlements.[105] Many states have also been critical of the Israeli settlement policy. The European Council has called on Israel to halt its settlement activities on several occasions.[106] Arab states have adamantly condemned the Israeli settlements,[107] while the PLO has denounced Israeli colonization policies and practices as violations of international humanitarian law and principles of international law.[108] Even Israel's strongest ally, the US government, has expressed its opposition to the Israeli settlements in the OPT. The US position was defined in 1978 by the Legal Adviser to the Department of State:

[103] UNSC Res. 446 (22 March 1979) UN Doc. S/RES/446.

[104] ICRC (Official Statement) 'Conference of the High Contracting Parties to the Fourth Geneva Convention' (5 December 2001).

[105] ICRC (Declaration) 'Conference of the High Contracting Parties to the Fourth Geneva Convention' (5 December 2001): 'The participating High Contracting Parties call upon the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem, and to refrain from perpetrating any violation of the Convention. They reaffirm the illegality of the settlements in the said territories and of the extension thereof' (para. 12).

[106] European Council, 'EU Presidency Conclusions, Annex IV: Declaration on the Middle East Process' (16 and 17 June 2005), EU Doc. 10255/05: 'The European Council also stresses for a halt to Israeli settlement activities in the Palestinian Territories. This implies a complete cessation of construction of dwellings and new infrastructures such as bypass roads. The European Council also calls for the abolition of financial and tax incentives, and of direct and indirect subsidies, and the withdrawal of exemption benefiting the settlements and their inhabitants. The European Council urges Israel to dismantle illicit settlement outposts. Settlement policy is an obstacle to peace and it threatens to make any solution based on the coexistence of two States physically impossible' (point 6).

[107] As reflected in UN votes, and letters of Permanent Representatives to the UNSC.

[108] PLO, 'Israeli colonies and international law'.

While Israel may undertake, in the occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation . . . the establishment of the civilian settlements in those territories is inconsistent with international law.[109]

However, the US official stance has been relatively inconsistent ever since. The initial US position on the illegality of the Israeli settlements was expressly based on the Fourth Geneva Convention, until President Reagan declared in 1981 that the settlements were 'not illegal'.[110] Subsequently, recent US administrations have all declined to address the legal issue of the Israel settlements, although they have opposed them on the basis that they constitute an obstacle to peace in the Middle East.[111]

On 30 April 2003, the Quartet, consisting of representatives of the United States, the European Union, the Russian Federation and the United Nations, presented the government of Israel and the Palestinian authority with a 'road map' for peace in the Middle East.[112] The road map laid down clear, reciprocal obligations upon both parties with the ultimate goal of ending the Israeli–Palestinian conflict by 2005, through the creation of an independent Palestinian state, alongside a strong and secure State of Israel. Among the obligations set out for Israel, the Quartet called on Israel to freeze all settlement activities (including natural growth settlements.

Despite almost universal condemnation by the international community, settlement expansion in the Palestinian territories has continued unabated throughout the years. Israeli measures associated with the construction of these settlements, including construction of bypass roads, land confiscation and demolition of houses, have had a disastrous effect on Palestinians, in the West Bank and East Jerusalem in particular. One of the most drastic measures has been the construction, since 2002, of the Separation Wall in the West Bank, which has consolidated the situation created by the settlements and added to the plight of the Palestinian people. In July 2004, the ICJ issued an Advisory Opinion stating that the

[109] Letter by Herbert J. Hansell, Legal Adviser of the US Department of State, 1578.

[110] Neff, 'Settlements in US policy', 1994, 53–4.

[111] CMEP and Foundation for Middle East Peace, 'Statements on American policy toward settlements by US Government Officials, 1968–2009', www.fmep.org/analysis/analysis/israeli-settlements-in-the-occupied-territories (accessed 17 May 2011).

[112] UNSC, Letter dated 7 May 2003 from the Secretary-General addressed to the President of the Security Council – Annex 'A performance-based road map to a permanent two-state solution to the Israeli–Palestinian conflict', S/2003/529. The road map was then endorsed by the Security Council in Res. 1515 (19 November 2003).

construction of the Wall in the OPT violated international law. The implications of the Advisory Opinion in relation to the Israeli settlements and the prohibition of population transfers and forced displacement in general will be analysed below.

The ICJ, the Separation Wall and the settlements

The Separation Wall and internal displacement of Palestinians

In response to continuing terrorist attacks on Israeli soil, the government of Israel decided, in April 2002, to build a 'Separation Fence'[113] for the purpose of controlling Palestinian entry into the territory of Israel and preventing further acts of terrorism. 'At times, it takes the form of an eight-metre-high concrete wall, at other times it takes the form of a barrier some 60–100 metres wide with buffer zones protected by barbed wire and trenches and patrol roads on either side of an electric fence.'[114] Once completed, the Barrier will be 707 km long.[115]

Only 15 per cent of the Barrier's length runs along the 1949 armistice line between Israel and Jordan (also known as the 'Green Line').[116] The remaining path of the Barrier departs from the Green Line and cuts into the West Bank so as to incorporate Israeli settlements.[117] According to an OCHA report, eighty West Bank Israeli settlements, comprising over 85 per cent of the total Israeli settler population in the West Bank (including East Jerusalem), will lie between the Barrier and the Green Line.[118] The

[113] Also referred to as the 'Anti-terrorist Fence' by its supporters, and known as the 'Annexation Wall' or the 'Apartheid Wall' by its opponents. The rest of the international community, including the UN, commonly refer to the Separation Wall/Fence/Barrier.

[114] UNCHR, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories' (27 February 2004), E/CN.4/2004/6/Add.1, para. 8.

[115] OCHA, 'West Bank barrier route projections' (July 2010) www.ochaopt.org/documents/ocha_opt_route_projection_july_2010.pdf (accessed 17 May 2011).

[116] *Ibid*.

[117] In the north of the West Bank, the route of the Barrier deviates up to 22 km from the Green Line to incorporate the Ari'el settlement. In addition, adjacent to Jerusalem, the planned Barrier route will encircle the Ma'ale Adumin settlement group and will extend 14 km into the West Bank (i.e. 45 per cent) across its width (OCHA, 'Preliminary analysis of the humanitarian implications of the April 2006 Barrier projections' (July 2006), www.humanitarianinfo.org/opt/docs/UN/OCHA/OCHABarrierProj_6jul06.pdf (accessed 20 May 2011), 3).

[118] OCHA, 'Six years after the International Court of Justice Advisory Opinion: the impact of the Barrier on health' (July 2010), www.ochaopt.org/documents/ocha_opt_special_focus_july_2010_english.pdf (accessed 17 May 2011).

area between the Barrier and the Green Line is designated as a 'Closed zone' or 'Seam zone' and will, when completed, incorporate 9.4 per cent of the West Bank.[119] Approximately 33,000 West Bank Palestinians will be located in the 'Closed zone', in addition to the majority of the 250,000 residents of East Jerusalem.[120]

According to a UN report, the Separation Barrier will be responsible for a whole 'new generation of displaced persons'.[121] In 2005, house demolitions and land confiscation by the government of Israel in connection with the construction of the Barrier were the main cause of internal displacement.[122] A Palestinian survey undertaken in May 2005 on the impact of the Wall indicated that 2,448 households were already displaced from the localities that the Wall passed through.[123]

Local inhabitants are said to be deeply concerned at the possibility of increased uprooting and displacement as a result of harsher living conditions, including high levels of social and economic marginalization, property demolitions and protracted access restrictions in threatened villages.[124] According to the ICRC, the lives of Palestinians have been dramatically affected, due to restrictions on freedom of movement and access to jobs, health facilities, schools, land and family members.[125] Palestinians on either side of the Wall are affected by these restrictions. Palestinians living in the 'Closed zone' need a 'permanent resident permit' in order to remain in the zone. However, health and education services are generally located on the other side of the Barrier and residents of the 'Closed zone' need to pass through specifically designated gates to access their

[119] OCHA, 'West Bank barrier route projections' (July 2010). [120] *Ibid*.

[121] UNCHR, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories' (17 January 2006), E/CN.4/2006/29, para. 20.

[122] IDMC, 'Palestinian territories – West Bank Wall main cause of new displacement amid worsening humanitarian situation' (21 June 2006), 4, www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/B373C6CCA0474439C125719400383504/$file/Palestinian%20Territories%20-June%202006.pdf (accessed 17 May 2011).

[123] Palestinian Central Bureau of Statistics, 'Survey on the impact of the Expansion and Annexation Wall on the socio-economic conditions of the Palestinians localities which the wall passes through, June 2005' (September 2005), www.pcbs.gov.ps/Portals/_pcbs/PressRelease/Socioeconomic_June_e.pdf (accessed 17 May 2011).

[124] Written Statement submitted by Palestine to the International Court of Justice in relation to the request for Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory, 125.

[125] ICRC (press release), 'Israel/occupied and autonomous Palestinian territories: West Bank Barrier causes serious humanitarian and legal problems' (18 February 2004) http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-142541.pdf (accessed 17 May 2011).

schools, health care facilities and workplaces.[126] Palestinians on the east side of the Barrier have often been cut off from their farms, land and water resources, and require a special 'visitor' permit to cross the Wall and enter the area.[127] However, at least 40 per cent of applications for permits are rejected and the process of application has been described as 'humiliating'.[128] All these restrictions and hardships have compelled many Palestinians to leave the closed areas, abandon their land and relocate to the Palestinian side of the Barrier.

The ICJ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

Events leading to the request for an Advisory Opinion

On 9 October 2003, in a letter addressed to the President of the Security Council, the Permanent Representative of the Syrian Arab Republic, acting in his capacity as Chairman of the Arab Group and on behalf of the State Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the 'grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard'.[129] The letter also included a draft resolution, which was considered by the Council on 14 October 2003, under Agenda item 'The situation in the Middle East, including the Palestine question'. The Security Council meetings provided the parties concerned with a forum for discussion in which to put forward their position on the construction of the Separation Wall and to discuss the root of the problem, namely the construction of Israeli settlements in the OPT.

The Permanent Observer of Palestine declared that the establishment of the 'expansionist wall of conquest' complemented Israeli settlements activities and was illegal under international law and international humanitarian law.[130] In his reply, the Israeli representative explained at

[126] OCHA and UNRWA, 'The humanitarian impact of the Barrier: four years after the Advisory Opinion of the International Court of Justice' (July 2008), www.ochaopt.org/documents/Barrier_Report_July_2008.pdf (accessed 17 May 2011).

[127] *Ibid*.

[128] UNCHR, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories 2006, para. 17.

[129] Letter dated 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the President of the Security Council, S/2003/973.

[130] 4841st meeting of the Security Council, 14 October 2003, 10:30 a.m., S/PV.4841, 5.

length the reasons why Israel felt compelled to build the 'security fence'. He indicated that the fence was a temporary security measure and that it was 'one of the most effective non-violent methods of preventing the passage of terrorists and their armaments from the terrorist factories in the heart of Palestinian cities to the heart of civilian areas in Israel'.[131] He also drew attention to the fact that the fence had no political significance and that it was not intended to change the status of the land.[132]

The Representative of Malaysia, speaking on behalf of the Non-Aligned Movement, declared himself to be 'extremely concerned at the implications and long-term effect of Israel's continued settlement policies and the construction of the wall in the occupied Palestinian territory',[133] while the European Union expressed its strong opposition to the construction by Israel of a separation wall in the West Bank and called on Israel to freeze all settlement activities.[134] The draft resolution submitted for consideration was put to a vote but once again failed to be adopted, due to the negative vote of a permanent member of the Security Council.[135]

On 15 October 2003, the Chairman of the Arab Group requested the resumption of the Tenth Emergency Special Session of the General Assembly 'in light of the inability of the Security Council to fulfil its responsibility for the maintenance of international peace and security due to the exercise by one of its permanent members of the veto, in order to address the grave issue of Israel's expansionist wall in the Occupied Palestinian Territory, including East Jerusalem'.[136] The Tenth Emergency Special Session of the General Assembly[137] thus reconvened on 20 October 2003 and

[131] *Ibid*., 8. [132] *Ibid*., 10.

[133] Statement by the Representative of Malaysia, on behalf of the Non-Aligned Movement (*ibid*., 25).

[134] Statement by the Ambassador of Italy, on behalf of the EU (*ibid*., 42).

[135] There were 10 votes in favour, 1 against and 4 abstentions. In his statement, the US representative explained his negative vote, not because he considered the Separation Barrier or the Israeli settlements to be legal, but because the draft resolution was unbalanced and did not condemn terrorism in explicit terms (UNSC, 4842nd meeting, 14 October 2003, 10:45 p.m., S/PV.4842, 2).

[136] Letter dated 15 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the President of the General Assembly (A/ES-10/242).

[137] UNGA Res. 377A(V) (3 November 1950), entitled 'Uniting for Peace', provides that:

> if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to

adopted resolution ES-10/13, by which it demanded that 'Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law' and requested the UN Secretary-General to report on compliance with the resolution within one month.[138]

The report of the Secretary-General, released on 24 November 2003, confirmed the non-compliance by Israel with the demands of resolution ES-10/13.[139] In light of the report, the General Assembly adopted resolution ES-10/14, requesting the ICJ, pursuant to Article 65 of the Statute of the Court, to urgently render 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?[140]

The Court received forty-nine written statements, the majority of them arguing that the construction of the wall violated international law. Many states also urged the Court to deny jurisdiction or to decline to answer the question posed by the General Assembly. The United Kingdom, for instance, requested the Court to exercise its discretion and to decline to

> Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefore. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of Members of the United Nations.

In 1997, after the Security Council failed on two occasions to adopt a resolution condemning the construction of a new settlement in Jebel Abu Gneim, in occupied East Jerusalem, due to a negative vote by the USA, the General Assembly, acting pursuant to Res. 377A(V), convened its Tenth Emergency Special Session, under the title 'Illegal Israeli actions in occupied East Jerusalem and the rest of the occupied territory'. The 10th Emergency Special Session has since been reconvened on several occasions.

138 UNGA Res. ES-10/13 (21 October 2003) paras. 1, 3 (144 in favour, 4 against and 12 abstentions).

139 UNGA, 'Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13' (24 November 2003), A/ES-10/248.

140 UNGA Res. ES-10/14 (8 December 2003) (90 in favour, 8 against, 74 abstentions).

answer the question, as, it argued, an Advisory Opinion on this matter 'would be likely to hinder, rather than assist, the peace process'.[141]

On 9 July 2004, the ICJ nevertheless rendered the Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The Court ruled, by fourteen votes to one, that:

> The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law.[142]

The Advisory Opinion

In the first part of the Opinion, the Court dealt with questions of jurisdiction and judicial propriety. The Court ruled that it had jurisdiction to give the Advisory Opinion requested by resolution ES-10/14,[143] and refused to use its discretionary power to decline to give that opinion.[144]

The Court then addressed the question put to it by the General Assembly. After a brief clarification of the terms of the question,[145] the Court proceeded to an analysis of the status of the territory concerned[146] and a

[141] Written statement of the United Kingdom of Great Britain and Northern Ireland (January 2004), para.1.6. The UK had previously voted in favour of Resolution ES-10/13 which demanded that Israel stopped and reversed the construction of the Wall. However, the UK stressed in its statement that it believed that the most important priority in the Middle East was the achievement of a negotiated settlement based upon the road map drawn up by the Quartet (*ibid*., para. 1.5).

[142] *Legal Consequences of the Construction of a Wall*, para. 3A of the dispositif.

[143] *Ibid*., paras. 24–42. The Court rejected the arguments that the General Assembly had acted *ultra vires* under the Charter when it requested an Advisory Opinion on the legal consequences of the construction of the wall in the OPT (paras. 24–8) and that the request violated Res. 377 A(V) (paras. 29–35). The Court also held that the issue of the construction of the Separation Wall was a 'legal question' within the meaning of Article 96(1) of the UN Charter (paras. 36–41).

[144] *Ibid*., paras. 43–65 According to the Court's jurisprudence, only 'compelling reasons' should lead the Court to refuse to give an opinion (para. 44). The Court thus examined each of the arguments put forward as to why it should not exercise its jurisdiction (paras. 46–64) and concluded that there was no compelling reason for it to use its discretionary power not to give an opinion on the question asked by the General Assembly (para. 65).

[145] The Court noted that different terms were being employed to describe the 'wall', either by Israel ('fence') or by the Secretary-General ('barrier') but that none of them were accurate. It thus decided to use the terminology employed by the General Assembly and to refer to the 'wall'. The Court also noted that some parts of the Wall were being built, or planned to be built, on the territory of Israel itself, and that it was not called upon to examine the legal consequences arising from the construction of those parts of the Wall (*ibid*., para. 67).

[146] The Court concluded that: 'The territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in

description of the works already constructed or in the course of construction. The Court then determined the rules and principles of international law relevant in assessing the legality of the measures taken by Israel, and ruled that both the Hague Regulations and the Fourth Geneva Convention, as well as certain human rights instruments were applicable to the OPT.[147]

Next, the Court addressed the question of whether the construction of the Wall violated those rules and principles. In this regard, the Court noted that the Wall's route had been traced in such a way as to include Israeli settlements within the 'Closed Area' and that the settlements had been themselves established in breach of international law.[148] The Court also found that the construction of the Wall posed a risk of further alterations to the demographic composition of the OPT by contributing to the departure of Palestinians from certain areas.[149] The Court thus concluded that the construction of the Wall severely impeded the exercise by the Palestinian people of their right to self-determination, and was therefore a breach of Israel's obligation to respect that right.[150]

The Court also observed that the construction of the Wall had led to the destruction or requisition of properties under conditions which contravened the requirements of Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention.[151] Concerning the military necessity exception contained in Article 53, the Court was 'not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations'.[152] The Court found that the construction of the Wall impeded the liberty of movement of the inhabitants of the OPT, as well as their right to work, to health, to education and to an adequate standard of living. Finally, the construction of the Wall, by contributing to the alteration of the demographic composition of OPT, contravened Article 49 paragraph 6 of the Fourth Geneva Convention.[153] The Court thus held:

> 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories . . . have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel had continued to have the status of occupying Power' (*ibid*., para.78).

[147] *Ibid*., paras. 86–113. [148] *Ibid*., paras. 119–20. [149] *Ibid*., para. 122. [150] *Ibid*.
[151] *Ibid*., para. 132. [152] *Ibid*., para.135. [153] *Ibid*., paras. 133–4.

The wall, along the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.[154]

In addition, the Court rejected Israel's claim that the construction of the Wall was consistent with the right of self-defence enshrined in Article 51 of the UN Charter, simply concluding that Article 51 had no relevance in this case.[155] The Court also stated that Israel could not rely on a state of necessity which would preclude the wrongfulness of the construction of the Wall.[156]

Having concluded that, by the construction of the Wall in the OPT, Israel had violated various international law obligations, the Court then examined the consequences of those violations. First, Israel has an obligation to put an end to the violation of its international obligations flowing from the construction of the Wall in OPT[157] and to make reparation for the damage suffered.[158] Furthermore, all states are under an obligation not to recognize the illegal situation resulting from the construction of the Wall in the OPT, and not to render aid or assistance in maintaining the situation created by such construction. In addition, 'all the States parties to the Geneva Convention . . . are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention'.[159] Finally, the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the Wall.[160]

The issue under consideration is whether the principles of international humanitarian law on the prohibition of population transfer are applicable to the Israeli policy and practices of settlements and, more recently, the construction of the Separation Wall in the OPT. The following section will therefore examine the relevant findings of the Advisory Opinion and assess the implications of the ruling on the general prohibition of settlements and population transfers in occupied territory.

[154] *Ibid*., para. 137. [155] *Ibid*., para. 139. [156] *Ibid*., para. 140. [157] *Ibid*., para. 151.
[158] *Ibid*., paras. 152–3. [159] *Ibid*., para. 159. [160] *Ibid*., para. 160.

The legality of the settlements in light of the ICJ ruling

The main criticism of the Court's ruling has related to the reasoning, or lack thereof, used by the Court to reach its conclusions. In general, while agreeing with most of the Court's conclusions, many have felt that the ICJ had missed an opportunity to clearly address some issues of international law.[161] Indeed, as underlined by Judge Higgins in her separate opinion:

> It might have been expected that an Advisory Opinion would have contained a detailed analysis, by reference to the texts, the voluminous academic literature and the facts at the Court's disposal . . . Such an approach would have followed the tradition of using Advisory Opinions as an opportunity to elaborate and develop international law.[162]

In Ardi Imseis's view, the Court's unwillingness to offer exhaustive and compelling reasons for its conclusions 'will undoubtedly cast a cloud over its findings, particularly for those of us who held greater expectations of what the Court might have achieved'.[163] The reasoning behind the Court's conclusions is especially weak on questions of international humanitarian law in general, and on the illegality of the settlements in particular. The Court merely stated that the Israeli settlements in the OPT had been established in breach of international law.[164] Two questions thus remain: first, was the reasoning used in reaching this conclusion sufficiently adequate? Second, how does the illegality of the Israeli settlements affect the illegality of the Separation Wall?

[161] Kretzmer, 'The Advisory Opinion', 2005, 88.

[162] Separate Opinion of Judge Higgins, para. 23. Other criticisms of the Advisory Opinion concerned the Court's lack of fact analysis and the poor explanation, if any, of its findings. In his declaration, Judge Buergenthal explained that he voted against the Court's findings on the merits because it 'did not have before it the requisite factual bases for its sweeping findings' and should have therefore declined to hear the case. In his view, without an in-depth examination of the nature of cross-Green Line terrorist attacks and their impact on Israel and its population, the findings made by the Court were 'not legally well founded': 'In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the Opinion the credibility I believe it lacks' (paras. 1 and 3).

[163] Imseis, 'Critical reflections', 2005, 103.

[164] *Legal Consequences of the Construction of a Wall*, para. 120 The Court was unanimous on this finding, as even Judge Buergenthal, who had voted against the Court's findings, stated in his declaration: 'I agree that this provision [Art. 49, para. 6] applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6' (para. 9).

On the illegality of the settlements in occupied territory

The Court rejected Israel's argument that Article 49(6) allowed for voluntary migration of individuals into occupied territory. Instead, it confirmed that the prohibition contained in Article 49(6) concerned both forcible and voluntary transfers of population into occupied territory:

> That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.[165]

While this proposition is undoubtedly true, it is regrettable that the Court did not offer a more detailed reasoning on such an important issue. The Court merely stated that since 1977, Israel had 'conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territories' in violation of Article 49(6) and that three resolutions of the Security Council had condemned these policies and practices.[166] However, the Court did not provide any explanation as to how it came to the conclusion that *all* transfers of population into occupied territory were prohibited under Article 49(6).

Given the controversial character of the settlements and the debatable interpretation by Israel of Article 49(6), the Court missed an opportunity to offer an authoritative interpretation of the provision. Indeed, it is clear, upon reading Article 49 as a whole, that paragraph 6 prohibits all forms of transfers of civilians, as opposed to paragraph 1, which only relates to 'forcible transfers'. In addition, the Court did not think it necessary to describe the measures taken by Israel in order to encourage settlements in the OPT, thus casting doubts over which specific measures would constitute, in the eyes of the ICJ, unlawful transfer of population. The Court should have taken time to explain how it had reached the conclusion that the mere organization or encouragement of transfer, in addition to direct transfer of population into occupied territory, constituted a violation of Article 49(6) of the Convention. Furthermore, and this is of primary importance, the Court should have clarified that 'protected persons' within the meaning of Article 4 of the Fourth Geneva Convention are the Palestinian people and not the population of Israel. Finally, the Court made no mention of other arguments put forward by Israel, such as its historical and ideological claims of a 'Greater State of Israel' or

[165] *Legal Consequences of the Construction of a Wall*, para. 120. [166] *Ibid*., paras. 120–1.

the argument that settlements are not intended to displace Palestinians. As noted earlier, none of these arguments can justify the settlement of populations into an occupied territory, under both international law and international humanitarian law. By reaching such a general conclusion, the Court failed to properly address the issue of the illegality of settlements and therefore deliver a strong message on the Israeli settlements in the OPT.

On the relationship between the illegality of the settlements and the illegality of the Separation Wall

Notwithstanding the Court's findings on the legality of settlements, doubts have been expressed over the relevance of the issue with regards to the legality of the Wall. Some critics have even argued that the question of the legality of the settlements should not have been addressed.[167]

It is undeniable that the route of the Wall was established to incorporate the settlements.[168] Consequently, the questions of the legality of the settlements and that of the Wall are inevitably interconnected, and the Court was right to address the issue of settlements in its Advisory Opinion. However, although the ICJ held that the Israeli settlements were established in violation of Article 49(6), it failed to provide any explanation as to why such violation would result in the illegality of the Wall.[169] It seems that the Court considered that the unlawfulness of the settlements under Article 49(6) directly affected the legality of the Wall, but the lack of explanation in this regard is rather disappointing. Additionally, it may be argued that the presence of settlements in the OPT, coupled with the route of the Separation Wall, significantly alter the demographic composition of the territory and prejudge the future frontier between Israel and Palestine, thus amounting to de facto annexation. These issues, establishing a link between the settlements and the Wall, will be examined below.

[167] Ruth Lapidoth, for instance, contends that the ICJ has dealt with matters that are not directly relevant to the issue, including the legality of the settlements. She argues that since the Court ruled that all the segments of the fence situated in the OPT were illegal, without making a distinction among its various segments (e.g. those that protect Israel proper and those that protect settlements) the discussion of the legality of the settlements was not necessary, and thus only an *obiter dictum* ('The Advisory Opinion and the Jewish settlements', 2005, 293–4).

[168] UNCHR, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories' (7 December 2004) E/CN.4/2005/29: 'Settlements in East Jerusalem and the West Bank are the principal beneficiaries of the wall and it is estimated that approximately half of the 400,000 settler population will be incorporated on the Israeli side of the wall' (para. 24).

[169] Kretzmer, 'Advisory Opinion', 91.

Construction of a wall for the protection of unlawful settlements

The Court observed that the route of the Wall included within the 'Closed Area' some 80 per cent of the settlers living in the OPT and that it was apparent that 'the wall's sinuous route [had] been traced in such a way as to include within that area the great majority of the Israeli settlements'.[170] In light of these considerations, the ICJ held that:

> The route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements.[171]

This finding is yet another example of the Court's lack of reasoning on such an important issue. In the Court's view, the fact that the route of the Wall was designed to incorporate the unlawful settlements rendered the Separation Wall automatically unlawful under Article 49(6). What is the legal basis behind this finding? The Court does not develop the point any further.

It has been argued that the illegality of the settlements, which the Wall seeks to protect, entails *ipso facto* the illegality of the Wall.[172] The issue here stems from the fact that the Jewish settlements have been established in contravention of the law of belligerent occupation and Article 49(6) of the Fourth Convention in particular. The settlements being unlawful, any action undertaken to legitimize and strengthen this situation should therefore be illegal. This does not necessarily mean that Israel is prevented from taking any measure to protect the Israeli settlements. Indeed, as acknowledged by the ICJ, Israel has the obligation, under human rights law, to protect all individuals present in the OPT, including Israeli settlers.[173] In addition, the Oslo Accords clearly state that, until a resolution on the final status of the settlements, Israel carries 'the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility'.[174]

[170] *Legal Consequences of the Construction of a Wall*, para. 119.

[171] *Ibid*., para. 122.

[172] Declaration of Judge Buergenthal, para. 9.

[173] *Legal Consequences of the Construction of a Wall*, paras. 106–13; see Shany, 'Head against the Wall?', 2004, 366; similarly, Kretzmer argues that: 'a theory that posits that the fact that civilians are living in an illegal settlement should prevent a party to the conflict from taking any measures to protect them would seem to contradict fundamental notions of international humanitarian law' ('Advisory Opinion', 93).

[174] Israeli–Palestinian Interim Agreement, Article XII. On the legal status of the Oslo Accords and their relevance in the context of the Wall Advisory Opinion, see Watson, 'The "Wall" decisions', 2005, 22–4.

However, when considering security measures, Israel must bear in mind that the settlements have been established in breach of international humanitarian law and that it has an obligation to put an end to it. Therefore, any long-term measure, such as the construction of a separation wall, which consolidates a situation considered illegal under international law, is unlawful.

This theory is supported by the UN Special Rapporteur, John Dugard, who stressed in his 2004 report that 'the illegal nature of settlements makes it impossible to justify the penetration of the Wall into Palestinian territory as a lawful or legitimate security measure to protect settlements'.[175] The issue was also brought to the attention of the ICJ during the proceedings. As Palestine noted, in its written statement:

> The settlements being unlawful, there can be no legal right to protect them by diverting the course of the Wall away from the Green Line.[176]

These arguments are based on a general principle of international law – *ex injuria jus non oritur* – according to which 'an illegal act cannot produce legal rights'.[177] Although the issue was explicitly raised, the Court did not address it. Instead, it made a sweeping statement on the illegality of the Wall derived from the illegality of the settlements. It could have simply stated that the fact that the Wall was designed to protect unlawful settlements rendered it illegal *ipso facto* and that there was therefore no need to examine security concerns.[178]

The Court could also have tackled the issue in relation to the question of a state of necessity. Having concluded that the construction of the Wall constituted breaches of international humanitarian law and human rights instruments, the Court indeed went on to consider whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the Wall.[179] The Court relied on the

[175] UNCHR, 2004 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories, para. 26.

[176] Written statement for Palestine, para. 467; see also Written statement for the League of Arab States, para. 9.17.

[177] Separate Opinion of Judge Elaraby, para. 3.1.

[178] Oral statement for Palestine, para. 12; see also Shany, 'Capacities and inadequacies', 2005, 220, fn. 17.

[179] *Legal Consequences of the Construction of a Wall*, para. 140. According to the ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts: 'The term "necessity" ("état de nécéssité") is used to denote those exceptional cases where the only way a state can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some

Gabčíkovo-Nagymaros Project jurisprudence, in which it held that the state of necessity was 'a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation' and observed that such ground could only be accepted 'on an exceptional basis' and 'under strictly defined conditions'.[180] One of these conditions required that the act being challenged be 'the only way for the State to safeguard an essential interest against a grave and imminent peril'.

The Court thus held:

> In the light of the material before it, the Court is not convinced 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.[181]

The Court overlooked the principle that 'necessity may not be relied on if the responsible State has contributed to the situation of necessity', as expressed in Article 25(2)(b) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.[182] Even if there were a state of necessity related to the security of Israeli settlers in the OPT, Israel could not rely upon that state of necessity because it had created it itself.[183] Consequently, the construction of unlawful settlements in the OPT should preclude the invocation of a state of necessity in order to protect them.[184]

Although the ICJ reached the right conclusion as regards the illegality of the settlements and the subsequent illegality of the Separation Wall, the lack of fact-based analysis and detailed legal reasoning are regrettable. Yet, as demonstrated above, the legal arguments were plenty. In addition, the illegality of the Separation Wall does not only derive from the violation of Article 49(6) per se. The basis for the illegality of the Wall may also be found in a more general principle of the law of belligerent occupation, linked to the establishment of settlements and population transfers: the prohibition of permanent changes in occupied territory.

other international obligation of lesser weight or urgency' (ILC, 'Report of the International Law Commission on the work of its 48th Session' (6 May–26 July 1996), UN Doc. A/51/10, 194).

[180] *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), Judgment, ICJ Reports 1997, p. 7, para. 51.

[181] *Legal Consequences of the Construction of a Wall*, para. 140.

[182] Draft Articles on Responsibility of States for Internationally Wrongful Acts, (2001) II *Yearbook of the International Law Commission*, 31, 80.

[183] *Gabčíkovo-Nagymaros Project*, para. 57.

[184] Shany, 'Head against the Wall?', 364.

Alteration of the demographic composition of the Palestinian territory

Both the settlements and the Separation Wall dramatically alter the demographic composition of the Palestinian territories, thereby creating unlawful permanent changes. The establishment of settlements in the OPT is invariably accompanied by the departure of Palestinians, amounting to a de facto expulsion of Palestinians, in violation of Article 49(1) of the Civilians Convention. The combination of the two creates a substantial change in the demographic structure of the Palestinian territory, contrary to international humanitarian law.

The effect of settlements on the demography of Palestine was acknowledged by the UN Security Council when it determined, in 1980:

> that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian or other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity.[185]

As regards the Separation Barrier, its effect on the demographic composition of the Palestinian territories is undeniable. As underlined by Palestine in its written statement:

> Faced with a choice of remaining in a walled-off town, perhaps requiring residence permits, perhaps needing permission for daily crossings of the Wall for work or education or medical care, and moving elsewhere, it is unsurprising that there is increasing evidence of widespread displacement of the population of the Occupied Palestinian Territory, including East Jerusalem, from areas outside the Wall.[186]

According to the League of Arab States, 'it is the practical effect, if not the intended result of the wall that the population in the areas cut off by that barrier move away because of the unbearable living conditions'.[187] Similarly, the UN Special Rapporteur argues that one of the unofficial purposes of the Wall, along with the incorporation of settlers within Israel and the seizure of Palestinian land, is 'to compel Palestinian residents in the so-called "Seam Zone" between the Wall and the Green Line and those residents adjacent to the Wall, but separated from their lands by the Wall, to leave their homes and start a new life elsewhere in the West Bank, by making life intolerable for them'.[188]

[185] UNSC Res. 465 (1 March 1980) UN Doc. S/RES/465.
[186] Written Statement of Palestine, para. 480.
[187] Written Statement of the League of Arab States, para. 9.14.
[188] UNCHR, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian Territories' (December 2004), p. 35.

The ICJ recognized, in the Advisory Opinion, that the settlements and the Separation Barrier unlawfully alter the demographic composition of the OT:

> in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated regime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements . . . is tending to alter the demographic composition of the Occupied Territories.[189]

The Court concluded that by doing so, the construction of the Wall and its associated regime contravened Article 49(6) of the Fourth Geneva Convention and the Security Council resolutions.[190] While this is certainly true, it may have been appropriate for the Court to add that, as far as the displacement of Palestinians is concerned, the construction of the Wall and its associated regime also violated Article 49(1), which prohibits 'individual or mass forcible transfers' in occupied territory. Yet, the Court only mentions the displacement of civilians as an element of the prohibition of demographic changes in occupied territory, as opposed to a prohibition per se.

De facto annexation of Palestinian land

The government of Israel has consistently maintained that the Wall is a temporary measure, whose sole purpose is to prevent terrorism. During a meeting at the General Assembly on 8 December 2003, the Israeli Permanent Representative to the United Nations indeed underlined the temporary, non-political nature of the Wall:

> As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way.[191]

Nevertheless, it is an undeniable fact that the immediate beneficiaries of the Wall are the settlers.[192] Indeed, the route of the Barrier departing from the Green Line was manifestly planned in order to incorporate 56 settlements containing some 170,000 settlers on the Israeli side of the Wall,[193] resulting in 'some 10 per cent of Palestinian land being included

[189] *Legal Consequences of the Construction of a Wall*, paras. 122, 133.
[190] *Ibid*., para. 134.
[191] A/ES-10/PV.23, 6; *Legal Consequences of the Construction of a Wall*, para. 116.
[192] UNCHR, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories' (8 September 2003) E/CN.4/2004/6, para. 12.
[193] B'Tselem, 'Under the guise of security: routing the Separation Barrier to enable the expansion of Israeli settlements in the West Bank' (December 2005), www.btselem.org/Download/200512_Under_the_Guise_of_Security_Eng.pdf (accessed 20 May 2011).

in Israel'.[194] In fact, this intrusion into the West Bank has been construed on many occasions as de facto annexation. In his 2006 report, Special Rapporteur John Dugard established a direct link between the settlements in the West Bank and the route of the Wall, and noted:

> Like the settlements it seeks to protect, the Wall is manifestly intended to create facts on the ground. It may lack an act of annexation, as occurred in the case of East Jerusalem and the Golan Heights. But its effect is the same: annexation.[195]

A number of states have expressed doubts about the alleged temporary nature and security purpose of the Wall,[196] while others have more openly condemned Israel's 'expansionist policy'.[197] Furthermore, the General Assembly has stated, in resolution ES-10/13 of 21 October 2003, that:

> the route marked out for the wall under construction by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, could prejudge future negotiations and make the two-State solution physically impossible to implement and would cause further humanitarian hardship to the Palestinians.

During the proceedings before the ICJ, several states expressed concerns towards Israel's de facto annexation of Palestinian territory.[198] In the course of the oral pleadings, the Court heard a statement by Mr Vaughan Lowe, on behalf of Palestine:

> The wall is changing the status of the Occupied Palestinian Territory. It is, entirely foreseeably, causing demographic and other changes in the Occupied Palestinian Territory that will eliminate the possibility of the Palestinian people effectively exercising their right to self-determination, and this is tantamount to de facto annexation of territory.[199]

[194] UNCHR, 2006 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories, para. 14.

[195] *Ibid*.

[196] During a meeting at the Security Council, on 14 October 2003, the French representative stated that: 'This will be a permanent structure that will permanently change geographic and demographic data. The building of the wall can only encourage the development of settlements and aggravate the already serious problems that these are causing' (S/PV.4841, 18).

[197] Statement of the Representative of the Islamic Republic of Iran (S/PV.4841, 27); see also Statement of the Representative of Malaysia, on behalf of the Non-Aligned Movement (S/PV.4841, 26).

[198] See Written Statement of Palestine, para. 481; Written Statement of the League of Arab States, para. 9.19; Written Statement of the Government of the Republic of South Africa, paras. 12–23.

[199] ICJ – Verbatim Record of public sitting held on Monday 23 February 2004 at 10:00 a.m., Oral statement for Palestine, 53.

After noting the assurances given by Israel that the construction of the Wall did not amount to annexation and that the Wall was a temporary measure, the ICJ held:

> The Court considers that the construction of the wall and its associated regime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.[200]

The Court has thus focused on the permanency of the Wall, rather than its implied purpose. This may be explained by the fact that the Court lacked the evidentiary basis to declare that the construction of the Wall constituted an outright act of annexation.[201] Consequently, only if it acquired a permanent character would the construction of the Wall amount to de facto annexation.[202] In principle, this finding seems reasonable. However, a more thorough examination by the Court of each segment of the Wall that encroaches upon Palestinian territory in order to incorporate Israeli settlements would have enabled it to make a more reasoned judgment in relation to a potential act of de facto annexation.[203]

With this Advisory Opinion, the ICJ had the opportunity to address for the first time the issue of the illegality of the settlements in the Palestinian territories, and to render an unequivocal decision on the subject. While the conclusions of the Court are to be welcomed in most respects, the lack of reasoning behind the findings will inevitably affect the outcome of the opinion.

The aftermath of the ICJ ruling

Beit Sourik and the implications of the ICJ ruling for Israel

On 30 June 2004, the Israeli High Court of Justice rendered its own decision on the legality of a 40-kilometre section of the Wall, in *Beit Sourik*

[200] *Legal Consequences of the Construction of a Wall*, para. 121.

[201] Kretzmer, 'Advisory Opinion', 92.

[202] Judge Higgins agrees with the Court's findings that 'the wall does not at the present time constitute, *per se*, a de facto annexation' (Separate Opinion of Judge Higgins, para. 31). Judge Koroma, on the other hand, is of the opinion that 'the construction of the wall has involved the annexation of parts of the occupied territory by Israel . . . contrary to the fundamental international law principles of non-acquisition of territory by force' (Separate Opinion of Judge Koroma, para. 2). Judge Elaraby argues that the Court's finding should have been incorporated in the dispositif with an affirmation that the OPT could not be annexed (Separate Opinion of Judge Elaraby, para. 2.5).

[203] Kretzmer, 'Advisory Opinion', 94.

Village Council v. *Israel*.[204] While the Israeli Court clearly stated that the purpose of the Separation Fence could not be to draw a political border, it came to the conclusion that the Fence was in fact motivated by security concerns.[205] It held that Israel was entitled, under the law of belligerent occupation, 'to take possession of individual land in order to erect the separation fence upon it on the condition that this is necessitated by military needs'.[206] However, the Court also stated that security considerations were not enough to justify the construction of the Wall in Palestinian territory and that security powers had to be 'properly balanced against the rights, needs, and interests of the local population'.[207] The Court thus applied the principle of proportionality to its examination of the legality of the Fence. In this respect, the key question was: 'whether the Separation Fence route . . . injures the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit of the fence'.[208] The High Court, while validating orders for some parts of the Wall, held that most of the Barrier's route imposed disproportionate hardships on Palestinians and had to be re-examined.

The ICJ Advisory Opinion and the *Beit Sourik* decision share a few common grounds, but these are far outweighed by the differences between them.[209] Indeed, where the ICJ reached broad, sweeping conclusions on the illegality of the Wall, the Israeli Court, applying a three-part proportionality test on each segment of the Wall, found that some, but not all of them violated international law.[210] The Israeli Court's decision, if not the more convincing in terms of its findings, is surely the more satisfying in terms of fact analysis and reasoning. However, the Israeli Court failed to address the issue of the legality of settlements in occupied territory, a nonetheless important factor in the determination of the legality of the Separation Wall.[211] In addition, as opposed to the High Court of Justice's decision, which is binding on Israel, the international court's opinion, 'advisory' in essence, has no binding effect. The government of Israel thus announced that it would not follow the ICJ's ruling but would abide

[204] HCJ 2056/04, *Beit Sourik Village Council* v. *Government of Israel and the Commander of IDF Forces in the West Bank* (30 June 2004). The petition, filed by the residents of villages north-west of Jerusalem, argued that the military orders of seizure of their land were illegal in light of Israeli administrative law and the principles of public international law (paras. 9–11).

[205] *Ibid*., paras. 27–8. [206] *Ibid*., para. 32. [207] *Ibid*., para. 34.

[208] *Ibid*., para. 44. [209] Watson, '"Wall" decisions', 24.

[210] *Ibid*. [211] Shany, 'Head against the Wall?', 366.

by the High Court's decision.[212] In August 2004 the Israeli High Court however instructed the Israeli government to produce a statement assessing the implications of the Advisory Opinion.[213]

The Israeli Cabinet approved a revised route of the Wall in February 2005 and once again in April 2006.[214] Stretching a total of 707 km, the revised Barrier route now incorporates about 9.4 per cent of the West Bank and East Jerusalem, as opposed to the initial 12.7 per cent.[215] However, as noted by the Association for Civil Rights in Israel, although the new route reduces to some degree the scope of human rights violations resulting from the Barrier, it still significantly infringes on the human rights of the Palestinians residing in the vicinity.[216] In addition, while the new route of the Wall follows more closely the Green Line in the locality of the Hebron hills, it penetrates more deeply into Palestinian territory further north to include settlements in the Gush Etzion Bloc near Bethlehem.[217] It is also clear that the construction of the Wall enables the continuing expansion of settlement activity in the closed zone,[218] with complete disregard of the ICJ's ruling.

The government of Israel eventually replied to the request of the High Court of Justice to assess the implications of the ICJ Advisory Opinion. In a statement presented to the Israeli Court on 23 February 2005, the government of Israel declared:

> It is the position of the State of Israel that the factual background before the Court when it wrote the Advisory Opinion was lacking, inexact and now irrelevant in a manner that precludes its conclusions that the entire route of the fence within

[212] A. Benn, S. Shamir and Y. Yoaz, 'Israel firmly rejects ICJ fence ruling', *Haaretz* (11 July 2004), www.haaretz.com/hasen/pages/ShArt. jhtml?itemNo=449729&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y (accessed 23 May 2011).

[213] UNCHR, 2004 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories, para. 38.

[214] Since 2002, the Israeli Cabinet has approved four routes of the Wall, in 2003, 2004, 2005 and 2006. See OCHA, 'Six years after the International Court of Justice Advisory Opinion: the impact of the Barrier on health' (July 2010), fn. 2. The latest route, revised and approved on 30 April 2006, is available on the Israeli MoD, at: www.securityfence.mod.gov.il/pages/eng/route.htm (accessed 24 May 2011).

[215] OCHA, 'West Bank barrier route projections' (July 2010).

[216] A. Pinchuk, 'The responses in Israel to the ICJ Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory' (8–9 March 2005), Geneva, United Nations Office, p. 12, http://unispal.un.org/UNISPAL.NSF/0/321BFD8CAB197930852574B8006D8A7D (accessed 28 November 2011).

[217] UNCHR, 2006 Report of the Special Rapporteur on the situation of human rights in the Palestinian Territories, para. 14.

[218] *Ibid*., paras. 22–8.

the West Bank was in violation of international law from having any application upon the cases before the High Court of Justice. These cases should be decided based upon the factual and normative bases that have been developed by Israel's Supreme Court as exemplified in the Beit Sourik case.[219]

The Israeli High Court of Justice has backed the government's opinion in subsequent decisions, including the *Alfei Menashe* case,[220] in which the Israeli Court dismissed the ICJ's Advisory Opinion, for being based upon insufficient factual basis, particularly in respect of security considerations for the construction of the Wall.[221] Instead, the Israeli Court vowed to continue to examine each of the segments of the Fence, as they are brought for its decision, and to ask itself, 'regarding each and every segment, whether it represents a proportional balance between security–military need and the rights of the local population'.[222]

Reaction of the international community to the Advisory Opinion

Shortly after the issuance of the Court's Advisory Opinion, the tenth emergency session of the General Assembly reconvened. On 20 July 2004, the General Assembly adopted Resolution ES-10/15, which acknowledged the Advisory Opinion of the ICJ and demanded that Israel comply with its legal obligations.[223] The resolution also requested the Secretary-General to establish a register of damage relating to the construction of the Wall. Statements made during the session reflect the states' individual reactions to the Advisory Opinion. Most states expressed their support for the opinion's findings regarding the illegality of the Separation Wall. The representative of the Netherlands, speaking on behalf of the European Union, stated that: 'the Advisory Opinion largely [coincided] with the European Union's position on the legality of the barrier built by Israel on the Palestinian side of the Green Line'.[224] With the exception of Israel, no state

[219] Israeli MFA, 'Unofficial summary of State of Israel's response regarding the Security Fence', 28 February 2005, www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Summary+of+Israels+Response+regarding+the+Security+Fence+28-Feb-2005.htm (accessed 23 May 2011).

[220] HCJ 7957/04 – *Mara'abe* v. *Prime Minister of Israel* (15 September 2005), ruling available at: www.diakonia.se/sa/node.asp?node=861 (accessed 23 May 2011).

[221] *Ibid*., para. 74: 'the ICJ's conclusion, based upon a factual basis different than the one before us, is not *res judicata*, and does not obligate the Supreme Court of Israel to rule that each and every segment of the fence violates international law.'

[222] *Ibid*.

[223] UNGA Res. ES-10/15 (20 July 2004) A/RES/ES-10/15 (150 in favour, 6 against, 10 abstentions and 25 non-voting).

[224] GAOR, 10th Emergency Special Session, 27th meeting (20 July 2004) A/ES-10/PV.27, 8. However, the EU expressed reservations on certain paragraphs of the Advisory Opinion:

which voted against the resolution or abstained from voting criticized the Court's conclusion on the illegality of construction of the Wall.[225] The USA's main concerns related to the content of the resolution, which was unbalanced and would 'politicize the Court's non-binding opinion'.[226] As regards the Advisory Opinion itself, the representative of the United States expressed concerns regarding the Court's conclusion on the right to self-defence,[227] but did not question the findings on the illegality of the Wall.

While a resolution by the General Assembly welcoming the Advisory Opinion was to be expected, a resolution by the Security Council any time soon is very unlikely, due to the strong probability of a US veto. Neither the General Assembly, nor the Security Council has considered the opinion since.[228]

What next?

In parallel with the construction of the Wall, the then Israeli Prime Minister Ariel Sharon announced, in 2004, a unilateral 'Disengagement Plan' to evacuate all the settlements in the Gaza Strip and four settlements in the northern part of the West Bank.[229] The disengagement thus concerned a

'We recognize Israel's security concerns and its right to act in self-defence. The European Union reconfirms its deep conviction that the Quartet road map . . . remains the basis for reaching a peaceful settlement. It calls on all sides to refrain from further escalation and to take the steps required to begin the implementation map.'

225 M. Hmoud, 'The significance of the Advisory Opinion rendered by the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory' (UN International Meeting on the Question of Palestine, p. 40).

226 A/ES-10/PV.27, 4.

227 In this regard, the US Representative stated that: '[The opinion] seems to say that the inherent right of self-defence, Article 51 of the United Nations Charter does not apply when a state is attacked by terrorist organizations. That seems to be directly at odds with the Security Council's resolutions adopted after 11 September 2001, which confirm the right of self-defence in the face of a terrorist threat.' For a discussion on the ICJ's findings on the right of self-defence, see R. Wedgwood, 'The ICJ Advisory Opinion on the Israeli security fence and the limits of self-defence', AJIL, 99 (2005), 52; S. D. Murphy, 'Self-defence and the Israeli Wall Advisory Opinion: an *ipse dixit* from the ICJ', AJIL, 99 (2005), 62.

228 UN (press release) 'UN experts mark anniversary of ICJ "Wall opinion" – call on Israel to halt the construction of the Wall' (4 August 2005) HR/05/092.

229 General outline of the Disengagement Plan available at: www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm (accessed 23 May 2011); full text of the revised Disengagement Plan available at: www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm (accessed 23 May 2011).

mere 2 per cent of the total settler population living in the OPT.[230] Evacuation of Gaza started in August 2005 and was completed on 12 September 2005. In a letter addressed to the then US President George W. Bush, Sharon explained that the Disengagement Plan was designed 'to improve security for Israel and stabilize [its] political and economic situation'.[231] On the other hand, the general outline of the Disengagement Plan explicitly states that:

> in the West Bank, there are areas which will be part of the State of Israel, including cities, towns and villages, security areas and installations, and other places of special interest to Israel.[232]

The possibility of a future incorporation of part of the West Bank into the State of Israel upon negotiations of the permanent status agreement was also acknowledged by the US president:

> In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949, and all previous efforts to negotiate a two-state solution have reached the same conclusion. It is realistic to expect that any final status agreement will only be achieved on the basis of mutually agreed changes that reflect these realities.[233]

It should nevertheless be pointed out that while such letters may be politically hugely significant, 'they carry no legal weight, and can certainly not compromise Palestinian rights under international humanitarian law',[234] which are protected by Articles 7 and 8 of the Fourth Geneva Convention.

On 25 November 2009, the Israeli government announced a 10-month moratorium on settlement construction in the West Bank.[235] However, the UN Special Rapporteur noted a number of caveats, most notably the

[230] Al-Haq, 'Waiting for justice', 143.

[231] Letter from PM Ariel Sharon to US President George W. Bush (14 April 2004), www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Exchange+of+letters+Sharon-Bush+14-Apr-2004.htm (accessed 23 May 2011).

[232] General outline of the Disengagement Plan.

[233] Letter from President Bush to PM Sharon (14 April 2004), http://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040414-3.html (accessed 24 May 2011).

[234] UNGA, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967' (25 August 2008), A/63/326, para. 29.

[235] MFA, Statement by PM Netanyahu on the Cabinet decision to suspend new construction in Judea and Samaria (25 November 2009), www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2009/Statement+by+PM_Netanyahu_suspend_new_construction_Judea_Samaria_25-Nov-2009.htm (accessed 24 May 2011).

fact that the freeze did not apply to East Jerusalem, considered as an integral part of Israel, and allowed for the construction of housing units and other buildings that had started before the freeze.[236] Furthermore, the moratorium did not stop settlement construction altogether, but merely slowed the pace of expansion in some part of the West Bank, only for the settlement activity to resume, following the end of the freeze, on 26 September 2010.[237] Meanwhile, the construction of the Separation Wall in the West Bank is still progressing. As of July 2010, 434 km (i.e. 61.4 per cent) of the Barrier had been completed and 60 km (i.e. 8.4 per cent) was under construction.[238]

Conclusion

Israel's policy and practices of settlements and the construction of the Separation Wall in the West Bank clearly show that, while the prohibition of population transfers in situations of occupation is clearly established, implementation and enforcement of international humanitarian are most problematic. Notwithstanding Israel's controversial interpretation of Article 49(6), there seems to be a fundamental lack of will on the part of the international community to ensure respect for the provisions of the Geneva Conventions, in accordance with Common Article 1.[239] Despite an ICJ Advisory Opinion declaring both the settlements and the Separation Wall to be illegal, the international community has failed to act. The disengagement from Gaza resulted in a reinforcement of Israel's position in the West Bank, while a self-imposed moratorium on settlement activity consisted of a rather partial and limited freeze and was never properly implemented. Both measures have aroused suspicions that these measures were carried out, not as a result of Israel's newfound concern for international law, but as a way of diverting attention away from the permanent establishment of settlements in the West Bank and

[236] UNGA, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967' (30 August 2010), A/65/331, para. 12.

[237] UNHRC, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967' (10 January 2011) A/HRC/16/72, para. 14.

[238] OCHA, 'West Bank barrier route projections' (July 2010).

[239] Art. 1 Common to the four Geneva Conventions states that 'The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances.'

the ongoing construction of the Separation Wall, thereby consolidating Israel's hold on part of the Palestinian territory.

In spite of the evident unlawfulness of population transfers, there is, regarding the Middle East situation in particular, an overbearing ideological component that threatens to render any contrary legal argument devoid of force and meaningfulness.[240] In such cases, population transfers become deeply rooted in the conflict and international humanitarian law gradually loses its relevance.

[240] Henckaerts, 'Deportation and transfer of civilians', 518.