The Wall and international humanitarian law

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In their pleadings submitted to the International Court of Justice in relation to the request submitted by the General Assembly for an advisory opinion on the Legal consequences of the construction of a wall in the Occupied Palestinian Territories, some States— for instance, Australia, Belgium, Cameroon, Canada, Israel, Italy, the Netherlands, Spain, the Marshall Islands, Micronesia, Palau and the United Kingdom—have argued that the Court should decline to deliver an opinion. Others— notably the United States—while arguing that there are reasons why the Court should decline jurisdiction, have perhaps taken a more nuanced view, indicating issues that should not be addressed by the Court if it decides to deliver a substantive opinion in order to avoid prejudice to the Peace Process. A third group of States— including Brazil, Egypt, France, Jordan, Palestine, Sweden and Switzerland—have presented pleadings addressing both the Court’s competence to deliver the opinion and the substance of the case. Should the Court be persuaded by the arguments of the first group of States and refuse to deliver an opinion, this will contradict its settled jurisprudence regarding the exercise of its advisory competence.

As France observed, however, should the Court deliver an opinion, it must necessarily address the prior question of its legality:

[The] question concerns solely the legal consequences of the construction of the disputed wall in the Occupied Palestinian Territory... It is not about the conformity of the construction of the wall with international law. Determining its lawfulness is however prerequisite to responding to the question posed:

first, the consequences of the construction of the wall along the chosen route are obviously very different depending on whether or not the

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1. This paper was initially delivered to a United Nations International Meeting on the Impact of the Construction of the Wall in the Occupied Palestinian Territory, held in Geneva on 15-16 April 2004. The text of this revised version was finalised before the Court delivered its advisory proceedings.

2. All the pleadings in the proceedings, with the exception of Israel’s submission that Judge Elaraby should be disqualified (see the Court’s 30.01.04 Order on the composition of the Court), are available on the Court’s website <www.icj-cij.org>.

construction is deemed in compliance with international law;

secondly, in order to determine those consequences, it is necessary to ascertain not only whether the construction of the wall along the chosen route is lawful but also, if it is not, which exact rules of international law have been violated. 4

This paper considers an aspect of the second point raised by France, by considering whether the construction of the wall violates any rules of international humanitarian law in particular. Some of the pleadings submitted to the Court have identified various rules which, it is claimed, have been breached by the construction of the wall. I shall concentrate on the protection afforded to privately owned property by the rules of international humanitarian law, and conclude by considering whether there are any legal justifications available to exculpate Israel for any breaches it has committed. 5

a. the relevance of humanitarian law:
To argue that international humanitarian law is relevant to the construction of the wall in occupied territory pre-supposes that it is applicable. Israel, notoriously, has denied this, although this is not a view shared by other parties to Geneva Convention IV, relative to the Protection of Civilian Persons in Time of War, nor of the International Committee of the Red Cross. As Kuttner records:

The International Committee of the Red Cross (ICRC), in a note handed to the Government of Israel on 24 May, 1968, indicated that its interpretation of [common Article 2 of the 1949 Geneva Conventions] was that an occupation such as to effect the automatic application of the Convention exists where territory under the authority of one of the parties passes under the authority of an opposing party. Israel, in its reply to that note on 16 June, 1968, indicated its willingness to permit the Committee to continue its humanitarian work in the territories, but expressly declined to accept its interpretation of


5. Considerations of space do not allow for an analysis of the legality of any use of publicly owned land in the Occupied Territories for the construction of the wall, although doubt must be expressed whether Israel is fulfilling the standard of a bonus paterfamilias required by the principle of usufuct embodied in Article 55 of the Hague Regulations. On the treatment of publicly owned property by a belligerent occupant, see Scoobie I, Natural resources and belligerent occupation: mutation through permanent sovereignty, in Bowen S (Ed), Human rights, self-determination and political change in the Occupied Palestinian Territories (Nijhoff: The Hague: 1997) 2221 at 232 et seq, and the materials cited therein.

6. The first two paragraphs of common Article 2 provide:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
Article 2.  

More recently, during the December 2001 Conference of the High Contracting Parties to Geneva Convention IV, convened by Switzerland (as depository) pursuant to General Assembly resolution ES-10/7, the ICRC declared:

2. In accordance with a number of resolutions adopted by the United Nations General Assembly and Security Council and by the International Conference of the Red Cross and Red Crescent, which reflect the view of the international community, the ICRC has always affirmed the de jure applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem. This Convention, ratified by Israel in 1951, remains fully applicable and relevant in the current context of violence. As an Occupying Power, Israel is also bound by other customary rules relating to occupation, expressed in the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907.  

This Conference adopted a declaration, which reflected the common understanding of the participating High Contracting Parties, and reaffirmed in paragraph 3:

the applicability of the Convention to the Occupied Palestinian Territory, including East Jerusalem and reiterate the need for full respect for the provisions of the said Convention in that Territory.  

Although Dinstein argues that, as the result of the agreements concluded during the Peace Process, Israel's belligerent occupation of the West Bank and Gaza has terminated, this view has not been accepted by the Israel High Court which recently ruled that the territories are subject to a belligerent occupation by the State of Israel. Nevertheless, the official governmental position has been that the West Bank and Gaza are territories which Israel merely administers, and are not subject to the legal regime of belligerent occupation. This view was based on the claim that, when Israel invaded the territories, Jordan and Egypt, the States which previously had controlled them, did not themselves possess sovereignty over Gaza.
and the West Bank. Accordingly, Israel asserted that because it had displaced no legitimate sovereign, it could not be a belligerent occupant. In deciding cases bearing arising in the Occupied Palestinian Territories, however, the Israel High Court has consistently found the international law governing belligerent occupation applicable. Accordingly, in the Ajuri case, for example, President Barak observed:

I would like to make the following two remarks: first, all the parties before us assumed that in the circumstances currently prevailing in the territory under the control of the IDF, the laws of international law concerning belligerent occupation apply (see, in this regard, HCJ 102/82 Zemel v. Minister of Defence, at p. 373; HCJ 574/82 El Nawar v. Minister of Defence; HCJ 615/85 Abu Satiha v. IDF Commander); second, the rules of international law that apply in the territory are the customary laws (such as the appendix to the (Fourth) Hague Convention respecting the Laws and Customs of War on Land of 1907, which is commonly regarded as customary law; hereafter the Fourth Hague Convention). With regard to the Fourth Geneva Convention, counsel for the Respondent reargued before us the position of the State of Israel that this convention which in his opinion does not reflect customary law does not apply to Judaea and Samaria. Notwithstanding, Mr Nitzan told us in accordance with the longestablished practice of the Government of Israel (see M. Shamgar, The Observance of International Law in the Administered Territories, 1 Isr. Y. H. R. 1971, 262) that the Government of Israel decided to act in accordance with the humanitarian parts of the Fourth Geneva Convention. In view of this declaration, we do not need to examine the legal arguments concerning this matter, which are not simple, and we may leave these to be decided at a later date. It follows that for the purpose of the petitions before us we are assuming that humanitarian international law as reflected in the Fourth Geneva Convention (including article 78) and certainly the Fourth Hague Convention applies in our case.

This ruling reflects the established position that the 1907 Hague Regulations

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12. On this issue see, for instance, van Baarda TA, *Is it expedient to let the World Court clarify, in an advisory opinion, the applicability of the Fourth Geneva Convention in the Occupied Territories?,* 10 Netherlands Quarterly of Human Rights 4 (1992); Bar-Yaacov N, *The applicability of the laws of war to Judea and Samaria (the West Bank) and to the Gaza Strip,* 24 Israel Law Review 485 (1990); Blum Y, *The missing reviserioner: reflections on the status of Judea and Samaria,* 3 Israel Law Review 279 (1968); Boyd SM, *The applicability of international law to the Occupied Territories,* 1 Israel Yearbook on Human Rights 258 (1971); Lapidoth R, *International law within the Israel legal system,* 24 Israel Law Review 451 (1990) at 477-479; and Shamgar M, *The observance of international law in the administered territories,* 1 Israel Yearbook on Human Rights 262 (1971). Kretzmer notes that, when the IDF took control of the West Bank, the military commander assumed all governmental powers, and issued an order that made proceedings before military courts subject to Geneva Convention IV; this was subsequently revoked, as the IDF view that the territories were occupied was incompatible with the stance adopted by many Israeli politicians see Kretzmer D, *The occupation of justice: the Supreme Court of Israel and the Occupied Territories* (SUNY Press: Albany: 2002) 32-35, and Chapter Two generally.

(annexed to Hague Convention IV) have customary status.\textsuperscript{14} Some States have argued before the International Court that the provisions of the Geneva Conventions have also been transformed into custom,\textsuperscript{15} relying on rulings made by the International Court in the \textit{Legality of the threat or use of nuclear weapons} advisory opinion, namely:

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the \textit{Corfu Channel} case (\textit{I.C.J. Reports} 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.\textsuperscript{16}

Claims have also been made that the Israel High Court recognised the customary status of Geneva Convention IV in the \textit{Ajuri} case, most notably by Palestine in its Written Statement which alleged that the judgment contained the ruling that:

\begin{quote}
\textit{it is almost undisputed that the Fourth Geneva Convention reflects customary law and binds all states even those that have not signed it because it enshrines basic principles accepted by all states.}\textsuperscript{17}
\end{quote}

\textsuperscript{14} This position was first set out in the \textit{Cessation of vessels and tugs for navigation on the Danube} case, 1 Reports of International Arbitral Awards 83 (1921) at 104, and authoritatively endorsed by the International Military Tribunal at Nuremberg in the \textit{Trial of the German major war criminals}, Cmd. 6964 (1946) at 65. The Nuremberg ruling was expressly endorsed by then-President Shamgar of the Israel High Court in \textit{Affo v IDF Commander in the West Bank}, 83 International Law Reports 122 at 163.

\textsuperscript{15} For instance, Jordan asserted in its Written Statement that Geneva Convention IV may be regarded as wholly or at least in substantial part declaratory of customary international law 63, para.5.69(c); and the Arab League stated that, the rules of the Fourth Convention and of the Hague Regulations also apply as a matter of customary international law, Written Statement 83, para.9.4.

\textsuperscript{16} \textit{Legality of the threat or use of nuclear weapons} advisory opinion (8 July 1996) paras.79 and 83.

\textsuperscript{17} Palestine Written Statement, 185, n.310. The same claim is made, and quotation used, in a position paper prepared by the International Federation for Human Rights (FIDH) and the International Commission of Jurists, entitled \textit{Legal consequences of the construction of a wall in Occupied Palestinian Territory} (request for an advisory opinion), available at <http://www.icj.org/IMG/pdf/wall_paper_ICJ_The_Hague.pdf>, at 6.
This ruling does not appear in the judgment, nor is it adverted to in commentaries to the case, which it surely would have been had the High Court made this finding. Such a ruling would have reversed the High Court’s previous jurisprudence on its ability to enforce Geneva Convention IV as a matter of Israeli law: customary international law automatically forms part of Israeli law, cognisable by the courts, while treaties which have not been incorporated into domestic law do not. Instead, the High Court contented itself with the situational ruling, quoted above, based on the parties’ consensus that the provision of Geneva Convention IV relevant to the case reflected custom.

Indeed, within the context of the advisory opinion proceedings before the International Court, it is perhaps counter-productive to argue that the provisions of Geneva Convention IV apply as customary rules rather than as conventional provisions. Although this is a useful strategy before Israeli courts, to circumvent claims that the Convention is not cognisable because it has not been incorporated into Israeli domestic law, it is irrelevant before the International Court. It simply does not matter at the international level whether Israel’s obligations are conventional or customary. Unlike before Israeli courts, there is nothing to gain by claiming that they are customary. Indeed, to insist that the Convention’s provisions have customary rather than conventional status might well detract from the legal consequences of breach the Court could potentially indicate. The Court may decide to elaborate on the obligations of High Contracting Parties under common Article 1 of the Conventions. This provides:

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

While the undertake to respect aspect of this provision simply, and perhaps redundantly, reiterates the foundational principle of pacta sunt servanda, it is difficult to conceive how the ensure respect undertaking could readily achieve customary status. This envisages ensuring the performance of other High Contracting Parties of their obligations under the Convention. Where a State’s own interests are not injured by the breach of an international custom by another, under the law of State


19. See Lapidoth, note 12 above; and also her National treaty law and practice: Israel, in Leigh M et al (Eds), National treaty law and practice: Canada, Egypt, Israel, Mexico, Russia, South Africa (ASIL, Studies in Transnational Legal Policy, No.33: Washington: 2003), 65, especially at 74-76. See also Kretzmer, note 12 above, 35-40 on the High Court’s approach to Geneva Convention IV.

responsibility, it can only invoke the responsibility of the delinquent State if it has breached an obligation owed to the international community as a whole (an obligation *erga omnes partes*). Not all provisions of the Geneva Conventions have this status; for instance, the provisions regarding facilities for the recreation study, sports and games of prisoners of war, or their duties to salute, contained in Articles 38 and 39 of Convention III, or the analogous provisions for civilian internees in Article 94 of Convention IV.

Accordingly, to argue before the International Court on the basis of custom is simply to introduce an unnecessary complication. Israel is a party to Geneva Convention IV. Its claim that the Convention does not apply in the Occupied Territories has been unanimously rejected by other States Parties, relevant international organisations, and by the vast majority of doctrinal writers. This demonstrates the invalidity of the Israeli contention.

**b. the requirement of humane treatment of the civilian population:**

The construction of the wall within the Occupied Palestine Territories breaches a number of rules contained in the Hague Regulations and Geneva Convention IV. For instance, Amnesty International has claimed that this involves a breach of Article 27 of Geneva Convention IV, which provides that protected persons shall at all times be humanely treated although 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. As the ICRC commentary to Article 27 underlines:

> Article 27 is the basis on which the Convention rests, the central point in relation to which all its other provisions must be considered.

Although an occupant may impose measures of control and security, the freedom of movement of civilians in occupied territory cannot be:

suspended in a general manner. Quite the contrary; the regulations concerning occupation...are based on the idea of the personal freedom of


22. As Israel is not a party to the 1977 Additional Protocol I to the Geneva Conventions, it can only be held accountable for breaches of those of its provisions which also form part of customary international law.


civilians remaining in general unimpaired.\textsuperscript{25}

Freedom of movement can only be restricted within the limits laid down by the Convention, and:

What is essential is that the measures of constraint...should not affect the fundamental rights of the persons concerned...[T]hose rights must be respected even when measures of constraint are justified.\textsuperscript{26}

The pivotal nature of this provision, and the general principles it expresses, buttresses claims that the construction of the wall breaches other Convention IV provisions which essentially specify given examples of its application, such as Article 50 (the obligation to ensure the proper working of all institutions devoted to the care and education of children); Article 52 (the prohibition of all measures aiming at creating unemployment or at restricting the opportunities offered to workers in occupied territory); Article 55 (the duty of ensuring the food and medical supplies of the population); and Article 56 (the duty of ensuring and maintaining...the medical and hospital establishments and services, public health and hygiene in the occupied territory). Given the relationship between Article 27 and these more specific provisions, the question arises whether the cumulative effect is that the grave breach of inhumane treatment, as defined in Article 147, has been committed. The ICRC Commentary concedes that this is rather difficult to define, but:

the aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them being brought down to the level of animals. That leads to the conclusion that by inhumane treatment the Convention does not mean only physical injury or injury to health. Certain measures, for example, which might cut the civilian internees off completely from the outside world and in particular from their families, or which caused grave injury to their human dignity, could conceivably be considered as inhuman treatment.\textsuperscript{27}

c. interference with property rights and international humanitarian law: In the summary of the Israeli Government's legal position annexed to the Secretary-General's Report prepared pursuant to General Assembly resolution ES-10/13, it is stated that Israel relies on Article 23.g of the 1907 Hague Regulations which permits the seizure of property if demanded by the necessities of war; that before the General Assembly on 20 October 2003, Israel claimed that construction of the wall was consistent with Article 51 of the UN Charter and its inherent right of self-defence; that the land requisitions are proportionate to the Israeli deaths and injuries; and that Israel has claimed that the requisition of land for construction does not change the ownership of the land, and that compensation is available for the use

\begin{enumerate}
\item Pictet, note 20 above, 202.
\item Pictet, note 20 above, 207.
\item Pictet, note 20 above, 598.
\end{enumerate}
of the land, crop yield or damage caused to the land. It must be doubted whether self-defence, in terms of Article 51 of the Charter, is an operative concept in the context of a continuing belligerent occupation, as the moment for the application of the law regulating the *ius ad bello* would appear to be long past. Further, as Jordan, for instance, noted in its written statement to the Court, Article 51 appears to be irrelevant because there has been no armed attack on Israel, and Israel has not reported to the Security Council that the construction of the wall is a measure that it is taking in self-defence.

Leaving this issue to one side, Israel’s arguments should be addressed on their own terms. It justifies its requisition of land for the construction of the wall on Article 23.g of the Hague Regulations. This provides:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden ...
> (g) to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war;

Whether the land requisitions are justified by the necessities of war, and thus by Article 23.g, need not detain us. This Article is simply not relevant, because it is contained in Section II (Hostilities) of the Hague Regulations, and not in Section III (Military authority over the territory of the hostile State). The Special Criminal Court of the Hague analysed the relationship between these two Sections in *In re Fiebig* (1949), and ruled that:

> it was evident that the provisions of Section II remained in operation so long as there was still active war between the invading forces and the forces of the invaded country, a period which ends with a capitulation or an armistice... After such a capitulation or armistice, while the war may continue elsewhere, it is Section III and no longer Section II which regulates the rights and obligations of the invader as Occupant.

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29. Article 51 of the UN Charter provides:

> 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 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.

30. Jordanian Written Statement, 140, para 5.270; see from 138 et seq.

31. 16 Annual Digest of Public International Law Cases 487 at 489.
This relationship between the two Section has been affirmed by publicists and by the ICRC Commentary on Convention IV. Accordingly, the justification offered by Israel for land requisitions fails, but it must be considered whether others exist.

d. **property and the Hague Regulations:**
The treatment of property under the regime of belligerent occupation is principally governed by the Hague Regulations. Geneva Convention IV concentrates on the protection of the person. Under Article 46 of the Hague Regulations, private property must be respected and cannot be confiscated. *Ex facie*, this only affords protection against the loss of property through outright confiscation. As, allegedly, Israel has undertaken to compensate individuals for losses sustained, and the ownership of the land does not change, apparently it does not fall foul of the prohibition on confiscation.

Nevertheless, in its written statement to the International Court, Jordan advanced an interesting counter-argument which has some merit, namely that this prohibition on confiscation must be read in the light of general international law governing expropriation. Jordan argued:

Expropriation in international law connotes the deprivation of a person's use and enjoyment of his property, either as the result of a formal act having that consequence, or as the result of other actions which *de facto* have that effect. Expropriation involves the deprivation by State organs of a right of property either as such, or by permanent transfer of the power of management and control.

Drawing on the decisions of international tribunals as well as doctrinal writings, Jordan concluded that the fact that there may have been no formal expropriation, that Israeli administrative measures do not describe the taking of property as a taking or as involving a change of ownership does not mean that no expropriation has taken place in the sense of international law. The key point is whether the interference with property rights is so comprehensive that they no longer yield benefits for the owner and become useless. This occurs when the owner is deprived of the effective use, control and benefit of the property, in which case it

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33. See Pictet, note 20 above, 301 (commentary to Article 53).


must be deemed to have been expropriated. Accordingly, by looking beyond the formal legal position to the actual circumstances, it is arguable that Israel is in breach of Article 46 of the Hague Regulations.

Even if the Jordanian argument is wrong, because of its terms Article 46 provides the controlling principle for the treatment of private property, thus any interference with property rights must find justification within the terms of the Regulations. In relation to land, powers of interference are granted to the Occupant only by Article 52, which provides in part:

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation...

Manifestly, this cannot legitimise land requisitions for the construction of the wall, because Israel expressly claims that it is a measure taken in self-defence for the protection of the civilian population. Further, as the Israel High Court recognised in the *Elon Moreh* case:

the military needs mentioned in [Article 52] cannot include, according to any reasonable interpretation, national-security needs in their broad sense.

Accordingly, no justification for the requisitioning of land for the construction of the wall can be found in the Hague Regulations.

e. property and Geneva Convention IV:

Geneva Convention IV is supplementary to the Hague Regulations. Article 154 provides:

In the relations between Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of the Hague.

Geneva Convention IV principally provides for the protection of the civilian population of occupied territory, but contains one potentially relevant provision for Israel’s treatment of property in the Occupied Palestinian Territories. This, however, deals with the destruction and not the requisition of property. Article 53 provides:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to
other public authorities, or to social or cooperative organisations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

It could be argued that land, particularly agricultural land, requisitioned for the wall has been effectively destroyed because it can no longer be utilised: this is similar to the Jordanian argument regarding expropriation through the deprivation of the benefits that property might be expected to yield. Nevertheless, it is beyond doubt that buildings have been destroyed and olive trees uprooted. The question is therefore whether this was rendered absolutely necessary by military operations. The Convention contains no definition of military operations, nor is this elucidated by the ICRC Commentary. The term is, however, used in Article 51.1 of Additional Protocol I to which Israel is not a party, but which the ICRC Commentary affirms is customary. This provides:

The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

The Commentary observes:

According to dictionaries, the term military operations, which is also used in several other articles in the Protocol, means all the movements and activities carried out by armed forces related to hostilities. A mixed group of the Diplomatic Conference gave the following definition of the expression zone of military operations: in an armed conflict, the territory where the armed forces of the adverse Parties taking a direct or an indirect part in military operations, are located. This entails the destruction of property in relation to an operation during which violence is used. Even if this can be interpreted to encompass a measure taken to protect Israel’s civilian population, the question arises whether this destruction was absolutely necessary. Surely this cannot be the case, as Israel could construct wall within its own territory, rather than encroach further into Palestine a point noted by Ireland:

Israel...has not shown that its stated goal in constructing the wall, namely the security of Israel, could not be achieved by alternative means, such as constructing the wall within Israeli territory. Indeed, the route taken by the wall indicates that is purpose is to protect Israeli citizens illegally settled in the

41. Sandoz, note 39 above, commentary to Article 48, 600, para.1875.
Occupied Palestinian Territory, contrary to Articles 49 and 147 of the Fourth Geneva Convention. Nor has it been shown that any destruction or appropriation is necessitated by military operations. It is thus clear that these measures have not been taken in accordance with international humanitarian law.\textsuperscript{42}

Accordingly, as indicated in Ireland’s written statement, under Article 147, there is room to argue that Israel has committed a further grave breach of Convention IV, namely, the:

extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

\textbf{f. Israel’s attitude to the proceedings:}

The International Court’s opinion on the legal consequences of the construction of the wall is yet to be delivered. The opinion might not address some, or all, of the issues considered in this paper. The Court’s task has not been aided by Israel’s attitude to the proceedings. It did not participate in the oral hearings, and its written statement only:

addresses the jurisdiction of the Court and the propriety of any response by it on the substance of the request. It does not address the legality of the fence, legal consequences that flow from it or other matters pertaining to the question of substance presented to the Court. Israel considers that the Court does not have jurisdiction to entertain the request and that, even were it to have jurisdiction, it should not respond to the requested opinion.\textsuperscript{43}

The strategy employed by Israel in relation to the proceedings mirrors that it adopted in relation to the UN Secretary-General’s investigation into events in Jenin from March to May 2002.\textsuperscript{44} Although Israel initially agreed to co-operate with the fact-finding team assembled by the Secretary-General, after taking advice, it refused to do so and, it is alleged, Israeli politicians...attempted to discredit the investigation by claiming it [was] part of a rising tide of global anti-Semitism.\textsuperscript{45} Israel’s strategy before the International Court has analogous elements of disengagement from, and

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\textsuperscript{42} Irish Written Statement para 2.9.
\textsuperscript{43} Israeli Written Statement, ii, para 0.5.
\textsuperscript{44} The Secretary-General was asked to prepare a report by the General Assembly in resolution ES-10/10 (7 May 2002). The report is available at <www.un.org/peace/jenin>.
\end{flushright}
pre-emptive discrediting of the proceedings. It has argued only on matters of competence, not substance, and cast doubt on the Court’s impartiality:

The present Chapter sets out a number of aspects of the treatment that the Court has already given the request which raise serious questions about the fairness of the Court’s approach and its compliance with the requirements of natural justice...  

Somewhat paradoxically, also Israel relies on its own disengagement from the proceedings as a reason why the Court should not deliver an advisory opinion which addresses the question posed by the General Assembly. It argued that:

the Court will not have before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon disputed questions of fact the determination of which is necessary for it to give an opinion compatible with its judicial character.  

The United Kingdom raised a similar objection, noting that much of the information is available only to Israel, and Palestine adverted to the difficulties it faced in preparing its case because of there is no transparency surrounding the construction of the Wall and its final course.

Arbitral tribunals have consistently drawn an adverse inference if a State fails or refuses to produce evidence which is in its possession or control. Indeed, in the contentious Aerial incident of 27 July 1955 proceedings, Israel itself invoked this rule when it noted that Bulgaria had refused to release information it possessed regarding this incident, and argued:

Having regard to the manner in which the Bulgarian Government has responded to the requests for information, the Israeli Government is contending that the Bulgarian Government must now accept all the legal consequences deriving from the deliberate withholding of material facts. The Government of Israel is accordingly reserving all its rights in the matter of evidence, including the right to make appropriate applications to the Court under Article 49 of the Statute and under any other provision or rule of law, should this become necessary.


47. Israeli Written Statement, 110, para 8.9.


49. Palestine Written Statement, 202, para 450: see also para 451.


51. Aerial incident Pleadings 98.
The *Aerial incident* case did not proceed to merits, being rejected on the basis that the Court lacked jurisdiction, and it was a contentious case which, admittedly, the present proceedings are not. Nevertheless, if it is assumed that the Court’s competence has been validly engaged by resolution ES-10/14, the spectre is raised of a State relying on its own refusal to co-operate with the Court as a reason for the Court not to discharge its lawful function. It is to be hoped that the International Court will not be so easily dissuaded from fulfilling its task.