War and Peace in the Jewish Tradition

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THE ORTHODOX FORUM

The Orthodox Forum, initially convened by Dr. Norman Lamm, Chancellor of Yeshiva University, meets each year to consider major issues of concern to the Jewish community. Forum participants from throughout the world, including academicians in both Jewish and secular fields, rabbis, rashei yeshivah, Jewish educators, and Jewish communal professionals, gather in conference as a think tank to discuss and critique each other’s original papers, examining different aspects of a central theme. The purpose of the Forum is to create and disseminate a new and vibrant Torah literature addressing the critical issues facing Jewry today.

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What war is deemed to be a milhemet mitzvah? A war against the Seven Nations, or against Amalek, or to deliver Israel from an enemy that is attacking him... For a milhemet mitzvah, the king need not obtain the sanction of the Beit Din.

(Maimonides, Laws of Kings and Their Wars, 5:1–2)

I knew that this Government, at least, would never agree to submit to a tribunal the question of self-defense, and I do not think any of them [the other states parties to the Kellogg-Briand Pact] would.

(U.S. Secretary of State Frank B. Kellogg, in testimony before the Senate Committee on Foreign Relations, December 7, 1928)
America will never seek a permission slip to defend the security of our country.

(U.S. President, George W. Bush, State of the Union Address, January 20, 2004)

To initiate a war of aggression...is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

(Judgment of the International Military Tribunal, Nuremberg, 1946)

Israel's current war on terrorism is, in its dimensions and many of its aspects, unprecedented. It shares many of the features, dilemmas, and asymmetries of the global war on terrorism, but it is also unique. The asymmetries are sharper, the anomalies greater, and the dilemmas starker. Above all, Israel, rather than the Palestinian Authority that unleashed the terror, has been put in the international political and judicial dock. Alone among the nations, Israel has been called upon repeatedly to justify every measure that it takes to defend its existence and that of its inhabitants. Its efforts – including very prominently those of its judicial arm – to balance its security needs with the maintenance of civil rights in wartime, are often scorned.

It is not the purpose of this article to explain the phenomenon of anti-Israelism; as with classic anti-semitism, there are many explanations, and none. Nor have any of the proposed “cures” to this malady succeeded. (Perhaps, as Anton Chekhov, a medical doctor by profession, once remarked, when numerous remedies are recommended for the same disease, it is a sure indication that none would be effective, and the disease is incurable.) The purpose of this article is to highlight the manner in which Israel’s present predicament has been tragically sharpened by some of the more worrisome trends in international law and international organizations; and to indicate briefly how the more blatant attempts to delegitimize Israel’s right of self-defense may be, and have been, countered.
I.
The two areas of international law that need to be examined most closely are first, *jus ad bellum*, related to the initiation of war (or in modern terminology, recourse to force); and second, *jus in bello*, the laws of war (or in present-day lingo, the laws of armed conflict or “international humanitarian law”). Theoretically, these are two separate spheres (and it is the second that has the longer history and is more greatly codified in international, and also in Jewish, law). They are, in fact, integrally related. In just war theory, for example, a war launched for a just cause may become unjust if cruelly or unjustly waged. On the other hand, in the UN and other international forums, there is a current propensity (particularly strong in relation to Israel) to condone the most heinous war crimes committed by a belligerent deemed to have “justice” on its side, and to condemn the self-defensive acts of the “unjust” party – even if these conform to all the requirements of international law.

That the norms of international law are often vague and undefined is a truism obvious to all but the uninitiated or over-committed. The existing uncertainties are especially conspicuous in relation to the rules regarding permissible recourse to force; and they are more greatly magnified still when a state is called upon to defend itself against terrorist, rather than conventional state-to-state, threats. The unrelenting Arab campaign to prevent Israel’s birth and later to extinguish its sovereignty has entailed both types of threat. Understandably, Israel has embraced principles, such as that of anticipatory self-defense (the equivalent of the tenet *ha-ba le-hargekha hashkem le-horgo*) in order to thwart the politcidal – indeed genocidal – plots of its enemies. For their part, even friendly states, such as the United States, as long as they felt immune from terrorist threats themselves, freely condemned Israel and ostensibly rejected her operative legal doctrines. Nevertheless, a broad interpretation of the right to self-defense was sustainable as a matter of law, and it began to be openly espoused in some quarters as the terrorist threat became palpable for other countries as well. The post-9/11 Bush Doctrine on the preemptive use of force is the most obvious recent example. It is neither as
novel in theory nor as unprecedented in state practice as is popularly assumed; but Israel has not benefited as greatly as might have been expected from such renewed awareness. In this matter, as in so many others, politics and expediency tend to trump law and principle.

As codified in international legal texts, the modern laws and principles designed to restrain the unfettered recourse to war are of relatively recent origin. The first modest step was taken at the Hague Conference of 1907, with the adoption of the Porter Convention, which restricted the right to use force for collecting contract debts. More significant attempts followed World War I, in the form, most prominently, of the League of Nations Covenant and the 1928 Kellogg-Briand Pact for the Renunciation of War. The League Covenant established mainly a procedural framework for distinguishing legal from illegal (rather than “just” from “unjust”) resorts to “war.”

There were famous “gaps” in the Covenant, which allowed member states to initiate war without thereby violating any legal obligation; and throughout much of the interwar period, statesmen and international lawyers, tormented by the existence of these “gaps,” strove mightily to plug them, primarily by defining more precisely the concept of “aggression.” The definitional enterprise did not succeed, and many doubted whether the goal was achievable or worth pursuing. Sir Austen Chamberlain, for one, considered that such definitions would be “traps for the innocent and signposts for the guilty.” World War II and its preludes occurred not because of any unplugged “gaps” but because the whole League structure was spurned and jettisoned. The same fate, of course, greeted the Kellogg-Briand Pact, which, in terms of its implementation, turned out to be the international equivalent of the Eighteenth Amendment of the U.S. Constitution (the Prohibition amendment). Noteworthy, too, are some of the reservations attached to the Pact by leading powers, including the United States, whose reservation included an absolute claim of self-judgment with respect to the right of self-defense. “There is nothing in the treaty,” the reservation stated, “which restricts or impairs in any way the right of self-defense.” Such a right “is inherent in every sovereign state.” Each “is free at all times and regardless of treaty provisions to defend its territory from attack or
invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.”

Following the Second World War, the Nuremberg Charter (in Article 6) conferred jurisdiction on the Nuremberg Tribunal to try major war criminals for, *inter alia*, “Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” The Charter for the Tokyo Tribunal contained a similar mandate, with the addition that the war might be declared or undeclared. But neither document defined the term “war of aggression”; nor did the tribunals feel the need to do so. They were, after all, confronted with clear-cut core cases of aggression. For the judges – who, significantly, were all from states that were victims of the just-concluded “wars of aggression” – there was no question of who were the aggressors, and who the victims exercising the right of legitimate self-defense. The issue of subjective assessment was thus not seriously contemplated – and not only because the trials predated the era of post-modernism and moral relativism. In a later era, where these elements would be lacking, elaboration of the “Nuremberg principles” would become much more problematic.

The framers of the UN Charter did not employ the term “war of aggression.” In their attempt to regulate more rigorously the ability of states to use armed force against other states, they replaced the word “war” with terms such as “threat or use of force,” “threat to the peace,” and “breach of the peace.” Though they used the term “aggression” (in Article 1, on the Purposes of the Organization, and in Article 39, relating to the Security Council’s powers of determination), they too, like their predecessors, did not include any definition. The application of the term in concrete cases was left to the discretion of the Council, which was expected to act in accordance with the Purposes and Principles of the Organization and not arbitrarily. Only some of the Council’s decisions were to be binding on member states – the prevalent erroneous contrary assumption notwithstanding. Decisions under Chapter 6 (Pacific Settlement of Disputes) were
recommendatory only; it did not all Chapter 7 decisions necessarily have binding force. As the late British Judge of the International Court of Justice (ICJ), Sir Gerald Fitzmaurice, convincingly argued, the Council may not, for example, “in the guise of peace-keeping order transfers or cessions of territory”; and “even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration.” After all, “it was to keep the peace, not to change the world order, that the Security Council was set up.”

When the UN was established, it was expected that the Council would act effectively to deal with the threat or use of force and, if necessary, adopt even military sanctions. Such sanctions would be undertaken only following the conclusion of special agreements between the Council and member states, as contemplated by Article 43. But the original plan never came to fruition, even after the end of the Cold War. No such agreements were adopted. (Peacekeeping forces, which are not mentioned in the Charter, have different legal bases, and are premised on the consent rather than the coercion of the host state.) Against this background, the two main UN Charter provisions dealing with the use of force and self-defense – Article 2(4), which states the general prohibition on the use of force, and Article 51, which permits individual and collective self-defensive actions – assumed greater significance.

The two provisions, however, raise more problems than they solve. “All members” according to Article 2(4), “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” What if the force used or threatened does not affect the territorial integrity or political independence of a state? What if, in fact, it enhances them, for example by ridding the populace of an oppressive regime? Does the provision connote a guarantee of territorial inviolability and a total ban on the use of force in international relations? If so, why did the period not appear after the word “force”? Are a state’s intentions relevant or not? Would an Entebbe-style operation to protect one’s nationals be permitted? Or an attack like
the one Israel executed on the Iraqi nuclear reactor, which did not in any way affect Iraq’s territorial integrity or political independence? Is force that is used to advance one of the UN Purposes – strengthening universal peace, promoting respect for human rights, for example – included in the prohibition? Above all, is not the ban, in any case, premised on a bargain – namely, that the Organization will guarantee peace by means of “effective collective measures,” its primary purpose? (This was the view of such eminent international law experts as Julius Stone and A.L. Goodhart.) And surely the prescription was meant to apply to “international” rather than “internal” uses of force, the latter remaining, in principle, unregulated (unless they entail the kind of threat to international peace that would call into play enforcement action under Chapter 7).\footnote{13}

As for Article 51, it is no less riddled with unresolved conundrums, some of which the terrorist threat has served to heighten. Its interpretation has been hotly debated by scholars over the years, most famously regarding the permissibility of anticipatory self-defense. “Nothing in the present Charter,” the provision states, “shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.” Measures so taken are to be immediately reported to the Security Council and are not to affect that organ’s responsibility “to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

On the basis of the drafting history of the provision and considerations of logic, renowned international law experts such as James Brierly, Sir Humphrey Waldock, Julius Stone, A.L. Goodhart, Georg Schwarzenberger, Derek Bowett, and Myres McDougal concluded that anticipatory self-defense was included.\footnote{14} Several alternative and complementary arguments have been put forward to justify this view. First, Article 51 was a “saving clause,” designed merely to clarify the fact that there was no intention to impair the pre-existing and “inherent” right of self-defense, which encompassed preventive as well as reactive steps. And in the phrase “if an armed attack occurs,” the
word “if” was used in a descriptive, rather than conditional, sense. It clearly does not mean “if and only if” an armed attack occurs. Second, the decision to include a reference to self-defense in the Charter was dictated by the need to provide for collective, rather than individual, self-defense; had the latter alone been at issue, it would have remained an unstated, self-understood, reservation of rights (as in the League Covenant). (Guaranteeing the right of collective self-defense was a way of resolving the “Latin-American crisis” at San Francisco. By means of Article 51, the Charter régime was to be harmonized with the system of inter-American regional security, launched early in 1945 with the adoption of the Act of Chapultepec.) Third, even assuming that the “if” was conditional, the term “armed attack” need not be so restrictively interpreted as to require that the armed attack will have actually begun; it is sufficient if the “armed attack” is imminently threatened. And finally, in any event, the provision had to be interpreted in the context of changed realities (the rebus sic stantibus principle). A state faced either with a nuclear threat, on the one hand, or guerrilla and terrorist threats, on the other, could not reasonably be expected to adhere to the standards set in an earlier, less menacing, international environment.

State practice, too, accords with the view that there is no need to wait for an attack to occur and that an “imminent” attack may be preempted. The famous Caroline formula regarding self-defense, enunciated in 1842 by U.S. Secretary of State Daniel Webster in correspondence with Britain, is often quoted in this regard, since it clearly encompassed the concept of preemption. At the same time, the formula – which required that a “necessity of self-defense” be shown to be “instant, overwhelming, leaving no choice of means and no moment for deliberation” – may be too rigid for application in a modern nuclearized and terrorized world. (It may also be narrower than the definition of anticipatory self-defense incorporated by implication in the U.S. Constitution.) Certainly when dealing with rogue states that support, harbor, and encourage terrorism, it has been plausibly suggested, the test of “imminence” and “necessity” requires reassessment and revision.

Moreover, while “necessity” and “proportionality” are stan-
dardly deemed to be essential concomitants of the right of self-
defense, both have always entailed generous doses of subjective
appreciation along with some fundamental theoretical questions.
Is the “necessity” to be limited to repelling the immediate danger or
does it include the removal of the danger? Must actions be propor-
tionate to measures taken or also to those threatened? Both American
and British legal spokesmen have in recent years come out forcefully
(in cases in which they have been involved) in favor of assessing pro-
portionality by reference to the overall threat to the victim state.17 In
an ongoing armed conflict (whether labeled “war” or not) involving
a series of attacks (some of them deemed, in isolation, to be “pin-
prick”), must the response be proportionate to each attack, or is the
entire context of continuous conflict to be the referent?18 The former
position, if combined with the assumption that Article 51 requires
that an armed attack will have actually occurred and that reprisals
are no longer permitted,19 would mean that the hands of the victim
of a non-conventional guerrilla war would be tied. Such a stance is
not only unreasonable; it finds no support in state practice (except
when directed against disfavored states, especially Israel.)

These issues were perceptively discussed by Robert W. Tucker,
in his edition of Hans Kelsen’s Principles of International Law.20 And
in an article justifying Israel’s war in Lebanon in 1982, he reverted
(in words that ring, sadly, no less true today than when they were
penned) to the question of how “necessity” and “proportionality”
should be measured. After chiding critics of Israel for demanding
that it abide by “a very rigid standard – one that no government
would seriously consider holding to in practice,” since none would
dare to jeopardize its national security in this manner, he noted:

Even according to the prevailing standard, it has never been
altogether clear whether acts of legitimate self-defense must be
limited to repelling the immediate danger or may be directed
toward removing the danger. A license to remove the danger
obviously may be abused, yet an action limited to repelling a
danger may lose its purpose if circumstances permit the danger
to reappear. 21
In some instances, too, “necessity” might include action taken to induce régime change. As Judge Stephen Schwebel (the American judge on the ICJ bench) observed in the Nicaragua case, government overthrow can be a defensive measure – as it was in anti-Axis acts in World War II.22 (Even before the latest Gulf War, similar arguments were put forward at various times regarding the need to remove the Saddam regime in Iraq. Iran, for example, openly but vainly strove to accomplish this goal during the Iran-Iraq war.)

II.

The attempts of the interwar statesmen and jurists to “plug” the troublesome “gaps” of the League Covenant have been paralleled during the UN period by a series of endeavors to plug the gaps that the bare UN provisions have exposed. The results of these, still continuing, endeavors have been no more felicitous, in legal terms, than those in the earlier world organization. Indeed, instead of closing existing gaps, they have widened them, obfuscating still further issues about which there had previously been some consensus. Politically, they have been even more damaging. Not only have they created “traps for the innocent and signposts for the guilty”23; they have, arguably, reversed the roles of “innocent” and “guilty.” This has been accomplished insidiously, through the adoption of a new “just war” doctrine, whose roots go back to the 1960–1961 period and whose pernicious offshoots have continued to spread uncontrollably ever since. The doctrine affects, most obviously, the sphere of jus ad bellum; but its effects may be felt no less poignantly in the realm of jus in bello. What occurred in the halls of the Peace Palace at The Hague in 2004 is but a further reflection of processes long operative in the various organs and sub-organs of the World Organization.

At the end of 1960, following the influx of new African states into the UN, the General Assembly adopted the famous Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514). Viewed by the Third World as its Magna Carta, it heralded a new direction in the halls of the UN, one that places “self-determination” at the pinnacle of UN values, above the prohibition of the use of force. The Charter, of course, had never
done so. Nor had it ever referred to “self-determination” as a “right”; and the Assembly is not competent to amend the Charter. Moreover, the proposition that “all peoples have the right to self-determination” was intrinsically unrealizable, if the right was understood (as increasingly it was in UN halls) as synonymous with the right to full independence. Self-determination claims do not, as a rule, clash with anti-self-determination claims, but rather with conflicting claims to self-determination; thus, the very act of fulfilling one claimant’s right will generally constitute the denial of the claim of another contender to the right. The Declaration was also internally inconsistent since in the one paragraph most firmly premised on Charter tenets (paragraph 6), it was stated that “any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.” But which claimant is entitled to its “national unity and territorial integrity” and which to separate self-determination? What is the territorial unit within which such separate self-determination is to be implemented, and who are the people who belong to it and are thus entitled to exercise the right?

To answer these questions the UN adopted assorted formulas that merely shifted the semantic ground and gave no real guidance, but that could be conveniently exploited against target states. The beneficiaries of the “right” of self-determination were “peoples under colonial and alien domination”; “peoples subject to colonial exploitation”; and those under “alien occupation” or “racist régimes.” All of these terms, as the West German representative at the 1977 Geneva Conference on Humanitarian Law, observed, “are not objective criteria, but lend themselves to arbitrary subjective and politically motivated interpretation and application.” They raise further issues such as: which is the “indigenous” population that “belongs” to the territory (once it has been delimited) and which, the “alien,” “colonial,” or “settler” population? What is the “critical date” to determine such “belonging”? How is one to define régimes that are “racist” rather than simply “nationalist”? And how does one do so in a world in which so many régimes are undemocratic?

Untroubled by these issues, the majority of the UN proceeded to
expand on some of the propositions that were not yet spelled out in 1960 but came to be part of the “collective wisdom” soon thereafter. In December 1961, India invaded and annexed Goa and two other Portuguese enclaves in India (for good measure, without consulting the local inhabitants), and enunciated what was later termed the “Goa Doctrine.” To justify their use of force, the Indians presented several arguments, among them that Portugal’s conquests of 1510 could not confer good title; that its continued presence in the Indian enclaves constituted “permanent aggression,” giving rise to an Indian right of self-defense; and that the Declaration on Colonialism legitimated India’s liberation of this colonial vestige by force. These assumptions were rejected by the majority of the Security Council at the time; but when a Soviet veto prevented adoption of a resolution deploring India’s actions and calling for its withdrawal from the conquered territory, the matter was not transferred to the General Assembly (as it might have been under the Uniting for Peace resolution). It was obvious already then that for the reigning Third World-Soviet coalition in the Assembly, the culprit was Portugal, not India, and that the latter’s actions were subjects of commendation rather than condemnation.

Elaborated further before very long, the new doctrine became a full-blown modern version of the medieval doctrine of the “just war.” In place of the medieval church, there was the Assembly, with its automatic majority purporting now to determine whose struggles were “legitimate” because they were for “self-determination” or “national liberation” and against “colonial, alien or racist domination.” For those thus blessed, Article 2(4) was effectively deemed to be overridden, while for those who would suppress such “legitimate” struggles, the prohibition was considered absolute. Colonialism was not only “permanent aggression”; it was a “crime.” Resisting it was thus a right, and assisting the resisters, an obligation. But the “colonial,” “racist” and “occupying” states forfeited any inherent right to self-defense. For them, Article 51 was, in this new perspective, annulled.

Just how disturbing the corollaries of this new “just war” doctrine could be, both for jus ad bellum and jus in bello, started be-
coming more apparent from the mid-1960s onward. Moreover, as the decade of the 1970s wore on, Western resistance to Soviet-Third World perspectives began to weaken discernibly. It is sufficient to examine, in this respect, three major oft-cited documents produced from 1970 to 1977, each of which was preceded by “grand debates.” The first was the Declaration on Friendly Relations, adopted by the General Assembly in October 1970, and intended to elucidate key UN principles, including those relating to self-determination and the use of force.28 Several years later the Assembly adopted a so-called “Definition of Aggression,” ostensibly ending the half-century quest begun during the League period. Both of these were adopted by consensus. And in 1977, a long process, fueled by General Assembly initiatives, culminated in the adoption of Additional Protocols to the 1949 Geneva Conventions. (The First Additional Protocol was and remains controversial, and unratified by either the United States or Israel.)

What happened, in brief, was that the Third World-Soviet coalition steadily pushed to give special exemptions from use-of-force prohibitions to “national liberation movements” and their supporters and correspondingly to restrict the rights of those who would suppress the “legitimate struggles” of such movements. Thereby, they aimed to replace long-established customary international law with a new “UN Law.” For example, in traditional international law a state was culpable if it knowingly permitted its territory to be used as a base for hostile activities against a neighboring state. In the Declaration on Friendly Relations, the traditional rule was still fairly accurately stated. “Every State,” it said, “has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.” Additionally, “every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force” [italics added]. Elsewhere, ambiguous formulations served to bridge differences between the various blocs.
By cross-reference to the Charter régime (which, of course, was not amendable by a mere Assembly resolution, whether labeled “Declaration” or not), the debate and uncertainty were perpetuated. Thus, on the role of third states in support of self-determination struggles, the Declaration asserted first, most unhelpfully, that “every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the present principle of the right to self-determination and freedom and independence” [italics added]. (One searches in vain in the cited section for a list or a definition of the “peoples” entitled to self-determination as opposed to those who were not to be beneficiaries. The “right” of self-determination is simply ascribed to “all peoples” – a formulation that does not in any way limit the universe of potential claimants to the right. Nor are later references to peoples under “alien subjugation, domination and exploitation” any more illuminating; they merely shift the semantic ground.) “In pursuit of the exercise of their right to self-determination,” the Declaration adds, these – unspecified – peoples “are entitled to receive support in accordance with the purposes and principles of the Charter” [italics added].

In the Consensus Definition of Aggression, the traditional rule regarding the culpability of sanctuary states was considerably enfeebled. Among the “acts of aggression” enumerated in Article 3 we find: “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [i.e., invasion, bombardment, etc.], or its substantial involvement therein.” Still later, in the Nicaragua case, the International Court of Justice assumed that this watered down provision reflected customary law, and it then proceeded to misread it and water it down still further. The provision of weapons or logistical or other support was not, in its view, sufficient to trigger any right to collective self-defense.29 Even more disturbing was the Court’s clear implication, in an apparent aside, that intervention in a decolonization context would have a privileged status – a hypothesis vigorously objected to by Judge Schwebel in his dissenting opinion.30 It is not lawful, he said, “for a foreign State or movement to intervene in that struggle
[of peoples seeking self-determination] with force or to provide arms, supplies and other logistical support in the prosecution of armed rebellion;” and this was true whether or not “the struggle is or is proclaimed to be…against colonial domination.” Moreover, he observed, in many cases, the identity of the “colony” and the “colonizer” was “a matter of sharp dispute.” Perceptions differed, and “the lack of beauty,” in this context, “is in the eye of the beholder.”

The Court’s implied willingness, in its aside, to grant a privileged status to decolonization struggles contrasted starkly with its adoption of an otherwise extremely restrictive interpretation of Article 51 of the UN Charter. Evidently, the Court was opting for the Third World’s interpretation of the “self-determination” saving clause in the Consensus Definition of Aggression. That provision had been purposely worded ambiguously, to read:

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right…, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter…. [italics added.]

Despite the multiple ambiguities in the clause, the Third World perceived it as an absolute entitlement of peoples struggling for self-determination to use force and for third states to assist them in their armed struggle. Legally, their argument was controversial, to say the least. But, as noted by Julius Stone, “the fact that the Consensual Definition makes the point seem even arguable gives for the future a certain spurious political legitimacy to devices of indirect armed aggression, which the preexisting rule of international law condemned as unlawful.”

The purpose of the Definition, in truth, was not to state the law unambiguously – something which, in any event, the consensus procedure precluded. “Defining aggression,” as Stone aptly observed,
was a way of “conducting political warfare by other means.” And for that purpose, imprecision, omissions, and ambiguous formulations could be very convenient. The various loopholes could always be plugged later, in specific cases, by means of automatic majorities in the General Assembly and other international forums. But for those who would be disfavored by those majorities, the situation was fraught with dangers that Stone presciently described at the time. “By its very gaps and equivocations,” he noted, the Definition had produced “a new armoury of weapons of political warfare, which may well herald a new level of confrontation and tension.” The results would be very negative for the cause of peace, since negotiating positions would be hardened rather than tempered; states that were “particular targets of manipulated majorities in the General Assembly” would be subjected to “grave political and military wrongs to which they are unlikely to submit,” leaving them with “military alternatives” only.

To such long-debated questions as the legality of anticipatory self-defense, the standards of “proportionality,” and the relationship between Articles 2(4) and 51 of the Charter no answers were furnished or attempted. Interestingly though, perhaps the main disputed matter that was decided least ambiguously was that of the acquisition and occupation of territory entered into by lawful force. Article 5(3) provides that “no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.” The Egyptians had led an unsuccessful bid to substitute for “aggression” the term “the threat or use of force.” Similarly, in the Preamble, the Assembly reaffirmed that the territory of a state shall not be “the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof” [italics added]. An attempt to delete the words “in contravention of the Charter” was rebuffed. What all this signified, as Stone correctly observes, was an unwillingness, at least at that point, to go beyond the accepted legal principle ex iniuria non oritur ius, that one is not permitted to benefit from one’s own wrong-doing. And though, given the political
realities, reaffirmation of this principle was unusual, it was not, he thought, “a substantive achievement” since “the principle was clear” in any case. But where Assembly majorities are involved, even the reaffirmation of accepted and logical principles is to be reckoned a minor miracle. It would have been much more in character for the Assembly to grant to favored aggressors the immunity from punishment desired by Egypt, and to convey to them the message: If at first you don’t succeed, try, try again! Hints, some more and some less transparent, of this message were sadly not so rare in later years.

The new UN perspective on self-determination, which became so dominant in the 1970s in the sphere of _jus ad bellum_, spilled over simultaneously and progressively into the sphere of _jus in bello_ as well. Pursuing, in main outline, the guidelines that the General Assembly had been urging since the late 1960s, the 1977 Diplomatic Conference on the International Humanitarian Law Applicable to Armed Conflicts, adopted a controversial Additional Protocol (No. 1), which, among other things, conferred special international standing on “self-determination” struggles, eased immeasurably the conditions for granting combatant status to those engaged in such struggles, and relaxed even more the conditions for receiving prisoner-of-war “treatment.” Many objections were voiced to these provisions, including the inescapable subjectivity entailed in interpreting such terms as “colonial domination,” “alien occupation,” and “racist régimes”; and – a matter referred to innumerable times in the conference debates – the attenuation of the distinction between combatants and civilians, which would likely result in a net loss, rather than a gain, for human rights in armed conflicts. “The consequence,” the Swiss representative warned, “would be that the adverse party could take draconian measures against civilians suspected of being combatants.” “Military necessity,” the Italian representative feared, might be invoked “in justification of an attack on the civilian population as a whole.” The problem was perhaps explained most cogently by Professor Richard Baxter of Harvard University (and later judge of the International Court of Justice). “If combatants disguise themselves as civilians,” he warned, then civilians become suspect. “Military considerations will demand that more forceful
measures be taken against them – that they be interned” and that
they be “more widely attacked on the ground that disguised com-
batants are intermingled with those who take no active part in the
hostilities.” The maintenance of “strict standards for irregulars and
guerrillas,” he concluded, was “conducive to the amelioration of the
condition of warfare and to the immunity of the civilian population”
and the safeguarding of its rights.45

Israel, understandably, is not a party to this Protocol; nor is
the United States. Yet, many of its controversial elements have been
incorporated in the 1998 Rome Statute establishing the International
Criminal Court. Its drafters viewed the Protocol as embodying
customary law regulating armed conflicts, thereby affirming for
this new tribunal, too, a tilt toward privileging “national liberation
movements.”46 Such privilege, in effect, knocks out the crucial
prop holding up the entire law-of-war edifice: the assumption of
reciprocity and of a mutual distinction between combatants and
non-combatants. A law in which one side has all the rights and the
other, only obligations, is not apt to be obeyed. Nor will it be very
helpful in the battle to overcome the scourge of terrorism.47 Revival
of the just war idea, in its present un-led reincarnation, can only
lead to greater, and unrestrained, violence. And in this environment,
the Organization’s principal judicial organ, no less than its political
organs, has regrettably become part of the problem, rather than of
its solution.

III.

“O My people, remember now what Balak king of Moab devised, and
what Bileam the son of Beor answered him; from Shittim unto Gilgal,
that you may know the righteous acts of the Lord.”

(From the Haftarah to Parashat Balak, Micah 6:5)

There is much in Parashat Balak that seems particularly pertinent
to the situation that Israel has been facing in the various UN forums,
including that of the International Court of Justice at The Hague.
Unable to expel the Jews in regular battle, the Arabs have turned
to other means: delegitimizing Israel’s existence, by delegitimizing
all steps that Israel might take in defense of its citizens’ security. Confident, on the basis of previous precedents (relating to South Africa’s presence in its former mandate, South West Africa/Namibia) in which the Court was called in, that here, too, it will be a matter of “he whom you bless is blessed, and he whom you curse is cursed” (Num. 22:6) – that judicial delegitimation will bring in its train stronger steps, such as anti-Israel sanctions – the Palestinians and their Arab allies have viewed the present stage as merely the opening salvo in a longer battle. Their not unreasonable expectation was that the Court would share their perspective and that of the UN generally, that “libbo ke-libbam shaveh.” Ultimately, their hope is to expel Israel, first, from the territories that were conquered in the Six-Day War (as the analogue of South West Africa) and later, from pre-1967 Israel as well (even as the white minority was defeated in South Africa). (In their statements before the Court, some of the Arabs stated candidly that the pre-1967 borders were also illegitimate, and it was necessary to return to those of the 1947 partition resolution – a resolution which, of course, was decisively rejected by the Arabs at the time. And the Egyptian judge, Nabil Elaraby, in his separate opinion, similarly reverted to the partition resolution.) Diplomatic isolation of Israel, as a pariah state, “a people that shall dwell alone, and shall not be reckoned among the nations” (Num. 23:9), is part and parcel of the strategy. So too is the idea that if, at present, “they are too mighty for me,” Israel may nevertheless be diminished incrementally – “Ulay ukhal nakkeh bo,” and ultimately, through a process of joint political-judicial delegitimation and internal demoralization, expulsion might ensue, “va-agarashennu min ha-aretz” (Num. 22:6).

Indeed, the current campaign comports very well with the “plan of stages,” adopted by the Palestine National Council on June 9, 1974 (parts of which seem to have been inspired by developments then underway in southern Africa). The plan’s stated goal was “the liberation of all Palestinian territory” – to be achieved by “all means, and first and foremost armed struggle.” That struggle, in turn, was to be pursued by “an independent combatant national authority … over every part of Palestinian territory that is liberated”; and after its establishment, “the Palestinian national authority” was to continue
its struggle, with help from the surrounding confrontation states. (Much of the terminology is reminiscent of the battle to rid South West Africa/Namibia of the South African presence.)

By turning to the Court, the Arabs reverted to a strategy that they attempted unsuccessfully to employ during the 1947–1952 period.49 They had then sought to have the Court rule on such matters as the Assembly’s competence to adopt the partition plan, the Security Council’s right to implement it, the validity of the Assembly’s vote to admit Israel despite Britain’s abstention in the Security Council, and the rights of Arab refugees. Although in two instances the Assembly came close to adopting the proposed requests for an opinion, a majority of the UN members had considered such moves unhelpful, at best, and positively damaging, at worst. The problem, as was stated at one stage of the proceedings, was “the most uniquely political problem of all questions in international history,” and if submitted to the Court, that tribunal would become embroiled “in one of the most intractable problems of political relations.”50

Judicial embroilment in the problem was precisely what was now eagerly sought by the Arab states, convinced as they were that the Court would be a willing accomplice. Earlier judicial proclivities were reassuring from their perspective – and correspondingly worrisome from the vantage point of Israel and those in the West not blinded by “judicial romanticism.”51 Nevertheless, the extent to which previous tendencies converged in a poisonous brew could not be foretold, despite the troubling omens evident from the start of the consultation process.

In deciding to solicit the Court’s opinion, the Assembly circumvented in a most blatant manner the requirement that states not be subjected to adjudication of their disputes without their consent. Objections based on lack of consent of an interested state had been raised in previous cases, and they had been dismissed by the Court, in line with a philosophy that seeks to cooperate maximally with fellow UN organs barring compelling countervailing reasons.52 But none of the cases involved existential matters bearing so closely on the security of the non-consenting state and on its citizens’ right to life. None entailed the kind of daily terrorist threat confronting
Israel. To allow “back-door” compulsory jurisdiction in this context was unconscionable.

Moreover, the wording of the request was objectionable on several counts. The question posed by the General Assembly’s “Tenth Emergency Special Session” on December 8, 2003,\(^5\) in a resolution whose constitutionality was justifiably challenged by Israel\(^5\) – was:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

Quite obviously, the Court was not being asked a legal question; it was being told what it is that the Assembly wished to hear. Both the factual and legal issues involved were to be assumed by the Court, rather than examined by it; and any examination of the underlying premises was to be pro forma or, preferably, it would furnish additional elaboration and reinforcement of the existing assumptions. There was a “wall” being built, not a security fence; that wall was being erected not only in “occupied” territory, but in “Occupied Palestinian Territory [with the capitalization intended to underscore the existence of a separate, recognized, and sanctified legal status]; Israel was the “occupying Power”; the 1949 Fourth Geneva Convention applies to the territories where the wall was being erected, including East Jerusalem [capitalized, again, to denote a status separate from that of West Jerusalem]; the legal obligations of Israel were defined not only by treaties but also by Security Council resolutions [whose binding nature is assumed, and this, regardless of the rubric under which they were adopted, and the absence of a Council competence, even under Chapter 7, “to abrogate or alter territorial rights, whether of sovereignty or administration”];\(^5\) and General Assembly resolutions too are binding on Israel. The references in
the requesting resolution to the report of the Secretary-General and to the Assembly’s earlier resolution (adopted on October 21, 2003)\textsuperscript{56} were also significant. In that resolution, the Assembly had deemed the wall constructed inside the “occupied Palestinian territories including in and around East Jerusalem” to be illegal and had demanded that its construction cease and that parts of it be dismantled. In the Secretary-General’s report, the factual and legal issues, as seen through the typical UN lenses, are detailed.

Clearly, the answers to many very controversial questions were contained within the question posed to the Court. And other resolutions and actions taken by the Assembly on the identical subject manifested the absence of any genuine legal doubts. Such practices are not unknown in advisory cases. They were evident in the Namibia request (the only one ever to be sent to the Court by the Security Council, and some of whose wording was borrowed by the Assembly in the present case); and they had aroused misgivings among some of the judges. The Court there was asked: “What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)”\textsuperscript{57} Yet in another resolution, adopted simultaneously with the requesting resolution, the Council had itself spelled out, and in great detail, what were “the legal consequences for States of the continued presence of South Africa in Namibia.” Judge Petén, for one, felt that “the natural distribution of roles as between the principal judicial organ and the political organs of the United Nations was thereby reversed. Instead of asking the Court its opinion on a legal question in order to deduce the political consequences flowing from it, the Security Council did the opposite.”\textsuperscript{57} Several judges also objected to the fact that the legal premises had been asserted rather than questioned.\textsuperscript{58}

In the PLO Mission case, the Assembly twice adopted resolutions stating its conclusions on the very question sent to the Court for its determination. This was, in Judge Schwebel’s view, unacceptable behavior.\textsuperscript{59} “An answer to a legal question normally should not be sought by an organ that purports to know it,” Schwebel later wrote. “The appearance of telling the Court what the answer is to
the question put to the Court is not consonant with the judicial character and independence of the Court.\textsuperscript{60}

In the present case, the problem was far more acute, primarily because of the terrorist context – unmentioned both in the requesting resolution and in the cited Secretary-General’s report. As noted by Anne Bayefsky, the question before the court had “been carefully crafted to elicit a list of negative human rights consequences for Palestinians.” There was, from the start of the ICJ proceedings, “a glaring omission: consideration of the human rights of Israelis.” But this was not so surprising when one considered that “the same 2003 General Assembly that decried the fence was also marked by its refusal to adopt a resolution on the rights of Israeli children – after passing one on Palestinian children.” “The \textit{UN} message,” she concluded was clear in both cases. “The human rights of Israelis are not part of the equation.”\textsuperscript{61}

It is, even as Balak said to Bil‘am, “Come with me now into another place from which you will not be able to see them all, but only the outskirts of them; and you will send curses on them from there” (Num. 23:13). It is far easier to condemn Israel if you are shown only the edge, the fence, the partial picture detached from the general context of barbaric acts of slaughter of innocents that Israel’s defensive measures are intended to forestall. (This, too, has sadly been a general pattern in the \textit{UN}, practiced whenever Israeli issues arise. After the March 2002 Pesach massacre at the Park Hotel and the ensuing Operation Defensive Shield, an investigative committee appointed by the \textit{UN} Secretary-General was set to visit Jenin to examine the extent of Israeli “war crimes” committed there – not the context in which the Israeli operation was launched. Nor would the terms of reference have included the care that Israel displayed to avoid civilian casualties – which translated into many Israeli casualties in house-to-house combat.)

Turning from the forum that asked for the opinion to the one that gave it, it is important to understand certain aspects related to the Court’s current composition and philosophy that may not be generally known.

By the mid-1960s, the composition of the Court was beginning
to change, reflecting the altered membership of the General Assembly and Security Council and the attitudes of the most powerful blocs in the UN. Since the judges are elected by the Assembly and the Security Council to renewable nine-year terms, and since these elections are not subject to veto, the influence of the five permanent members is weakened and that of the most numerous blocs in the UN enhanced. Additionally, after the Court refused in 1966 to hand down a judgment on the merits in the *South West Africa Cases*, the Assembly, its ire aroused, set about to bring the Court into closer alignment with the philosophy of the reigning majority in the political organs. During the protracted pleadings on the merits of that case, counsel for Ethiopia and Liberia had put forward certain propositions regarding law-formation that even the “liberal” contingent of a deeply divided bench found difficult to embrace. In particular, the Court had been urged to attribute quasi-legislative powers to the General Assembly, and to replace insistence on state consent to legal rules with a recognition that such rules could be formed by a “consensus” of states comprising the “organized international community.” By 1971, when the Court rendered its opinion in the *Namibia* case, it was clear that the composition and philosophy of the Court were more in conformity with the prevailing trends in the UN. Indeed, the Court, which had been turned to more than anything in order “to redeem its impaired image,” had not disappointed. As noted earlier, the Court was expected, and did, legitimize the Council’s previously stated firm opinions.

U.S. awareness of the effect of the Court’s new composition and philosophy did not come until the *Nicaragua* case, which sounded some alarm bells among many American international lawyers. The more expansive view that the Court always tended to take of its advisory competence now seemed to affect the contentious jurisdiction as well. The case involved use-of-force issues (but not ones that impinged on the daily lives of American citizens); the United States presented a strong case, on multiple grounds, against the Court’s accepting jurisdiction; and when the Court decided, in 1984, to reject all the American arguments, the Reagan administration became convinced that it would be pointless to continue to
participate in the proceedings and argue to the merits. The State Department issued a statement, in which it warned of the perils of an aggrandizing court. “The right of a state to defend itself or to participate in collective self-defense against aggression,” it asserted, “is an inherent sovereign right that cannot be compromised by an inappropriate proceeding before the World Court.” Regrettably, the Court had departed from its “tradition of judicial restraint” and had ventured into “treacherous political waters,” with “long-term implications for the Court itself.” It would be a “tragedy,” the statement continued, if the trends, rampant in international organizations, to “become more and more politicized against the interests of the Western democracies” were to “infect” the Court as well.66

Many in the American international legal community were inclined to agree with the Administration’s assessment once the Court gave its judgment on the merits in 1986. The fact that the decision favored Nicaragua was perhaps less important than the legal reasoning employed – especially the attribution of binding force to mere resolutions of the General Assembly (particularly those termed “declarations”), and the implicit willingness to condone force employed for the purpose of decolonization. As noted earlier, Judge Schwebel had strongly objected to the Court’s endorsement of such a pernicious double standard.

Additionally, as Davis R. Robinson, former Legal Adviser to the U.S. Department of State recently revealed, suspicions that one of the judges of the Court actively assisted Nicaragua in filing the suit against the United States were confirmed within the last few years. Other unsavory and unethical actions also tainted the actions of some of the Court’s members in that case.67 Since its experience in the Nicaragua case, the United States withdrew its Optional Clause Declaration of 1946, and it has, wherever possible, shunned the use of the plenary Court and opted for chambers, in whose composition it could have a say. That “arbitralization” option, of course, is not available in advisory proceedings.

For Israel in 2004, all the standing concerns of the United States were multiplied severalfold. The two Arab judges on the bench – Elaraby of Egypt, and Al-Khasawneh, of Jordan – had been
outspokenly anti-Israel in their official and unofficial capacities, and had expressed strong opinions on the issues that formed the legal premises in dispute. Both had been representatives of their states at the UN for lengthy periods. Al Khasawneh had served in that capacity for 19 Assembly sessions until the mid-1990s. As a special rapporteur for the UN Human Rights Commission, he had (unsurprisingly) concluded that Israel’s settlements were illegal. Elaraby had been Egypt’s representative to the UN in Geneva from 1987 to 1991, and at the UN headquarters in New York from 1991 until 1999. (It might also be noted that as legal adviser to the Egyptian delegation at the 1978 Camp David conference, Elaraby had reportedly opposed the Israeli-Egyptian framework agreement and the ensuing bilateral peace process.) Significantly, Elaraby had been a leading figure in the continuing Tenth Assembly Emergency Session (first convened in 1997 and reconvened, by December 2003, a further eleven times) regarding “illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory” – and it was this forum from which the request for an advisory opinion emerged. In an interview that he gave in his personal capacity (and not as representative of his state) before joining the bench, Elaraby was reportedly “concerned about a tendency to play into Israel’s hands, and thus to marginalise the crux of the Arab Israeli conflict, which is the illegitimate occupation of territory.” “I hate to say it,” he was quoted as saying, “but you do not see the Palestinians, or any other Arab country today, presenting the issue thus when addressing the international community: Israel is occupying Palestinian territory, and the occupation itself is against international law.”68 Furthermore, Elaraby asserted (incorrectly) that the Sharon government had “very recently” and unlike earlier Israeli governments, described the territories as “disputed” rather than “occupied,” thus “wreaking confusion and gaining time.” All of this, he said amounted to “attempts to confuse the issues and complicate any serious attempt to get Israel out of the occupied territories. You can negotiate security, which will be mutual for both parties, but you cannot negotiate whether to leave or not.”69 Israel’s request that he be disqualified in the judicial proceedings was rejected by all of the judges, with the sole exception
of the American judge, Thomas Buergenthal, who based his dissent on the dictum that justice must not only be done, but must also be seen to be done.\textsuperscript{70}

Other decisions on preliminary matters, too, did not reflect an unbiased approach to the case at hand. These included the decision to allow “Palestine,” which has only the status of an observer mission at the UN, to appear before the Court as if it were a state; the rejection of Israel’s request to extend the unprecedentedly draconian time limits for filing written statements; and the adoption of a title flagrantly tilted against the Israeli position.\textsuperscript{71} Nor was the composition of the Court, even apart from its Arab contingent, apt to quash Israel’s fears regarding the outcome of the judicial consultation. Among those not known to harbor pro-Israel sentiments were the Court’s president, Shi Jiuyong (who had been the legal adviser to the Chinese Foreign Ministry during the Tiananmen Square massacre), Abdul Koroma of Sierra Leone (who had been a delegate to the General Assembly from 1977 to 1994), and even such a Western judge as Gilbert Guillaume of France (who, according to some reports, may have been the principal author of the opinion). Several judges (such as Kooijmans of the Netherlands, Owada of Japan, and Tomka of Slovakia) had been intimately associated with various UN organs, including those dealing with human rights and international humanitarian law, and may well have absorbed (wittingly or not) the condemnatory attitudes to Israel so ubiquitous in those bodies. (Thus, for example, Owada came to refer, in his separate opinion, to “the so-called terrorist attacks by Palestinian suicide bombers against the Israeli civilian population.”\textsuperscript{72}) Many of the judges, too, might naturally be expected to reflect the biases of the states whose nationals they were and to whom they owed their nomination and the lobbying efforts that ensured their election.

Even with such inauspicious signs of what to anticipate from the Court, the “unevenhandedness”\textsuperscript{73} of the opinion was startling in its dimensions.\textsuperscript{74} To overcome objections based on Israel’s non-consent to the rendering of the opinion, the Court minimized Israel’s status as a quasi-litigant and correspondingly, and unjustifiably, magnified the role and rights of the General Assembly, by attributing
to that body highly questionable continuing authority over a former
League of Nations mandate and implicitly endorsing the Assembly’s
continuing stark double standard vis-à-vis Israel.\textsuperscript{75} The essential
historical background was presented in a totally skewed and san-
itized fashion – it was, as Judge Rosalyn Higgins noted in typical
British understatement, “neither balanced nor satisfactory.”\textsuperscript{76} Events
and wars just “broke out” – like natural disasters. There were no
responsible parties, no culprits. One searches in vain for references
to the incessant Arab threats to Israel’s existence from pre-State
days through major wars, wars of attrition, and the still-continuing
terrorist onslaughts. The background to the Six-Day War is ignored,
and those unaware of the dire Arab threats that preceded it might
readily conclude that Israel launched an aggressive war in order to
conquer territories that it has been illegally occupying ever since. The
“Green Line” – a temporary and precarious Armistice line, whose
vulnerability became most manifest in 1967 – is endowed (but, as
will be seen, only for certain purposes) with a status it did not legally
possess. And nowhere is there any acknowledgment of the rejection
of offers of statehood extended to the Arab population of Palestine
at critical junctures, nor any hint that that rejection might have been
motivated by an unwillingness to co-exist with Israel and accept a
Jewish right to self-determination.

The Court’s obliviousness to the terrorist context in which the
security fence was being constructed – the term “terrorism” does
not even appear – is noteworthy. Relying almost exclusively on the
inadequate and one-sided reports of the UN Secretary-General and
of John Dugard, a special rapporteur whose lack of balance has
long been the subject of displeasure in Israel, the Court proceeds to
compose a laundry list of all the provisions of the Fourth Geneva
Convention that might have been violated by Israel, and to make
short shrift of Israel’s security concerns. No mention is made of pro-
visions of the cited convention that could justify Israel’s actions (even
if one accepts the Court’s assumption that the territories are “occu-
pied” rather than disputed). Article 27, most prominently, permits
the occupying power to “take such measures of control and security
in regard to protected persons as may be necessary as a result of the
war.” And according to Jean Pictet’s semi-official *Commentary* on the provision, the measures taken may include “prohibition of access to certain areas” and “restrictions of movement.” There is no discernible attempt to clarify the facts, even on the basis of material readily available in the public domain. The impression that emerges is of a tribunal that did not wish to be confused by any facts that might clash with its preconceived conclusions.

This nonchalant and non-judicial approach to the factual nexus was sharply criticized by Judge Buergenthal, the lone dissenter on the propriety of giving an opinion. “The absence in this case of the requisite information and evidence,” he felt, “vitiated the Court’s findings on the merits.” The Court had pronounced itself on “the wall as a whole” and had done so “without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel’s legitimate right of self-defence, military necessity and security needs.” It had “never really seriously examined” the nature of the “cross-Green Line attacks and their impact on Israel and its population”; and it had relied on the UN Secretary-General’s dossier, which was insufficient, since it barely touched on the “repeated deadly terrorist attacks” on Israel. Moreover, even the summaries of Israel’s position that were appended to the Secretary-General’s report were barely addressed by the Court.

Instead, the Court merely describes “the harm the wall is causing,” discusses “various provisions of international humanitarian law and human rights instruments,” and then concludes that “this law has been violated.” There was no “examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route.” The Court asserted many times that “it is not convinced,” but “it fails to demonstrate why it is not convinced, and that is why…[its] conclusions are not convincing.”

Among the matters the Court was “not convinced” of were: “that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations”; “that the specific course Israel has
chosen for the wall was necessary to attain its security objectives;” and “that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.” Indeed, the Court’s reasoning throughout is inadequate, inconsistent, and replete with mere ipse dixit – assertions that never rise above the level of political discourse in the United Nations. Some of these assertions are deeply disturbing not only to Israel but to all of those concerned with counter-terrorism. Thus, Article 51 of the UN Charter is interpreted as permitting self-defense only if the attack originates from a “state.” This interpretation is not sustainable on the basis of the text, the drafting history, or state practice. It is also, of course, illogical in an era in which the worldwide terrorist threats stem primarily from non-state actors. Its logic, however, is neither that of international law, in the sense of consensual law based on state practice; nor is it UN Charter law. It is rather that of the “New UN Law of Self-Determination.” Under this law, as noted earlier, favored groups have rights without obligations, and their protagonists have only obligations and no rights, whether in relation to jus ad bellum or jus in bello.

In its inconsistent attitude to the status and international personality of “Palestine,” the Court presents a particularly egregious example of the application of this perspective. “Palestine” is granted the procedural rights of a state (and indeed, it is given the privileges, in the oral proceedings, of a principal quasi-litigant, being placed first among those appearing before the Court). Its violations of its commitments, of the prohibition against using force, and of the most basic of the laws of war – non-targeting of innocent civilians – are not, for the Court, part of the legal equation. “Palestine” possesses no responsibility for acts originating in its territory. The “uneven-handedness” of the Court’s approach was criticized by Judge Higgins. Palestine, she wrote, “cannot be sufficiently an international entity to be invited to these proceedings and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable…. The question is surely where responsibility lies for the sending of groups and persons who
act against Israeli civilians and the cumulative severity of such action."

Similarly, as noted by Judge Buergenthal, the “Green Line” is viewed inconsistently by the Court. For if it delimits “the dividing line between Israel and the Occupied Palestinian Territory,” then according to the Court’s own interpretation of Article 51, cross-Green Line attacks should endow Israel with the right of self-defense. (Moreover, how much actual control Israel possessed in the territories from which the anti-Israel terrorism originated was not free of doubt.) So anxious, however, is the Court to deny Israel the protection of that un Charter provision, and also that of the Security Council’s post-9/11 resolutions against terrorism, that it makes a sharp differentiation between national and international terrorism and proceeds to place Palestinian terrorism in the former category. Yet, it has been convincingly argued, the 9/11 terrorism was no less “national” than that to which Israel has been exposed, and the Palestinian terrorism has been no less “international.” For example, the perpetrators of the 9/11 atrocities were all residents of the United States and used American planes to crash them into American sites. And Palestinian terrorism certainly has a strong international component, if only because it has received financial and other support from Syria, Lebanon, Iran, and Saddam’s Iraq. In any event, there was no justification for excluding terrorism against Israel from the terms of the relevant Security Council resolutions.

What emerges is an approach to terrorism that mirrors that of the General Assembly members who voted to request the opinion, and is closer to that of the 1998 Arab League Convention on Terrorism than to the definition of terrorism recently proposed by the UN Secretary-General’s High-Level Panel on Threats, Challenges and Change. In the former, “all cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with principles of international law, shall not be regarded as an offense.” But, significantly, it was added, “this provision shall not apply to any act prejudicing the territorial integrity of any Arab State.” The Secretary-General’s panel, on the other hand, stated that the deliberate
use of force against civilians, even by peoples resisting foreign occupation, constitutes terrorism. For the Court, as for the UN political organs, “self-determination” for favored “selves” is a supernorm, displacing the linchpin of the UN Charter – the prohibition of the use of force – and permitting exemption from the strictures of the laws of war as well.

In sum, the opinion was one in which the Court rubber-stamped questionable General Assembly practices; adopted, across the board, the Assembly’s perspective on the Arab-Israeli dispute; and went so far as to urge – transparently and inappropriately – that the opinion be implemented by the UN political organs. “The United Nations,” the Court declared in the opinion’s dispositif, “and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.”

(In seeking thus to operationalize its opinion and galvanize the UN organs into taking further action, the Court, besides departing from its role, also evinced, yet again, internal inconsistency. In order to overcome objections to the propriety of rendering an opinion in the face of Israeli non-consent, the Court had cited an earlier opinion in which the non-binding nature of advisory opinions had been emphasized.)

The attitude of the ICJ to Israel’s self-defense is reminiscent of UN Secretary-General U. Thant’s decision in 1967 to remove the UN peacekeeping force in the Sinai (UNEF), in the face of dire Egyptian threats. Abba Eban, in his inimitable style, compared that to closing an umbrella once the rain starts. Today, for protection against the rain of rockets and guided human bombs, Israel can clearly not look to the Court, any more than to the UN’s avowedly political organs, to acknowledge its right to an umbrella of self-defense (even in the passive form of a security fence).

The tribunal’s opinion, it should be emphasized, is not legally binding; nor, in light of its patent bias and unpersuasive reasoning, does it possess any moral authority. It effectively aids and abets the Amalekite acts to which Israel has been exposed without surcease.
Surely terrorism is conceptually well defined by the following verse regarding Amalek:

Who met you on your way, and attacked you when you were tired and without strength, and cut down all the feeble ones in your rear (Deut. 25:18).

Terrorism has greeted Israelis innocently on their way, pursuing their daily routines – on buses, in cafés, in Batei Midrash, at the Seder, in their homes. It targets the weak and defenseless – men, women and children, and babes in arms and in their cribs.

It may be difficult to overcome the tendency of Westerners, including Israelis, to grant automatic deference to judicial institutions. But there are times when it is appropriate to recall the wisdom of Ecclesiastes, and to shout out the truth that “makom ha-mishpat, shammah ha-resha” (Eccl. 3:16). It is sometimes necessary to delegitimize the delegitimizers, and to conclude, as did some American scholars of international law post-Nicaragua, that “there is no necessary connection between world law and the particular institution that is housed in the Peace Palace in The Hague.”

IV.

Israel’s decision not to argue to the merits and to boycott the Court’s oral proceedings should not be misconstrued. It was not based on any doubts regarding the defensibility of Israel’s case. It was premised on the conviction that no state – least of all, one in Israel’s present position – was legally obligated to have such matters decided without its consent; that The Hague tribunal, as presently constituted, was manifestly not one to which Israel would, in any event, have referred its disputes; and that presenting arguments on the merits would have been inconsistent with the challenge to the jurisdiction. Significantly, in 1985, Israel, following the U.S. lead, had withdrawn from the general compulsory jurisdiction of the Court. And even when its 1956 Optional Clause Declaration had been in effect, Israel had excluded from its application, inter alia, disputes arising out of the War of Independence and those “arising out of, or having
reference to, any hostilities, war, state of war, breach of the peace, 
breath of armistice agreement or belligerent or military occupation 
(whether such war shall have been declared or not, and whether any 
state of belligerency shall have been recognized or not) in which the 
Government of Israel are or have been [sic] or may be involved at 
time.”

In general, it should be noted, even democracies have not 
viewed with favor even domestic judicialization of measures that 
they have felt it necessary to take in self-defense. And their judicia-
ries, in turn, have tended to be deferential during ongoing conflict. 
As Justice Hugo Black wrote, even while dissenting in the Eisentrager 
case at the end of World War II: “It has always been recognized 
that actual warfare can be conducted successfully only if those in 
command are left the most ample independence in the theatre of 
operations.” And while hostilities are in progress, it would be unre-
realistic “to suggest that alien enemies could hail our military leaders 
into judicial tribunals to account for their day-to-day activities on 
the battlefront.” (More recent Supreme Court decisions, especially 
Hamdi v. Rumsfeld, adopt a somewhat different tone, but do not go 
as far as some assume in shackling the administration. Moreover, the 
sense of an ongoing conflict threatening Americans in their daily 
lives was not as acute in 2004 as it was in the immediate aftermath 
of 9/11.)

Israel, of course, has been called upon repeatedly to defend – in 
domestic and international forums – every step that it takes in its 
current war on terrorism (a war that it attempted vainly to avert by 
peaceful means). And within Israel the matter has been unprecedent-
edly judicialized. This is not surprising, given the Israeli Supreme 
Court’s liberal approach to standing, combined with a judicial 
philosophy that deems all matters to be inherently justiciable (as 
-opposed to the “political question” doctrine of U.S. courts).

Among the issues that the Israeli courts have had to address over 
the years, and most keenly since September 2000, are which body of 
law to apply and to which territories and how to assess whether the 
measures adopted were necessary and proportionate to the threat. 
The answers given have often aroused internal dissatisfaction, from
both parts of the political spectrum. The complexity of the issues is apparent to anyone even mildly familiar with the web of interconnected questions that present themselves for determination.

A primary question, naturally, and one that arose shortly after the Six-Day War, was whether the Fourth Geneva Convention applies to the areas conquered in the course of those hostilities. The official Israeli position has always been that formally it does not – that the territories are not “occupied” since they were not taken from a previous legitimate sovereign. Israel had not crossed an international boundary; the so-called “Green Line” (of late so ostensibly sanctified by the Arab states and so much of the world community, including the ICJ) had never been accepted as anything other than a temporary armistice line. In Judea and Samaria (the West Bank), Jordan was itself, at most, only a “belligerent occupant,” its sovereignty over the areas having been recognized only by Britain and Pakistan (and over eastern Jerusalem, by Pakistan alone). Moreover, it was often noted, Israel, as the only state to emerge from the previous mandate in Palestine, and as the state that waged a defensive war (unlike Jordan), had the better title to the territories, had it wished to annex them. Nevertheless, while denying that the principles of the Fourth Geneva Convention were applicable de jure, Israel was prepared, voluntarily, to apply the treaty’s humanitarian principles de facto and to have the courts judge its actions on that basis. (In contrast, other nations – including, prominently, the United States – have been reluctant to apply the Fourth Geneva Convention strictly, or even to acknowledge its applicability to their occupations, though there have arguably been several clear-cut instances in which they should have done so – as, for example, in relation to Panama, Afghanistan, and Iraq in the two Gulf Wars.) Israeli legislation with respect to the eastern sections of Jerusalem and to the Golan Heights put those two areas in a different category domestically, and correspondingly before the Israeli courts.

The anomalies became compounded with the institution of the “Oslo process” between 1993 and September 2000, after which the terrorist war unleashed by Arafat brought it to a complete halt. While the process was still operative, Israel redeployed its forces
and surrendered to the Palestinian Authority a goodly measure of autonomy in significant areas of Judea, Samaria, and the Gaza district. In those areas, the PA was to apply its own laws and undertake a security role in cooperation with Israel, in preparation for final status negotiations over the future of the territories. Palestinian violations of critical obligations – including control of terrorism and non-incitement – are too well known to require repetition. But successive Israeli governments, anxious to continue the “process” at all costs and maintain its “momentum,” opted to overlook these breaches (and sometimes to conceal their extent from a peace-hungry public).

Mislabeled by the PA as the “Al Aksa intifada” (a term taken up by much of the media), the newest intensified terrorist war necessitated some readjustment by the Israeli Supreme Court of its view regarding the applicable law. Israel was forced to reenter areas from which it had previously redeployed; the circumstances of that reentry showed that the law of belligerent occupation could not be applied as before. The complexity of the new legal-factual nexus was described by Supreme Court president, Justice Aharon Barak, in the Ajuri judgment of September 3, 2002. The “fierce fighting…in Judaea, Samaria and the Gaza Strip” since the end of September 2000 could not be characterized as “police activity”; it was rather “an armed struggle” – one in which “bereavement and pain overwhelm us.” Israel was not faced with a regular army, but rather with non-uniformed terrorists who “hide among the civilian Palestinian population in the territories, including in holy sites.” The terrorists “are supported by part of the civilian population, and by their families and relatives.” The Court recognized that Israel’s “special military operations,” which was aimed at destroying the infrastructure of the terrorists and preventing further attacks, were taken by virtue of Israel’s right of self-defense. Nevertheless, despite its recognition of the unusual nature of the situation, the Court decided to apply the law of belligerent occupation, while adopting what Justice Barak termed a “dynamic interpretive approach” to the provisions of the Fourth Geneva Convention. In this way it could “deal with the new reality” – one that could hardly have been anticipated by the framers.
of that Convention. In the Ajuri case, it was decided to permit the transfer to Gaza for two years of two of the three petitioners; the third was not considered to be sufficiently dangerous to warrant such a step. Barak quoted, in support, the verse in Deuteronomy 24:6, “Fathers shall not be put to death for their children or children for their fathers; every man shall be put to death for his own sin.”

Commenting on the case, Detlev Vagts wrote admiringly in the *American Journal of International Law*, of “the meticulous and courageous way in which the Israeli Supreme Court, acting as it did in the immediate vicinity of violence, approached the task of distinguishing between appropriate and inappropriate uses of the executive's security powers.” And he wondered aloud whether, “if security problems in the United States were to reach the same level of intensity, American courts would do as well.”

In the United States, the Geneva Conventions have unsurprisingly also come up for reassessment, as part of a general reappraisal of former failed approaches to the plague of terrorism. Some have considered that those conventions are archaic, and require overhaul (but, of course, in a direction diametrically opposed to that of Additional Protocol I and its unjustified grant of privileged status to irregular combatants having a so-called “just cause”). Since the laws of war are naturally formulated in reaction to the war just ended, they reason that the post-World War II rules must be revised in the light of the post-9/11 political, military, and technological developments that underscored the inadequacy of the present legal régime. Other commentators have focused more on an issue (perhaps insufficiently emphasized in Israel): non-implementation of the existing law by irregular combatants. Thus, Jane Dalton, Legal Counsel to the Chairman of the U.S. Joint Chiefs of Staff, felt that the problem faced by the United States in Iraq was not the unsatisfactory nature of the law but rather “noncompliance with even the most basic principles of the law, such as immunity for noncombatants from intentional attack.” She expressed great concern regarding the tendency to focus on what armed forces should not do and on searching “for ways to constrain the legitimate use of force, while largely ignoring the fact that terrorists…exhibit an utter disregard for the law.” Such an
approach “limits those who most diligently seek to follow the law.” Were the protections of the Third Geneva Convention extended to those who deliberately target civilians, there would be “no incentive in the world for nations to adhere to the Geneva Conventions or for armies to honor the laws of armed conflict.”

For Israel, the problem of non-compliance by its enemies with the most basic laws of war is central, of course – and the inability or unwillingness of so many to acknowledge this fact, tragic. That unwillingness, in turn, stems from a perspective that condemns Israel, rather than those bent on its destruction, as the aggressor in the present conflict. It is Israel’s right to life, collective and individual, that is challenged. In this context, it should be added, current efforts by a Special Working Group on the Crime of Aggression to define the crime (which the Rome Statute on the International Criminal Court left for future determination) arouse concern. Among the suggestions being seriously considered are: having the Security Council adjudge, in a veto-proof manner, who the aggressor is; handing that task, essentially, to the General Assembly if the Security Council has failed to act within twelve months; and endowing an advisory opinion of the International Court of Justice with binding force in the matter. Given the UN majority’s proclivity to perceive a “cycle of violence” at best, and more usually, Israeli aggression, and given the advisory opinion of the ICJ on Israel’s security fence, clearly none of these suggestions would be designed to calm Israeli sensibilities.

V.

“And Jacob was greatly afraid and was distressed.” Rashi: “‘Afraid’ – lest he kill; ‘distressed’ – that he might have to kill others.” (Gen. 32:7)

“Hear, O Israel! You are about to join battle with your enemies. Let not your hearts falter. Do not be in fear, or in panic, or in dread of them.” Rashi: “‘With your enemies’ – these are not your brethren, and if you fall into their hands they will have no pity on you.” (Deut. 20:3)
The terrorist war against Israel is widely acknowledged to be an asymmetric war. But the more important asymmetries are not the ones upon which most commentators focus, and the implications of the ones that are noticed are not always properly grasped. The fact that Israel’s F-16s, tanks, and missiles, are arrayed against the lesser and more primitive missiles of the Palestinians carries with it vulnerability as well as power. In fact, Israel suffers both from the weakness of the powerful and the weakness of the weak. It is unable, practically, and does not wish, morally, to employ the full force of its weaponry against the enemy. It will not and does not desire to embrace the norms of its enemies, and to weaken thereby basic principles of the laws of war and humanity and of deep-rooted Jewish ethical principles. Like Yaakov Avinu, it wishes neither to kill nor be killed. And its diplomatic isolation is a source of weakness – compounded, aided, and abetted by elements within Israel and the Jewish Diaspora, some of whom perhaps feel more comfortable with the idea of Jewish powerlessness and victimhood than with Jewish power, even when used in self-defense. Peacemaking efforts by outside powers, even when well-intentioned, tend to expose Israeli vulnerabilities – if only because ostensible “success” is more easily attained when pressure is applied against the more malleable and less intransigent party in the equation. Appeasement of terror tends to be dangerously overlooked.

Conversely, the Palestinians benefit from the power of the weak, and the power of the powerful. The local David combating the Israeli Goliath is a useful self-portrayal, especially for the purpose of summoning worldwide sympathy for the Palestinian cause, and thereby augmenting the support received from regional allies, an increasingly menacing worldwide Muslim and Islamist Diaspora, and the inroads made among Jews in Israel and abroad. Among our enemies there are no readily discernible doubts about the legitimacy of their rights (and to the entire area of mandatory Palestine); no significant
Opposition parties, except those that espouse even greater and more barbarous anti-Israel tactics; and no legal system worthy of its name. Leit din ve-leit dayyan. Israeli civilian casualties are reveled in and their perpetrators held up as heroes for emulation by the Palestinian youth. Both killing and being killed for the cause are glorified.

Perhaps the most baneful of the forces arrayed against Israel in its current war are those that come dressed in the false garb of self-determination, human rights, and humanitarianism. Those causes have been hijacked by a so-called “human rights community,” for whose members, as Irwin Cotler has observed, “human rights” has become a new secular religion, with Israel as the antichrist. The extent to which this has occurred in the diverse UN and UN-sponsored forums has been well documented by Anne Bayefsky over the past years (and even during the supposed heyday of the Oslo process). Her conclusion that “a human rights cover for a contrary political agenda has become something of a UN art form” is inescapable.

The words of Rabbi Dr. Joseph B. Soloveitchik in 1945, in his article “The Sacred and the Profane,” have unfortunately lost none of their relevance:

We have witnessed how the corruption of great ideals gave birth to evil forces in religious and ethical impregnation, more dangerous than evil fathered by evil.

Noble paternity should serve to highlight, rather than mask, the waywardness of the progeny.

NOTES
2. Even in the most developed domestic systems of law, the war on terrorism has generated the need for new balancing acts regarding such matters as the rights of the accused, trial by military commissions, and racial profiling. See, e.g., the U.S. Supreme Court case, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); and Rumsfeld v. Padilla, 542 U.S. 426 (2004).
3. On U.S. formal justification of its actions in the Cuban missile crisis, its avoidance of the logical Article 51 basis, and reliance instead on a more legally questionable “OAS rationale” coupled with an untenable reading of Article 53 of the UN Charter,


6. For an analytic review of the protracted League efforts to define the concept, see Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (1958), Chap. 2; and see ibid., p. 35, on the continuing relevance of the 1933 Soviet draft definition and its inclusion of state support for, or toleration of, armed bands as constituting aggression.

7. Comment in House of Commons, November 24, 1927; cited ibid., p. 36.


13. See Article 2(7) according to which the Organization is not, in principle, authorized “to intervene in matters which are essentially within the domestic jurisdiction of any state.”


15. For a good discussion of the context in which the Caroline formula was enunciated and its aftermath, see R.Y. Jennings, “The Caroline and McLeod Cases,” American Journal of International Law, vol. 32 (1938), pp. 82–99.


19. The assumption that reprisals are no longer permissible in international law appears in the Declaration on Friendly Relations of October 24, 1970, which, as will be noted below (Section 11), was intended to be a kind of “gloss” on the relevant UN Charter principles. But see, for example, the incisive criticism of this position, by Tucker, cited below, note 20.


23. See Austin Chamberlain comment, at note 7, above.


25. Official Records, Humanitarian Law Conference, 1977, vol. 6, p. 61. On the futile UN attempts to define the questionable terms so as to rule out any implication that “secession” (basically a synonym for self-determination) was permissible, and the question-begging definitions that were proffered, see Pomerance, Self-Determination in Law and Practice, pp. 14–15.

27. The assertion that colonialism is a "crime" was first made by the General Assembly in Resolution 2621 (XXV), October 12, 1970.


32. Article 7 of Definition of Aggression, annexed to General Assembly Resolution 3314 (XXXIV), December 14, 1974.


34. Ibid., *Conflict through Consensus*, pp. 138–139.

35. Ibid., p. 57.

36. Ibid., pp. 142, 175.

37. Ibid., p. 126. On the difference between occupation of land by defensive as against aggressive force, see Stephen M. Schwebel, "What Weight to Conquest?" *American Journal of International Law*, vol. 64 (1970), pp. 344–347. On reconciling the *ex iniuria* principle with the much-cited and much-misunderstood Security Council Resolution 242, of November 22, 1967, see Stone, *Conflict through Consensus*, p. 126. And see, regarding the legislative history of the resolution and the deliberate omission of the definite article in the paragraph on withdrawal from territories, ibid. pp. 57–60, 63 (citing, inter alia, the attitude of Lord Caradon, United Kingdom
representative and sponsor of the resolution); and Eugene V. Rostow (a prominent participant in the formulation of the resolution), “Legal Aspects in the Search for Peace in the Middle East,” Proceedings of the American Society of International Law, vol. 64 (1970), pp. 64, 68–69.

38. And see, for the proposition that this kind of approach would be tantamount to replacing a legal principle with an “aggressor’s charter,” Elihu Lauterpacht, Jerusalem and the Holy Places (1968), p. 52.


41. See Article 44, paragraphs 3 and 4 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts. For an analysis of the purport of these provisions and of the difference between the gloss placed on them by the Western states as against that of the Arab states and the PLO, see Ruth Lapidoth, “Qui a Droit au Statut de Prisonnier de Guerre,” Revue Générale de Droit International Public, vol. 82 (1978), pp. 170–210.

42. See, for example, the comments of the West German representative, cited in text at note 25, above.


44. Ibid., vol. 15, p. 177. See also, e.g., ibid., pp. 156–157, 166, 172–173, 180–182, 185–186; vol. 6, pp. 121–123, 130–134, 137, 143–144.


46. On the objectionable nature, from the U.S. standpoint, of some of the provisions of the Rome Statute of July 17, 1998, establishing the International Criminal Court (including Article 8 on war crimes and Article 21 on the “applicable law”), see Guy Roberts, “Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court,” American University International Law Review, vol. 17 (2001), (and especially text accompanying nn. 80–81). And for Israel’s objections, relating also to the attempt to criminalize Israel’s settlement activity, see Alan Baker, “The International Criminal Court: Israel’s Unique Dilemma,” in Justice, No. 18 (Autumn 1998), pp. 19–25. It may be noted that the current assault against Israel’s security fence as an “apartheid fence” is connected with the Rome Statute’s listing (in Article 7(1)(j)) of “the crime of apartheid” among “crimes against humanity.”

47. For fears expressed by delegates at the 1977 Geneva Conference regarding the possibility that some of the provisions of the Additional Protocol I might be interpreted as sanctioning terrorism, including urban terrorism: see, e.g., Official Records, Humanitarian Law Conference, Vol. 6, pp. 122, 138; vol. 14, p. 536; vol. 15, p. 178.

48. See the alternative explanation of Rashi to the words “nakkeh bo” in Num. 22:6.
50. Ibid., p. 254.
54. On Israel’s challenge to the Court’s competence (based, inter alia, on Article 12[1] of the UN Charter, the Security Council’s consideration of the issues and its adoption of the “road map,” and the “rolling” nature of the General Assembly’s “emergency session”), see Israel’s *Written Statement to the Court* (available in the ICJ website: www.icj-cij.org); and the unofficial summary of the statement in *Justice*, No. 38 (Spring 2004), pp. 7–9.
55. See the views of Judge Sir Gerald Fitzmaurice, quoted at text accompanying note 12, above.
65. See, in general, Pomerance, *Advisory Function*, Chap. 5; Pomerance, “Advisory Role of the ICJ.”
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68. Cited in Judge Buergenthal’s Dissenting Opinion to the Court’s Order of January 30, 2004 (in which the Court refused Israel’s request that Elaraby be disqualified from sitting in the case), para. 8.

69. Cited ibid.

70. Ibid., paras. 11, 13.

71. On the importance of selecting a neutral title, see the comments of Judge Schwebel in the Nicaragua case (cited in note 67, above).

72. Separate Opinion of Judge Owada, para. 31; emphasis added.

73. The term used by the British member of the bench, Rosalyn Higgins, to characterize some of the Court’s reasoning. See text accompanying note 82 below.


75. See Pomerance, “The ICJ’s Advisory Jurisdiction and the Crumbling Wall,” pp. 34–35.

76. Separate Opinion of Judge Higgins, para. 16.


78. Declaration of Judge Buergenthal, paras. 1, 3, and 7. See also, for trenchant criticism of the Court’s handling of the facts, Wedgwood, pp. 53–54; Murphy, pp. 70–75.

79. “Wall” Opinion, paras. 135, 137, 140.

80. On the dismay privately conveyed by an array of foreign ministry legal advisers, see Wedgwood, p. 57.

81. Ibid., p. 58; and see, especially, Murphy, pp. 63–70. See also Declaration of Judge Buergenthal, para. 6; Separate Opinion of Judge Higgins, para. 33.
82. Separate Opinion of Judge Higgins, para. 34.
83. Declaration of Judge Buergenthal, para. 6.
84. See, on this point, Murphy, pp. 68–69; Wedgwood, p. 58.
85. See Declaration of Judge Buergenthal, para. 6; Murphy, pp. 67–68; Wedgwood, p. 58.

“Wal” Opinion, para. 165 (2) (E); emphasis added.
90. Ibid., para. 47.
92. Declaration deposited on October 17, 1956, 253 UNTS 301; reproduced in Shabtai Rosenne, The Law and Practice of the International Court (1965), pp. 894–895. Israel remains bound, however, through compromissory clauses in certain treaties (including the Genocide Convention), to acceptance of the compulsory jurisdiction of the Court.
96. Ajuri and others v. IDF Commander of the Area of Judea and Samaria and others, Case No. HCJ 7015/02, 7019/02, paras. 1–3, 40. The case is reproduced in English translation in International Law Reports, vol. 125 (2004), pp. 537 ff.