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## Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier

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# Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier

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## **Abstract**

On July 9, 2004, the International Court of Justice ("ICJ") handed down an Advisory Opinion concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In producing the Opinion, the Court traversed issues concerning its jurisdiction to deal with the request, the applicable law, the adherence by Israel to that law, the right of self-defense and the consequences of its findings of unlawfulness. It is well known that the long running issue of Israeli and Palestinian reconciliation is a politically heated one and the work of the ICJ has not been immune from the effects of this context. This Article asserts that the context overtook the law in the production of the Opinion and has thereby distorted the result. As a consequence, the ICJ has done significant damage to its credibility and to the aspects of international law traversed in the Opinion.

# CRITICAL ANALYSIS OF THE INTERNATIONAL COURT OF JUSTICE RULING ON ISRAEL'S SECURITY BARRIER

Michael J. Kelly\*

## I. DEVELOPMENT OR DETRACTION

On July 9, 2004, the International Court of Justice ("ICJ") handed down an Advisory Opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (the "*Advisory Opinion*" or the "*Opinion*").<sup>1</sup> The *Advisory Opinion* had been sought by the General Assembly.<sup>2</sup> In producing the *Opinion*, the Court traversed issues concerning its jurisdiction to deal with the request, the applicable law, the adherence by Israel to that law, the right of self-defense and the consequences of its findings of unlawfulness.<sup>3</sup> It is well known that the long running issue of Israeli and Palestinian reconciliation is a politically heated one and the work of the ICJ has not been immune from the effects of this context. This Article asserts that the context overtook the law in the production of the *Opinion* and has thereby distorted the result. As a consequence, the ICJ has done significant damage to its credibility and to the aspects of international law traversed in the *Opinion*.

This Article will not enter into an analysis of the Israeli/Palestinian problem, but will make objective comments on those aspects of the *Opinion* that are incorrect as a matter of law. In particular, it is vital that the deliberations of the Court in relation to the issues of the relationship between international hu-

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1. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 43 I.L.M. 1009 (July 9, 2004) [hereinafter *Advisory Opinion*].

2. See *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, U.N. GAOR, 10th Emergency Spec. Sess., U.N. Doc. A/ES-10/L.16 (Dec. 3, 2003).

3. See Rebecca Kahan, Note, *Building a Protective Wall Around Terrorists—How the International Court of Justice's Ruling in The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 FORDHAM INT'L L.J. 827, 831-33 (2005). See generally *Advisory Opinion*, 43 I.L.M. 1009.

manitarian law (“IHL”), international human rights law and the right of self-defense are addressed. The *Opinion* also gives rise to a broader question of the weight to be given to ICJ advisory opinions in defining and developing international law. It will be argued that this particular *Opinion* ought to be given no weight because it has not contributed to the law or the resolution of the underlying conflict but has instead detracted from its own reputation and the law.

Throughout this Article, there are references to the “Israeli security barrier” or “barrier.” As with every other aspect of the dispute between Israel and the Palestinian Authority, the issue of terminology is highly charged. On the one hand, the Israelis would prefer to refer to the structure as the “separation fence” or “fence,” while the Palestinians are keen to promote the term “wall.”<sup>4</sup> The ICJ ultimately decided to adopt the term used by the General Assembly. This was the first indication of an unfortunate tendency to prejudge this issue and the pitfalls of hearing only one side of the argument. The Court, as it indicates in its own reasoning, is not required to adhere to terminology or assertions of the General Assembly and is, in fact, obliged to come to its own position based on an objective legal analysis and the facts.<sup>5</sup> The correct position, as with much else in the troubled area, lies somewhere in the middle. While the term “fence” connotes something less intrusive and permanent, the term “wall” implies permanence and resonates with recent historical memory of the Berlin Wall. Of the 180 kilometers of the structure completed at the time of the *Opinion*, only 8.5 kilometers could be described as a concrete wall. The remainder is sensory fencing with supportive anti-vehicle ditches, patrol and trace roads and barbed wire.<sup>6</sup> Clearly then, it is not a wall, and in its totality, it can not be considered a mere fence; thus, the term “barrier” used by the U.N. Secretary-General seems the most appropriate.<sup>7</sup> Why then did the Court choose the term “wall”? We shall see that using this term was an attempt to bolster the clearly incorrect ruling that building the barrier amounts to an “annexation”

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4. *See id.* at 1029, ¶ 67.

5. *See id.* at 1028, ¶ 62.

6. *See id.* at 1033, ¶ 82.

7. *See* The Secretary-General, *Report of the Secretary General Prepared Pursuant to General Assembly Resolution ES-10/13*, ¶ 2, delivered to the General Assembly, U.N. Doc. A/ES-10/248 (Nov. 24, 2003).

of the parts of the occupied territories it encompasses because of its tendency to permanence as a *fait accompli*. This is one of the cumulative indicia of the lack of objectivity by the Court in this case.

## II. *JURISDICTION*

The idea that the ICJ be able to make advisory opinions as distinct from dealing with contentious cases is certainly something that appears on the surface to be a meritorious concept. However, an example that reflects the significant limitations on the utility of the exercise exists where the matter is in reality highly contentious, is part of a much broader dispute, and where one of the parties would have critically important information to bring to the table, which, if missing, would render the exercise nugatory. All these factors were present in the subject case, which led to some disquiet among a number of the judges and is reflected in the qualified wording of the *Opinion*, itself a relevant factor when considering the weight to be given to the case. It is submitted that the cumulative effect of all these factors should have led the Court to decline to exercise its jurisdiction.

The deficiencies of the Court's process are placed in stark relief by the proceedings of the Israeli Supreme Court in the matter of *Beit Sourik Village Council v. Government of Israel*.<sup>8</sup> In this case, the Israeli Supreme Court had before it the detailed submissions of the petitioners relating to specific locations and factors, as well as the complete arguments of not only the responsible security authorities but also useful *amicus curiae* submissions, including from the private Council for Peace and Security. Add to this the superior expertise of the Israeli Court on the law of armed conflict and the ability of the Court to also deal with Israeli administrative law provisions, and one sees the stark contrast in value and efficacy between the two decisions. What makes the ICJ decision even more puzzling is the fact that the Israeli Court ruling was handed down before the ICJ's, thus allowing the ICJ to not only see that the matter was in hand in the municipal jurisdiction, but also enabling them to have regard to the arguably more correct legal analysis undertaken in that

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8. HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr., 43 I.L.M. 1099 (2004).

case.<sup>9</sup>

The more specific difficulties faced by the ICJ were reflected in the separate opinions. One of the problems facing the Court was the proper interpretation of the *Western Sahara Advisory Opinion*<sup>10</sup> (“*Western Sahara*”) in regard to the question of the exercise of the Court’s jurisdiction. One of the jurisdictional conditions to be fulfilled required that the Court be satisfied that:

The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court’s opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.<sup>11</sup>

The Court here seemed to be indicating that the first situation described in the above extract would not be suitable for an advisory opinion but that the latter was.<sup>12</sup> According to *Western Sahara*, the *Advisory Opinion* would very clearly fall within the first category, and so there was a real issue that jurisdiction should not be exercised or that, at the least, this point demanded elucidation. As Judge Higgins stated in her separate opinion:

The Court has not dealt with this point at all in that part of its Opinion on propriety. Indeed, it is strikingly silent on the matter, avoiding mention of the lines cited above and any response as to their application to the present case. To that extent, this Opinion by its very silence essentially revises, rather than applies, the existing case law.<sup>13</sup>

This is clearly an unsatisfactory approach to such critical issues and it is submitted that *Western Sahara* is authority for the fact that the court erred in determining to proceed in this case. Judge Owada was also deeply troubled by the lack of fairness that

9. Compare the *Advisory Opinion*’s decision date of July 9, 2004 with *Beit Sourik*’s earlier decision date of June 30, 2004.

10. *Western Sahara Advisory Opinion*, 1975 I.C.J. 12 (Oct. 16) [hereinafter *Western Sahara*].

11. *Id.* at 26-27, ¶ 39.

12. See *id.*; see also Kahan, *supra* note 3, at 856-57.

13. See *Advisory Opinion*, 43 I.L.M. 1009, 1060, 1 ¶ 13 (separate opinion of Judge Higgins).

arose as a result of the *Advisory Opinion*'s transformation into a contentious case.<sup>14</sup> He asserted that:

[T]he critical criterion for judicial propriety in the final analysis should lie in the Court seeing to it that giving a reply in the form of an advisory opinion on the subject-matter of the request should not be tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute that currently undoubtedly exists between Israel and Palestine.<sup>15</sup>

He added that in relation to the requirements of the judicial character of the Court:

One of such *requirements* for the Court as a judicial body is the maintenance of fairness in its administration of justice in the advisory procedure in the midst of divergent positions and interests among the interested parties. To put it differently, it must be underlined that the Court's discretion in advisory matters is not limited to the question of whether to comply with a request. It also embraces questions of advisory procedure. This requirement acquires a special importance in the present case, as we accept the undeniable fact as developed above that the present case does relate to an underlying concrete legal controversy or a dispute.<sup>16</sup>

The paucity of material from the Israeli side, in what then amounted to a contentious case, takes on special importance. This disturbed a number of the judges. Judge Higgins commented that the information provided by Israel "has only been very partial."<sup>17</sup> Judge Buergenthal disagreed with the Court on the jurisdiction issue on this ground alone stating:

[T]he Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case. In reaching this conclusion, I am guided by what the Court said in *Western Sahara*, where it emphasized that the critical question in determining whether or not to exercise its discretion in acting on an advisory opinion request is "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of

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14. See *id.* at 1094, ¶ 13 (separate opinion of Judge Owada)

15. *Id.*

16. *Id.* at 1094-95, ¶ 16 (emphasis added).

17. *Id.* at 1064, ¶ 40 (separate opinion of Judge Higgins).

which is necessary for it to give an opinion in conditions compatible with its judicial character." In my view, the absence in this case of the requisite information and evidence vitiates the Court's findings on the merits.<sup>18</sup>

He noted that the Court never really considered the nature or impact of the attacks conducted by terrorists operating across the Green Line, and that the dossier provided by the United Nations ("U.N.") to the Court, "on which the Court to a large extent bases its findings barely touches on that subject."<sup>19</sup>

More generally, other comments were passed in the separate opinions that further illustrated the disquiet caused by the lack of objectivity of the Court. Thus, Judge Higgins was not satisfied with the narrative background set out by the Court, which she found "neither balanced nor satisfactory."<sup>20</sup> In such a complex matter with implications for the overall settlement of a long standing crisis, she asserted that, "[w]hat a court faced with this quandary must do is to provide a balanced opinion, made so by recalling the obligations incumbent on all concerned. I regret that I do not think this has been achieved in the present case."<sup>21</sup> Judge Kooijmans was also troubled by the historical narrative, calling it "two-dimensional."<sup>22</sup> He highlighted as an example that it neglected to record the period during which Jordan had control of the West Bank between the conclusion of the General Armistice Agreement in 1949 and the Six Day War in 1967, asserting sovereignty over that territory and only relinquishing this claim in 1988.<sup>23</sup> Continuing this theme, Judge Kooijmans went on to say that the *Opinion*:

[C]ould have reflected in a more satisfactory way the interests at stake for all those living in the region. The rather oblique references to terrorist acts which can be found at several places in the Opinion, are in my view not sufficient for this purpose. An advisory opinion is brought to the attention of a political organ of the United Nations and is destined to have an effect on a political process. It should therefore throughout its reasoning and up till the operative part reflect the le-

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18. *Id.* at 1078, ¶ 1 (declaration of Judge Buergenthal) (citations omitted).

19. *Id.* at ¶ 3.

20. *Id.* at 1060, ¶ 16 (separate opinion of Judge Higgins).

21. *Id.* at 1060, ¶ 17-18.

22. *Id.* at 1067, ¶ 7 (separate opinion of Judge Kooijmans).

23. *See id.* at ¶ 8.



gitimate interests and responsibilities of *all* those involved and not merely refer to them in a concluding paragraph.<sup>24</sup>

Judge Buergenthal scathingly attacked the Court's failure "to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security" and accused the Court of barely addressing "the summaries of Israel's position on this subject that are attached to the Secretary-General's report and which contradict or cast doubt on the material the Court claims to rely on."<sup>25</sup> Judge Owada, after noting his concern with the Court's approach to the case, emphasized that the Court was obliged to "be extremely careful not only in ensuring the objective fairness in the result, but in seeing to it that the Court is seen to maintain fairness throughout the proceedings, whatever the final conclusion that we come to may be in the end."<sup>26</sup> It seems that the Court was not able to achieve objectivity in this case, and the case serves as a good example of heated politics generating bad law, as we shall see from an analysis of the findings on the merits of the case.

### III. APPLICABLE LAW

#### A. *Human Rights v. Law of Armed Conflict?*

Perhaps in no area of the case was the paucity of legal analysis as apparent as that concerning the disentanglement of the relative application of international human rights law and IHL. If we accept the exercise of the Court's jurisdiction to deliver the *Opinion*, a positive outcome of this could have been the first authoritative and detailed consideration of how these bodies of law interact in the context of a case study affording the opportunity for, and indeed demanding, such a consideration. This failure to achieve such an outcome was compounded by the approach taken by the Court to deal with the barrier in relation to those parts on occupied territory, as if it were one consolidated issue, rather than the specifics of the unlawful aspects. In relation to the various allegations of breaches of IHL, Judge Higgins was to comment in this respect that:

It might have been expected that an advisory opinion would

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24. *Id.* at 1068, ¶ 13 (emphasis added).

25. *Id.* at 1080, ¶ 7 (declaration of Judge Buergenthal).

26. *Id.* at 1097, ¶ 25 (separate opinion of Judge Owada).

have contained a detailed analysis, by reference to the texts, the voluminous academic literature and the facts at the Court's disposal, as to *which* of these propositions is correct . . . . Further, the structure of the Opinion, in which humanitarian law and human rights law are not dealt with separately, makes it in my view extremely difficult to see what exactly has been decided by the Court.<sup>27</sup>

The key point to make here is that, in the context of real operations, it is extremely important that there be as much clarity and simplicity as possible if we are to expect military commanders and their staff to adhere strictly to legal standards. The findings of the Court in this case have achieved exactly the opposite effect and have added support to the arguments of those who would say that international law in the context of real life is too ambiguous, impractical, and incapable of strict compliance. That is why it is imperative that the *Opinion* be deconstructed in this respect in particular.

With respect to the application of IHL to the portions of the barrier on occupied territory, it was undisputed that the Hague Regulations of 1907 applied, notwithstanding that Israel is not a party to them. This was based on the solid jurisprudence asserting that the Regulations are declaratory of customary law, accepted as such by Israel and all the participants in the proceedings.<sup>28</sup> The Court also dealt with the Fourth Geneva Convention of 1949 ("GCIV"), which was more technically problematic but, in practice, not really an issue, as Israel accepts the application of the relevant provisions of the GCIV as customary law and purports to apply and operate in accordance with those standards.<sup>29</sup> The Israeli Supreme Court has also regularly applied these provisions to rulings on issues before it concerning the administration of the occupied territories.<sup>30</sup> What the Court failed to consider were various other provisions relating to the law of occupation set out in the Hague Cultural Property Convention and its Protocols, and, in particular, the question of the customary law status of a number of occupation provisions in Additional Protocol I to the Geneva Conventions ("Additional Protocol I").<sup>31</sup> This was a

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27. *Id.* at 1061-62, ¶¶ 23-24 (separate opinion of Judge Higgins).

28. *See id.* at 1035, ¶ 89.

29. *See id.* at ¶ 93.

30. *See id.* at 1037, ¶ 100.

31. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and

major flaw in the work of the Court, thereby missing an opportunity to make a useful contribution to this area of the law.

In relation to the human rights instruments, the Court's proposition was that the International Covenant on Civil and Political Rights ("ICCPR"),<sup>32</sup> the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),<sup>33</sup> and the United Nations Convention on the Rights of the Child ("UNCROC")<sup>34</sup> could continue to apply in armed conflicts and occupation situations, and in fact applied to the circumstances of the case. They then cited some provisions of these instruments, which they claimed had been breached.<sup>35</sup> In analyzing this position, it is first necessary to determine whether human rights law and IHL can have concurrent application. If the answer to this question is "yes" or "perhaps," then it must be determined exactly what the nature of the relationship is. There has certainly been a trend in recent years by those bodies involved in the promotion and enforcement of human rights law to assert a broader application. This trend suffers, however, from the same lack of clarity and precision as the subject *Opinion*.

The views of commentators are varied as to the application of international human rights instruments to the administration of an occupying power. Eyal Benvenisti, in supporting the application of these conventions to occupations where the occupying power has ratified them, asserts that they clearly provide for the exigencies related to security emergencies or war conditions, and therefore it was within the contemplation of the drafters that they would apply in conflict situations.<sup>36</sup> He claims that, if and when the level of the security threat to the occupying power subsides, the requirement to adhere to fundamental human

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Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1950, arts. 3(6), 4, 14, 15, 33, 34, 63, 64(3), 69, 70, 72-79, 1125 U.N.T.S. 3 [hereinafter Protocol Additional I].

32. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) [hereinafter ICCPR].

33. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, (entered into force Jan. 3, 1976) [hereinafter ICESCR].

34. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCROC].

35. See *Advisory Opinion*, 43 I.L.M. 1009, 1038-40, ¶¶ 102-13.

36. See Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 ISR. L. REV. 24, 27-30 (1992). In particular, Benvenisti refers to the case of Israel and the territories it occupies in relation to the international human rights instruments Israel has ratified. See *id.*

rights as indicated in the Conventions will become more pronounced. At the same time, the option to derogate from those rights will also be available within the conditions that attach to such derogations. The support cited for this position includes the pronouncements on the issue by the U.N. General Assembly and the Secretary-General. Benvenisti states that the above conventions complement the law of occupation as they deal with specific issues in greater detail, in particular in relation to political rights.<sup>37</sup>

Another argument put forward by Benvenisti, based on the finding by the European Commission of Human Rights in *Cyprus v. Turkey*,<sup>38</sup> is that when a state becomes a signatory to the Conventions, the application of them will extend to any territory under the "jurisdiction" of the State.<sup>39</sup> In the case of occupied territory, Benvenisti points to the fact that the occupant is in the position of temporary sovereign, or at least that the rights of administration adhering to the occupant mean that the territory is effectively in the occupant's jurisdiction.<sup>40</sup> Benvenisti did not adopt as robust a position in his general work on occupation in 1993 where he stated that:

If the political process is lawfully halted for the duration of

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37. *See id.*

38. *Cyprus v. Turkey*, App. No. 25781/94, 2001-IV Eur. Ct. H.R. 1; *see also* 62 INTERNATIONAL LAW REPORTS 230-32 (1978). The Commission determined that the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which Turkey was a High Contracting Party, applied to the Turkish military occupation of northern Cyprus. *See id.* It found that the term "within their jurisdiction" contained in Article 1 of the Convention referred to all persons under the High Contracting Party's, "actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad." *Id.* at 230. This decision is limited by the fact that Turkey did not seek to argue that a military occupation was in place and that the laws of occupation applied and overrode the European Convention. It instead based its case on the fact that a new State had been created (the Turkish Federated State of Cyprus) and therefore it claimed no occupation existed and no jurisdiction by Turkey was being exercised in the territory of this entity. *See id.* at 132-40. There was therefore no evaluation by the court of the status of the human rights provisions of the European Convention in relation to the laws of occupation. *See id.* In fact, the violations complained of by the Republic of Cyprus against Turkey would also have constituted violations of the laws of occupation and the situation would therefore have been adequately covered by the occupation provisions. *See id.* 102-30. The decision is also limited to situations involving High Contracting Parties of the European Convention. *See id.*

39. *See* Benvenisti, *supra* note 36, at 27-30.

40. *See id.* at 33-35; *see also* Interview with Eyal Benvenisti, Professor, Tel Aviv Univ., in Jerusalem, Isr. (Dec. 4, 1994) (on file with author).

the occupation, the suspension of political rights seems to be a sensible consequence . . . . [P]olitical rights are often among the first to be suspended by occupants, and this propensity has not been criticized as unlawful in principle. In the interplay between the conflicting interests, the law of occupation concedes that certain civil and political rights will from time to time be subjected to other concerns. Ultimately, as in other cases, the occupant is required to balance its interests against those of the occupied community. Thus, as hostilities subside, and security interests can permit, the occupant could be expected to restore civil and political rights. Under such circumstances, the human rights documents may well serve as *guidance* for re-establishing civil and political rights in the occupied territory.<sup>41</sup>

This statement seems much closer to the mark as it acknowledges the primacy of occupation law and the relevance of the levels of security threat to the degree of rights exercisable by the occupant. Benvenisti also suggests human rights instruments can be used for guidance in less exigent circumstances, suggesting that the law does not apply *de jure*.<sup>42</sup> This suggestion is echoed by other commentators who are uncertain as to the status of human rights instruments in this context.

Jaime Oraa claims that insofar as some aspects of human rights law have attained the status of general international law, particularly in relation to the elements of derogation and proportionality, these aspects will be applicable to an occupation situation.<sup>43</sup> John Quigley posits that while the law of occupation applies in conflict situations, human rights law applies in both peace and conflict. In support of the universality of human rights law, Quigley refers to the statement by the U.N. Secretary-General:

The Universal Declaration of Human Rights does not refer in any of its provisions to a specific distinction between times of peace and times of armed conflict. It sets forth the rights and freedoms which it proclaims as belonging to "everyone," to "all," and formulates prohibitions by the phrase that "no one" shall be subjected to acts of which the Declaration disap-

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41. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 189 (1993) (emphasis added).

42. See *id.*

43. See JAMES ORAA, *HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW* 256-57 (1992).

proves. The Declaration proclaims that the "universal and effective recognition and observance" of the rights and freedoms shall be secured.<sup>44</sup>

Quigley then goes on to refer to the conflict provision of the ICCPR and compares this to the provisions of the Hague Regulations and Fourth Geneva Convention, which are expressed to be limited, setting no equivalent "universal standard."<sup>45</sup> In addition, he claims that "most scholars" disagree with the positions of Jean Pictet, Henri Meyrowitz, and Esther Cohen that human rights law is not applicable either in wartime or to the law of occupation.<sup>46</sup> The scholars referred to by Quigley assert that general international human rights law and IHL are complementary and operate side by side in conflict situations.<sup>47</sup> Quigley also relies on the *Cyprus* case and General Assembly pronouncements on the subject stating that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict," in particular referring to the applicability of the Universal Declaration of Human Rights ("UDHR") to military occupation.<sup>48</sup> Quigley also relies upon commentators, such as Georg Schwarzenberger, who asserted that occupants are not obliged to respect local laws where they offend a standard of civilization.<sup>49</sup> This standard of civilization, according to Quigley, refers to fundamental and universally accepted human rights as they

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44. John Quigley, *The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does an Occupied Population Have a Right to Freedom of Assembly and Expression?*, 12 B.C. INT'L & COMP. L. REV. 1, 3 (1989) [hereinafter Quigley, *Belligerent Occupation*].

45. *Id.* at 4-5.

46. *See id.* at 5-9.

47. *See id.* at 4-9.

48. *Id.* at 9-11.

49. *See* 2 GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT* 195 (1968). Schwarzenberger asserts in this respect that, even before the Fourth Geneva Convention, there was an exception to the stipulation to respect local laws:

It is concerned with the position of a civilized Occupying Power in the territory of an enemy who has relapsed into a state of barbarism. In so exceptional a situation, compliance with the standard of civilization may demand action, rather than the exercise of restraint. It may, for instance, make unavoidable the exercise of the occupant's legislative powers for the double purpose of destroying the legal foundations of such a barbarous system and restoring a minimum of civilized life in the occupied territory.

*Id.*

exist at the time of the occupation.<sup>50</sup> Quigley points out the extensive rights of censorship available to the occupant to suppress all hostile speech and assembly and contrasts this with the provisions of human rights instruments, drawing the conclusion that the former have given way to a norm calling for protection of freedom of assembly and speech. Quigley asserts that this norm has achieved the status of customary law and is binding beyond those signatory to the treaties. He also extends this argument to the formation of trade unions under military occupation.<sup>51</sup>

Dealing with the derogation provisions of the human rights instruments, Quigley claims these are only available in relation to the home territory of the occupant, notwithstanding his assertion that the obligations of these laws apply in the occupied territory.<sup>52</sup> His reasoning in this respect is that:

It is questionable whether the "public emergency" exception can apply in military occupation. It would be difficult to demonstrate imminent threat since the territory of occupation is separate from (though possibly contiguous to) the territory of the occupant. If there is serious disorder in occupied territory, that may pose a threat to the occupier's continued control, but not necessarily to the occupying state itself.<sup>53</sup>

It is difficult to see how, on the one hand, the occupied territory and the population can be considered to be under the jurisdiction of the occupying power and the instruments applicable, and yet, on the other hand, the derogation provisions would not apply. Presumably, if the provisions can be binding on the occupying power in relation to foreign territory, it is no further leap to say that a threat to the life of the occupied nation constitutes a public emergency in relation to which the occupying power may act in accordance with those provisions (under Article 4 of the ICCPR for example). Clearly, there are general human rights customary principles that will apply to occupation situations, but the primary reference point in determining the rights of the population and the occupying power will be the specific provisions of the extant conventions governing occupa-

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50. See Quigley, *Belligerent Occupation*, *supra* note 44, at 6-13.

51. See John Quigley, *The Right to Form Trade Unions Under Military Occupation*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 295-312 (Emma Playfair ed., 1992).

52. See Quigley, *Belligerent Occupation*, *supra* note 44, at 6-13.

53. *Id.* at 25.

tion and State practice. To the extent that these are ambiguous or do not cover a particular issue, general human rights principles may be turned to.<sup>54</sup>

No State has renounced the rights available to an occupant; the relevant documents to consult in this regard are the various military manuals, not statements that acknowledge standards applicable when a State is dealing with its own citizens. As an example, the British and U.S. military manuals specifically assert the full range of rights available to an occupant, including censorship.<sup>55</sup> To state that an occupant is not permitted to stop broadcasts inciting violence against it is patently contrary to all forms of treaty provision, customary law, and State practice relating to occupation.<sup>56</sup>

James Demotses also regards human rights law as applicable but does not go as far as Quigley, allowing for the availability of the specified derogations, nor does he claim that the Hague Regulations and Fourth Convention are redundant in any respect.<sup>57</sup> In fact, Demotses's assertion is merely that although human rights law was designed for peacetime, it is also *useful* during occupations. It is not apparent how *utility* translates into an obligation under international law. Demotses makes the well supported point, however, that the UDHR is now customary international law, but he does not explain how it interacts with the specific conventions regulating occupation. Demotses does not assert that the ICCPR is customary law—although some of its provisions are accepted to be—but does maintain that signato-

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54. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

55. See, e.g., U.S. DEP'T OF THE ARMY, Field Manual 27-10, THE LAW OF LAND WARFARE ¶ 377 (1956) [hereinafter U.S. ARMY, FIELD MANUAL].

56. See GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 139 (1957):

Most writers as well as military manuals permit severe restrictions on the freedom of the press, suspension or closing of newspapers, and even imprisonment of journalists on the grounds that such control will tend to lessen materially the spirit of opposition in the native population and will aid in the suppression of news items of military importance. Dispatches dealing with any aspect of the war or of the occupation, and particularly stories hostile in tone to the occupying authorities, are subject to strict censorship.

*Id.*

57. See J.A. Demotses, *Israeli Action in Response to the Intifada: Necessary Security Measures of Violations of International Law?*, 16 SUFFOLK TRANSNAT'L L. REV. 92, 97-100 (1992).



ries must apply the law to territory under their military control.<sup>58</sup>

Adding to the weight of argument regarding the UDHR is Steve Fireman. His position is that:

The provisions of the Geneva Convention . . . were written to interact with the Universal Declaration of Human Rights so as to ensure human rights in times of peace and war. While the Fourth Geneva Convention is more suited for temporary belligerent occupations, the Universal Declaration of Human Rights is more readily suited for prolonged occupations. Consequently, the two sets of rules or standards are often applied in unison so as to guarantee a comprehensive set of standards to protect human rights in both war and peace.<sup>59</sup>

This position is more tenable given that the two documents, the UDHR and the GCIV, were initiated in the post-war years of 1948 and 1949, respectively.<sup>60</sup> The post-war context was certainly significant and the UDHR appears to have been written with conflict situations and the relationship between forces and civilians in contemplation. Notwithstanding this, the Fourth Convention, having been written subsequent to the UDHR, was clearly intended to be the primary regime governing occupations, and to preserve the operation of the Hague Regulations, so that the UDHR would only be applicable to the extent that it does not conflict with specific provisions of the Hague Regulations and the Fourth Convention.<sup>61</sup> During the drafting of the Fourth Convention, a proposal by the Mexican delegation to include wording that modifications to the law of the occupied territory could only occur in accordance with the UDHR was in fact rejected.<sup>62</sup> It is important to note, however, the clear thread in many of the arguments for the application of human rights law that this becomes a more distinct proposition in the context of prolonged occupations.

Other opinions and evidence suggest that human rights in-

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58. *See id.*

59. Steve Fireman, *The Impossible Balance: The Goals of Human Rights and Security in the Israeli Administered Territories*, 20 CAP. U. L. REV. 421, 426-27 (1991).

60. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) [hereinafter UDHR]; *see also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287 [hereinafter GCIV].

61. *See* Vienna Convention, *supra* note 54, art. 30.

62. *See* Final Record of the Diplomatic Conference of Geneva of 1949, Comm. III, 18th mtg. at 671, vol. II, sec. A (May 18, 1949).

struments are definitely not applicable de jure. Jean Pictet rejected the application of human rights law categorically on the grounds that humanitarian law was designed for the specific circumstances of occupation and conflict, while human rights law was essentially applicable only in peacetime, having derogation clauses for conflicts. He also highlighted that human rights law governed relations between the State and its own nationals, while IHL governed relations between a State and foreign nationals. IHL is universal and mandatory, much of human rights law is not, while the systems of supervision and sanctions are also different. Pictet's conclusion is that "the two systems are complementary, and indeed they compliment one another admirably, but they must remain distinct."<sup>63</sup> They are "complimentary" in the sense that the human rights regime will regulate the relationship between the State and its citizens, even during armed conflicts, while IHL will operate side by side to ensure that the situations of civilians in the hands of foreign military forces and the manner in which a conflict is fought between or among the parties are appropriately regulated.<sup>64</sup>

Henri Meyrowitz, in specifically addressing the occupation situation, emphasizes the contrast with the domestic public law relation presupposed by human rights, whereas in the occupation situation, there is no political or societal association.<sup>65</sup> John Quigley takes Meyrowitz's distinction of the two situations and summarizes it as being a result of the presupposition of hostility in the law of occupation based in an inherent conflict of interests. He asserts that human rights law is also founded on a similar conflict of interests between a government and its population. He explains this conflict by presenting the following formula: "The government desires to maintain itself in power, while the population desires to avoid repression. There would be no need for human rights law if hostility between the government and the population did not exist."<sup>66</sup> This is clearly wrong. Human rights law merely establishes a standard by which to

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63. Quigley, *Belligerent Occupation*, *supra* note 44, at 5-6 (quoting JEAN PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* (1975)).

64. *See id.*

65. *See* Henri Meyrowitz, *Le Droit de la Guerre et les Droits de l'Homme*, 88 *REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER* 1059, 1098-99 (1972).

66. Quigley, *Belligerent Occupation*, *supra* note 44, at 7.

judge the performance of a government in relation to the rights of the citizen. If one aspect of these rights is infringed, then a government may be held to scrutiny for this, but there is no presupposition of hostility or conflict of interests between the government and the whole population. The law of occupation also does not presuppose hostility. It presupposes only that the maintenance of order is dependent on a recognition of the authority of an occupying power, that there are basic human needs that must be filled, and that it is necessary to provide a framework for the regulation of the temporary relationship between the occupying power and the population. The order it envisages is primarily an obligation on the occupying power as something of benefit to the population. The point to Meyrowitz's comments is the very lack of a political and sovereign relationship between an occupant and the people, which is the fundamental premise of human rights law.<sup>67</sup>

Adam Roberts tends toward a personal belief in the application of at least some aspects of human rights law but concedes that the situation as a matter of law is ambiguous and he is not convinced of the utility of pursuing the debate.<sup>68</sup> He highlights a number of flaws and inadequacies in the application of human rights law to occupation situations: (a) there is uncertainty as to the legal status of some of the human rights instruments; (b) fewer States are party to them; (c) the human rights instruments have derogation provisions based on "public emergencies," and an occupant will be inclined to view the occupation as a public emergency, especially where there is continuing conflict and internal disturbances; (d) the conventional law governing occupants is more extensive, more detailed, and relevant than human rights instruments and their supervisory machinery may be more appropriate; and (e) on specific issues, there may be conflict between the two bodies of law as in relation to the guarantees of freedom of movement and speech in the human rights instruments.<sup>69</sup> He then states that there are aspects of human rights law that would be *highly desirable* to apply to occupations and that it would probably assume prominence in the interim

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67. See *id.* at 6-7.

68. See Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 51, at 25, 53.

69. See *id.* at 56-57.

period following an agreement to terminate the occupation before the territory has a legitimate sovereignty established.<sup>70</sup>

The specific issues Roberts feels human rights provisions address, that the law of occupation does not, are discrimination in employment, education, and the import of educational materials. These issues are, however, adequately addressed in Articles 27 (non-discrimination), 50 (education of children), 58 (import of religious books and articles), and 142 (educational materials for internees) of the Fourth Convention,<sup>71</sup> and Articles 69 and 70 (dealing with relief without adverse distinction) of Protocol I,<sup>72</sup> given the usual circumstances of the occupying power and the nature of the relationship with the population. In most occupation situations, nothing more could realistically be expected of an occupant than the current provisions, which are designed specifically to deal with those circumstances. To insist that more is required is only likely to encourage a disinclination by States to accept the legal status of an occupant and the application of international law regimes together.<sup>73</sup>

In fact, much of the argument on this issue has been politically distorted, centering on the Israeli occupied territories, and must be weighed carefully in this light. Mazen Qudus, for example, reflects upon the difficulty in separating this argument from the political overlay. He is nevertheless forced to acknowledge the lack of certainty in the position of those proposing the application of human rights law.<sup>74</sup> Marc Bernstein also highlights the

70. See *id.* at 53-57; see also Adam Roberts, *The Applicability of Human Rights Law During Military Occupations*, 13 REV. OF INT'L STUD. 39, 47 (1987) [hereinafter Roberts, *Human Rights Law*]; Adam Roberts, *What Is a Military Operation?*, 55 BRIT. Y.B. OF INT'L LAW 250, 287 (1985) [hereinafter Roberts, *Military Operation*]. This is in fact proving to be the case in the Israeli/Palestinian settlement agreements. For example, the Protocol Concerning Legal Matters states: "Both sides shall take all necessary measures to ensure that the treatment of the individuals transferred under this article complies with the applicable legal arrangements in Israel and in the Territory and with internationally-accepted norms of human rights regarding criminal investigations." Israel-Palestinian Interim Agreement on the West Bank and Gaza Strip, Annex IV – Protocol Concerning Legal Matters, art. II(7)(h)(1), Sept. 28, 1995, PLO-Isr., 36 I.L.M. 551, 637. The provisions of the remainder of this and the other protocols, particularly relating to the safeguards and processes for dealing with persons accused of offenses, reflects the influence of human rights instruments.

71. See GCIV, *supra* note 60, arts. 27, 50, 58, 142.

72. See Protocol Additional I, *supra* note 31, arts. 69, 70.

73. Benvenisti documents well the trend in this reluctance, particularly since the 1970s. See Benvenisti, *supra* note 36, at 27-30.

74. See Mazen Qudus, *The Application of International Law in the Occupied Territories as*

division of opinion and cannot commit to the application of this law, notwithstanding that he believes the law does not pose a problem for Israel in terms of the legality of Israel's actions, even if it did apply.<sup>75</sup> Richard Falk and Burns Weston, who take a particularly strident position in allegations of breaches of international law against Israel concerning the occupied territories, are only able to state that human rights law is "increasingly authoritative" in such circumstances without being able to assert its *de jure* application or explain what is meant by "increasingly authoritative" as a category of international law.<sup>76</sup>

Yoram Dinstein is of the view that human rights law only applies between a State and its citizens and not to occupied territories.<sup>77</sup> In an article in which he sets out the distinction between human rights law and IHL in the context of their application, Dinstein states that the nature of the two relationships is entirely different, IHL requiring a special legal mechanism, and that the codifications of this law in the Hague Regulations, Fourth Convention and Protocol I cover the field.<sup>78</sup> The Israeli Supreme Court has also specifically rejected the application of human rights instruments to occupied territories as irrelevant and as applying only between States and their citizens.

It is highly doubtful that the arguments for the intrusion of these laws into the body of law governing occupations would find favor at this stage with the majority of countries. It would be far more realistic to encourage compliance with the law as it stands, which guarantees all the protections and imposes all the obligations that occupations can viably sustain. As Adam Roberts has pointed out, the application of human rights law to oc-

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*Reflected in the Judgments of the High Court of Justice in Israel*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* *supra* note 51, at 87, 122-23 (Michael Jackson trans.).

75. See Marc E. Bernstein, *Freedom of Speech in the Israeli Occupied Territories: The Search for a Standard*, 21 N.Y.U. J. INT'L L. & POL. 527, 533-37 (1989).

76. Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES*, *supra* note 51, at 125, 148.

77. Interview with Yoram Dinstein, Vice President, Israel United Nations Association, in Tel Aviv Univ., Isr. (Dec. 12, 1994) (on file with author).

78. See Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in *HUMAN RIGHTS IN INTERNATIONAL LAW* 345-46, 349, 350-52, 355 (Theodor Meron ed., 1984); see also Michael Curtis, *International Law and the Territories*, 32 HARV. INT'L L.J. 457, 476 (1991) (applying *de jure* the law of occupation to his analysis and not human rights instruments).

cupations would have no real practical value given the circumstances they normally occur in and the derogation provisions of the human rights instruments.<sup>79</sup>

This is not to say that human rights law should be disregarded. As a set of guidelines and objectives, they will be highly relevant to non-belligerent occupations and pacific occupations in particular. The pacific occupations of Cambodia and Bosnia heavily featured these human rights objectives and seem to indicate a trend in this regard. Particularly relevant in the collapsed State scenario is the UDHR. This reflects the requirements of the historic elements of non-belligerent occupation—that the occupant promote the democratic process and work towards the restoration of popular sovereignty at the earliest possible moment. This imperative is suggested by Article 21 of the UDHR.<sup>80</sup> The fundamental principle, however, is that the specific provisions of the law of occupation will override any contradictory provision of the UDHR.

Other possible avenues of the application of human rights law would be: (a) through those provisions that had been incorporated into domestic law prior to the commencement of the occupation, which the occupying power would then be obliged to respect, unless it were prevented from doing so for security reasons or had the right to circumvent as provided by the provisions of occupation law, and (b) where the forces of the occupant had incorporated human rights provisions as regulating the activities of its force in any circumstances, including occupations. This last case was the circumstance applying in relation to the Canadian contingent in Somalia where a charge was brought against an individual soldier for violations of the Torture Convention, which had been incorporated into the Canadian Criminal Code under Section 269.1.<sup>81</sup> This Convention was also specifically referred to by the prosecution at the trial of the individual in relation to the matter of sentencing. In addition, the provisions of the human rights instruments could provide the guidelines for determining which local laws were contrary to the international “standards of civilization” permitting the occupying power to alter or ignore them. They could also serve as a

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79. See Roberts, *supra* note 68, at 56-57.

80. See UDHR, *supra* note 62, art. 21.

81. See Canada Criminal Code, § 269.1, R.S. 1985, c. 10 (3d Supp.), s. 2.

reference for the introduction of the occupying power's own regulations seeking the improvement of the conditions of the population, particularly in longer term or humanitarian occupations.

A more recent comment on this issue was the comment passed by the European Court of Human Rights in the *Bankovic* case in relation to the application of the European Convention on Human Rights ("ECHR").<sup>82</sup> The Court rejected the extraterritoriality of the ECHR obligations in respect of an aerial bombing campaign, but left open the question of its extraterritorial effect in relation to military occupation and the exercise of effective control over foreign territory—a situation which the Court was not called to rule upon in the *Bankovic* case. The European Court may, therefore, be inclined to rule in favor of the application of that Convention in military occupation situations in the future. Further reinforcement of the broader application of human rights instruments is contained in recent pronouncements of the Human Rights Committee, which was established pursuant to the ICCPR.<sup>83</sup> This, however, seems to be contrary to, or at least qualified by, the decision of the ICJ in the *Nuclear*

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82. See generally *Bankovic and Others v. Belgium and Sixteen Other Contracting States*, 2001-XII Eur. Ct. H.R. 333. The *Bankovic* case was an application made in October 1999 by a Serbian couple, Mr. and Mrs. Bankovic, who had lost their daughter during NATO's bombing of the Serbian Radio-Television in April 1999, and another four Yugoslav nationals, to the European Court of Human Rights. The claim was against 17 European State members of NATO. The essence of the claim was that the bombing had violated the European Convention on Human Rights. See *id.*

83. See Human Rights Comm., U.N. Covenant on Civil and Political Rights [CCPR], *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶¶ 10-11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004). The Covenant applies to:

[T]hose [territories] within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

*Id.* at ¶ 10. Paragraph 11 adds:

As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

*Id.* at ¶ 11 (citations omitted). As we shall see it is simply not accurate to state that these respective bodies of law are complimentary and not mutually exclusive.

*Weapons Case*, which found that where IHL applied de jure as the *lex specialis*, it would take precedence over conventional human rights law, such as the right to life.<sup>84</sup> While the court in that case accepted that the ICCPR would continue to apply in armed conflicts, it did not state whether this meant only within the territory of a State Party or also to occupation situations.<sup>85</sup> Clearly the ICCPR foreshadows and provides for continuing application *within* the territory of a State Party during time of “public emergency,”<sup>86</sup> but it is clear in its terms that it cannot apply de jure to an occupation. This is indicated by the fact that occupations are not included in the expanded situations of application for the right of self-determination listed in Article 1(3),<sup>87</sup> while Article 2 otherwise confines application of the ICCPR to individuals “*within its territory* and subject to its jurisdiction.”<sup>88</sup> The ICCPR

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84. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 239-40, ¶¶ 24-25 (July 8) [hereinafter *Nuclear Weapons Case*].

85. See generally *id.* In terms of the relative legal merits of the General Comments and the ICJ opinion it should be noted that General Comments of the Human Rights Committee have no legal standing and are only for the purpose of assisting interpretation and application of ICCPR provisions. They are mentioned under Article 40 (4) of the ICCPR but are not given the function of binding interpretations or directions. See ICCPR, *supra* note 33, art. 40(4). The rulings of the ICJ are binding between or among Parties to the particular case if they have agreed to be so bound under Article 36 of the ICJ Statute but are not binding on any other State, nor are they binding on the Court itself in any other matters. See Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, 3 Bevans 1179 [hereinafter ICJ Statute].

86. See ICCPR, *supra* note 33, art. 4:

(In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.)

*Id.*

87. See *id.* art. 1(3) (“The States Parties to the present Covenant, *including those having responsibility for the administration of Non-Self-Governing and Trust Territories*, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”) (emphasis added).

88. *Id.* art. 2(1):

(“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

*Id.*



was drafted in 1966, many years after the GCIV of 1949, so that occupations and the ICCPR relationship with the GCIV could readily have been addressed had it been the intention of the participants to supplement or override the GCIV.<sup>89</sup> It was clearly the intention of the participants in the GCIV process that additional human rights instruments and standards over and above what was already laid out in that ICCPR were inappropriate. For such an expanded interpretation to be truly effective, it would need to be endorsed by a meeting of States Parties to the ICCPR.

The problem is that general statements on the mutual application of IHL and human rights law are unhelpful. The issue becomes what this means in practice. The occupation provisions of the GCIV constitute an “exigency” human rights convention in themselves and would appear to cover the field on all relevant aspects of an occupation situation with respect to “human rights.” In some respects, it is in direct contradiction to the ICCPR, yet, wherever it is specific on such matters, it must certainly take precedence over human rights conventions as the *lex specialis* for military occupations. This principle of *lex specialis* (*derogat lex generali*) referred to by the ICJ in the *Nuclear Weapons Case* is an established principle of international law that has its roots in the writings of Grotius, who, in commenting on the rule resolving conflicting international law documents, stated: “Among those treaties which . . . are equal the preference is given to such as are more particular, and approach nearer to the point in question. For where particulars are stated, the case is clearer, and requires fewer exceptions than general rules do.”<sup>90</sup>

The rule has had wide application and acceptance by commentators, arbitration panels, and courts.<sup>91</sup> What the principle

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89. See, for example, the way this is dealt with in the relational provisions used in Articles 1 and 2 of Additional Protocol I of 1977. See Protocol Additional I, *supra* note 31, arts. 1-2.

90. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 193 (A.C. Campbell trans., M. Walter Dunne 1901) (1670). Grotius cites the example given by Puffendorf to illustrate his point, “[o]ne law forbids us to appear in public with arms on holidays: [sic] another law commands us to turn out under arms and repair to our posts, as soon as we hear the sound of the alarm bell. The alarm is rung on a holiday. In such case we must obey the latter of the two laws, which creates an exception to the former.” *Id.*

91. See, e.g., Panel Report, *Indonesia – Certain Measures Affecting the Automotive Industry*, WT/DS54R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted July 23, 1998); see also Report of the Panel, *EEC – Restrictions on Imports of Dessert Apples – Complaint by Chile*, ¶ 12.28, L/6491-36S/93 (June 22, 1989), GATT B.I.S.D. (36th Supp.) at 93, ¶ 12.1 (1990); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 96, 120 (2d ed.

of *lex specialis* requires, in effect, is that where there are two bodies of law that cover a general subject but one of these addresses a circumstance or matter in specific terms, or one body is general and one specific, then the specific provisions control. Regarding the case in question, this could apply in one of two ways. The provisions of IHL that expressly govern occupation situations thereby preclude all other bodies of law that do not specifically address occupations or alternately delineate their relationship to the existing specific IHL provisions. A second manner of application would be to reject such a global preclusion and analyze each human rights law provision to determine whether its subject matter is either addressed by, or in fundamental conflict with, a particular IHL provision applicable to occupations, and thereby subordinate. It is submitted that the former is the correct position, but the latter case will also be considered for completeness.

In practical terms, it is hard to see which aspects of the ICCPR would apply in a situation where the occupation provisions of the GCIV also applied. The ICCPR is clearly designed to regulate the relationship between a citizen and the sovereign State,<sup>92</sup> including an individual's political rights, which is inappropriate in an occupation situation.<sup>93</sup> The truth is that the ICCPR, as a matter of law and the likely override of its provisions in a military occupation, can add nothing to the human rights protections of the GCIV, and effort would be better directed in ensuring compliance with the GCIV rather than engaging in extended debate on this point.<sup>94</sup> Certainly, the ICCPR was not referred to, relied upon, or considered applicable by the Coalition in Iraq following the invasion of 2003, who referred solely to the law of occupation instruments as the *lex specialis*. This in itself is evidence of State practice by Parties to the ICCPR as far as inter-

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1984); Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 40, ¶ 86 (May 24); *Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission to the General Assembly*, art. 55, U.N. GAOR Supp. (No. 10) at 58, U.N. Doc. A/56/10, ch. IV.E.1 (2001), available at <http://www.un.org/law/ilc/sessions/53/53sess.htm> (last visited Nov. 13, 2005); Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), 117 I.L.R. 148 (Int'l Trib. L. of the Sea 1999).

92. See ICCPR, *supra* note 32, art. 2(1).

93. See PICTET, *supra* note 62, 128-37.

94. See Roberts, *Human Rights Law*, *supra* note 70, at 41, 45-46.

pretation is concerned.<sup>95</sup>

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95. See Press Release, U.S. Mission to the U.N. in Geneva, General Comments of the United States on Basic Principles and Guideline on the Right to a Remedy for Victims of Violations of International Human Rights and Humanitarian Law (Aug. 15, 2003), *available at* <http://www.usmission.ch> (last visited Sept. 25, 2005) (demonstrating a clear statement of the U.S. position, delivered by Gilda Brancato, Attorney-Adviser International from the Office of the Legal Adviser for Human Rights and Refugees in the U.S. Department of State, Washington, D.C.):

Second, the United States Government reiterates its firm belief, expressed at earlier stages of review and discussion, that the Principles should not address International Humanitarian Law. By attempting to address both human rights and [IHL], the Principles create conflict in a well-developed area of law conceptually distinct from international human rights law. It is true that many of the principles of humane treatment found in the law of armed conflict find similar expression in human rights law. The well-renowned scholar Jean Pictet, in a treatise on IHL . . . stated that:

"Indeed, the law of conflicts and human rights have the same origin: they stem from the need to protect the individual against those who would crush him." Nevertheless, the two systems are quite distinct. Professor Theodor Meron, currently the President of the International Criminal Tribunal for the Former Yugoslavia in The Hague, has written:

"Not surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law." Theodore Meron, *The Humanization of Humanitarian Law*, 94 A.J.I.L. 239, 240 (2002).

Further as Jean Pictet similarly observed, "Some writers on human rights thought I was trying to merge human rights and the law of armed conflicts. It would have been absurd to do so . . . What is important is to recognize that the two fields are interrelated and, conversely, that they are distinct and should remain so. . . . [T]he two legal systems are fundamentally different, for humanitarian law is valid only in the case of an armed conflict while human rights are essentially applicable in peacetime and contain derogation clauses in case of conflict. Moreover, human rights governs relations between the State and its own nationals, the law of war those between the State and enemy nationals."

"There are also profound differences in the degree of maturity of the instruments and in the procedures for their implementation. The Geneva Conventions are universal and of a mandatory nature. This is certainly not the case with human rights instruments. The systems of supervision and sanctions are also different. Thus the two systems are complementary, and indeed they complement one another admirably, but they must remain distinct, if only for the sake of expediency." J. Pictet, *Humanitarian Law and the Protection of War Victims* pages 14-15 (1975).

As a further example of the distinction between the two bodies of law, through international conventions (notably the Geneva Conventions of 1949) and customary international law, IHL already recognizes various remedies for

The Court in the subject opinion had regard to the decision on the *Nuclear Weapons Case* but seriously misapplied the findings. The Court described how certain States had argued that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.”<sup>96</sup> The Court then asserted that this argument was rejected as the decision went on to indicate that the ICCPR could continue in operation in conflicts, which is clearly the case within the territory of a Party to the Covenant.<sup>97</sup> The Court quoted the key paragraph on this point:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.<sup>98</sup>

In its citation, the Court left off the important final sentence, which states:

Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed

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transgressions, particularly in the context of international armed conflict and regarding state responsibility. Indeed IHL imposes binding legal obligations on States with respect to criminal sanctions, the duty to search for offenders of certain violations, and compensation, which was recognized as an obligation as early as the Fourth Hague Convention of 1907. We are concerned that these non-binding Principles being developed in this forum would be confusing when placed alongside binding international obligations that States Parties to IHL conventions have already undertaken for international armed conflict. . . .

. . . Accordingly, to avoid creating conflict and ambiguity in an already well-developed area of law, we again recommend that the Principles address human rights law, but not IHL.

*Id.*

96. See *Nuclear Weapons Case*, 1996 I.C.J. 226, 239, ¶ 24 (July 8).

97. See *id.*

98. *Id.* at 240, ¶ 25.

conflict and not deduced from the terms of the Covenant itself.<sup>99</sup>

Somehow the Court has taken the *Nuclear Weapons Case* as authority for the proposition that the ICCPR will apply to occupation situations and that it must be applied *in addition* to the relevant IHL. There is certainly nothing in the decision to support this, and the circumstance of occupations was not referred to by the Court or in any of the submissions. Even if it were accepted that the *Nuclear Weapons Case* decision intended to extend the ICCPR to cover occupations, the case is primarily authority for the requirement to disregard the provisions of the ICCPR where there is a *lex specialis* covering the issue. The Court, having found in the subject case that the Hague Regulations and the GCIV applied, was therefore obliged to resolve those aspects with the human rights instruments, an obligation it did not address.

#### B. Annexation & Self-Determination

If we accept the finding of the Court that the human rights instruments they cite apply to occupied territory, the question then becomes whether their evaluation of the application of the provisions of those instruments is correct. We must first deal with the overarching decision that the barrier was a breach of the right of the Palestinian people to self-determination. The Court does not cite its assertion of the right of self-determination, but it is clearly referring to Article 1 of both the ICCPR and the ICESCR. The Court claims that the parts of the barrier that do not adhere to the so-called “Green Line” nominally dividing Israeli territory from the occupied territories, amount to a de facto annexation of those areas.<sup>100</sup> This, of all the findings, is the most blatantly political and devoid of legal substance. The Court noted the frequent and unequivocal Israeli statements to the effect that the sole purpose of the barrier was to combat the current security threat, and that it was only a temporary measure. This includes the statement to the Security Council of 14 October 2003 that the fence does not annex territories to the State of Israel and that it would be dismantled as part of any

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99. *Id.*

100. See *Advisory Opinion*, 143 I.L.M. 1009, 1041, ¶ 115 (July 9, 2004).

political settlement.<sup>101</sup>

This was followed by Israel's statement to the General Assembly on December 8, 2003 that "[a]s 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."<sup>102</sup> Apart from these clearly expressed positions, Israel has made no effort to extend the operation of Israeli law to these areas or made any other legal or political move to change the boundaries of current Israeli territory in relation to the path of the barrier. There is no concept of "de facto annexation" in international law. Either there has been an attempt to politically and legally annex territory, or there has not. The only relevant considerations in making a legal finding on this point are the official statements of Israel and the objective facts as to whether political and legal steps have been taken to incorporate the territory.

This position and the assertion that the barrier, therefore, violates the right of self-determination caused great concern to Judges Higgins, Kooijmans, and Buergenthal. Judge Higgins, for example, described the Court's statement that the barrier severely impedes the right of self-determination and is therefore a breach of Israel's obligations as a "non sequitur."<sup>103</sup> She stated that:

[I]t seems to me quite detached from reality for the Court to find that it is the wall that presents a "serious impediment" to the exercise of this right. The real impediment is the apparent inability and/or unwillingness of both Israel and Palestine to move in parallel to secure the necessary conditions—that is, at one and the same time, for Israel to withdraw from Arab occupied territory and for Palestine to provide the conditions to allow Israel to feel secure in so doing. The simple point is underscored by the fact that if the wall had never been built, the Palestinians would still not yet have exercised their right to self-determination. It seems to me both unrealistic and unbalanced for the Court to find that the wall (rather than "the larger problem," which is beyond the ques-

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101. *See id.* at 1041, ¶ 116.

102. U.N. GAOR, 10th Emergency Spec. Sess., 23d mtg. at 6, U.N. Doc. A/ES-10/PV.23 (Dec. 8, 2003).

103. *See Advisory Opinion, supra* note 1, at 1062, ¶ 28 (separate opinion of Judge Higgins).

tion put to the Court for an opinion) is a serious obstacle to self-determination. Nor is this finding any more persuasive when looked at from a territorial perspective. . . . "Peoples" necessarily exercise their right to self-determination within their own territory. Whatever may be the detail of any finally negotiated boundary, there can be no doubt, as is said in paragraph 78 of the Opinion, that Israel is in occupation of Palestinian territory. That territory is no more, or less, under occupation because a wall has been built that runs through it.<sup>104</sup>

Judge Kooijmans reflected the same reasoning noting that the campaign of terror was as much an "impediment" to achieving Palestinian self-determination as the barrier.<sup>105</sup> He felt that the Court should have left issues of self-determination to the political process, as this is embedded in a much wider context than the construction of the barrier and has to be resolved in that wider context. He stated that, "[i]n my view the Court could not have concluded that Israel had committed a breach of its obligation to respect the Palestinians' right to self-determination without further legal analysis."<sup>106</sup> Judge Buergenthal was adamant that this issue could not be evaluated in isolation from the question of the right of self-defense, which will be looked at more closely below.<sup>107</sup>

### C. *Specific Provisions of ICCPR, ICESCR & UNCROC*

As was noted above, it is difficult to ascertain the precise legal conclusions of the Court in relation to the specific provisions of the human rights instruments it found applicable to the case. Reference was made to Articles 12 and 17 of the ICCPR,<sup>108</sup> Articles 4, 6, 7, 10, 11, 12, 13 and 14 of the ICESCR<sup>109</sup> and Articles 16, 24, 27 and 28 of the UNCROC.<sup>110</sup> These provisions will therefore be examined to determine which are rendered nugatory by the *lex specialis* of the Hague Regulations and the GCIV. The first point to make about the general approach of the Court

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104. *Id.* at 1062-63, ¶¶ 30-31.

105. *See id.* at 1067, ¶ 6 (separate opinion of Judge Kooijmans).

106. *Id.* at 1071-72, ¶ 31.

107. *See id.* at 1079, ¶ 4 (declaration of Judge Buergenthal).

108. *See id.* at 1045, ¶ 128.

109. *See id.* at 1049, ¶ 136.

110. *See id.* at 1046, ¶ 131.

to the issue of the application of the ICCPR is one of unfairness and legal error in reference to the relevance of the derogation provisions of Article 4. The Court notes that Israel has formally derogated from Article 9 of the ICCPR while it remains in the state of emergency created by the long-running terrorist campaign.<sup>111</sup> The Court also notes that Israel does not accept the application of the ICCPR to the occupied territories.<sup>112</sup> This position not only supports the fact that no attempt at annexation has been made, but particularly reflects the fact that Israel relies on the Hague and the GCIV provisions for the primacy of security measures, which would qualify the rights contained in the human rights instruments. Nevertheless, the Court chose to extend Israel's derogation from Article 9 to the territories, thus adopting an annexationist approach and acting in the place of the Israeli Government. The Court further concluded that—there being no other derogations—the rest of the ICCPR applied to the occupied territories.<sup>113</sup> One major issue that arises from this is the question of how the ICESCR and UNCROC are affected by derogations under Article 4, as there are no derogation provisions in either of those instruments. The fact that such provisions are absent is itself indicative of the fact that they were not intended to apply to occupation situations or in times of armed conflict, apart from the specific UNCROC provisions on the issue of child soldiers. The Court did not address this point, which stands as another fundamental flaw in the *Opinion*. The Court dishonestly approaches the derogation issue as if the Israeli Government has made a formal decision not to seek further derogations of the ICCPR in relation to the occupied territories, whereas Israel clearly relies on the security provisions in the IHL instruments to regulate the relevant rights. The Court then fails to analyze the relationship between these security provisions and the human rights instruments or to take into account the measures promulgated by Israel under the security authorities of the IHL instruments.

The position of the Court in relation to the issue of derogations is at the heart of the incompatibility and illogicality of asserting the ICCPR's application to occupation situations. The

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111. *See id.* at 1045, ¶ 127.

112. *See id.*

113. *See id.*



necessary conclusion from the Court's finding is that any State that is a Party to the ICCPR, which finds itself in an occupation situation, would be obliged to make a proclamation as to which aspects of the instrument were to be derogated from during the occupation. This is totally contradicted by the fact that the Occupying Power will always rely on the specific heads of security authority contained in the IHL instruments to create security provisions and operate in accordance with the limitations of the instruments in this respect. Certainly in not one instance of a military occupation has there been any such derogation proclamations by any State Party to the ICCPR so that the Court's position is completely contradicted by State practice. Given that the decision was not handed down until July 2004, it is curious that the Court chose not to consider the contemporaneous Iraq experience to inform themselves in this respect. The *Opinion* also does not take note of and address the official comments of one of the Occupying Powers specifically on this point.<sup>114</sup> This itself amounted to a failure of the Court to adhere to Article 38 of its own Statute.<sup>115</sup> This position also flies in the face of the specific legal obligations contained in the Hague Regulations (Article 43)<sup>116</sup> and the GCIV (Article 64)<sup>117</sup> that the Occupying Power must respect the laws in force in the country and that the penal laws are generally to remain in force. It has been established by authoritative commentators in this respect that it would be a breach of the Occupying Power's authority to apply its own law to the occupied territory.<sup>118</sup> This means that asserting the appli-

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114. See generally U.S. ARMY, FIELD MANUAL, *supra* note 55.

115. See ICJ Statute, *supra* 85, art. 38(1):

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of law.

*Id.*

116. See Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 35 Stat. 2277, art. 43 [hereinafter Hague Regulations].

117. See GCIV, *supra* note 60, art. 64.

118. See, e.g., VON GLAHN, *supra* note 56, at 94 ("It is also commonly accepted as fact that the occupant cannot apply his own domestic laws to the occupied territory until

cation of the domestic ICCPR regime of an Occupying Power in occupied territory would be unlawful.

Moving on to the specific provisions, the Court refers to ICCPR Article 17, which states that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”<sup>119</sup> Nowhere in the *Opinion*, however, does the Court analyze this provision or say how it has been violated or how it would apply. The only comment regarding Article 17 is the statement that it contains no qualifying clause. The Court ignores that this provision may be derogated from under Article 4, thus indicating that in security emergencies, equivalent to an occupation situation, this right may be subject to limitation. The various security provisions and basic humanitarian safeguards in the Hague Regulations and the GCIV, in fact, clearly render this provision nugatory. There are basic heads of authority for security action in these instruments that will be relevant to all the discussion that follows.

Article 43 of the Hague Regulations authorizes the Occupying Power to take all measures in its power to restore and ensure public order, while respecting, unless absolutely prevented, the laws in force in the country.<sup>120</sup> Under Article 52, the Occupying Power may requisition private property for the needs of the army of occupation as long as it is duly paid for and/or returned.<sup>121</sup> The GCIV makes provision in Article 78 for the holding of security internees and may keep certain of such persons incommunicado under Article 5.<sup>122</sup> In accordance with Article 28, the presence of protected persons may not be used to render points or areas immune from military operations.<sup>123</sup> Article 49 permits the Occupying Power to undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.<sup>124</sup> Article 53 allows the destruction of real or personal property belonging individually or collectively

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proper title has been secured to the area in question, either following *debellatio* of the legitimate sovereign or through the provisions of a treaty of peace”).

119. ICCPR, *supra* note 31, art. 17.

120. See Hague Regulations, *supra* note 116, art. 43.

121. See *id.* art. 52.

122. See GCIV, *supra* note 59, arts. 5, 78.

123. See *id.* art. 28.

124. See *id.* art. 49.

to private persons, to the State, to other public authorities, or to social or cooperative organizations, where such destruction is rendered absolutely necessary by military operations.<sup>125</sup> Article 64 provides for the ability to repeal or suspend the penal laws of the occupied territory by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the Convention.<sup>126</sup> The Occupying Power may also subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

The Israeli authorities have put in place a wide range of provisions and administrative arrangements pursuant to these authorities, none of which were considered by the Court for their relevance or lawfulness. Examples include the administrative mechanisms by which routing decisions are made, the requirement for Israeli forces to adhere to Israeli administrative law provisions in making decisions, and the provision for affected Palestinians to petition the Israeli Courts. The Israeli Supreme Court decision in *Beit Sourik*, referred to above,<sup>127</sup> is a good illustration of the type of analyses the Court should have applied to the *Opinion* in this respect.

In relation to the human rights safeguards contained in the Hague Regulations and the GCIV that further render Article 17 nugatory, Article 46 of the Hague Regulations, in particular, states that, “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.”<sup>128</sup> Adding to this, Article 27 of the GCIV sets out that:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their

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125. *See id.* art. 58.

126. *See id.* art. 64.

127. *See generally* HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr., 43 I.L.M. 1099 (2004).

128. Hague Regulations, *supra* note 116, art. 12. The meaning of the prohibition on confiscation is as opposed to lawful requisition and denotes the permanent acquisition of property without compensation. *See id.*

religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

*However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.*<sup>129</sup>

Beyond any doubt, therefore, there is no aspect of Article 17 that would be applicable in an occupation situation.

Similar considerations apply to the Court's reference to the ICCPR Article 12(1) that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."<sup>130</sup> In this instance, there is at least some guidance as to the Court's view of the relationship of this provision to the facts through the Court's reference to the fact that the barrier "and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory."<sup>131</sup> Clearly, the security provisions set out above and the specific regime of regulation established by the Israelis render this provision inapplicable. The Court should have assessed the Israeli action in accordance with the test of proportionality as the key relevant legal consideration to applicable *lex specialis*. The analysis of the Israeli Supreme Court in this respect is instructive and should have been referred to by, and guided, the Court.<sup>132</sup> Judge Kooijmans, in his opinion, also found the failure to apply the proportionality test a deficiency in the *Opinion*.<sup>133</sup>

In relation to the ICESCR, the Court first cited an alleged

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129. GCIV, *supra* note 60, art. 27 (emphasis added).

130. ICCPR, *supra* note 32, art. 12.

131. *Advisory Opinion*, *supra* note 1, at 1048, ¶ 134.

132. See *Beit Sourik*, 43 I.L.M. 1099, 1113-16 ¶¶ 36-44.

133. See *Advisory Opinion*, 43 I.L.M. 1009, 1072, ¶ 34 (separate opinion of Judge Kooijmans).

failure to comply with Article 4, requiring that the implementation of the restrictions on the Palestinian's economic, social, and cultural rights must be "solely for the purpose of promoting the general welfare in a democratic society."<sup>134</sup> This is an absurd proposition in light of the security provisions set out above. Clearly, any such requirement is thoroughly overridden by the provisions of the Hague Regulations and the GCIV, and no occupying power would ever consider itself bound by this requirement with respect to taking necessary security measures. Once again, the general economic, social, and cultural welfare of the population is specifically addressed in provisions of the IHL instruments. In addition to the provisions set out above, these include Articles 47 through 51 and 53 through 56 of the Hague Regulations<sup>135</sup> and the bulk of the provisions in Parts II and III, and Sections I, II and III of the GCIV.<sup>136</sup> With regard to the Court's reference to the right to work provisions in Articles 6 and 7 of the ICESCR,<sup>137</sup> it should be noted that the security provisions in Articles 51 and 52 of the GCIV<sup>138</sup> cover this aspect in tandem with the general requirement to restore, and ensure, as far as possible, public life under Article 43 of the Hague Regulations.<sup>139</sup>

The Court cites in general terms various overlaying provisions of the ICESCR and UNCROC relating to protection for families and children contained in Articles 10, 13 and 14 of the former<sup>140</sup> and Articles 16, 24, 27 and 28 of the latter.<sup>141</sup> Article 16 of UNCROC is an exact repetition of the wording in ICCPR Article 17, except that the words "[n]o one" are substituted by the words "[n]o child."<sup>142</sup> The same considerations therefore

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134. *Id.* at 1049, ¶ 136.

135. See Hague Regulations, *supra* note 117, arts. 47-51, 53-56.

136. See generally GCIV, *supra* note 60.

137. See *Advisory Opinion*, 43 I.L.M. 1009, at 1046, ¶ 130.

138. See GCIV, *supra* note 60, arts. 51, 52.

139. See Hague Regulations, *supra* note 116, art. 43. The issue of mistranslation is also set out here. See *id.*

140. See *Advisory Opinion*, 43 I.L.M. 1009, at 1046, ¶ 130 (citing ICESCR, *supra* note 33, arts. 10, 13, 14).

141. See *Advisory Opinion*, 43 I.L.M. 1009, at 1046, ¶ 131 (citing UNCROC, *supra* note 34, arts. 16, 24, 27, 28).

142. See UNCROC, *supra* note 34, art. 16(1) ("No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation."); see also ICCPR, *supra* note 32, art. 17(1) ("No one shall be subjected to arbitrary or unlawful interference

apply to this provision as to the ICCPR provision with the additional consideration of the provisions of the GCIV that relate to children.<sup>143</sup> Article 10 of the ICESCR contains general aspirational statements on the family and children and specifically comment on the working conditions of mothers.<sup>144</sup> All such issues are covered in Article 46 of the Hague Regulations<sup>145</sup> and Articles 13, 16 through 18, 20 through 27, and 49 through 51 of the GCIV.<sup>146</sup> These provisions demonstrate a clear intent to cover the field as all that can be reasonably expected of an occupying power. Similarly, Articles 13 and 14 of the ICESCR<sup>147</sup> and 28 of the UNCROC<sup>148</sup> dealing with education are made redundant by the provisions of GCIV Articles 24 and 50.<sup>149</sup> Once again, this is all that could be expected of an occupying power, and indeed greater interference with the education system of the sort described in some parts of the human rights instruments would be assuming the longer term rights of a sovereign, thereby overstepping occupation authority and thereby appearing "annexationist."<sup>150</sup> Articles 24 and 27 of UNCROC deal with the health of children, their access to health facilities (along with their mothers) and their standard of living generally.<sup>151</sup> These

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with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.").

143. See GCIV, *supra* note 60, arts. 14, 17, 23, 24, 38.5, 50, 82, 89, 94, 132.

144. See ICESCR, *supra* note 33, art. 10.

145. See Hague Regulations, *supra* note 116, art. 46.

146. See GCIV, *supra* note 60, arts. 13, 16-18, 20-27, 49-51.

147. See ICESCR, *supra* note 33, arts. 13-14.

148. See UNCROC, *supra* note 34, art. 28.

149. See GCIV, *supra* note 60, art. 24.

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

*Id.* ("The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children."). *Id.* art. 50.

150. Despite the examples of interference in education perpetrated by occupiers with particular ideologies (such as Nazism and Communism), von Glahn summarizes the state of the law, stating that "the occupant in essence may control and supervise only such aspects of an educational system in occupied enemy territory as affect directly the military occupation and the conduct of hostilities. Beyond this point no interference appears to be permissible." VON GLAHN, *supra* note 56, at 64.

151. See UNCROC, *supra* note 34, arts. 24, 27.

are subjects given special and specific attention in Article 43 of the Hague Regulations (the aspect relating to public life)<sup>152</sup> and Articles 16-18, 20-23, 50, 55, 56, 58 and 59 of the GCIV.<sup>153</sup> Finally, the Court specifically cites the provisions of Articles 11 and 12 of the ICESCR dealing with standard of living, including clothing and housing, food security, and health generally.<sup>154</sup> Once again, these have been covered in the provisions of the IHL instruments already cited.<sup>155</sup> From this survey it can be seen that there is no aspect of the human rights instruments' provisions cited by the Court that has not been excluded by the *lex specialis* provisions of the IHL instruments. The Court's recourse to these provisions was therefore wrong in law and it should have confined itself to an analysis of the adherence by Israel to the relevant IHL.

#### D. Remaining Provisions of the ICCPR

The Court only cited two provisions of the ICCPR as being relevant to the *Opinion* (Articles 12 through 17)<sup>156</sup> although it might have included Article 9 if Israel had not derogated from it in relation to its own territory. What of the remaining provisions of the ICCPR? To what extent might they have any relevance to an occupation situation? If we were to look at the remaining provisions and none of them were to survive the *lex specialis* test, then would this not add weight to the broader argument against the applicability of international human rights law as a whole to IHL-encompassed situations? We will now therefore examine Part III (Articles 6 through 27) of the ICCPR.<sup>157</sup>

As noted above, the ICJ in the *Nuclear Weapons Case* clearly determined that Article 6(1) of the ICCPR is subordinate to IHL.<sup>158</sup> A number of other provisions are set out in Article 6 relating to the issue of the death penalty. These include assur-

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152. See Hague Regulations, *supra* note 116, art. 43.

153. See GCIV, *supra* note 60, arts. 16-18, 20-23, 50, 55, 56, 58, 59.

154. See *Advisory Opinion*, 43 I.L.M. 1009, 1046, ¶ 130 (citing ICESCR, *supra* note 33, arts. 11, 12).

155. See Protocol Additional I, *supra* note 31, arts. 14, 15, 33, 34, 63, 64(3), 69, 70, 74-78 (providing more detailed coverage of family and child welfare).

156. See *Advisory Opinion*, 43 I.L.M. 1009, 1046, 1049, ¶¶ 129, 136 (citing ICCPR, *supra* note 32, arts. 12, 19).

157. See ICCPR, *supra* note 32, arts. 6-27.

158. See *Nuclear Weapons Case*, 1996 I.C.J. 226, 239-40, ¶¶ 24-25 (July 8).

ing that the penalty is limited to serious crimes<sup>159</sup> and rendered by a competent court,<sup>160</sup> that the right to seek pardon<sup>161</sup> or commutation is available, and that it should not be imposed on pregnant women or on persons under the age of eighteen.<sup>162</sup> All these issues are specifically picked up in the quite detailed provisions governing process in the GCIV (Articles 64 through 77)<sup>163</sup> and Additional Protocol I (Articles 75 through 77).<sup>164</sup> There is no question that the whole of Article 6 will be subordinate to this detailed body of law. Article 7 of the ICCPR deals with torture.<sup>165</sup> Once again, this is specifically addressed in Article 32 of the GCIV,<sup>166</sup> Article 75 of Additional Protocol I,<sup>167</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>168</sup> It is interesting to note that this latter instrument was drafted to specifically deal with peace and armed conflict contexts and addresses the need for the instruction of both civil and military authorities.<sup>169</sup> It is precisely this specificity that is missing in the ICCPR, which tends to further indicate its subordination to IHL.

Article 8 of the ICCPR deals with the regulation of labor and with labor as the punishment for criminal convictions.<sup>170</sup> Apart from the obligation to apply whatever local laws exist on the question of labor<sup>171</sup> so long as they do not clash with the application of the GCIV,<sup>172</sup> there are also specific provisions on labor issues in the GCIV.<sup>173</sup> The question of criminal penalties is also governed by Article 67 of the GCIV.<sup>174</sup> Article 8 of the

159. See ICCPR, *supra* note 32, art. 6(2).

160. See *id.*

161. See *id.* art. 6(4).

162. See *id.* art. 6(5).

163. See GCIV, *supra* note 60, arts. 64-77.

164. See Protocol Additional I, *supra* note 31, arts. 75-77.

165. See ICCPR, *supra* note 32, art. 7.

166. See GCIV, *supra* note 60, art. 32.

167. See Protocol Additional I, *supra* note 31, art. 75.

168. See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (entered into force June 26, 1987).

169. See *id.* arts. 2, 5, 10.

170. See ICCPR, *supra* note 32, art. 8(3).

171. See Hague Regulations, *supra* note 116, art. 43; see also GCIV, *supra* note 60, art. 51.

172. See GCIV, *supra* note 60, art. 64.

173. See *id.* arts. 51, 52.

174. See *id.* art. 67.



ICCPR is a good example of a provision that is in total contradiction to authorities contained in the IHL instruments.<sup>175</sup> In Articles 8(3)(a) and (c), there is a prohibition on forced or compulsory labor.<sup>176</sup> Article 51 of the GCIV, however, provides that the Occupying Power may compel protected persons over the age of eighteen years to perform work that is necessary either for the needs of the army of occupation, for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.<sup>177</sup> The prohibition on slavery in Article 8 of the ICCPR is covered by the prohibitions on the transfer of persons from the occupied territory in the GCIV Article 49 and the inability to compel labor for other than as provided in the GCIV Article 51.<sup>178</sup> Article 8 of the ICCPR is therefore subordinated to all these provisions and is rendered nugatory.

Articles 9, 10, 11, 13, 14 and 15 of the ICCPR all relate to criminal law and process and the treatment of detainees.<sup>179</sup> Apart from the obligation to respect and leave in operation the local law, these subjects are specifically addressed in Articles 64 through 143 of the GCIV and Articles 75 through 77 of Additional Protocol I.<sup>180</sup> They are also subject to the security authorities available to the Occupying Power. The ICCPR Articles are therefore subordinate to these IHL provisions and rendered nugatory.

Articles 2, 16, 18, 20, 26 and 27 of the ICCPR all deal with the status of persons, discrimination, and freedom of religion.<sup>181</sup> The GCIV and Additional Protocol I provide legal recognition and status through the categorizations of "protected persons," "civilians" and "persons in the power of a Party to the conflict." "Protected persons" are defined in Articles 4<sup>182</sup> and 11<sup>183</sup> of the

175. See ICCPR, *supra* note 32, art. 8.

176. See *id.* arts. 8(3)(a), (c).

177. See GCIV, *supra* note 60, art. 51.

178. See *id.* arts. 49, 51. These are provisions that were drafted in direct reference to the Nazi slave labor activities during World War II. See, e.g., Int'l Comm. of the Red Cross [ICRC], Commentaries: Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, art. 49 [hereinafter ICRC Commentaries]; *id.* at art. 51.

179. See ICCPR, *supra* note 32, arts. 9-11, 13-15.

180. See GCIV, *supra* note 60, arts. 64-143; see also Protocol Additional I, *supra* note 31, arts. 75-77.

181. See ICCPR, *supra* note 32, arts. 2, 16, 18, 20, 26, 27.

182. See GCIV, *supra* note 60, art. 4 ("Persons protected by the Convention are

GCIV (which is reinforced by the specific inclusion of refugees and stateless persons by Article 73 of Additional Protocol I); "civilians" are defined in Article 50 of Additional Protocol I,<sup>184</sup> while Article 75 of Additional Protocol I deals with "persons in the power of a Party to the conflict."<sup>185</sup> All these persons are prevented from being denied legal status by Articles 8 and 47 of the GCIV.<sup>186</sup> Protection from discrimination is provided by Articles 13 and 27 of the GCIV and Article 75 of Additional Protocol I.<sup>187</sup> Religious freedom and considerations are dealt with in Articles 23, 24, 58, 76 and 93 of the GCIV and Articles 15 and 69 of Additional Protocol I.<sup>188</sup>

Article 19 of the ICCPR deals with freedom of expression.<sup>189</sup> As is to be expected in an occupation situation, the provision for this freedom runs head on into the security provisions of IHL. In the first place, under Article 43 of the Hague Regulations the Occupying Power is authorized to take "all measures in his power to restore, and ensure, as far as possible, public order."<sup>190</sup> Further reference to the ability to impose security related measures, which would include restrictions on freedom of expression, is contained in Articles 27 and 64 of the GCIV.<sup>191</sup> In addition, under Article 53 of the Hague Regulations, the Occupying Power has sweeping authority with respect to the seizure of "[a]ll appliances, whether on land, at sea, or in the air, adapted for the transmission of news . . . even if they belong to private individuals."<sup>192</sup> It is a well accepted principle that there is no clearer and broader authority of the Occupying Power than the control over the media and the ability to place limitations on free speech during the tenure of the occupation based on security concerns.<sup>193</sup>

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those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.").

183. See *id.* art. 11.

184. See Protocol Additional I, *supra* note 31, art. 50.

185. *Id.* art. 75.

186. See GCIV, *supra* note 60, arts. 8, 47.

187. See *id.* arts. 13, 27; see also Protocol Additional I, *supra* note 31, arts. 15, 69.

188. See GCIV, *supra* note 60, arts. 23, 24, 58, 76, 93; Protocol Additional I, *supra* note 31, arts. 15, 69.

189. See ICCPR, *supra* note 32, art. 19.

190. Hague Regulations, *supra* note 116, art. 43.

191. See GCIV, *supra* note 60, arts. 27, 64.

192. Hague Regulations, *supra* note 116, art. 53.

193. See VON GLAHN, *supra* note 56, at 139, 215, 265.

This is further illustrated by the ability to keep certain detained persons incommunicado under Article 5, and the provision relating to the control of the flow of information between family members under Article 25. One safeguard offering some protection for freedom of expression, however, was included in Article 70 of the GCIV, which provides that “[p]rotected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.”<sup>194</sup> This was extended to a degree by the introduction of Article 75 of Additional Protocol I, which provided that the protections offered in the Article were available “without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.”<sup>195</sup> Privately held beliefs, opinions and convictions are, therefore, to be permitted, even if there may be limitations or prohibitions placed on the ability to express these during the occupation. Given these clear provisions and parameters, there can be no question that the issue of freedom of expression in an occupation will be exclusively governed by the above provisions and Article 19 of the ICCPR will be subordinated and redundant for the duration of the occupation.

Similar considerations apply to Articles 21 and 22 of the ICCPR dealing with the right of peaceful assembly and freedom of association, including to form and join trade unions. In relation to the trade union aspect, this will be additionally governed by the considerations discussed above concerning the regulation of labor in general. It will readily be appreciated that an occupying power will wish to retain wide rights of regulation with regard to demonstrations, association, and gatherings that should only be read in conjunction with the humanitarian requirements set out in the IHL instruments. The IHL instruments address and describe fully all the human rights that can and may be expected to be exercised in an occupation situation to the exclusion of such rights as legally sustainable against an occupying

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194. GCIV, *supra* note 60, art. 70.

195. Protocol Additional I, *supra* note 31, art. 75.

power. It is for the Occupying Power to determine the extent to which it will permit these freedoms to be exercised, but it has not been the practice of occupying powers to regard these ICCPR rights as in any way constraining the security discretion and authorities available to them. The ICCPR provisions are therefore directly contradicted by these discretions and authorities and by State practice in this regard.

Article 23 of the ICCPR deals with the family and the right of men and women to marry and to do so consensually.<sup>196</sup> It also provides for the equality of spouses during marriage and at its dissolution. This aspect of the life of a nation is heavily intertwined with cultural issues. There are many States and cultural traditions that have not given effect to these provisions, least of all the countries of the Middle East, including the territories occupied by Israel. Is the Court asserting that Israel must adhere to the ICCPR, and, not having derogated from this provision, therefore required to interfere with the traditions and family law of the occupied territories? Of course, if Israel was to do so, there would rightly be an outcry that this would be an annexationist act and culturally insensitive or imperialist. Article 23 is one of the provisions of the ICCPR that clearly indicates that it is an instrument aimed at regulating the relationship between a sovereign and its citizens, and has no relevance to the temporary circumstances of occupation where the Occupying Power is an *ad interim* sovereign. The application of Article 23 is excluded by virtue of the obligation under Article 43 of the Hague Regulations to respect "unless absolutely prevented, the laws in force in the country" and under the requirement in Article 27 of the GCIV to respect the existing family rights, religious practices, manners and customs of protected persons. Interfering with the family law of an occupied territory would be *ultra vires* for an occupying power as a flagrant interference with the rights of the sovereign. The only possible basis for interference in this area would be if the laws were a source of racial discrimination or genocide, such as the Nazi family laws. In that case, the obligations on the Occupying Power under Article 27 of the GCIV to administer the territory without racial discrimination would provide authority for such interference.<sup>197</sup>

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196. See ICCPR, *supra* note 32, art. 23.

197. See GCIV, *supra* note 60, art. 27 ("[A]ll protected persons shall be treated with

The rights of children are also specifically addressed in detail in the IHL instruments discussed above and, therefore, Article 24 of the ICCPR would be subordinate and redundant. Finally, Article 25 of the ICCPR is another example of a provision clearly indicative of the regulation of the relationship between the citizen and the sovereign. It sets out the right to take part in public affairs and public service directly or through freely chosen representatives, to be able to vote in genuine periodic elections affording universal and equal suffrage and to guarantee the free expression and will of the electors.<sup>198</sup> Nothing could be more in conflict with the basis on which an occupation is conducted. The provisions governing military occupation envisage a temporary state of affairs in a conflict or post-conflict environment when the holding of elections would be impossible, impractical, or undesirable. The advent of the U.N. Charter makes it clear that the Occupying Power cannot play a unilateral determinative role in the political structure of the occupied territory and could only do so in coordination with the Security Council. Such unilateral interference is also prohibited under the law of occupation.<sup>199</sup> Certainly there would be nothing to prevent an

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the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.”).

198. See ICCPR, *supra* note 32, art. 25.

199. See VON GLAHN, *supra* note 56, at 96. Von Glahn explains:

Just as an occupant is bound . . . to maintain the laws in force in occupied enemy territory, so he is forbidden to change the internal administration of the area. By that is meant that he may not substitute a new indigenous governmental structure or change internal boundaries, except, in the latter case, on a temporary basis to protect the safety of his armed forces and to realize the purposes of the war.

*Id.* In one sense this is an extension of Grotius's principle that the status of occupied territory cannot be changed until settled by treaty and that under occupation:

Lands are not understood to become a lawful possession and absolute conquest from the moment they are invaded. For although it is true that, that an army takes immediate and violent possession of the country it has invaded, yet that can only be considered as a temporary possession, unaccompanied with any of the rights and consequences alluded to in this work, till it has been ratified and secured by some durable means, by cession, or treaty.

GROTIUS, *supra* note 90, at 336. Georg Schwarzenberger adds that “[t]he first function of the law of belligerent occupation consists in drawing a firm line between wartime occupation and any pretension to the acquisition of a definitive territorial title through unilateral annexation.” SCHWARZENBERGER, *supra* note 49, at 163. Furthermore, Schwarzenberger states that the constraint on the Occupying Power to respect local law “powerfully supports the rule prohibiting wartime annexation.” *Id.* at 201. Note that the political transition arrangements in Iraq were not done pursuant to the authority of

occupying power allowing normal participation in public affairs, public service and elections, but it is beyond question that there is no obligation on the Occupying Power arising from the ICCPR in this respect. This would specifically be overridden by and subject to the IHL security provisions, and, in particular, to the authority of the Occupying Power to establish its own temporary administration and to dismiss public officials.<sup>200</sup>

### E. *Self-Defense*

Perhaps the most controversial and least supportable aspect of the ruling is the comment on self-defense. The Court considered whether Article 51 of the U.N. Charter, enshrining the inherent right of self-defense, could be relied upon by Israel to support the erection of the barrier. The Court defined Article 51 in these terms: "Article 51 of the Charter thus recognises the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*. However Israel does not claim that the attacks against it are imputable to a foreign State."<sup>201</sup>

Israel's right of self-defense against armed attack emanating from the territories was denied. This was the extent of the discussion on the point of Article 51, notwithstanding the vast amount of discussion, deliberation, and State practice on this issue. First, it is important to recall the exact words of Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security

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the Occupying Powers but on the basis of U.N. Security Council Resolutions 1483 and 1511.

200. See Hague Regulations, *supra* note 116, art. 43; see also GCIV, *supra* note 60, arts. 54, 64. In regard to Article 54, note the ICRC commentary:

The last sentence of Article 54 confirms the Occupying Power's right to remove public officials from their posts for the duration of occupation. That is a right, of very long standing, which the occupation authorities may exercise in regard to any official or judge, whatever his duties, for reasons of their own.

ICRC Commentaries, *supra* note 177, art. 54.

201. *Advisory Opinion*, 43 I.L.M. 1009, 1050, ¶ 139 (emphasis added).

Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>202</sup>

The Article refers only to “armed attack” occurring against a Member State and in no way qualifies this by stating that the attack must be committed by or emanate from another State.<sup>203</sup> Apart from this, the Article makes it clear that the Charter in no way impaired the “inherent right of individual or collective self defence.”<sup>204</sup> The intention and effect of the Article is, therefore, to enshrine the rights and law governing self-defense that pre-existed the Charter but still place this in the context of the new reality that the Security Council had at least the right to intervene to assume responsibility and control of the use of force in the situation.

Certainly at the time of drafting the provision there had not historically been as many instances of transnational terrorist actions not directly or not clearly attributable to a State. There had nevertheless been numerous examples of extraterritorial law enforcement and response to armed bands conducting cross-border activity. The most famous authority of all for establishing the principles of self-defense was just such an instance. In 1837, an incident occurred in the Niagara River area in North America involving the destruction of a ship, the *Caroline*, by British forces. The correspondence that followed between the United States and Great Britain formed the basis for customary principles of self-defense that have been referred to, and relied upon, ever since.<sup>205</sup> The interesting point about the incident is that it involved the conduct of hostile activities by armed and organized

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202. U.N. Charter, art. 51.

203. It is clear that current State practice and the determinative authority of the Security Council have converged to make it absolutely clear that armed attacks include those committed by terrorist organizations. See S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001); see also S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

204. It was stated in the committee discussion of Article 51 at the San Francisco Conference in 1945 that “the use of arms in legitimate self defence remains admitted and unimpaired.” Report of Rapporteur of Committee I to Commission I, 6 Docs U.N. Conf. Int’l Org. 446, 459 (1945). This understanding is supported by many commentators and it was also confirmed in the *Nicaragua* case. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 211 (June 27); see also I. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 274 (1963).

205. See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AMER. J. OF INT’L LAW 82, 82 (1938).

citizens of the United States across the border in the British province of Canada, in support of a rebellion in that province. These actions were not supported or conducted in any way by the U.S. government, but it was unable to prevent them. The ship that was sunk had been running arms and supplies to the Canadian rebels, and it was clear that it would continue to do so. The British attempted to resolve the matter through approaches to the United States and the Governor of New York in particular, but to no avail. As a result, a party of eight British soldiers crossed to U.S. territory, captured the vessel, and destroyed it. Two U.S. citizens were killed in the action. The United States protested and the British responded in justification that the vessel was "piratical" in character, the laws of the United States were not being enforced, and the action was warranted in self-defense.<sup>206</sup> The United States' reply set out the famous principle that to qualify as self-defense the necessity for action must be "instant, overwhelming, leaving no choice of means and no moment for deliberation."<sup>207</sup> The British authorities would then be required to show that they did nothing "unreasonable or excessive; since the act, justified by the necessity of self defence, must be limited by that necessity" and that "admonition or remonstrance" with the crew was "impracticable."<sup>208</sup>

The U.S. authorities questioned whether these tests had been met in the *Caroline* instance. The British responded by adding the consideration of "how long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect."<sup>209</sup> The dispute was settled amicably by 1842 and no reparation or redress was required of the British. The United States was to take the principles established by this exchange and apply them many times in the future. One example was the military expedition launched into Mexico in 1916 to repress the bandits of Francisco ("Pancho") Villa. President Wilson justified the action on the basis that the Mexican government was unable to prevent the cross-border activities of the bandits and there was

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206. *See id.* at 85.

207. *Id.* at 89.

208. *Id.*

209. *Id.* at 83-90 (detailing the record of the correspondence).



no other way to stop them.<sup>210</sup> Michael Reisman summarizes the doctrine arising from the *Caroline* as allowing:

[A] target state to act unilaterally against a planned terrorist act emanating from the territory of another state, if it were clear that either of two conditions obtained: (1) the state from whose territory the action was emanating could not, even with the information supplied to it by the target, respond in timely fashion to prevent the terrorist act because of a shortage of time; or (2) the state from whose territory the action was emanating could not, even with adequate notice, act effectively to arrest the terrorist action. A military action in another state would be justified only if it could be related to deterrence of further terrorist actions.<sup>211</sup>

This argument could only operate *a fortiori* in relation to territory not having acquired legal standing as a State, particularly where there is no prospect of the indigenous security elements being able to bring the threat under control. Added to this would be that the methods would have to be proportional and designed to minimize collateral damage. Yoram Dinstein refers to this “extra-territorial law enforcement” as a category of self-defense and asserts that it is exercisable where the State from which the attacks emanate is unable or unwilling to act to prevent it.<sup>212</sup> From this discussion, it can be clearly seen that the Court in the present case has come to a profoundly flawed conclusion with respect to the right of self-defense, and it should in no way be regarded as a correct statement of the law.

### CONCLUSION

The result of the above analysis leads to the conclusion that the ICJ has performed a disservice to the development of international law in the areas of IHL and self-defense, in particular. If one were to lay aside the jurisdictional issue as to whether the Court should have entertained the matter at all, there was an opportunity to attempt to resolve human rights and IHL with respect to occupation situations. This opportunity was rejected and reflects the inadequacy of the scholarly foundation of the

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210. See 1 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES*, § 68 n.21 (2nd ed. 1945).

211. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. INT'L L. 3, 46-47 (1999).

212. See YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF DEFENCE* 242 (2d ed. 1994).

decision. The effect can only be further confusion for the military and other practitioners in the field leading to a disinclination to resolve these issues or come to grips with the law. As stated, the objective of the Court should have been to encourage adherence to the clear IHL provisions rather than to muddy the waters further by attempting to assert a relationship with inapposite human rights law that it made no attempt to reconcile. Encouraging adherence to highly credible and concrete IHL would have delivered the desired result of promoting the interests of the affected Palestinians. The correct path in this respect has been demonstrated by the Israeli Supreme Court with real and beneficial outcomes.

This lack of scholarly rigor and analysis carried through to the paltry comments on the issue of self-defense. With such an array of State practice, commentary, Security Council resolutions, and case law available on this subject, this can only be described as judicial negligence. The proof of this will be in the total disregard for this position in the Security Council and by Member States.

In the absence of an analysis by the Court, this Article has attempted to deal with the *lex specialis* issue in terms of the relationship between the human rights instruments and IHL provisions. It is asserted that this exercise establishes that the protection offered by the relevant IHL is adequate to the task, and that, in all key respects, it covers the field and takes precedence over the human rights provisions. The circumstances in which IHL provisions apply are the key to understanding why this must be so and why it is the only logical approach.

The pity of this decision and the clear inability of the Court to rise above the charged politics of the subject matter is that it adds grist to the mill of those who will argue analogously that the International Criminal Court cannot be entrusted with the fate of Member State military personnel. For all of these reasons, this decision will appear historically as the low point of the ICJ and will carry no weight in the serious discussion of the key international law principles it traversed.