

# THE UN, THE ICJ AND THE SEPARATION BARRIER: WAR BY OTHER MEANS

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*This article compares the Hobbesian realist and Kantian idealist analyses of international law and organizations with respect to the UN General Assembly resolutions and the International Court of Justice (ICJ) advisory opinion on Israel's separation barrier. From the realist perspective, this case highlights the exploitation of moral claims in support of a particularist political agenda. In contrast, the idealist approach interprets the advisory opinion and resolutions as important normative expressions in the developing global system of governance based on universal human rights principles and treaty obligations.*

*The analysis begins with a detailed comparison of the ideological and intellectual foundations of these core approaches to international law and organizations, the evolution of this debate in the post Cold War international system, and the impact on protracted ethno-national conflicts. This provides the basis for examining the impact of both schools in the context of the Arab-Israeli conflict. The specific case of the UN and ICJ's involvement in the question of Israel's separation barrier is then analyzed in detail from both the realist and idealist perspectives.*

*The implications of this debate are of major importance, not only with respect to the specific challenges posed by terrorism and the necessary responses, but also in the wider context of the crisis in the international system at the beginning of the 21<sup>st</sup> century. The analysis concludes by noting the degree to which this case illustrates a wider process in which international legal principles are manipulated in a manner that contributes to conflict and justification of violence, conforming to the realist interpretation. While still pursuing idealist objectives, wishful thinking cannot conceal the abuse of universalist claims of morality in the pursuit of war by other means.*

## **I. Introduction**

The polarized responses to the UN General Assembly resolutions and the International Court of Justice (ICJ) advisory opinion regarding the Government of Israel's separation barrier reflect both different political ideologies and the intense clash between realists and idealists regarding the relevance of international law. From the realist perspective, this is another example in which the self-styled representatives of a non-existent "international community" exploit moral claims to advance a partisan position in the context of a violent political conflict. In contrast, in the view of idealists, the

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advisory opinion and resolutions constitute normative expressions in the developing global system of governance based on universal human rights principles and treaty obligations.

The implications of this debate are of major importance, not only with respect to the specific challenges posed by terrorism and responses, but also in the context of the crisis in the international system at the beginning of the 21<sup>st</sup> century. If these developments merely reflect the global power structure in the service of particular ideologies and interests, the logical response would be to focus on long-term efforts to alter the power balance, rather than on addressing the substantive issues. From this perspective, the specifics of the resolutions and advisory opinion are irrelevant, and even if the UN and ICJ positions were accepted, new issues would immediately take their place as part of the ongoing political warfare. Indeed, when viewed from this framework, these events are merely extreme symptoms of a much wider process of distortion extending to other settings and conflicts.

In contrast, for those who argue that the demands presented by the UN and ICJ embody enduring universal legal and ethical principles, compliance would strengthen international norms, eventually also encompassing interests that are consistent with such principles. Similarly, if these demands are constituent elements of an international community based on universal codes of conduct implemented by responsible nation states, democratic countries such as Israel, the U.S. and Europe are morally obliged to accept them.

Thus, in order to analyze the normative and policy implications of United Nations resolutions, the ICJ and the related rulings of the Israeli High Court of Justice on this issue, as well as in cases related to the policies of the U.S. and other countries, it is necessary to first consider this wider context. The framework for such an examination must encompass the role of norms and institutions in the post Cold War international system, in general, and specifically their implementation in protracted ethno-national conflicts.<sup>1</sup> The following analysis begins with a detailed comparison of the two conflicting and often orthogonal approaches that dominate discussions of international law and organizations – Hobbesian realism and Kantian-idealism. The ideological and intellectual foundations of each will be considered, as well as their relative strengths and weaknesses with respect to the impact in the context of the Arab-Israeli conflict. On this basis, the specific case of the UN and ICJ's involvement in the question of Israel's separation barrier will be analyzed in detail, including the distortions resulting

<sup>1</sup> The category of protracted ethno-national conflicts is generally considered to include Sri Lanka, the former Yugoslavia, Northern Ireland, the Basque conflict in Spain, Cyprus, Chechnya, the Arab-Israeli conflict, etc.

from the pursuit of a particular political agenda and the departure from the principles of universality and the natural right to self-defense in international norms.

## **II. *The Role of Law in the Anarchic International System***

The distinction between the realist (Hobbesian) approach and the idealist (Kantian) model in analyses of international relations predates the evolution of the modern nation-state. Indeed, many of the central dimensions of this dichotomy are discerned in the writings of Thucydides and his analysis of the Peloponnesian wars, as well as in other classical sources related to issues of war and peace. These two schools continue to have very different views regarding the importance and limits of national sovereignty; on the role of international institutions, such as the United Nations and International Court of Justice; and on the enforcement of legal and human rights norms in the context of conflicts between nations.<sup>2</sup>

### *A. The Resilience of Hobbesian Realism*

For centuries, the gross brutality, suffering, and irrationality of war has led to the search for a system of international law that would prevent warfare and provide an alternative means of settling disputes between nations, just as national laws provide such a mechanism among citizens. In the 17<sup>th</sup> century, Grotius wrote *De Jure Belli ac Pacis* (*The Law of War and Peace*), which created the foundations for this effort. Grotius based his views on human reason, natural law and the law of nations, arguing that while every effort to ensure the peace must be made, war is justified in cases of self-defense including the defense of property.

European statesmen sought to develop the basic concepts outlined by Grotius, convening international conferences to negotiate the laws of war, including the Hague conferences that took place the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century. After these proved ineffective during the Russo-Japanese war and World War 1, additional efforts were made in the framework of the League of Nations and various related conferences and treaties, including the 1928 Kellogg-Briand Pact, renouncing war. While these pacts failed to prevent the rise of Hitler, World War 2 and the Holocaust, these catastrophes produced yet another round of Grotian efforts

<sup>2</sup> Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics" (1992) 46(2) *International Organization* 391.

to devise a system of international law designed to protect universal human rights and rules of warfare.

For adherents of the realist school of international relations, this latest effort, like the previous attempts to regulate warfare based on humanitarian principles, is doomed to failure and may exacerbate the impact of inter-state violence. Realists reject the core assumptions of Grotius and his followers, arguing that the political and juridical frameworks within individual states are fundamentally different than the frameworks of inter-state relations. Within republican societies based on the consent of the governed, the legal process, courts and enforcement systems enjoy normative acceptance and authority. As David Easton observed, “Such a definition presupposes the organization of society under effective authority able to take decisions on values and priorities by way of the budget process and able to enforce its laws by holding in the background the threat of sanctions.”<sup>3</sup> A duly constituted state also maintains a monopoly on the use of force, which is regulated by statute in a consistent manner.

In contrast, in the history of the international system, these conditions have been largely absent (excluding periods of imperial hegemony, such as the Roman Empire, the Ottoman and Hapsburg empires, and during the Napoleonic era). There is no global government (despite claims regarding the United Nations – as considered in the discussion that follows), and instead of a monopoly on the use of force, the system is inherently anarchic.<sup>4</sup> As Easton concludes, “the model of the national political system cannot be extended to the international realm because there is no effective authority in existence at this level.”<sup>5</sup> Similarly, international law cannot be said to enjoy legitimacy resulting from covenants made with the consent of the governed, sanctions are not applied consistently, and there is no system of checks and balances to prevent private agendas from being disguised as “public good”.

In this anarchical “state of nature”, adherents to the realist school, broadly defined,<sup>6</sup> including Morgenthau and Waltz, view power, interests and competition (economic, territorial and other forms) as the dominant forces in international relations. Power balances and mutual deterrence relationships are the prime determinants of stability (or peace). Thus, Morgenthau asserts “International law as a restraint on the struggle for power is a fiction . . . , for it only gains its validity in the very sovereignty of nation-

<sup>3</sup> David Easton, *The Political System* (New York, Knopf, 1959) 1, 129-131.

<sup>4</sup> Thomas Hobbes, *Leviathan* (1651).

<sup>5</sup> David Easton, *A Systems Analysis of Political Life* (New York, John Wiley and Sons, 1965) 284.

<sup>6</sup> In the international relations literature, classical Hobbesian approaches have been supplanted by neo-realist versions. See, for example, Steven Walt, “International Relations: One World, Many Theories” *Foreign Policy* (1998) (110) 29-46.

states that create the law and mechanisms for enforcing it. Treaties that have sought to outlaw war have always failed.”<sup>7</sup>

From this perspective, and with the partial exception of relations within Europe and other liberal democratic states, what is referred to as “international law” is, in reality, a *pseudo legal system*. It has the symbols and rhetoric of legislation, courts, cases, and precedents, but lacks the substance, including the necessary political and social foundations, and the legitimacy based on the consent of the governed. Rather, specific procedures, resolutions, findings and rulings of the relevant international institutions, are a form of warfare by other means (parallel to Clausewitz’s observation that war is politics conducted by other means). (Maj. Michael Newton has referred to the use of pseudo-legal maneuvers to achieve strategic aims as “lawfare.”<sup>8</sup>)

In this framework, the activities of institutions such as the United Nations and its predecessor, the short-lived League of Nations, and the ICJ (as well as the newly developed International Criminal Court) are not the legitimate tools of an “international community”, but rather an ad hoc reflection of the power structure and the interests of the major actors. The political, structural and economic power of various groups, such as the Arab/Islamic bloc or the non-aligned movement (NAM), result in the adoption of UN resolutions and declarations by the UN Human Rights Commission that have political but not intrinsic normative importance.

Empirically, realists point to the high degree of international conflict and systematic violations of prohibitions against aggression in the UN Charter. Such actions are rarely punished through any judicial process – the UN and its associated arms did not extract penalties in the case of the Arab invasion of Israel in May 1948; the Soviet invasions of Hungary in 1956, Czechoslovakia in 1968, and Afghanistan in 1979; Iraq’s invasion of Iran in 1980, the warfare that raged in Vietnam and Indochina for decades; the violence in Sudan, etc. The few examples of UN endorsement of force in self-defense or in response to aggression, such as in Korea (the 1950 “Uniting for Peace” Resolution), or following the Iraqi invasion of Kuwait in 1990, were the result of political factors and reflections of American power, rather than consistent normative responses. This is the international equivalent of a society in which the police and courts respond to theft only when the victims are politically powerful, and can manipulate the system to protect their interests. Such situations are far removed from fundamental concepts of universal justice and equality.

<sup>7</sup> Hans J. Morgenthau, *Politics Among the Nations: The Struggle for Power and Peace* (New York, Knopf, 5<sup>th</sup> ed. 1973) 273. See also Hans J. Morgenthau, “Positivism, Functionalism, and International Law” (1940) 34 *Am. J. Int’l L.* 260, at 283.

<sup>8</sup> Cited by Jeremy Rabkin, “Lawfare” *Wall Street Journal*, 14 July 2004.

While the rhetoric of these international institutions often invokes the vocabulary of human rights and claims of universality, from a Hobbesian perspective, these are usually reflections of interests and influence, filtered through political institutions and processes. The United Nations and its ancillary organizations do not constitute a global democratic legislature representing the will of the people. In reality, the regimes that control the majority of UN member states are far from democratic, do not adhere to basic norms of human rights, and cannot be said to represent their citizens.<sup>9</sup> Similarly, majority votes cast by a collection of dictatorships, totalitarian regimes and tyrannies do not convey any ethical or normative legitimacy. And unlike legitimate political frameworks, the UN and similar organizations are devoid of the checks and balances necessary to avoid the exploitation of normative tools in the service of particular interests.

#### B. *The Limits of Kantian Idealism*

In sharp contrast to the realists, the Kantian idealist or liberal approach emphasizes the importance of international law and institutions, including the centrality of universal human rights, as major normative elements in relations between states. The Kantian school acknowledges the anarchic foundation of the international system, but argues that its impact can be moderated through agreements among nations and the proliferation of liberal democratic political structures. Going further than Grotius, who merely attempted to regulate warfare, Kant strives for “Perpetual peace”, to be attained through cooperation among republican governments and via the development of international law.<sup>10</sup> Under the banner of “democratic peace theory”, this model has been extended through the claim that the spread of democracy is directly and causally linked to the prevention of warfare and the management of conflict through peaceful means.

This idealist approach, and the rejection of the cynical and amoral nature of “balance of power” politics, provided the conceptual basis for the establishment of the League of Nations, for Woodrow Wilson’s faith in the role of public opinion in preventing war, and, despite the failure of this experiment, for the creation of the United Nations following World War II. The “utopian idealists”, to quote the terminology of E. H. Carr<sup>11</sup>, believe that the “harmony of national interests” and of

<sup>9</sup> See, for example, Dore Gold, *Tower of Babel: How the United Nations has Fueled Global Chaos* (New York, Crown Forum, 2004).

<sup>10</sup> Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795).

<sup>11</sup> Edward Hallet Carr, *The Twenty Years' Crisis 1919-1939* (London, MacMillan, 1939).

common humanity can overcome the “war of all against all” in the state of nature. (Similarly, liberal institutionalist models focus on international cooperation based on economic self-interest as a means for overcoming international anarchy.)

In the post-World War II and post-Holocaust era, the utopian idealist approach has focused specifically on human rights issues.<sup>12</sup> In this context, Prof. Irwin Cotler has observed that human rights have become the basis for a new civil religion. And within this framework, international institutions such as the United Nations, claiming the mantle and legitimacy of a democratic legislature operating in the international system, and the closely allied network of very powerful non-governmental organizations, are perceived as the authoritative sources of normative behavior.

Critics of this approach focus on its utopian nature, the emphasis on wishful thinking, as opposed to realism, and the “democracy deficit” which is characteristic of such global political organizations. The UN and international legal frameworks are limited to relations between sovereign states, and do not encompass non-state actors, including terror organizations, thereby leaving a gaping hole in core security issues. (Until recently, the UN Human Rights Commission and the ancillary NGOs that work closely with this structure, such as Amnesty International and Human Rights Watch, explained their failure to consider the impact of terror on human rights on the grounds that their mandates and international law focused exclusively on the behavior of governments. When the absurdity of this situation became overwhelming, they reluctantly began to include analysis of non-state actors, including terror groups.)

In addition, the idealist approach to international relations is often plagued by the apparent absence of a normative hierarchy of values based on common sense and reason claimed by advocates of natural law. For example, attacks against civilians and the limitation of civil liberties designed to prevent such attacks are often considered to be equally egregious. When terror attacks are conducted or supported by non-state actors, and the defensive response of the state under attack encroaches on civil liberties and human rights, the existing international legal framework is more likely to condemn the defensive actions than the perpetrators of the violence, particularly given the anti-state bias that permeates post-modern ideology. These distortions undermine the claims of universality that are central to the legitimacy of idealism.

The realist/idealist divide also constitutes a major fault line between the dominant American and European approaches to international relations. According to Robert Kagan, “On the all-important question of power - the efficacy of power, the morality

<sup>12</sup> See, for example, Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, Cornell University Press, 2nd ed., 2003.); Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York, Routledge, 2000).

of power, the desirability of power ... Europe is turning away from power, or to put it a little differently, it is moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation. It is entering a post-historical paradise of peace and relative prosperity, the realization of Kant's 'Perpetual Peace.'"<sup>13</sup> In contrast, as many critics note, the evidence from Europe prior to World War I, and, more recently, from the former Yugoslavia and in many other cases, indicates a large gap between the optimism of the theory and the political reality. This experience indicates that emphasis on international law, support for organizations such as the UN, and the rhetoric of liberal democracy and universal human rights, do not readily produce peace, prevent conflict, or promote equal treatment for different nation-states. Nevertheless, in Europe, the emotional appeal of idealism and the optimism that it conveys, accompanied by the rejection of realism, remain dominant.<sup>14</sup>

### **III. *The Arab-Israeli Conflict in the UN and International Legal Frameworks***

The UN has served as a major political battleground in the Arab-Israeli conflict since the 1947 partition debate, UN General Assembly Resolution 181, and the end of the British mandate a few months later. After the Arab invasion and war, the UN played a central role in the armistice talks, and in continuing efforts to broker peace agreements, embodied in UNGAR 194, UNSCR 242, 338 etc.<sup>15</sup> UN peacekeeping and monitoring forces were also deployed along the cease-fire lines, with different degrees of effectiveness.

During this period, the debates and resolutions in the UN took an increasingly pro-Arab and anti-Israeli position.<sup>16</sup> In 1975, the UN General Assembly adopted the resolution classifying Zionism as racism, and although the resolution was repealed in 1991 following a major American political effort prior to the opening of the Madrid

<sup>13</sup> Robert Kagan, "Power and Weakness" (2002) 113 *Policy Review* 3. See also Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York, Knopf, 2003). For a European rebuttal, see Will Hutton, *A Declaration of Interdependence: Why America Should Join the World* (New York, W.W. Norton, 2003).

<sup>14</sup> For reviews of recent European academic literature on this debate, see Michael Byers, ed. *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, Oxford University Press, 2000); and Andreas L. Paulus, "Law and Politics in the Age of Globalization" (2000) 11(2) *European Journal of International Law* 465. Paulus does not include any mention of Hobbes or realism.

<sup>15</sup> Ruth Lapidoth, *Israel and the Palestinians: Some Legal Issues* (Jerusalem, The Jerusalem Institute for Israel Studies, 2003).

<sup>16</sup> Avi Beker, *The United Nations and Israel: From Recognition to Reprehension* (Lexington, Mass., Lexington Books, 1988).

peace conference, its content was revived in the 2001 Durban Conference on Racism and Xenophobia. The UN also began to actively promote specific pro-Palestinian activities, reflecting the political power structure. These include conferences of “Civil Society on Support of Palestinian People” (mandated by General Assembly resolutions), appointment of special “rapporteurs”, whose mandates and political or ideological agendas are predominantly anti-Israel, and frequent adoption of resolutions that reflect a pro-Palestinian position.<sup>17</sup> In addition, a number of UN bodies were specifically created to promote the Palestinian agenda, such as the Committee on the Exercise of the Inalienable Rights of the Palestinian People, and the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.<sup>18</sup> Similarly, the United Nations Commission on Human Rights, which is based in Geneva, and the associated powerful non-governmental organizations (NGOs), have become major political instruments in promoting the Palestinian cause.<sup>19</sup> The UNCHR’s condemnations of Israel for alleged violations of Palestinian rights are often led by countries whose human rights records are far from stellar, including Pakistan, Libya, etc.<sup>20</sup>

Another example of the political exploitation of the international legal structure is provided by the extraordinary and unique convening of the parties to the 1949 Fourth Geneva Convention in July 1999. No similar session has been called with respect to any other dispute, clearly suggesting that this event was motivated by political and not normative goals. The timing, at the beginning of permanent status negotiations between Israel and the Palestinians, seemed designed to isolate and pressure the Israeli government. These circumstances are inconsistent with justifications based on claims of universal international law and a wider idealist framework.<sup>21</sup>

In contrast, for utopian idealists, for whom the UN and its associated agencies are the arbiters of behavior and standards of international morality, this record is cited

<sup>17</sup> Hillel C. Neuer, “The UN’s Food Politics”, *National Post* (Toronto, Ca.), 6 September 2004.

<sup>18</sup> The American Jewish Committee, “One-Sided: The Relentless Campaign Against Israel in the United Nations (A Report on 2003-2004 General Assembly Resolutions on the Arab-Israeli Conflict)” (September 2004) [http://ajc.org/upload/pdf/UNGA\\_one\\_sided\\_58th\\_session.pdf](http://ajc.org/upload/pdf/UNGA_one_sided_58th_session.pdf).

<sup>19</sup> Anne Bayefsky, “Israel and the United Nations’ Human Rights Agenda: The Inequality of Nations Large and Small” (1995) 29(3) *Is.L.R.* 424; Jeffrey Andrew Hartwick, “Non-Governmental Organizations at United Nations-Sponsored World Conferences: A Framework for Participation Reform” (2003) 26 (2) *Loy LA Int’l & Comp L Rev* 217-280, Robert Charles Blitt, “Who Will Watch the Watchdogs? Human Rights, Nongovernmental Organizations and the Case for Regulation” *BHRLR* (2004) 10.

<sup>20</sup> American Enterprise Institute, “The United Nations and Israel” (Conference transcript) 4 August 2004 available at the American Enterprise Institute website available at <http://www.aei.org/events/filter.all,eventID.862/transcript.asp>.

<sup>21</sup> Dore Gold, “From ‘Occupied Territories’ to ‘Disputed Territories’” (2002) 470 *Jerusalem Viewpoints* published at the Jerusalem Center for Public Affairs website available at <http://www.jcpa.org/jl/vp470.htm>.

as evidence that Israeli policies (usually couched in terms of “the occupation”) are fundamentally at fault. While some members of this school acknowledge flaws and imperfections in the way in which the international legal system operates, they do not consider these flaws to be sufficient to invalidate the overall approach. From this perspective, the UN system and the body of treaties and other elements that constitute international law are of supreme normative importance. But such claims are very difficult to sustain in the face of the evidence pointing to the absence of universality, the violation of basic norms of natural justice, including the core right to self-defense, and the other evidence of politicization.

*A. The UN and ICJ Role in Political Campaign Against Israel’s Separation Barrier*

The role of the UN General Assembly and the ICJ in the case of Israel’s separation barrier is consistent with the history of the UN’s political role in the conflict, and strongly supports the realist analysis. Claims that the ICJ advisory opinion reflects moral and ethical standards, or international norms, are not supported by a careful analysis of both the substance and the procedures. Rather, the evidence demonstrates the political exploitation of normative claims to pursue an anti-Israeli ideological agenda.<sup>22</sup>

The UNGA resolution of December 8 2003 requesting an advisory opinion from the ICJ was adopted by a ninety-to-eight margin with seventy-four abstentions – hardly an overwhelming consensus. This resolution reflects the Palestinian usage of the politically loaded term “wall” rather than neutral “barrier” (or Israeli “fence”), as well as the vocabulary and historical distortions of the Palestinian narrative (including the misnomer of “occupied Palestinian territory”). The one-sided indictment repeats the political allocation of the Fourth Geneva Convention on behalf of the Palestinian cause, and poses leading questions such as:

“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...considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

<sup>22</sup> This exploitation is also seen in the NGO campaign against the separation barrier. See, for example: NGO, “HRW’s Political Condemnation of Israel’s Separation Barrier” (2003) 2(2) *NGO Monitor Analysis*, October 4, 2003 published at the NGO website available at <http://www.ngo-monitor.org/editions/v2n02/v2n02-3.htm>

As Rothenberg and Bell have noted, “The UN General Assembly (GA) resolution asking the International Court of Justice (ICJ) for an advisory opinion is actually a request for an endorsement of an already-stated political opinion of the GA. The ICJ lacks jurisdiction over the case because the GA has dictated the desired result. The court is not authorized to make endorsements of the GA’s political opinions dressed in legal garb.”<sup>23</sup> The resolution “reaffirm[s]” an earlier UNGA resolution declaring that the “construction of the wall...is in contradiction to relevant provisions of international law” and demanded that Israel stop and reverse construction.<sup>24</sup>

Similarly, both the UNGA and the ICJ largely ignored context of the separation barrier, including the catastrophic end to the Oslo “peace process”,<sup>25</sup> the ensuing Palestinian terror campaign, which was responsible for the murder of almost 1000 Israelis between September 2000 and July 2004 (when the ICJ published its advisory decision), and the obligation of the Israeli government to protect the lives of its citizens.

As noted by Judge Thomas Buergenthal in his strong dissent, the one-sided advisory opinion was devoid of credibility: “The Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case.” As a result, the ICJ’s decision to issue an advisory opinion, “...without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel’s legitimate right of self-defense, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel.... cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided to the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject.”<sup>26</sup>

Buergenthal’s emphasis on the failure of the UN and ICJ to include consideration of Palestinian terror, and the absence of a hierarchy of ethical norms and moral behavior in the proceedings, highlight the deficiencies of the utopian idealist approach. Furthermore, the substantial evidence linking the construction of the

<sup>23</sup> Laurence E. Rothenberg and Abraham Bell, “Israel’s Anti-Terror Fence: The World Court Case” (2004) 513 *Jerusalem Viewpoints*: available at the Jerusalem Center for Public Affairs website: <http://www.jcpa.org/jl/vp513.htm>.

<sup>24</sup> *Ibid.*

<sup>25</sup> This history is presented in great detail by Dennis Ross, *The Missing Peace: The Inside Story of the Fight for Middle East Peace* (New York, Farrar, Straus, and Giroux, 2004).

<sup>26</sup> Declaration of Judge Buergenthal, available at [http://www.icj-cij.org/icjwww/idocket/imwp/imp\\_advisory\\_opinion\\_seperate\\_declaration\\_Buergenthal.htm](http://www.icj-cij.org/icjwww/idocket/imwp/imp_advisory_opinion_seperate_declaration_Buergenthal.htm).

barrier to the decline in Israeli casualties from terror attacks<sup>27</sup> is unmentioned, while neither the UNGA nor the ICJ presented or considered alternative policies to prevent this carnage. (While some idealists argue that “ending the occupation” would result in an end to terror, the level of violence from the 1920s until the 1967 war and the resulting “occupation” undermines the credibility of such claims. The PLO’s “Palestinian National Charter”, which continues to be published without the changes ostensibly made during the negotiations, and “The Covenant of the Islamic Resistance Movement” (Hamas) state their main goal as the destruction of the State of Israel, without regard to borders.)

Indeed, the blatant political objectives of these proceedings on the separation barrier are emphasized in the majority opinion, citing submissions from the UN itself, which repeats the standard Palestinian narrative and version of history. Ignoring Arab rejection of UNGAR 181 and the subsequent invasion to destroy Israel, the justices wrote “On 14 May 1948 Israel proclaimed its independence...armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.” Similarly, instead of noting the Arab failure to implement commitments to negotiate peace treaties with Israel in the 1948/9 armistice agreements and elsewhere and the continued attacks, the 1967 War was summarized as the result of “armed conflict ...between Israel and Jordan.”

In her critique of the ICJ “advisory opinion”, Prof. Anne Bayefsky shows that the majority based its views on the claim that the barrier “severely impedes” or “prevents the realization” of a “right of the Palestinian people to self-determination”, as well as freedom of movement, the right to work, to health, to education, and to an adequate standard of living. In contrast, “Not once did the Court refer to the individual rights of Israelis, though the rights violated by terrorism start with the right to life and end with the freedom to move anywhere without fear of dying on the way to school or work.”<sup>28</sup>

In an oblique reference to terror, the ICJ majority argued that the right of self-defense embodied in the UN Charter is irrelevant in this case, because Palestinian terrorists operate from Israeli-controlled territory and is therefore not “international”. Not only does such pedantry further undermine the moral claims of the process, but this claim is factually false, since much of the terrorist infrastructure is based in Syria and Lebanon, using weapons supplied via Egypt and Iran. The highly convoluted

<sup>27</sup> <http://www.securityfence.mod.gov.il/Pages/ENG/news.htm#news19> ; Ministry of Foreign Affairs, “The Anti-terrorist Fence Saves Lives”, 1 July 2004, <http://www.mfa.gov.il/mfa/terrorism-obstacle+to+peace/terrorism+and+islamic+fundamentalism-/anti-terrorist+fence+saves+lives.htm>.

<sup>28</sup> Anne Bayefsky, “Had Enough?” *National Review Online*, 17 July 2004.

construction of the argument is clearly designed to apply this discriminatory criterion uniquely to the case of Israel.

In contrast to the ICJ's erasure of Israel's right of self-defense, the Israeli High Court (*Bagatz*) has ruled, the security of Israeli citizens and protection from Palestinian terror are valid and necessary criteria, to be considered in planning the route of the barrier.<sup>29</sup> Within the confines of the Israeli state, decisions of the duly constituted judicial system enjoy the legitimacy that is lacking in the context of the international system. However, when a national court goes beyond the context of its own legal system and cites "international law", treaties, UN resolutions, etc., that have not been expressly adopted by the state, this is conceptually problematic, and weakens the legitimacy of the decision. While endowing international law with universal moral importance, particularly with respect to global treaties and regional pacts (such as the European Convention of Human Rights), the designation of particular examples as "more normative" than others is entirely subjective. Furthermore, the Israeli court, like other legal bodies in other nations, lacks the competence to consider core political and diplomatic factors that go far beyond the legal issues, including the fact that a barrier based on the 1949 armistice lines would also constitute the starting point for eventual border negotiations, leaving no room for compromise.

In their advisory decision, the statements of the ICJ regarding the specific route of the separation barrier (which has shifted many times in response to internal Israeli domestic policies, including the security dimensions and decisions of the Israeli court), and its relation to the 1949 Armistice line (the "green line") also reflect a specific political position couched in legal rhetoric. This line was the result of the war triggered by the 1948 Arab invasion (an early and clear violation of the UN Charter that was never penalized), and its normative standing is certainly no greater than of boundaries that are based on imperialist-era treaties. Similarly, the status of the territories in question (Judea, Samaria, and the Gaza strip), is strongly disputed. The West Bank (a term coined after Jordan seized this territory in the 1948 invasion and designed to legitimize control<sup>30</sup>) was under various forms of foreign occupation for 2000 years, and prior to 1948, was held (without international recognition) by the British and Ottoman empires. And Gaza was controlled by Egypt without claim of

<sup>29</sup> H.C.J. 2056/04 *Beit Sourik Village Council v. The Government of Israel* 58(5) P.D. 807. See this issue of the Israel Law Review for an English translation of this decision: "H.C.J. 2056/04 *Beit Sourik Village v. The Government of Israel* 58(5) P.D. 807" (2005) 38 (1-2) *Is.L.R.* 83.

<sup>30</sup> Prior to the Jordanian annexation, the terms Judea and Samaria were used in UN reports. See United Nations Special Committee on Palestine, Recommendations to the General Assembly, A/364, 3 September 1947.

sovereignty from 1948 until 1967.<sup>31</sup> But the members of the ICJ simply adopted the UN political agenda and Arab narrative, declaring that “there [is] no need for any enquiry into the precise prior status of those territories.” This arbitrary approach to history and precedent is a further demonstration of the ICJ’s narrow agenda.

With respect to process, the particular political, rather than normative universal objectives of the UNGA and ICJ procedures are demonstrated in the effort to isolate Israeli policy from the wider context and single this issue out for special treatment. As noted, the UN resolutions before and after the publication of the ICJ opinions were framed by the distorted Palestinian historical narrative, and predetermined the outcome, based on undisguised political terminology, and essentially condemning Israeli policy before any pseudo-legal discussion.

Furthermore, the ICJ itself is, by definition, also a non-binding political body, reflecting many of the flaws inherent in the United Nations. Of the 49 statements submitted to the ICJ regarding this issue, many, including the United States, Australia, the members of the EU, Japan, and Canada argued that the ICJ was not an appropriate venue for a political discussion of the Arab-Israeli conflict. In contrast, statements from nine Arab states, “Palestine” (submitted by the PLO’s Negotiation Affairs Department), North Korea, and Cuba supported ICJ involvement – in itself a highly political division.<sup>32</sup>

The ICJ is composed of 15 representatives of UN members states, based on the political decisions of the regional groupings, and the prejudices and political agendas of the judges were very visible in their separate statements. For example, Anne Bayefksy notes that Judge Abdul Koroma of Sierra Leone wrote: “It is understandable that a prolonged occupation would engender resistance.” Judge Hisashi Owada of Japan spoke of the “the *so-called* terrorist attacks by Palestinian suicide bombers against the Israeli civilian population.”<sup>33</sup>

The presence on this panel of Nabil Elaraby, Egyptian ambassador to the UN through 1999 and known for his strong attacks against Israel, is sufficient to demonstrate the dominance of partisan politics. In his separate statement, Elaraby claimed that “Throughout the annals of history, occupation has always been met with armed resistance. Violence breeds violence.” He “wholeheartedly subscribe[d] to the view” that there is “a right of resistance.”<sup>34</sup>

<sup>31</sup> Gold, *supra* n. 21; Rothenberg and Bell, *supra* n. 23.

<sup>32</sup> David Makovsky and Ben Thein, “Unilaterally Constructed Barriers in Contested Areas” (2004) 465 *Peacewatch* published at The Washington Institute for Near East Policy website: <http://www.washingtoninstitute.org/templateC05.php?CID=2156>.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

Indeed, due to the power of the Arab lobby, Israel is uniquely subject to discrimination in the UN and is not a full member of any of the constituent regional grouping from which the ICJ members are elected. (In recent years, Israel has “enjoyed” second class status in the WEOG – Western Europe and Others Group.) On this basis, Alan Dershowitz compared the ICJ to “a Mississippi court in the 1930s. The all-white Mississippi court, which excluded blacks from serving on it, could do justice in disputes between whites, but it was incapable of doing justice in cases between a white and a black. It would always favor white litigants. So, too, the International Court. It is perfectly capable of resolving disputes between Sweden and Norway, but it is incapable of doing justice where Israel is involved, because Israel is the excluded black when it comes to that court – indeed when it comes to most United Nations organs. A judicial decision can have no legitimacy when rendered against a nation that is willfully excluded from the court’s membership by bigotry.” Dershowitz also wrote that “By showing its preference for Palestinian property rights over the lives of Jews, the International Court displayed its bigotry.”<sup>35</sup>

While a legitimate legal process conforming to basic standards of justice would consider precedents and accepted procedures in comparable situations, the ICJ also failed in this measure. Indeed, three of the supporters of the UNGA resolution – Turkey, Saudi Arabia, and India have built their own separation barriers in contested areas.<sup>36</sup> Rothenberg and Bell note that “the fence is far less intrusive than security barriers used by other states in disputed and occupied territories. In order to block terrorist infiltrations, India is now building a barrier longer than Israel’s security fence along the line of control separating Indian and Pakistani forces within disputed Kashmir. Importantly, this barrier is entirely within the disputed territory. Smaller barriers to prevent movement of potential terrorists and irregular combatants have been employed by allied forces occupying Iraq and the former Yugoslavia, often entirely surrounding and cutting off towns and cities from the rest of the occupied territory.”<sup>37</sup>

Other procedural inadequacies used by the ICJ would have been unacceptable in the judicial systems characteristic of liberal democracies. Judge Buergenthal notes the court’s reliance on [biased] United Nations reports and resolutions as evidence, rather than considering the issues independently. These include the Secretary General’s December 2003 report listing Palestinian complaints regarding the barrier,

<sup>35</sup> Alan Dershowitz, “Israel Follows its Own Law, not Bigoted Hague Decision” *Jerusalem Post*, 11 July 2004.

<sup>36</sup> Makovsky and Thein, *supra* n. 32.

<sup>37</sup> Rothenberg and Bell, *supra* n. 23.

while failing to mention the terrorism that led to the adoption of this policy. The submissions of the UN special rapporteur on Israel were taken at face value, despite the careful research that showed the impact of his particularist ideology, political agenda and biases in these reports.<sup>38</sup> Judges who base their opinions and analysis on such biased sources cannot be considered to constitute a legitimate impartial court of law, in any reasonable sense of the word.

#### **IV. Evaluation and Implications:**

Utopian idealism, as embodied in universal codes of conduct, and human rights that extend beyond the boundaries of national states, are important dimensions in the Western concept of political and social evolution towards a universal just society.

But for most of the world, these dimensions remain largely divorced from the reality of bitter and very violent conflict, including mass terrorism devoted to the pursuit of ideological objectives. Instead of providing a normative foundation for behavior, human rights claims and the rhetoric of international law are exploited routinely as a central part of the conflict itself, delegitimizing the basic right of self-defense. In other words, Kantian idealism is being exploited in the service of realism's pursuit of power and influence. This combination takes the form of "soft power", reflecting political interests disguised as cultural norms, and channeled through international institutions, the media, and a very powerful NGO network (largely subsidized by governments and other political bodies to further their goals).<sup>39</sup> This soft power, like the more visibly destructive hard power reflected in military force, is not inherently moral, and, in the case of the campaign against Israel, can also be used to pursue genocidal objectives.<sup>40</sup>

Thus, despite the efforts of Grotius, Kant, Wilson, and many others, the structures that are supposed to advance the legal and idealist dimensions of international behavior – such as the United Nations and the International Court of Justice – are very much part of the problem, rather than the solution.

<sup>38</sup> UN Watch, "In Focus: Abuse of Mandate by Jean Ziegler, UN Special Rapporteur on the Right to Food", available at <http://www.unwatch.org/speeches/ZieglerFocus.html>.

<sup>39</sup> On the problems of NGO legitimacy and accountability see Hugo Slim, "By What Authority? The Legitimacy and Accountability of Non-Governmental Organizations" The International Council on Human Rights Policy, International Meeting on Global Trends and Human Rights Before and after September 11, Geneva, 10-12 January 2002. A copy of the lecture is on file with the author.

<sup>40</sup> Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics* (NY Public Affairs, 2004); Gerald M. Steinberg, "NGOs Make War on Israel" (2004) XI (3) *Middle East Quarterly*, available at The Middle East Forum's website: <http://www.meforum.org/article/633>.

As demonstrated in the preceding analysis, the role of the UN and the ICJ in the case of Israel's separation barrier is overwhelmingly political, reflecting the processes and dimensions of *realpolitik*. In this as in other examples, blatantly one-sided and often illogical claims regarding human rights and justice are pressed into service as part of the ongoing political war against Israel. Indeed, among Palestinians, the publication of the advisory opinion was greeted with celebration.

At the same time, the actions of the UN and the ICJ are an accurate reflection of Israel's isolated and vulnerable international position. These actions are part of the Arab and Palestinian "South African" strategy designed to create a situation in which sanctions can be imposed on Israel, thereby furthering diminishing Israel's legitimacy.

An effective response must address both the power structure in the international system, as well as the abuse of the normative dimensions, particularly with respect to the dominant European (and Canadian) Kantian utopian idealists. Beyond the specific issues relating to the normative pseudo-legal rhetoric of the UN and ICJ in the case of the separation barrier, the façade that allows for the exploitation of human rights in preventing effective anti-terror policies must be challenged directly. Messianic idealism remains a noble objective, but while the messiah tarries, the pragmatic requirements of political survival in an anarchic and immoral international system give primacy to a realist approach. And wishful thinking cannot conceal the cynical abuse of universalist claims of morality in the pursuit of war by other means.