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ISRAEL AND THE FOURTH GENEVA CONVENTION: ON THE ICJ ADVISORY OPINION CONCERNING THE SEPARATION BARRIER[1]

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1. INTRODUCTION

Since 1977 Israel has pursued an open policy of settlement building in the Occupied Palestinian Territories. Although the Security Council determined that this action constituted a flagrant violation of the Fourth Geneva Convention,[3] Israel continued to settle its nationals and new Jewish immigrants in these territories.

The approval by the Israeli government on 26 February 1997 of a disputed plan to settle a colony in Djabal Abou Ghounaym, in the south of Jerusalem, led to a draft resolution being submitted to the Security Council, which was not adopted due to the repeated veto of the United States on 5 and 21 March 1997.

As a result, the question of the applicability of the Fourth Geneva Convention (hereinafter, GC IV) for the Protection of Civilians in Time of War in the Occupied Palestinian Territories was taken up by the tenth Emergency Special Session of the General Assembly[4] – based on resolution 377 of 3 November 1950, the so-called 'Uniting for Peace Resolution' – which, after the first meeting on 24 April 1997, adjourned and resumed its work many times. The General Assembly immediately declared it was convinced that the violations of international law, and more particularly the construction of settlements, by the Occupying Power, harmed the peace process in the Middle East and constituted a threat to international peace and security.[5] The General Assembly recommended that the Swiss government, as depository of GC IV, start constituting a group of governmental experts,[6] which would meet twice.[7]

Although this group did not study any particular situation or any specific regional case and contented itself with evoking general problems in terms of the applica-

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1. © D. Momtaz, 2006.

2. Professor of international law at the University of Teheran and a member of the International Law Commission.

3. SC Res. 465, 1 March 1980.

4. See P.-Y. Fux and M. Zambelli, 'Mise en oeuvre de la quatrième Convention de Genève dans les Territoires palestiniens occupés: historique d'un processus multilatéral (1997-2001)', 84 *IRRC* No. 847 (2002).

5. GA Res. A/ES-10/2, 25 April 1997.

6. GA Res. A/ES-10/4, 13 November 1997.

7. Meetings held 9-11 June 1998, and 27-29 October 1998.

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tion of GC IV, its work implicitly pointed out the obligations of Israel in the Occupied Palestinian Territories.[8]

The two conferences of the High Contracting Parties, summoned by Switzerland following the recommendation of the General Assembly[9] on 5 July 1999 and 5 December 2001, focussed specifically on the applicability of the Convention in these territories.

In the two declarations adopted at the outcome of the 2001 Conference, the participants asserted the applicability of this instrument to the Occupied Palestinian Territories, including East Jerusalem, and the need to fully respect the provisions of the Convention as regards these territories.[10]

The completion by Israel on 31 July 2003 of the first phase of the construction of the wall on the Occupied Palestinian Territories, and the inaction of the Security Council following the United States' veto of the draft resolution condemning it on 14 October of the same year, led the General Assembly to consider this new breach of GC IV by Israel.

The resolution of the General Assembly ordering Israel to put an end to this construction[11] remaining a dead letter, the General Assembly was driven on 8 December 2003 to request an Advisory Opinion from the International Court of Justice (hereinafter, the Court), asking 'what are the legal consequences arising from the construction of this wall considering the rules and principles of international law, including GC IV and relevant Security Council and General Assembly resolutions'.[12] In consideration of the conceptual divergences existing about the applicability of GC IV to the Occupied Palestinian Territories, the Court, in its Advisory Opinion of 9 July 2004, first studied this question before looking at the conformity with the Convention of the construction of the wall on these territories.

2. THE APPLICABILITY OF THE FOURTH GENEVA CONVENTION TO THE OCCUPIED PALESTINIAN TERRITORIES

The Court looked into the territorial and temporal applicability of GC IV.

2.1 Territorial applicability of the Convention

Although Israel ratified GC IV on 6 July 1951, it refuses to apply it *de jure* to the Occupied Palestinian Territories, considering that they cannot be qualified as occupied territories according to the definition given by GC IV. This thesis is based on a literal interpretation of Article 2(2) of the Convention. According to this article,

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8. M. Sassoli and A. Bouvier, *Un droit dans la guerre?*, Vol. 1 (Genève, CICR 2003) p. 1058.
9. GA Res. A/ES-10/3, 30 July 1997, and GA Res. A/ES-10/6, 24 February 1999.
10. Sassoli and Bouvier, *supra* n. 8, p. 1065.
11. GA Res. A/ES-10/13, 27 October 2003.
12. GA Res. A/ES-10/14, 8 December 2003.

GC IV will apply to 'all cases of partial or total occupation of the territory of a High Contracting Party'. According to Israel, the West Bank does not fulfil this condition as its annexation to Jordan on 24 April 1950 was not recognised by the community of states, except by Pakistan and the United Kingdom. The same argument applies to the Gaza Strip, which Egypt was satisfied with administering without annexing it to its territory until its occupation by Israel.[13]

According to the Court, GC IV applies to the Occupied Palestinian Territories without having to look at their status before their occupation by Israel.[14]

The Court rejected the literal interpretation that Israel gave of Article 2(2) of the Convention. The Court's reasoning is based on Article 31 of the Vienna Convention on the Law of Treaties (hereinafter, Vienna Convention), which provides for a general interpretation rule qualified by the Court as customary law. According to this rule: '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The Court also applied Article 32 of the Vienna Convention, which refers to 'complementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion', which it resorted to in the recent past and many times previously.

According to the Court, the preparatory works of the Convention reveal that its drafters were preoccupied with the protection of civilians living in an occupied territory independently of the status of this territory, as Article 47 of the Convention attests to. Although the Court did not indicate the reasons why it referred to this article of the Convention, such a reference is justified since this article deals with the intangibility of the rights of protected persons living in an occupied territory who 'shall not be deprived, in any case or in any manner whatsoever' of the benefits of the Convention. It is true that the examples which could possibly have the consequences described by this article involve cases where the Occupying Power tried to be released from its obligations after occupying a territory and do not concern the present case. However, the rule on the intangibility of the rights is absolute and does not allow for any exception.[15]

That is how the Court, basing its Opinion on general rules of interpretation of the law of treaties, concluded that Article 2(2) does not aim to restrict the application of the Convention as defined in paragraph 1 of this same article. Indeed, based on this article, GC IV is applicable in an occupied territory when two conditions are fulfilled: (1) the existence of an armed conflict, which is (2) between two contracting parties.[16] Contrary to what Israel pretends, Article 2(2) does aim to exclude territories that are not the sovereign territory of one of the contracting parties. This conclusion is in accordance with the notion of occupation as defined by Article 32

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13. Sassoli and Bouvier, *supra* n. 8, p. 1000.

14. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Rep.* (2004) pp. 136, para. 101 (hereinafter, Advisory Opinion).

15. *Commentaire de la IVeme convention de Geneve relative a la protection des personnes civiles en temps de guerre* (Genève, CICR 1956) p.294 (hereinafter, *Commentaire*).

16. Advisory Opinion, *supra* n. 14, para. 95.

of the Fourth Hague Convention of 1907 Respecting the Laws and Customs of War (hereinafter, Fourth Hague Convention). According to this article, a 'territory is considered occupied when it is actually placed under the authority of the hostile army'.

A reference to this article in the motivation of the Advisory Opinion and in support of the reasoning of the Court would have been welcome, even more so given that it had already held that Israel, although not a party to this Convention, is nonetheless bound by its provisions, which have acquired the status of customary law.[17] It is interesting to note that Article 1 of Additional Protocol I of the Geneva Conventions, which supplements the Geneva Conventions and to which, it is true, Israel is not a party precisely because this protocol applies to cases covered by Article 2, includes armed conflicts in which peoples are fighting against 'alien occupation'. This provision rejects the restrictive interpretation of Article 2(2) provided by Israel and accords with the Court's interpretation, which is consistent with the subsequent practice of the States Parties to the Convention.

The Court drew particular attention to the practice of the States Parties in the framework of the principal United Nations organs. The Security Council resolutions, whose adoption was spread out over a long period of time starting soon after the occupation of the Palestinian Territories by Israel, do not leave any doubt about the applicability of GC IV to the territories. Indeed, the Court referred to many resolutions delivered by this organ which order Israel to recognise the applicability *de jure* of this Convention to all the territories it occupied.[18] The General Assembly has, in many of its resolutions and again recently, taken a similar position.[19] This interpretation was chosen during the two conferences held by the States Parties to GC IV. The Court also referred to the declaration of the International Committee of the red cross and red Crescent (hereinafter, ICRC) at the Second Conference of the High Contracting Parties to the Convention, which gives the same interpretation of this instrument.[20] Although states are not bound by the ICRC's interpretation, they cannot totally ignore it. Indeed, this declaration, coming from an impartial institution with power concerning the application of humanitarian conventions, constitutes without doubt an element that states are meant to consider in good faith.[21]

Despite the consensus that has been reached in favour of the applicability of GC IV to the Occupied Palestinian Territories, Israel still refuses to change its unilateral decision by which it only applies the 'humanitarian provisions' of this Convention.[22] Israel considers that this instrument is not applicable since it has not

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17. Ibid., para. 89. For the position of Switzerland, see Sassoli and Bouvier, *supra* n. 8, p. 1071.

18. Advisory Opinion, *supra* n. 14, para. 99.

19. Ibid., para. 98.

20. Fux and Zambelli, *supra* n. 4, p. 683.

21. F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, 2nd edn. (Genève, CICR 2000) p. 1076.

22. Declaration of the Israel representative in front of the Security Council on 16 December 1987; and M. Happold, 'The Conference of High Contracting Parties to the Fourth Geneva Convention', 4 *YIHL* (2001) p. 393.

been incorporated into its national law.[23] This argument cannot be admitted since national law only constitutes a mere fact for international law and does not impede, as Article 3 of the International Law Commission's Articles on State Responsibility shows, the qualification of an international situation as illicit.

Fortunately, the recent jurisprudence of the Israeli Supreme Court (ruling as a High Court) seems to take a different path from the Israeli government in deciding on the applicability of GC IV to the operations of Israeli Defence Forces in the Occupied Palestinian Territories. The International Court of Justice itself referred to the judgement delivered by the Israeli Supreme Court on 30 May 2004, which ruled that: '[t]he military operations of the [Israeli Defence Forces] in Rafah, to the extent that they affect civilians, are governed by the Fourth Hague Convention.'[24] Can we hope for a reversal of opinion by the Israeli government in favour of the applicability *de jure* of GC IV to the Occupied Palestinian Territories?

2.2 Temporal applicability of the Convention

Before determining the legal consequences of the erection by Israel of a wall in the Occupied Palestinian Territories, the Court identified the relevant provisions of GC IV. The Court ruled that this instrument, like the Regulations annexed to the 1907 Fourth Hague Convention, distinguishes between the provisions applicable to the military operations leading to the occupation of a territory and those applicable during the entire occupation.[25]

Actually, in the case of the Regulations, this distinction is obvious. Indeed, as the Court pointed out, Section II of the Regulations deals with hostilities, whereas Section III concerns military authority in the occupied territories. This does not seem to be the case with GC IV for the mere reason that this instrument deals with the protection of civilians against the effects of war and does not deal with military operations. In other words, its principal object is the protection of a category of people against the arbitrary will of the enemy and not against the military operations themselves. Taking this into account, it is quite difficult to follow the distinction made by the Court in the interpretation of GC IV.

The Court's opinion is based on the distinction made in Article 6 of GC IV between the applicability of this instrument in the territory of the parties and the occupied territory. In the first case, according to this article, the applicability of the Convention will end with the cessation of the military operations, whereas, in the occupied territory it will end one year after the end of those same operations. Nevertheless, in this last case, Article 6(3) of the Convention specifies that the Occupying Power will be bound for all the occupation time by some provisions of the Convention if it exercises governmental functions in the relevant territory. The

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23. Summary of the Israeli opinion annexed to the report of the Secretary General, Un Doc. A/ES-10/248, 24 November 2003.

24. Advisory Opinion, *supra* n. 14, para. 100.

25. Ibid., paras.123-124.

provisions of the Convention which are no longer applicable in the conditions stated by this article are those which deal with military operations, whereas all the other provisions of the Convention continue to apply so long as the occupation continues.[26] Obviously, this distinction determines the juridical consequences of the general termination of the military operations in the territories depending on whether the state remains under sovereign control or falls under occupation. This distinction does not, however, deal with the general termination of hostilities which continue after the end of the military operations leading to the occupation of the enemy territory. Therefore, one cannot accept the interpretation the Court gave of Article 6 of GC IV. According to the Court: 'Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of GC IV referred to in Article 6, paragraph 3, remain applicable in that occupied territory.'[27]

As reported by the ICRC, the preparatory works of the 1949 Geneva Convention leading to the adoption of GC IV are not of such a nature as to confirm the legitimacy of the Court's interpretation of Article 6(3).[28] According to the ICRC, during the drafting of this article, the delegates had in mind the territories of Germany and Japan, which remained occupied by the victors of the Second World War long after the general termination of military operations in 1945. That is why it was considered wise to have GC IV continue to apply one year after the general termination of military operations. After that, the Occupying Power would only be bound by some of its provisions, and only if it continued to exercise governmental functions on the territory.

How can one interpret the Court's confusion, which has been qualified by some authors as a 'serious substantial error'?[29] Was the interpretation given by some authors of Article 6(3) the Court's justification in reaching such a conclusion? Should we consider that a prolonged military operation necessitates an adjustment of the occupation regime provided for in the Fourth Convention? All those questions remain unanswered. We can only regret that no judge considered them in their individual opinions or joint declarations to the Advisory Opinion in order to provide us with more clarification on the argumentation developed by the Court on this point.

One could reach a different conclusion than that of the Court and argue that all of the provisions of the Convention continue to apply in the Occupied Palestinian Territories. Indeed, one may wonder whether the armed resistance to the Israeli presence in the territories that some Palestinian groups continue to offer, above all since the second *Intifada*, is not similar to real military operations. Under these conditions, can one pretend that the 1967 military operations which led to the oc-

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26. *Commentaire, supra* n. 15, p. 70.
27. Advisory Opinion, *supra* n. 14, para. 125.
28. *Commentaire, supra* n. 15, pp. 69-70.
29. See, among others, A. Imseis, 'Critical reflections on the international law aspects of the ICJ Wall Advisory Opinion', 99 *AJIL* (2005) p. 106.

cupation of the West Bank ended? It is in reality a question of the qualification of facts taking place at this moment in the Occupied Palestinian Territories. Should we consider them as acts of war or isolated acts and sporadic violence? Although the Court seems to have opted for the second alternative, the question remains open. Be that as it may, the Court's restrictive interpretation of Article 6(3) of GC IV presents a major setback, reducing the extent of the protection this instrument is deemed to offer to the civilian population in the Occupied Territories, with the risks inherent in leaving the population in the arbitrary power of the occupant.

It was precisely to deal with such situations that the second experts meeting, which took place from 27 to 29 October 1998, initiated by Switzerland to analyse the general problems of application of GC IV, asked that it be respected 'integrally and with a non selective manner'.[30] This approach conforms with the Declaration adopted on 5 December 2001 by the High Contracting Parties to this Convention, which requires the 'application of all' of its provisions.[31] Likewise, the resolutions adopted by the Security Council requesting Israel to apply GC IV in the Occupied Palestinian Territories do not distinguish between its provisions. The references in some General Assembly resolutions to the individual responsibility of people committing serious breaches of this Convention[32] support this thesis.

In the framework of the aforesaid Declaration, the High Contracting Parties to GC IV asked Israel, the Occupying Power, to abstain from committing 'serious breaches', which cover the acts mentioned in Article 146 of GC IV. Yet Articles 146 and 147 are not part of the list included in Article 6(3) of the Convention and could not be considered to bind Israel, according to the Court in its Advisory Opinion.[33] Its restrictive interpretation has the disadvantage of destroying the dissuasive effect Articles 146 and 147 could have on potential inhuman behaviour of the occupying troops towards the inhabitants of the Occupied Territories.

3. OBLIGATIONS OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORIES UNDER THE FOURTH GENEVA CONVENTION

Of the Articles listed in Article 6(3) of GC IV which are, according to the Court, applicable in the Occupied Palestinian Territories, the relevance of only five of them was recognised by the Court.[34] In fact, only Article 49, which forbids the Occupying Power transferring its population to the territory it occupies, and Article 53, which forbids the destruction of civilian property, unless absolutely necessary, caught the attention of the Court.

30. Sassoli and Bouvier, *supra* n. 8, p. 1063.
31. Ibid., p. 1065.
32. GA Res. ES-10/3, 30 July 1997.
33. Imseis, *supra* n. 29, p. 106.
34. Advisory Opinion, *supra* n. 14, para 126.

3.1 Obligation not to transfer its population

According to Article 49(6) of GC IV: '[T]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' It has been argued that this provision only covers the transfer of the civilian population and does not encompass the voluntary transfer to the occupied territory of civilians having the nationality of the occupying state.[35] The Court expressly rejected this thesis: '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 organise or encourage transfers of parts of its own population into the occupied territory.'[36] The position taken by the Court is welcome since it takes into account the essential purpose of this provision, as previously noted by the ICRC, namely, to avoid the ethnic identity of the indigenous population being endangered by those transfers.[37] Therefore, the conditions of transfer do not matter.

In the case of Israel, the Court noted that this state has pursued a policy and developed practices consisting of establishing settlements of its population in the Occupied Palestinian Territories, in contravention of Article 49(6) of the Convention.[38] In support of this assertion, the Court referred to the position which the Security Council adopted in the framework of resolution 446 of 22 March 1979. According to the Council, the policy and practice followed by Israel in building settlements 'have no legal validity' and, as Occupying Power, it should 'abide scrupulously' by GC IV. The Court also referred to Security Council resolution 465 of 20 July 1980, which qualified those practices as 'a 'flagrant violation' of the Fourth Convention.[39] The importance of this resolution deserves to be underlined, because it marked the first time the United States condemned the policy and practices of Israel in settling its population and new migrants in the Occupied Palestinian Territories. The subsequent backtracking of president Carter, who pretended afterwards that the representative of the United States should have abstained during the vote as far as the resolution covered Jerusalem,[40] did not limit the effect of the resolution. Besides, the qualification of such acts as flagrant violations of GC IV is a precedent which could be considered as a prelude to their criminalisation. Included at the initiative of the Arab states, this provision obviously targeted the policy of settlements in the Occupied Palestinian Territories.[41]

According to the Court: 'There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing … to the departure of Palesti-

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35. G.R. Watson, 'The Wall decisions in legal and political context', 99 *AJIL* (2005) p. 13.
36. Advisory Opinion, *supra* n. 14, para. 120.
37. *Commentaire*, *supra* n. 15, p. 305.
38. Advisory Opinion, *supra* n. 14, para. 120.
39. Ibid.
40. P. Tavernier, 'Annee des Nations Unies', 26 *AFDI* (1980) p. 420.
41. UN Doc. PCNICC/1999/WGEC/DP 39, 3 December 1999.

nian populations from certain areas.'[42] Should we conclude that the Court established a link between the construction of the wall and the interdiction to transfer indigenous population into these same territories? It would be excessive to consider that Article 49(6) of GC IV covers both cases of transfer of population since the drafters of this disposition were looking to preserve the demographic composition of a whole occupied territory. One can wonder whether the construction of the wall in the Occupied Palestinian Territories will not lead many Palestinians to leave them for other countries. The restrictions it imposes are particularly onerous in Qalqiliya, which is entirely surrounded by the wall.

The Court did not foresee this eventuality, but if one could conclude that the construction of the wall will force a migration of a part of the Occupied Palestinian Territories' population, it would become clear that the modification of the demographic composition that would result from it would be incompatible with Israel's obligations under Article 49(6) of GC IV. It stands to reason that such a modification would be of a nature to negatively influence the Palestinian people's right of self-determination, a right which caught the Court's attention in a different respect. As a matter of fact, the Court worried about the consequences for the exercise of this right of the building of parts of the barrier, as 'the construction of the wall would be tantamount to *de facto* annexation' by Israel of the territories surrounded by the wall.[43]

Despite the commitment taken by Israel in the framework of the Israeli Palestinian Interim Agreement of 28 September 1995 to preserve the territorial unity and the integrity of the Gaza Strip and the West Bank, the number of settlements established in the Occupied Palestinian Territories has lately increased at an unprecedented rate.[44] Based on the Israeli Supreme Court's *Ayub* case of 15 March 1979, can one consider that, for Israel, as long as a belligerent situation continues, the creation of settlements in the Occupied Palestinian Territories addresses security needs? At that time, the Israeli Supreme Court judged that the requisitioning of land could have been justified for security reasons. Be that as it may, the Supreme Court refused to deliver a judgement on the legality of those settlements on the basis of Article 49(6). According to the Supreme Court, this provision does not form part of international customary law and should not be applied without being previously incorporated into Israel's national law.[45] Finally, the Court, in the *Yossef Muhammad Gosin* case of 30 May 2002, judged that the question of settlements should be resolved by political means.[46]

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42. Advisory Opinion, *supra* n. 14, para. 122.
43. Ibid., para. 121.
44. A. Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territory', 44 *Harvard ILJ* (Winter 2003) p. 105.
45. *Ayub* c. *ministère de la Défense*, Arrêt du 15 mars 1979. See Sassoli and Bouvier, *supra* n. 8, p. 1013.
46. See 5 *YIHL* (2002) pp. 538-539.

3.2 Obligation not to destroy civilian property

The requisitions and the destruction caused by the establishment of Jewish settlements cannot be compared to those caused by the wall. Israel justifies the construction of the wall on security grounds, claiming that it is necessary to ward off the risk of terrorist attacks targeting, in particular, the Jewish settlements in the Occupied Palestinian Territories.[47] The wall constructed by Israel, which, for the aforementioned reasons, this country prefers to refer to as the 'security fence', therefore aims to insure the security of the civilian population living in this territory. Of course, one cannot contest the right of Israel to protect the lives of its citizens in the Occupied Palestinian Territories even if, in conformity with Article 4 of GC IV, they cannot be considered as 'protected persons'. According to the Court, although Israel has the right, and indeed the duty, to respond in order to protect the lives of its citizens, the measures taken are bound nonetheless to remain in conformity with the applicable international law.[48] For the Court, the construction of a wall poses a number of problems in light of the relevant provisions of international law and human rights conventions.[49]

The Court dismissed out of hand the pertinence of Article 23(g) of the Regulations annexed to the Fourth Hague Convention, which forbids '[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'. The only argument invoked by the Court is that this disposition is part of Section II of this instrument, which deals with hostilities, and does not belong to Section III dealing with military authority in the occupied territories. Should we conclude that the Court once again supposed that since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago,[50] this provision does no longer apply? Additional information would have been welcome. We may wonder if Israel's recognition of the existence of active hostilities in this territory since September 2000[51] does not constitute a good basis for the application of Article 53 of GC IV,[52] whose provisions are almost identical to Article 23(g) of the Regulations annexed to the Fourth Hague Convention.

Indeed, Article 53 provides that, 'any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations'. The Court recognised that, even after the general termination of the military operations which result in the occupation of a territory, which is

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47. Written statement of the Israeli government of 29 January 2004, para. 0.2; and summary of the Israeli position annexed to the report of the Secretary-General, *supra* n. 23.

48. Advisory Opinion, *supra* n. 14, para. 141.

49. Ibid., para 123.

50. Ibid, para. 125.

51. Imseis, *supra* n. 29, p. 96.

52. Advisory Opinion, *supra* n. 14, para. 126.

according to the Court the case as far as the Occupied Palestinian Territories are concerned, military exigencies contemplated by these texts may be invoked. However, 'on the material before it', the Court was not convinced that the destruction carried out contrary to the prohibition in Article 53 of GC IV was rendered absolutely necessary 'by military operations'.[53] The Court observed, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of GC IV contains any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49(1) of the Convention, paragraph 2 of that article provides for an exception in those cases where 'the security of the population or imperative military reasons so demand'. This exception, however, does not apply to paragraph 6 of that article, which prohibits the Occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception 'where such destruction is rendered absolutely necessary by military operations' or by the requirements of national security or public order.[54]

4. CONCLUSION

The Court reached the conclusion that the construction of the wall and its associated regime are contrary to international law.[55] Should we consider that the construction of the wall by itself breaches international law, whatever its planned route? The plan is clear enough for us to give a positive answer to this question, all the more so since the Court, in the motivation of its Advisory Opinion, stated it was 'not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives'.[56] This position seems excessive, however, and it seems preferable to follow the opinions of Judge Buergenthal,[57] for whom it was not inconceivable that some segments of the wall being constructed on Palestinian territory meet that test and others do not, as well as those of Judge El Araby,[58] who conceived that building the wall, but not the destruction of property, could be justified by security measures.

In fact, some parts of the wall, more precisely those which follow the route of the 'green line' dividing Israel and the West Bank, do not seem to pose any difficulties. For the other segments, for which the construction involved destruction, it is worth wondering if they do not exceed the reasonable proportionality between

53. Ibid., para. 135.
54. Ibid., para. 137.
55. Ibid., para. 3.
56. Ibid., para. 137.
57. Ibid., Declaration of Judge Buergenthal, p. 240, para. 5.
58. Ibid., Separate opinion of Judge El Araby, p. 257, para. 3.2.

the military advantage and the damage caused.[59] It is true that in most of the cases the consequences resulting from the construction of the wall are disproportionate to the military advantages which it brings to Israel. However, one cannot consider that the wall in its totality breaches international law. We can only regret, like Judge Kooijmans does,[60] that the Court did not put the construction of the wall to the proportionality test before assessing its legality according to international humanitarian law, and contented itself with considering 'the material before it'.[61] Based on the same test, the Israeli Supreme Court in the *Beet Sourik* case of 30 June 2004, rendered a few days before the International Court of Justice delivered its Advisory Opinion on the wall, reached the conclusion that some segments of the wall should be reconsidered in order to cause the least damage to the population. This jurisprudence was followed by the Israeli Supreme Court in its judgement of 15 September 2005 on the legality of the construction of the wall at Alfei Manashe.[62]

It is unquestionable that the Advisory Opinion of the International Court of Justice on the legal consequences of the construction of a wall on the Occupied Palestinian Territories constitutes a main reference point when it comes to any determination of the legal regime of occupied territories. One can only regret, as Judge Higgins pointed out in her opinion,[63] that the motivation of the Court is not always detailed enough.

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59. *Commentaire*, *supra* n. 15, p. 325.
60. Advisory Opinion, Separate opinion of Judge Kooijmans, *supra* n. 14, p. 229, para. 34.
61. Ibid., para. 135; and Imseis, *supra* n. 29, p. 110.
62. *Mara'abe* v. *Prime Minister of Israel,* HCJ 7957/04 (Supreme Court of Israel, Judgement of 15 September 2005) *Takdin-Supreme* (2005) 3, p. 3333.
63. Advisory Opinion, Separate opinion of Judge Higgins, *supra* n. 14, p. 212, para. 23.