

## WALL OF REASON:

ALAN DERSHOWITZ v. THE INTERNATIONAL COURT OF  
JUSTICE*Nicholas Rostow\**

## I. INTRODUCTION

The work of Alan Dershowitz spans a great deal of the law: criminal, of course; civil liberties and international human rights; and international humanitarian law as well. A notable theme in the Dershowitz *oeuvre* is his relationship to Israel and Judaism.<sup>1</sup> Again and again he returns to it, both as a Jew and as an advocate.<sup>2</sup> In the tradition of Voltaire,<sup>3</sup> Dershowitz lives the First Amendment but in terms of its particular meaning for Jews: “If I were asked to defend the right of a Holocaust denier to express his perverse views,” he wrote, “I would agree to defend his right, but I would insist on exercising my own right to call his views anti-Semitic and false.”<sup>4</sup>

Nowadays, it is common to read that one must have courage to

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<sup>1</sup> See generally Martin H. Belsky, *Alan Dershowitz: The Advocate and Scholar as Jew; The Jew as Advocate and Scholar*, 71 ALB. L. REV. 929 (2008) (describing Dershowitz’s evolving relationship with Judaism and noting the impact on both his scholarship and advocacy).

<sup>2</sup> See, e.g., ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* (2003) [hereinafter *CASE FOR ISRAEL*]; ALAN DERSHOWITZ, *THE CASE FOR PEACE: HOW THE ARAB-ISRAELI CONFLICT CAN BE RESOLVED* (2005) [hereinafter *CASE FOR PEACE*]; ALAN M. DERSHOWITZ, *CHUTZPAH* (1991) [hereinafter *CHUTZPAH*].

<sup>3</sup> “Monsieur l’abbé, I detest what you write, but I would give my life to make it possible for you to continue to write.” Letter from Voltaire to M. le Riche (Feb. 6, 1770) (translated from French in NORBERT GUTERMAN, *A BOOK OF FRENCH QUOTATIONS* (1990)), available at [www.quotationspage.com/quote/35376.html](http://www.quotationspage.com/quote/35376.html).

<sup>4</sup> *CHUTZPAH*, *supra* note 2, at 173.

criticize Israel, much less Jews.<sup>5</sup> Indeed, an article in the *Chronicle of Higher Education Review*<sup>6</sup> argues this point, taking up the cudgels for Tony Judt's advocacy of abolishing Israel,<sup>7</sup> Juan Cole's assertions that Iran's President has not called for wiping Israel off the map,<sup>8</sup> and Mearsheimer's and Walt's<sup>9</sup> twisting of history and common sense to argue that the United States shed blood and expended treasure in Iraq at the behest of the pro-Israel lobby if not the Israeli government—in short, the Jews.<sup>10</sup> In most academic circles outside the United States, and in many academic circles inside the United States as well, it is much easier to stand against Israel than for it, particularly with respect to Israel's relations with Palestinians and the occupied territories. The abuse heaped on Dershowitz the man—not on what he says and the evidence supporting his arguments—shows that defenders of Israel face no easy task.<sup>11</sup> So, Alan Dershowitz's stand is brave. There are more

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<sup>5</sup> See, e.g., Peter Applebome, *Speech on the Mideast Brings Opinions to a Boil*, N.Y. TIMES, Feb. 17, 2008, at A29 (citing Alison Weir, who blames neoconservatives with strong ties to Israel for the Iraq war and the U.S. for arming and encouraging Israeli "aggression").

<sup>6</sup> Alan Wolfe, *Free Speech, Israel, and Jewish Illiberalism*, CHRON. REV., Nov. 17, 2006, at B6, available at <http://chronicle.com/free/v53/i13/13b00601.htm>.

<sup>7</sup> *Id.*; see Tony Judt, *Israel: The Alternative*, N.Y. REV. BOOKS, Oct. 23, 2003, at 8, available at <http://www.nybooks.com/articles/16671>.

<sup>8</sup> See Juan Cole, *Hitchens the Hacker; And, Hitchens the Orientalist And, "We Don't Want Your Stinking War!"* INFORMED COMMENT, May 3, 2006, <http://www.juancole.com/2006/05/hitchens-hacker-and-hitchens.html>; Sean Yoong, *Ahmadinejad: Destroy Israel, End Crisis*, WASH. POST, Aug. 3, 2006, [http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080300629\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080300629_pf.html).

<sup>9</sup> See John J. Mearsheimer & Stephen Walt, *The Israel Lobby and U.S. Foreign Policy* (Harv. Univ. John F. Kennedy Sch. Gov't 2006, Working Paper No. RWP06-011), available at [http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP06-011/\\$File/rwp\\_06\\_011\\_walt.pdf](http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP06-011/$File/rwp_06_011_walt.pdf). A revised version appeared as THE ISRAEL LOBBY AND U.S. FOREIGN POLICY (Farrar, Straus and Giroux 2007). For trenchant criticism of Mearsheimer's and Walt's publication, see Eliot A. Cohen, *Yes, It's Anti-Semitic*, WASH. POST, Apr. 5, 2006, at A23.

<sup>10</sup> See Lanny J. Davis, *Liberal McCarthyism: Bigotry and Hate Aren't Just for Right-Wingers Anymore*, WALL ST. J., Aug. 8, 2006, at A10, available at <http://www.opinionjournal.com/forms/printThis.html?id=110008763>; see also *The Chronicle of Higher Education*, WALL ST. J., Feb. 15, 2008, at A28 (displaying a full page advertisement defending the critics of Israel by the "Ad Hoc Committee to Defend the University"); WILLIAM F. BUCKLEY, JR., IN SEARCH OF ANTI-SEMITISM 9 (1992) (discussing how the obsessive criticism of Israel can be anti-Semitic because of risk it poses to Jews by threats against Israel).

<sup>11</sup> See, e.g., CASE FOR PEACE, *supra* note 2, at 167–98; Alexander Cockburn, *Will Lawrence Summers Take Action? Alan Dershowitz, Plagiarist?*, COUNTERPUNCH, Sept. 26, 2003, available at <http://www.counterpunch.org/cockburn09262003.html> (depicting Dershowitz as a plagiarist); Christian B. Flow, *In Speech, Trivers Derides Dershowitz*, HARV. CRIMSON, Feb. 15, 2008, available at <http://www.thecrimson.com/article.aspx?ref=521906> (quoting Robert Trivers referring to Dershowitz as a "skunk"); Y.M.D. Fremes, *Interview with Professor*

voices today for Israel than there were thirty years ago, and one of the reasons is because of Alan Dershowitz. From his perch at Harvard, he has demonstrated again and again why academic tenure is so important and why respect for evidence is important as well.

Dershowitz is an advocate whose tone is combative. He is not afraid to use the evidence at hand; he is not a pedant. By his own account, these qualities have been with him throughout his career. In his first trial, defending a young Jewish Defense League member named Sheldon Seigel, Dershowitz demonstrated the ability to out-manuever his opponents through the use of evidence. During the cross-examination of the prosecution's main witness, Dershowitz used homemade tape recordings of some conversations between Seigel and the witness to create the illusion that he could prove Seigel's version of all of the conversations between the two.<sup>12</sup> This tactic demonstrated that the witness had committed perjury and led to his subsequent admission that the defense's version of the conversations was indeed correct "[i]n substance," despite the fact that the tape recorder had actually failed to capture the parts of the conversations most damaging to the prosecution's case.<sup>13</sup>

Since that first case, Dershowitz has demonstrated a consistent willingness to use the other side's case to his client's advantage. The O.J. Simpson trial, for example, turned into a trial of evidence. The glove, the sock, the testimony of the racist detective—all this evidence was originally the prosecution's, but Dershowitz made it work for the defense.<sup>14</sup> These examples illuminate the "Dershowitz method" and are not isolated occurrences.

To shed more light on the Dershowitz approach and jurisprudence, imagine him in an argument—not a name calling

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*Norman G. Finkelstein*, PALESTINIAN CHRON., Nov. 25, 2003, available at <http://www.normanfinkelstein.com/article.php?pg=4&ar=17>, (quoting Professor Finkelstein calling Dershowitz "evil" and equating him with Adolf Eichmann); Interview by Amy Goodman with Howard Zinn and Noam Chomsky, *Noam Chomsky Accuses Alan Dershowitz of Launching a "Jihad" to Block Norman Finkelstein From Getting Tenure at Depaul University* (Apr. 17, 2007), available at [http://www.democracynow.org/2007/4/17/noam\\_chomsky\\_accuses\\_alan\\_dershowitz\\_of](http://www.democracynow.org/2007/4/17/noam_chomsky_accuses_alan_dershowitz_of) (accusing Dershowitz of being a "maniac," an "apologist for [Israeli] violence," and a "liar").

<sup>12</sup> ALAN M. DERSHOWITZ, THE BEST DEFENSE 52–60 (1982) [hereinafter BEST DEFENSE].

<sup>13</sup> *Id.* at 56–57.

<sup>14</sup> Although he was brought on board primarily to prepare for a possible appeal (Mr. Simpson referred to Dershowitz as his "God forbid" lawyer), by his own account, Dershowitz played a crucially important role in many of the defense team's most memorable evidentiary coups. See ALAN M. DERSHOWITZ, REASONABLE DOUBTS 13, 50–66, 76–77, 82–83, 130 (1996).

exercise, however apropos that might appear to be<sup>15</sup>—with the International Court of Justice.

## II. THE INTERNATIONAL COURT OF JUSTICE AND ISRAEL

In response to a request from the U.N. General Assembly,<sup>16</sup> on July 9, 2004, the International Court of Justice (I.C.J.) issued an Advisory Opinion<sup>17</sup> addressing the legal implication of Israel's

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<sup>15</sup> See CASE FOR PEACE, *supra* note 2, at 103.

The International Court of Justice is much like 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.

*Id.*

<sup>16</sup> G.A. Res. 10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003).

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?

*Id.* at para. 22. The Tenth Emergency Special Session was convened on April 22, 1997 “to discuss an item entitled ‘Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory.’” The Secretary-General, *Note by the Secretary General*, U.N. Doc. A/ES-10/1 (Apr. 22, 1997). The General Assembly has adjourned and reconvened the Tenth Emergency Special Session periodically since that date.

<sup>17</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), *available at* <http://www.icj-cij.org/docket/files/131/1671.pdf>. “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” U.N. Charter art. 96, para. 1. The I.C.J. has never refused such request from the General Assembly or the Security Council. *Wall*, 2004 I.C.J. at 156. The Opinion states: “Its decision not to give the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization was based on the Court's lack of jurisdiction, and not on considerations of judicial propriety.” *Id.* (citing *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 235 (July 8), *available at* <http://www.icj-cij.org/docket/files/95/7495.pdf>). For a discussion on the question of competence (jurisdiction), see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, 232-33 (July 8), *available at* <http://www.icj-cij.org/docket/files/93/7407.pdf>; see also Nicholas Rostow, *The World Health Organization, the International Court of Justice, and Nuclear Weapons*, 20 YALE J. INT'L L. 151, 151-52, 154-63 (1995) (discussing the competence of the World Health Organization and I.C.J. to give advisory opinions). On the legal significance of I.C.J. Advisory Opinions, see Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT'L L. 26, 36 (2005) (“Since advisory opinions are inherently nonbinding—and do not gain in legal force when endorsed by the General Assembly or even the Security Council—their authoritative nature depends, naturally, on the persuasiveness of their reasoning.”).

construction of a wall<sup>18</sup> in the Occupied Palestinian Territory. The title of the opinion came from the General Assembly request,<sup>19</sup> and the court opined that Israel's wall was a violation of international law to the extent it was outside the Green Line—the 1949 Armistice Demarcation Line between Israel and Jordan—because it impeded the exercise by the Palestinian people of their right of self-determination.<sup>20</sup> The court said that the wall created a *fait accompli* that could become permanent, including within it “Israeli settlements in the Occupied Palestinian Territory . . . established in breach of international law.”<sup>21</sup> The court further opined that military necessity or requirements to provide security against attack did not justify the construction of the wall.<sup>22</sup> The court concluded that the international law of self-defense was inapposite as well.<sup>23</sup> The court spelled out what it considered to be the legal consequences for other states of Israel's actions. It noted, of course, that its opinion was advisory only.<sup>24</sup> At the same time, the opinion touched on, if it did not cover, the legally relevant history of

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<sup>18</sup> To avoid confusion, this Paper refers to the wall constructed by the Israelis as “wall,” as the I.C.J. does; the Israelis themselves, however, refer to the same as a “security fence.” See, e.g., HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. [2004] IsrSC 58(5), 807, ¶ 10, 43 I.L.M. 1099, 1103,, available at [http://elyon1.court.gov.il/files\\_eng/04/560/020/a28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf); c.f., e.g., The Secretary-General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, ¶¶ 2, 4, U.N. Doc. A/ES-10/248 (Nov. 24, 2003) (using the term “barrier” on the ground it is a more neutral one than the others). The wall includes, among other things, concrete barriers, barbed wire, chain-linked fence barriers, anti-vehicle trenches, and sensors. *Id.* ¶¶ 9–11. Israel has argued that the wall's route as presented to the I.C.J. failed to account for ongoing changes. See *id.* ¶¶ 8–9; HCJ 2056/04 Beit Sourik Vill., [2004] IsrSC 58(5)807, ¶ 13. Further, the Israeli government has announced that it would reexamine the entire route in order to conform to the High Court decision in *Beit Sourik*. See TAMI AMANDA JACOBY, BRIDGING THE BARRIER: ISRAELI UNILATERAL DISENGAGEMENT 30 (2007) (citing *Separation Barrier: Judgment of the High Court of Justice Regarding Beit Sourik*, B'TSELEM, [http://www.btselem.org/english/separation\\_barrier/beit\\_surik\\_ruling.asp](http://www.btselem.org/english/separation_barrier/beit_surik_ruling.asp) (last visited Sept. 1, 2008)). Accordingly, Israel argues—apparently with merit—that the Advisory Opinion has considered a route that has never existed and will not exist. In late February 2005, the Israeli government approved modified routing of the wall that would place eight percent of occupied territory in the West Bank west of the fence. David Makovsky & Anna Hartman, *Israel's Newly Approved Security Fence Route: Geography and Demography*, WASH. INST. NEAR EAST POL., Mar. 3, 2005, <http://www.washingtoninstitute.org/templateC05.php?CID=2268>. See generally HCJ 7957/04 Mara'abe v. Prime Minister [2005], IsrSC 38(2), ¶¶ 47–55, 98–101 (discussing the lawfulness of the wall under international and Israeli law), available at [http://elyon1.court.gov.il/files\\_eng/04/570/079/a14/04079570.a14.pdf](http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf).

<sup>19</sup> See *Wall*, 2004 I.C.J. at 136.

<sup>20</sup> *Id.* at 200.

<sup>21</sup> *Id.* at 184.

<sup>22</sup> *Id.* at 195.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 162.

Palestine, including the League of Nations Mandate for Palestine;<sup>25</sup> the Arab-Israeli conflict, especially the history of that conflict since the Six Day War of June 1967;<sup>26</sup> and the international law of self-

<sup>25</sup> *Id.* at 165.

<sup>26</sup> For an account of the war, see generally MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2002). Dennis Ross summarized the run-up to, and unfolding of, the war as follows:

Nasser [President of Egypt], after being taunted by the Syrians and Jordanians for not doing enough to protect Syria in the face of escalating tensions and military engagements with Israel, demanded that U.N. Secretary-General U Thant pull the UNEF [United Nations Emergency Force established in 1956 to separate Egypt and Israel] out of the Sinai. U Thant complied. Nasser moved Egyptian forces back into the Sinai. While probably not originally intending to do so, he acted to reimpose the blockade on the Israeli port of Eilat when he declared on May [twenty-second] that the Straits of Tiran were mined. In addition, he moved six Egyptian divisions to the Israeli border, threatening to inflict a final defeat on Israel once and for all.

Israel, with no strategic depth and facing six divisions on its borders, mobilized its forces. It also asked the United States to fulfill the Eisenhower commitments of 1957 [to prevent any reimposition of a blockade of Eilat]. Being bogged down in Vietnam, the Johnson administration offered only to try to put together an international flotilla to open the Straits of Tiran to Israeli shipping from Eilat. The United States did not address the Egyptian threat in the Sinai, and in any case showed little capability or will to break the blockade of Eilat. After nearly two weeks of uncertainty—with bloodcurdling threats about the destruction of Israel coming from Egypt and ineffectual U.S. efforts still under way—Israel launched a pre-emptive attack against the Egyptian air force, destroying it in the first three hours of the war. In six days Israel went on to defeat Egypt, Jordan, and Syria, seizing considerable territory from all three: the Sinai Desert and the Gaza Strip from Egypt; the West Bank from Jordan; and the Golan Heights from Syria.

DENNIS ROSS, *THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE* 21–22 (2004). For further discussion, see Richard Schifter, *Palestine: Peace Not Apartheid*, *MEDITERRANEAN Q.*, Spring 2007, at 136–41 (reviewing JIMMY CARTER, *PALESTINE: PEACE NOT APARTHEID* (2006), and rebutting the charge that Israel attacked Jordan noting that in fact, Jordan entered the war on the side of Egypt despite Israeli assurances that Israel would not attack). See also ROSS, *supra*, at 166. In May 1967, the U.S. Embassy in Cairo reported that

Over the past ten years we have comforted ourselves with a number of myths regarding Egypt's relative indifference to Palestine problem as a factor in our relations and have proceeded on assumption Nasser wished keep issue in ice box. It is now clear how much it has rankled and how important it has been to Nasser. He is ready to risk everything for it. He has bided his time and has planned well. His only area of miscalculation may be his estimate of Egyptian military capabilities vis-a-vis Israel.

REPORT OF THE AMERICAN EMBASSY Cairo 5080 (May 27, 1967) (on file at LBJ Library, Austin, Texas). A mid-level Soviet official told an American source that

The Soviets overestimated the Arabs' ability to employ their substantial military strength against the Israelis while the Arabs overrated their own strength and underrated the Israeli military capability and determination to win. When [the] source asked if that meant that the Soviets had encouraged the Arabs in their hostile attitude toward Israel, the Soviet replied affirmatively, stating that the USSR had wanted to create another trouble spot for the United States in addition to that already existing in Vietnam. The Soviet aim was to create a situation in which the US would become seriously involved, economically, politically, and possibly even militarily and in which the US would suffer serious political reverses as a result of its siding against the Arabs. This grand design, which envisaged a long war in the Middle East, misfired because the

defense, terrorism, and the boundaries of Israel, among other things.

Alan Dershowitz has addressed a number of these subjects in his work.

### A. *Occupied Territories*

The court's opinion addressed the legal character of the Occupied Territories and of the League of Nations Mandate for Palestine because analysis of legal claims to the Territories, or part of the Territories, and assertions regarding self-determination involve these subjects.

As a result of the June 1967 War, Israel occupied territories previously under Arab control: the Sinai Peninsula and the Gaza Strip (Egypt), the West Bank and East Jerusalem (Jordan), and the Golan Heights (Syria). Unlike the Gaza Strip, the Sinai Peninsula had been an integral part of Egypt.<sup>27</sup> Israel restored Sinai to Egypt pursuant to the terms of the Israel-Egypt Peace Treaty of 1979.<sup>28</sup>

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Arabs failed completely and the Israeli blitzkrieg was so decisive. Faced with this situation, the Soviets had no alternative but to back down as quickly and gracefully as possible so as not to appear the villains of the conflict.

Cable from CIA to White House Situation Room (June 1967) (on file at LBJ Library, Austin, Texas, Doc. 84li, Case No. 82-156). As Ross points out, a school of thought holds that Israel per se is a belligerent occupant, with no right to any territory of the former Palestine Mandate. ROSS, *supra*, at 29–33 (discussing the rise of Arab nationalism and call for repudiation of Balfour Declaration and Sykes-Picot Agreement). That school of thought supports international law insofar as it favors Arab or Palestinian Arab self-determination, but not Jewish self-determination. Each side of the argument looks to the same international law for support.

In June 1967, Israel launched a preemptive strike against Egypt, Syria, and Jordan, after Nasser had declared his intention to annihilate the Jewish state and forged military alliances with Syria and Jordan for that purpose, building up troop concentrations along his border with Israel and blockading shipping to the Israeli port of Eilat.

THOMAS L. FRIEDMAN, FROM BEIRUT TO JERUSALEM 15–16 (Anchor Books, 1990) (1989). The I.C.J. wrote only that “[i]n the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).” *Wall*, 2004 I.C.J. at 166; *see also* ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 80–81 (2006) (discussing the Six-Day War as an example of “preemption” and eschewing the term “anticipatory self-defense”). A version of the foregoing footnote appears in Nicholas Rostow, *Gaza, Iraq, Lebanon: Three Occupations Under International Law*, 37 ISRAEL YEAR BOOK ON HUMAN RIGHTS 205 (2007).

<sup>27</sup> *See, e.g.*, Meir Rosenne, *Development of Oil Resources in Sinai*, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS, 335–36 (Meir Shamgar ed., 1982) [hereinafter MILITARY GOVERNMENT] (noting that both Egypt and Israel assume Egyptian sovereignty over Sinai).

<sup>28</sup> *See* Treaty of Peace, Egypt-Isr., Mar. 26, 1979, 18 I.L.M. 362 (1979). During the Egyptian military government of the Gaza Strip, a period between 1948–67, Egypt neither annexed nor asserted territorial claims to the area. While governing the Gaza Strip,

The Golan Heights had been within the French Mandate and French protectorate of Syria since 1923, and independent Syria since 1943.<sup>29</sup> Jordan not only occupied the West Bank and East Jerusalem during the same period, but also annexed and governed the two regions as part of Jordan.<sup>30</sup> In 1988, Jordan renounced territorial claims to the West Bank and East Jerusalem in favor of the Palestine Liberation Organization.<sup>31</sup> Article 3 of the 1994

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Egyptian policy stated that the Strip formed part of “the great Arab homeland”—in the words of the Gaza Constitution of 1962—and was administered by the Egyptian government. *See* Carol Farhi, *On the Legal Status of the Gaza Strip*, in *MILITARY GOVERNMENT*, *supra* note 27, at 77–78.

<sup>29</sup> Ya’akov Meron, *The Golan Heights: 1918–1967*, in *MILITARY GOVERNMENT*, *supra* note 27, at 89; *see also* Frederic C. Hof, *The Line of June 4, 1967*, *MIDDLE EAST INSIGHT*, Sept.-Oct. 1999, available at <http://www.jewishvirtuallibrary.org/jsourc/Peace/67line.html> (noting that the 1949 Armistice Demarcation Line between Israel and Syria did not track 1923 international boundary, which Syria has never accepted, and that the Golan Heights have been on the Syrian side of 1923 boundary).

<sup>30</sup> EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 108 (1993); ALLAN GERSON, *ISRAEL, THE WEST BANK, AND INTERNATIONAL LAW* 78 (1978). Only Britain, which decides on diplomatic recognition depending on the facts on the ground, and Pakistan, following Britain’s lead, recognized the annexation. BENVENISTI, *supra*, at 108 (footnote omitted); GERSON, *supra*, at 78 (footnote omitted).

<sup>31</sup> *Palestinefacts.org*, Jordan Renounced All Claims to the West Bank (Judea and Samaria) in 1988, [http://www.palestinefacts.org/pf\\_1967to1991\\_jordan\\_renounce\\_claims.php](http://www.palestinefacts.org/pf_1967to1991_jordan_renounce_claims.php) (last visited Sept. 1, 2008). In 1974, an Arab summit concluded by recognizing the Palestine Liberation Organization (PLO) as the “sole legitimate representative of the Palestinian people.” Seventh Arab Summit League Conference, *Resolution on Palestine, Oct. 28, 1974*, in 1974 *INTERNATIONAL DOCUMENTS ON PALESTINE* 525 (Jorgen S. Nielsen et al. eds., 1977), available at <http://www.myisraelsource.com/content/arableagueconference>. The Palestinian National Charter, adopted in July 1968 by the Palestine National Council (as published by the Palestine Liberation Organization (PLO)) provides in Article 2: “Palestine, with the boundaries it had during the British Mandate, is an indivisible territorial unit.” *See* Y. HARKABI, *THE PALESTINIAN COVENANT AND ITS MEANING* 33–39, 113 (1979).

Originally, the Mandate included what is now Israel, Jordan, the West Bank and Gaza. MARTIN GILBERT, *ATLAS OF THE ARAB-ISRAELI CONFLICT* 8 (6th ed. 1993). In 1922, the British separated Trans-Jordan, the area that became Jordan, from the Mandate area available to Jewish settlement. In 1923, Britain ceded to the French Mandate of Syria the area known as the Golan Heights. Therefore, whether the Palestine National Charter deems “Palestine” to encompass the original territory of the Mandate or just that part that became Israel under the 1949 Armistice Agreements—which themselves leave open the ultimate settlement of claims—is a question for interpretation. *See, e.g.*, GENERAL ARMISTICE AGREEMENT ISRAEL AND JORDAN, APRIL 3, 1949 (1949), reprinted in *THE ARAB-ISRAELI CONFLICT*, at 399 (John Norton Moore ed., 1974) (“It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations.”). The General Assembly put the “Question of Palestine” on its agenda and invited the PLO to participate in General Assembly deliberations as an observer. G.A. Res. 3236 (XXIX), U.N. Doc. A/RES/3236 (Nov. 22, 1974); G.A. Res. 3237 (XXIX), U.N. Doc. A/RES/3237 (Nov. 22, 1974). It is possibly not a coincidence that the General Assembly acted on the seventh anniversary of the Security Council’s adoption of Resolution 242. The terminology of General Assembly resolutions since 1973 has changed from “Arab States and peoples whose territories are under Israeli occupation,” G.A.



Israel-Jordan Peace Treaty established the Israel-Jordan border “without prejudice to the status of any territories that came under Israeli military government control in 1967.”<sup>32</sup> In terms of Israel’s bilateral relations, therefore, questions about whose land was occupied remained open.

Characterizations of the Occupied Territories have changed over time. The term “territories occupied” itself is derived from the language of Security Council Resolution 242 (1967).<sup>33</sup> Resolution 242, among other things,

*Affirm[ed]* that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles: (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force . . . .<sup>34</sup>

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Res. 3175 (XXVIII), U.N. Doc. A/RES/3175 (Dec. 17, 1973), to “the Palestinian territories occupied by Israel.” See G.A. Res. 34/65, U.N. Doc. A/RES/34/65 (Nov. 29, 1979). Now, U.N. General Assembly resolutions frequently refer to territories occupied by Israel in the wake of the June 1967 war as “occupied Palestinian and other Arab territories.” *E.g.*, G.A. Res. 33/29, U.N. Doc. A/RES/33/29 (Dec. 7, 1978). Security Council practice also has varied from “territories occupied in the recent conflict,” S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967), to “Arab territories occupied since 1967, including Jerusalem,” S.C. Res. 452, U.N. Doc. S/RES/452 (July 20, 1979), and “Arab territories occupied by Israel since 1967,” S.C. Res. 465, U.N. Res. S/RES/465 (Mar. 1, 1980). In 1979, the Security Council used the term “Palestinian and other Arab territories occupied since 1967” in Resolution 446. S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979). Ever since the 1967 conflict, the United States has been at the center of diplomatic efforts to achieve peace agreements between Israel and its neighbors as well as a political and diplomatic resolution of the Palestinian-Israeli conflict. Other governments have acknowledged the United States’ role and have asserted that U.S. diplomacy is essential to any progress for peace. See CARTER, *supra* note 26, at 16. As a result, one should treat the United States’s unwillingness to accept these references as legally or politically determinative as important to any judgment as to their weight or significance.

<sup>32</sup> Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Isr.-Jordan, Oct. 26, 1994, 34 I.L.M. 43, 47; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 167 (July 9), available at [http://www.icj\\_cij.org/docket/files/131/1671.pdf](http://www.icj_cij.org/docket/files/131/1671.pdf).

<sup>33</sup> S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967).

<sup>34</sup> *Id.* ¶ 4. Adoption of this Resolution was the culmination of months of diplomacy after the Six-Day War. According to one of the American participants in the negotiation of Resolution 242 (1967), U.S. policy was based on the conviction, articulated explicitly by President Johnson on June 19, 1967, that Israel should not have to return to the exact boundaries of June 5, 1967, because to do so would not be “a prescription for peace . . . but for

The Resolution further affirmed:

[T]he necessity (a) For guaranteeing freedom of navigation through international waterways in the area [i.e., the Suez Canal and the Straits of Tiran]; (b) For achieving a just settlement of the refugee problem [i.e., refugees from Israel's war of independence]; (c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones . . . .<sup>35</sup>

Resolution 242 did not state whose territory was occupied. Nor did it specify the boundaries of Israel or endorse the 1949 Armistice Demarcation Lines as permanent borders. The General Assembly submission to the court contained an answer to both of these questions; the I.C.J. chose not to examine and analyze it.

### *B. The League of Nations Mandate for Palestine*

The major premise of the Opinion is that Palestinians are entitled to self-determination because self-determination has been a central part of aspirations within international law,<sup>36</sup> at least since World War I. The court commenced its exposition by selecting from the legally relevant history of Palestine:

Palestine was part of the Ottoman Empire. At the end of the First World War, a class "A" Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that: "Certain communities, formerly belonging to

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a renewal of hostilities," and that there had to be real peace among the parties prior to any withdrawal. See ADNAN ABU ODEH ET AL., UN SECURITY COUNCIL RESOLUTION 242: THE BUILDING BLOCK OF PEACEMAKING 15 (Adnan Abu Odeh et. al. eds., 1993). Nabil Elaraby—in 1967 a member of Egypt's U.N. delegation, in 1993 Permanent Representative of Egypt to the United Nations, and in 2004 Judge on the International Court of Justice—argued that, as a matter of law, Resolution 242 (1967) required Israel to withdraw from all territories occupied in 1967. *Id.* at 35–44. From his seat on the I.C.J., Elaraby is said to have influenced the drafting of the General Assembly request for an advisory opinion as well as the drafting and content of the Advisory Opinion itself.

<sup>35</sup> S.C. Res. 242, *supra* note 33, ¶ 5. The I.C.J. opined that Resolution 242 "emphasized the inadmissibility of acquisition of territory by war." *Wall*, 2004 I.C.J. at 166, 182. This language is quoted from Resolution 242's second preambular paragraph without quotation marks. The entire preambular paragraph reads: "*Emphasizing* the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security . . ." S.C. Res. 242, *supra* note 33, ¶ 2.

<sup>36</sup> See, e.g., U.N. Charter art. 1, para. 2 ("The Purposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for *the principle of equal rights and self-determination of peoples* . . ." (emphasis added)).

the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”<sup>37</sup>

Yet the League of Nations Mandate for Palestine involved far more than this statement suggests. The League of Nations Mandate for Palestine was *not* a Class A Mandate in the literal sense set forth in Article 22 of the Covenant and quoted by the court; rather, it was created pursuant to, and to implement, the 1917 Balfour Declaration.<sup>38</sup> The Mandate provides:

The Council of the League of Nations:

Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the [Balfour] [D]eclaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish

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<sup>37</sup> *Wall*, 2004 I.C.J. at 165 (quoting The Covenant of the League of Nations, art. 22, para. 4, Dec. 1924, available at <http://www.yale.edu/lawweb/avalon/leagcov.htm>).

<sup>38</sup> The 1917 Balfour Declaration stated:

His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

Letter from Arthur James Balfour to Lord Rothschild, Nov. 2, 1917, available at <http://www.yale.edu/lawweb/avalon/mideast/balfour.htm> (last visited Sept. 1, 2008); see also DAVID FROMKIN, A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST 296–99 (1989) (discussing the events leading up to and subsequent to Balfour's letter); MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD 413–16 (2002); LEONARD STEIN, THE BALFOUR DECLARATION (1961); RONALD STORRS, ORIENTATIONS 338–90 (1945) (discussing generally Zionism, the French and Italian adoption of the Balfour Declaration, civil and political rights, and the Palestinian resentment of Article 6 of the Mandate).

communities in Palestine, or the rights and political status enjoyed by Jews in any other country; and

Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country; and

Whereas the Principal Allied Powers have selected His Britannic Majesty as the Mandatory for Palestine; and

Whereas the mandate in respect of Palestine has been formulated in the following terms and submitted to the Council of the League for approval; and

Whereas His Britannic Majesty has accepted the mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions; and

Whereas by the afore-mentioned Article 22 (paragraph 8), it is provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations;

Confirming the said Mandate, defines its terms as follows:

....

ART. 2: The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

....

ART. 6: The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State

lands and waste lands not required for public purposes.<sup>39</sup>

The fact that the court ignored the terms of the Mandate for Palestine as well as part of the Covenant of the League of Nations pursuant to which it was adopted and implemented means that its consideration of the circumstances invoked by the General Assembly was incomplete.

The I.C.J. emphasized self-determination; Dershowitz points out that the international community already had acknowledged the Jewish right to self-determination. Professor Dershowitz wrote: “A de facto Jewish homeland already existed in parts of Palestine, and its recognition by the Balfour Declaration became a matter of binding international law when the League of Nations made it part of its mandate.”<sup>40</sup> The silence of the Advisory Opinion is significant as well because the fourteen League of Nations mandates were governed pursuant to terms formally approved by the Council of the League to implement the League Covenant. As a legal matter, therefore, the court ignored more than half the relevant document in discussing what the Mandate for Palestine meant. Further, the Mandate is relevant because the U.N. Charter specifies that it does not alter the pre-existing rights “of any states or any peoples” under mandatory agreements or other existing international agreements.<sup>41</sup>

Despite the end of the League of Nations Mandate in 1948, when the British withdrew from Palestine, the Mandate retained its vitality in the sense of stating the purposes the international community had adopted for the disposition of the Mandate territory.

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<sup>39</sup> Mandate for Palestine, arts. 1–6, (1922), available at <http://middleeastfacts.org/content/UN-Documents/Mandate-for-Palestine.htm>. Article 4, in part, states:

An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home . . . . The Zionist organization, so long as its organization and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency.

*Id.* In 1971, the court had said that “[t]he acceptance of a mandate on these terms [of the Covenant of the League of Nations and the terms of the Mandate] connoted the assumption of obligations not only of a moral but also of a binding legal character.” *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. 16, ¶ 47 (June 21).

<sup>40</sup> CASE FOR ISRAEL, *supra* note 2, at 33; see also *Namibia*, 1971 I.C.J. at 29 (“In sum the relevant provisions of the Covenant and those of the Mandate itself preclude any doubt as to the establishment of definite legal obligations designed for the attainment of the object and purpose of the Mandate.”).

<sup>41</sup> U.N. Charter art. 80, para. 1.

By ignoring the totality of applicable law, the I.C.J. could avoid the issue of Jewish rights, rooted in international law, to settle within the territory of the Mandate west of the Jordan River, and focus almost exclusively on Palestinian rights of self-determination, which derive from the same international law. The court, thus, also could avoid having to analyze the wall in the context of efforts to protect the Jewish right of self-determination. The court had examined the character of League of Nations mandates as international trusts in 1971, but not in 2004:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust." The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.

54. In light of the foregoing, the Court is unable to accept any construction which would attach to "C" mandates an object and purpose different from those of "A" or "B" mandates. *The only differences were those appearing from the language of Article 22 of the Covenant, and from the*

*particular mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. . . .*

55. As already recalled, the League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. *To the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfillment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution.*<sup>42</sup>

Thus, the international trust continued in accordance with its terms until it was fulfilled. Israel and the Palestinian Authority, therefore, are, or should be, struggling to reach agreement on the disposition of the un-allocated Mandate territory between Israel and the area under Palestinian Authority jurisdiction.

In the case of South Africa's Mandate to administer South West Africa (Namibia), the U.N. Security Council, on referral from the General Assembly, decided, under Article 25 of the U.N. Charter, that the League of Nations Mandate was at an end.<sup>43</sup> This fact did not mean that the inhabitants of the mandatory area should cease to enjoy rights pursuant to the Mandate itself. Rather, the fundamental rights to which they were entitled continued under a different governing regime, including a governing regime of independence.<sup>44</sup>

### *C. Rights for All*

The relevance of this analysis for the Israel-Palestinian situation

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<sup>42</sup> *Namibia*, 1971 I.C.J. at 31–33 (emphasis added).

<sup>43</sup> *Id.* at 43–45, 51–54.

<sup>44</sup> *Id.* at 45–46, 58 (noting that fundamental rights are protected under international law); see also Eugene V. Rostow, "Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate, 5 YALE STUD. WORLD PUB. ORD. 147, 158–59 (1979) (stating that "the Palestine Mandate survived the termination of the Mandate administration as a trust" under the U.N. Charter).

and the I.C.J.'s Advisory Opinion on the Israeli Wall derives from the fact that the League of Nations Mandate for Palestine recognized Jewish and non-Jewish rights and required a balancing of them. That balancing is necessary in any Israeli-Palestinian negotiation. The court's 2004 opinion does not contain the same recognition and thus may cause concern that Israel has no rights, including existential rights as a Member State of the United Nations. Ignoring its own prior Advisory Opinion,<sup>45</sup> the I.C.J. in 2004 also did not address the way in which the international community of the day understood and implemented the League of Nations Covenant: "The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928."<sup>46</sup> Why did the court not mention the Treaty of Sevres of 1920, which provides:

The High Contracting Parties agree to entrust, by application of the provisions of Article 22 [of the League of Nations Covenant], the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory to be selected by the said Powers. The Mandatory will be responsible for putting into effect the declaration originally made on November 2, 1917, by the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.<sup>47</sup>

Why did the court decide not to take note of the 1920 San Remo Conference, which assigned the Mandate to Britain, which fact the

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<sup>45</sup> The court also stepped over its own strictures on analyzing the meaning and legal character of Security Council resolutions. *Namibia*, 1971 I.C.J. at 53 ("The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect.").

<sup>46</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 165 (July 9), *available at* <http://www.icj.cij.org/docket/files/131/1671.pdf>.

<sup>47</sup> The Treaty of Sèvres, The Treaty of Peace Between the Allied and Associated Powers and Turkey, Aug. 10, 1920, § VII, art. 95, *available at* <http://net.lib.byu.edu/~rdh7/wwi/versa/sevres1.html>.



League of Nations accepted in 1922 in the form of the agreed text of the Mandate?<sup>48</sup>

Dershowitz addressed the issue of self-determination as follows:

[T]here had never been a Palestinian state in this area. A Jewish homeland would not be carved out of a preexisting Palestinian state. Instead, a decision would have to be made about how to allocate a 45,000-square-mile area of land that had been captured from the Ottoman Empire and was populated by Arabs, Jews, and others. There were four basic alternatives: (1) give all the land, even that in which the Jews were a majority, to some new Arab state; (2) give all the land, even the part in which Arabs were the majority, to the Jews; (3) turn all the land over to Syria, to be ruled from Damascus; or (4) divide the land fairly between the Arabs and the Jews so that each could create a homeland based on self-determination. The last of these options was selected and the decision was made to allocate a portion of the land to the group that lived there, worked the land, and built the infrastructure. What could be fairer and more in the spirit of self-determination?<sup>49</sup>

The above example is exemplary of Dershowitz. His language is not technical. He avoids bogging the reader down in treaty provisions while boiling down the history and the documents to a presentable essence. He is always conscious of the need to reach his audience.

The court's approach followed a different line; not once does it refer to Jewish rights, the aspiration for a Jewish national home, or the international community's recognition of the historical Jewish connection to Israel.<sup>50</sup> Rather, consistent with its treatment of the League of Nations Mandate for Palestine, the court declared:

In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which "*Recommends* to the United

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<sup>48</sup> San Remo Resolution British Mandate for Palestine, Apr. 24, 1920, *available at* [http://www.lib.byu.edu/index.php/San\\_Remo\\_Convention](http://www.lib.byu.edu/index.php/San_Remo_Convention).

<sup>49</sup> CASE FOR ISRAEL, *supra* note 2, at 33.

<sup>50</sup> Nor did the court analyze Article 80 of the U.N. Charter, something that was particularly important to the Namibia Opinion. *See Namibia*, 1971 I.C.J. 33–38.

Kingdom . . . and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition” of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.<sup>51</sup>

To Dershowitz, this description misses the point: “The Reality: Israel defended itself against a genocidal war of extermination.”<sup>52</sup> Dershowitz then proceeds to demonstrate that the Arabs attacked first, directing hostilities towards civilians while the Israeli army attacked soldiers and military targets:

The pattern of past and future fighting was thus established: the Arabs would target soft civilian areas—cities, towns, kibbutzim, and moshavim—trying to kill as many children, women, elderly, and other unarmed civilians as possible, while the Israelis would respond by targeting soldiers, military equipment, and other lawful targets.<sup>53</sup>

The Jews had earned their right to a homeland. They had settled and worked mostly barren areas of the British mandate of Palestine, which they had bought—with the help of contributions from our blue-and-white Jewish National Fund boxes—largely from absentee landlords. They built hospitals, schools, and kibbutzim, and established the infrastructure of a state. . . . They were prepared to compromise their biblical and historic claims and to accept a fraction of Palestine as theirs. . . . Only three years after the close of the Holocaust, Arab leaders, many of whom supported Hitler’s genocide, were calling for a war of extermination against the Jews—a “momentous massacre which will be spoken of like the Mongolian massacres and the Crusades.”<sup>54</sup>

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<sup>51</sup> *Wall*, 2004 I.C.J. at 165–66. (quoting G.A. Res. 181(II), ¶ A, U.N. Doc. A/RES/181(II) (Jan. 1, 1948)).

<sup>52</sup> CASE FOR ISRAEL, *supra* note 2, at 74.

<sup>53</sup> *Id.* at 75.

<sup>54</sup> CHUTZPAH, *supra* note 2, at 213–14 (quoting Letter from the Chairman of the

According to Dershowitz, “the 1948 war was entirely the fault of the Arab states (with a little encouragement from the British), which were determined to abort the new nation of Israel before its birth . . . . According to the Arabs, all of Israel was occupied territory. There was no room for compromise.”<sup>55</sup>

None of this history, fraught as it is with legal implications, appears in the Advisory Opinion. Rather, the court notes:

As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister.<sup>56</sup>

As both the U.N. General Assembly and the Security Council had declared at various times that Israeli settlements beyond the Green Line violated international law, “[t]he Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”<sup>57</sup> Nowhere does the court engage in exegesis of the Security Council or General Assembly resolutions or assess their different significance, legal and political. Nor does it say what Israel’s rightful extent is. As Judge Al-Khasawneh noted in a separate opinion:

Attempts at denigrating the significance of the Green Line would in the nature of things work both ways. Israel cannot shed doubts upon the title of others without expecting its own title and the territorial expanse of that title beyond the [U.N. General Assembly] partition resolution [of 1947] not to be called into question.<sup>58</sup>

Finally, the court nowhere explains what happened to the Jewish/Israeli right to close settlement set forth in the League of Nations Mandate for Palestine and carried forward by the terms of the U.N. Charter.<sup>59</sup>

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International Conference of Soviet Jewry to Alan M. Dershowitz (March 15, 1983).

<sup>55</sup> *Id.* at 214.

<sup>56</sup> *Wall*, 2004 I.C.J. at 182–83.

<sup>57</sup> *Id.* at 184.

<sup>58</sup> *Id.* at 238 (separate opinion of Judge Al-Khasawneh).

<sup>59</sup> See U.N. Charter art. 80, para. 1; League of Nations Mandate for Palestine, art. 6 (1922), available at <http://middleeastfacts.org/content/UN-Documents/Mandate-for-Palestine.htm>; see also *supra* notes 41–43.

In its treatment of rights, the court's opinion is disappointing, leaving out so much that it might usefully have considered, and confusing the facts it did take up. The court had an opportunity to contribute to the acceptance that all peoples—Jews and non-Jews—have rights rooted in the same international law, which has developed from the time of the Covenant of the League of Nations, including its mandate system, to contemporary law under the U.N. Charter regime. The Jewish National Home and the civil and religious rights of non-Jews in Palestine have become Israel and the political, civil, and religious rights of all, respectively.

The language of the law can contain the elements of a solution to conflict if the parties desire a solution. As Dershowitz has written, peace is possible but it must recognize and accept the fact that Jews, Arabs, and others inhabiting what was once the League of Nations Mandate for Palestine have rights that must be respected and accommodated.<sup>60</sup> Dershowitz's ideas may yet find resonance. They involve an Israel with secure and recognized boundaries as well as a Palestine consisting of Gaza, parts of the West Bank, and at least parts of East Jerusalem. Jordan would remain Jordan.<sup>61</sup>

The International Court of Justice, despite its statement that its goal is to support the Arab-Israeli peace process,<sup>62</sup> has neither set forth an exposition of law and history that withstands scrutiny nor made a useful contribution to help bring the Arab-Israeli conflict to an end. In addition, of course, the court has damaged its own standing in the international community. While the court's Advisory Opinion on the Israel-Palestine conflict has relatively narrow application, the court's treatment of the international law of self-defense in the same opinion and other opinions and decisions affects the international community as a whole.

### III. THE I.C.J. AND SELF-DEFENSE<sup>63</sup>

The court's treatment of the international law of self-defense, more so than its treatment of the history of the Arab-Israeli conflict

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<sup>60</sup> CASE FOR PEACE, *supra* note 2, at 13.

<sup>61</sup> *Id.* at 22–23, 25.

<sup>62</sup> *Wall*, 2004 I.C.J. at 200–01.

<sup>63</sup> See generally Ruth Wedgwood, *The I.C.J. Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT'L L. 52 (2005) (discussing the I.C.J.'s 2004 advisory opinion regarding the legal consequences of the security fence then under construction by Israel in the West Bank); Sean D. Murphy, *Self-Defense and the Israeli Wall Opinion: An Ipse Dixit from the I.C.J.?*, 99 AM. J. INT'L L. 62 (2005) (arguing that the I.C.J.'s 2004 advisory opinion lacked an adequate legal and factual analysis).

or of Palestine, has broad reach. Accordingly, it drew immediate fire from interested States.<sup>64</sup> The court's views belong to its jurisprudence on the international law governing the use of force, a jurisprudence increasingly at odds with reality and, therefore, of limited relevance.

*A. I.C.J. Jurisprudence on the International Law of Self-Defense*

Article 51 of the U.N. Charter codifies the international law right of self-defense as follows:

Nothing in the present Charter shall impair the inherent<sup>65</sup> right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain

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<sup>64</sup> For example: the U.S., U.K., France, and others.

<sup>65</sup> The equally authoritative French language version of the Charter uses the term natural right—*droit naturel*—for “inherent,” making it even clearer than the English that the right pre-existed the U.N. Charter. Many commentators have agreed with this proposition, just as many have disagreed with it. The substantial literature on the international law of self-defense under the Charter divides into three broad camps. First, are those writers of an earlier generation like Waldock and McDougal, who saw the law as defined by the way States reasonably applied it, including circumstances of anticipatory self-defense. See, e.g., C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455 (1952); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION (2d ed. 1967). Second, are those like Thomas Franck and Rosalyn Higgins who are more circumspect and tend to the view, notably expressed by Antonio Cassese, that an armed attack must take place before force can be used in self-defense. Antonio Cassese, *The International Community's “Legal” Response to Terrorism*, 38 INT'L. & COMP. L. Q. 589, 596 (1989); see also THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 3, 51 (2002); ROSALYN HIGGINS, PROBLEMS & PROCESS, INTERNATIONAL LAW AND HOW WE USE IT 248–251 (1994) (examining the difficulties with ascertaining how much force is necessary for an attack to amount to an “armed attack”); Thomas M. Franck, Editorial Comment, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001). The third camp is the I.C.J.'s. The court adopted the second camp's approach but took it farther in the direction of restricting the right in the 1986 Nicaragua case and since then. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). Dershowitz seems to veer away from notions of self-defense as unduly restricting the right to “preempt” attack. See generally ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS (2006).

or restore international peace and security.<sup>66</sup>

The I.C.J.'s construction of this language has changed over time. The first I.C.J. case concerned the right of innocent passage in the Corfu Channel, exercised by British warships after being fired on by Albanian shore batteries.<sup>67</sup> In October 1946, Britain sent four warships, prepared for attack, back through the Channel. Two struck mines. The British subsequently swept the Channel, finding mines that appeared to have been placed by Albania. The court held that (a) the British did not violate Article 2(4) of the U.N. Charter<sup>68</sup> by sending warships ready for action through the Corfu Channel after the attack from Albanian batteries, (b) that States are responsible for attacks from their territories about which they know or should know, and (c) that Britain acted unlawfully in sweeping the minefield against Albania's express refusal of permission after its warships had struck the mines.<sup>69</sup> The British had argued, not that the minesweeping was in self-defense, but that it was undertaken pursuant to an agreement with France, the Soviet Union, and the United States dividing responsibility for minesweeping in the Mediterranean and was necessary to preserve evidence of Albania's responsibility for the minefield. The court expressly rejected "such a line of defence."<sup>70</sup> The principle of State responsibility set out in the Corfu Channel case operated in 2001 when the United States, invoking the right of self-defense under the U.N. Charter,<sup>71</sup> destroyed terrorist bases in Afghanistan and overthrew the Afghan government in response to the attacks of September 11, 2001.

The second case also occurred during the Cold War, but not in the shadow of World War II. It involved U.S. support for *Contra* rebels

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<sup>66</sup> U.N. Charter art. 51.

<sup>67</sup> Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9), available at <http://www.icj-cij.org/docket/files/1/1645.pdf>.

<sup>68</sup> U.N. Charter art. 2, para. 4 ("All Members [of the United Nations] 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."). Chapter I of the U.N. Charter sets forth the purposes and principles of the organization.

<sup>69</sup> *Corfu Channel*, 1949 I.C.J. at 21-36. The British minesweeping operation produced the evidence of a minefield that the court used to hold Albania responsible. The British cut twenty-two moored mines. *Id.* at 13.

<sup>70</sup> *Id.* at 35.

<sup>71</sup> Letter from the Permanent Representative of the U.S. to the United Nations President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001); Letter from the Chargé d'affaires a.i. of the Permanent Mission of the U.K. to the President of the United Nations Security Council, U.N. Doc. S/2001/947 (Oct. 7, 2001).

in Nicaragua in the 1980s and allegations of Nicaraguan subversion of the governments of El Salvador and Honduras. Because of a U.S. reservation to I.C.J. jurisdiction involving multi-lateral treaties, the court applied the customary law of self-defense. When, in 1986, the court addressed the merits of Nicaragua's claim, it interpreted the customary international right of self-defense as one that comes into play only in cases of state-to-state armed attacks, "the most grave forms of the use of force (those constituting an armed attack)."<sup>72</sup> Drawing on the 1970 Declaration on Friendly Relations, because "the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question,"<sup>73</sup> the I.C.J. wrote:

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "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" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein." . . . The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other

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<sup>72</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27).

<sup>73</sup> *Id.*; cf. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254–55 (July 8) (stating the established view that "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*").

States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.<sup>74</sup>

There can be no doubt that Article 51 encompasses attacks by one or more States against one or more States. It also encompasses more: the founders of the United Nations not only had experience with open armed attacks by States, for example those that occurred in 1914, 1931, and 1939, but they also had experience with armed attacks which were conducted so that the responsibility of a State was obscured. They had experience with foreign interventions in civil wars. They had experience with armed attacks that occurred when a government lacked sufficient territorial control to be able to prevent armed bands from crossing its frontiers to attack others, or from having hideouts or other havens on its base territory. And they had experience with victim States engaging in self-help in such circumstances.

Even if the court was considering “gravity of attack” only in the context of comparing an insurgency with a clash between regular armies,<sup>75</sup> the measure, which will be different depending on the circumstances of the defender, cannot be reasonably applied. It is also contrary to the statement of customary law in the Charter itself, which does not qualify an “armed attack” with any consideration of quantum or State sponsorship. This I.C.J. opinion does not meet the test of common sense. Finally, it is an ahistorical assessment, ignoring especially the history of the prior hundred years or so, in making assertions about how the international

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<sup>74</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103–04 (June 27). The court here ignores history, which forms customary international law. For example, for centuries the British regarded any great power intervention in the Low Countries as a threat to which it had the right to respond with force, and the United States took a similar view with any great power presence in the Western Hemisphere. Russia took a similar view with respect to the Baltic States. *C.f.* JEFFREY W. TALIAFERRO, *BALANCING RISKS: GREAT POWER INTERVENTION IN THE PERIPHERY* (2004) (discussing how countries often initiate risky military and diplomatic involvement in regions that do not pose major threats).

<sup>75</sup> *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 215 (July 9) (separate opinion of Judge Higgins), available at <http://www.icj-cij.org/docket/files/131/1671.pdf>.



community understands the universe of armed attacks against which a State lawfully might defend itself with force.<sup>76</sup> The court continued the practice with its advisory opinion on the “Legality of the Threat or Use of Nuclear Weapons” in 1996,<sup>77</sup> and in the 2003 *Oil Platforms* case<sup>78</sup> brought by Iran against the United States.

The *Oil Platforms* case arose as a result of the Tanker War in the Persian Gulf, part of the Iran-Iraq War of 1980–88. The following summary of the facts is from the U.S. response to the court’s decision.

On October 16, 1987, the Kuwaiti oil tanker, *Sea Isle City*, which had been re-flagged to the United States, was hit by a missile while in Kuwaiti waters. The missile attack injured six crew members and damaged the ship. Three days later, after concluding that Iran was responsible for the missile attack, U.S. naval forces, in an effort to prevent further attacks, took action against two Iranian offshore oil platform complexes that it had determined were being used for offensive military purposes.<sup>79</sup>

A similar U.S. action followed in April, 1988 when the USS *Samuel B. Roberts* struck a mine in international waters off Bahrain.<sup>80</sup> The I.C.J. addressed these events, even though it had no reason to do so because they were not relevant to the holding (in favor of the United States).<sup>81</sup>

In *Oil Platforms*, the I.C.J. relied on the *Nicaragua* case. It concluded that missile and mine attacks against U.S.-flag vessels and firing on U.S. navy helicopters from an Iranian oil platform in 1987 did not constitute “armed attacks” within the meaning of Article 51 of the Charter:

Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a ‘most grave’ form of the use

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<sup>76</sup> See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 238–43.

<sup>77</sup> *Id.*

<sup>78</sup> *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6).

<sup>79</sup> William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 296–97 (2004) (footnotes omitted).

<sup>80</sup> *Id.* at 297.

<sup>81</sup> *Id.* at 295.

of force.”<sup>82</sup>

As the then-State Department Legal Adviser noted, the rule of law enunciated by the court, is not only wrong, but also unworkable and encourages aggressors to commit aggression. Defining an armed attack in terms of its gravity

would encourage States to engage in a series of small-scale military attacks, in the hope that they could do so without being subject to defensive responses. Moreover, if States were required to wait until attacks reached a high level of gravity before responding with force, their eventual response would likely be much greater, making it more difficult to prevent disputes from escalating into full-scale military conflicts.<sup>83</sup>

In addition to articulating a view of the law that depends on the quantum or character of an armed attack to trigger a right of self-defense, rather than the traditional, pragmatic, and realistic tests of necessity and proportionality, when presented with evidence of necessity and proportionality, the court ignored it.<sup>84</sup>

#### *B. The I.C.J. Advisory Opinion on the Israeli Wall and Self-Defense*

This body of decisions and opinions provides the jurisprudential context in which the I.C.J. addressed self-defense in its Advisory Opinion on the Israeli wall. The Opinion used five sentences to deal with the claim that the wall should be considered a self-defense measure. The Opinion quotes Article 51 of the U.N. Charter and then states that:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001)<sup>85</sup>

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<sup>82</sup> *Oil Platforms*, 2003 I.C.J. at 192.

<sup>83</sup> Taft, *supra* note 79, at 300–01.

<sup>84</sup> *Id.* at 304–05.

<sup>85</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (recognizing the right of self-

and 1373 (2001),<sup>86</sup> and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.<sup>87</sup>

The first sentence is a misstatement of the law, and the fourth mischaracterizes a Security Council resolution. Article 51 of the Charter does not specify that the “armed attack” must be by one state against another for the right of self-defense to come into effect. Rather, the Charter takes account of the inherent right of one state to use proportional and necessary force to defend itself against whatever the source of an armed attack, even an armed band operating from another territory.

Resolution 1368 (2001) begins with the words: “*Determined* to combat by all means threats to international peace and security caused by terrorist acts, [and] *Recognizing* the inherent right of individual or collective self-defence in accordance with the Charter.”<sup>88</sup> Resolution 1373 (2001) repeats these points and adds that “every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.”<sup>89</sup> It is difficult to see how the Opinion could dismiss these Resolutions so easily if it characterized the “acts of violence” against Israel as terrorism or acts of terror. In the view of the United States and a substantial number of other U.N. Member states, terrorist attacks amount to armed attacks to which States have a right to respond with force consistent with the international law of self-defense. A substantial number of U.N. Member States and others share this view.<sup>90</sup>

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defense in response to terrorist attacks of September 11, 2001).

<sup>86</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (prohibiting active or passive assistance to terrorists).

<sup>87</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9), *available at* [http://www.icj\\_cij.org/docket/files/131/1671.pdf](http://www.icj_cij.org/docket/files/131/1671.pdf).

<sup>88</sup> S.C. Res. 1368, *supra* note 85.

<sup>89</sup> S.C. Res. 1373, *supra* note 86.

<sup>90</sup> *See, e.g.*, U.N. SCOR, 57th Sess., 4506th mtg. at 5, U.N. Doc. S/PV.4506 (Apr. 4, 2002) (the Secretary-General: “Israel has justified its acts as self-defence and counter-terrorist measures. However, we need to be very clear that self-defence is not a blank cheque.”).

The Quartet condemns the continuing terror attacks on Israel, and calls on the Palestinian Authority to take immediate action against terrorist groups and individuals who plan and execute such attacks. The Quartet members recognize Israel’s legitimate right to self-defense in the face of terrorist attacks against its citizens, within the

Dershowitz takes the fact of terrorist attacks against Israel and the applicability of the international law of self-defense as self-evident: “It is not enough to say that Israel retains the right to defend itself and to retaliate against terrorism, because when Israel has done so in the past, it has been condemned by the international community and the United Nations.”<sup>91</sup> Dershowitz further has argued:

Under international law and the laws of war,<sup>92</sup> it is entirely legal to target and kill an enemy combatant who has not surrendered. Palestinian terrorists—whether they are the suicide bombers themselves, those who recruit them, those in

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parameters of international humanitarian law. Middle East Quartet Communiqué, U.S., Russ., E.U., U.N. Secretary-General, May 4, 2004, available at [http://www.un.org/News/dh/infocus/middle\\_east/quartet-comque-4may04](http://www.un.org/News/dh/infocus/middle_east/quartet-comque-4may04); see also S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004); U.N. SCOR, 59th Sess., 4929th mtg. at 8, 12–15, U.N. Doc. S/PV.4929 (Mar. 23, 2004) (UK, Spain, Romania, Germany, and France recognizing Israel’s right to protect its citizens against terrorist attacks); U.N. SCOR, 58th Sess., 4841st mtg. at 42, U.N. Doc. S/PV.4841 (Oct. 14, 2003) (UK, France, Cameroon, Argentina, Italy on behalf of the European Union, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia: “The European Union understands the security preoccupation of Israel and recognizes its legitimate right to self-defence in the face of terrorist attacks against its citizens.”); U.N. SCOR, 58th Sess., 4841st mtg. at 43, U.N. Doc. S/PV.4841 (“Norway recognizes Israel’s legitimate right to self-defence.”); U.N. SCOR, 58th Sess., 4757th mtg. at 3, U.N. Doc. S/PV.4757 (May 19, 2003) (the Secretary-General’s Personal Representative and Special Coordinator for the Middle East Peace Process (Roed-Larsen): “I wish to make it clear that we do not question Israel’s right to self-defence in the face of repeated terrorist attacks.”); U.N. SCOR, 58th Sess., 4685th mtg. at 4, U.N. Doc. S/PV.4685 (Jan. 16, 2003) (Under Secretary-General for Political Affairs (Prendergast): “Although Israel’s need to defend itself against infiltration is acknowledged and must be respected . . . .”); U.N. SCOR, 57th Sess., 4588th mtg. at 9, U.N. Doc. S/PV.4588 (July 24, 2002) (France: “While Israel has a legitimate right to defend itself against terrorism . . . .”); U.N. SCOR, 57th Sess., 4588th mtg. at 9, U.N. Doc. S/PV.4588 (July 24, 2002) (Ireland: “[W]e fully accept the right of Israel to defend itself and to take necessary measures against those who plan or execute terrorist attacks.”); U.N. SCOR, 57th Sess., 4588th mtg. at 14, U.N. Doc. S/PV.4588 (Singapore: “Israel has the right and, in fact, the responsibility to protect its own civilians from terrorist attacks.”); U.N. SCOR, 57th Sess., 4588th mtg. at 20, U.N. Doc. S/PV.4588 (UK: “Mr. Straw, [the Foreign Secretary], said that he recognized and understood Israel’s need to take action against suspected suicide bombers and their accomplices. Israel was entitled to take steps to protect itself from terrorist attack, but those steps should be neither disproportionate nor excessive.”); U.N. SCOR, 57th Sess., 4525th mtg. at 28, U.N. Doc. S/PV.4525 (May 3, 2002) (“Mauritius understands the security concerns of Israel, including its right to protect its people from terrorist attacks, but it should be clear to Israel and to all that self-defence is not a blank cheque.”); U.N. SCOR, 57th Sess., 4510th mtg. at 7, U.N. Doc. S/PV.4510 (Apr. 8, 2002) (Ireland: “My delegation has said many times in this Chamber that Israel is entitled to take measures to defend itself against the terrorists who engage in suicide bombings.”); U.N. SCOR, 56th Sess., 4438th mtg. at 24, U.N. Doc. S/PV.4438 (Dec. 14, 2001) (“Canada fully supports Israel’s right to security and understands Israel’s need to defend itself against terrorist attacks.”).

<sup>91</sup> CASE FOR ISRAEL, *supra* note 2, at 235.

<sup>92</sup> Also known, interchangeably, as “international humanitarian law” or “the law of armed conflict.”

charge of the operation, or commanders of terrorist groups—are undoubtedly enemy combatants, regardless of whether they wear official uniforms or three-piece suits. It is lawful to kill an enemy combatant even when he is sleeping, as the United States tried to do with Saddam Hussein, so long as he has not surrendered.<sup>93</sup>

The court's view is different and again shows the importance of the way in which the Opinion treats the Palestinian right of self-determination without mentioning Jewish or Israeli rights.

While admitting that Israel has invoked a “peril” and not challenging its existence, the court opined that it “is not convinced 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.”<sup>94</sup> Yet, the court noted that “[t]he fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens.”<sup>95</sup> The court's language is significant.

The use of the term “acts of violence” to describe the terrorist attacks against Israel and Israelis may be the basis for the Opinion's conclusion that U.N. Security Council Resolutions 1368 (2001) and 1373 (2001) and, indeed, the international law of self-defense have no bearing on the issues before the I.C.J.<sup>96</sup> The court does not itself use the term “terrorism” or “terror” in connection with these acts. Rather, the four times<sup>97</sup> these words appear in the Opinion are in quotations or a summary of Israel's argument.<sup>98</sup>

The Opinion appears to promote the view of the *Nicaragua* and *Oil Platforms* cases that the right of self-defense only arises in the case of an actual armed attack by one State against another. While *Nicaragua* recognized that armed bands acting on behalf of a State could engage in an armed attack, it did not specify the degree of connection to a State required. The question is important. Over the last several decades, attacks against civilians—terrorist attacks—

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<sup>93</sup> CASE FOR ISRAEL, *supra* note 2, at 174–75.

<sup>94</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 195 (July 9), available at [http://www.icj\\_cij.org/docket/files/131/1671.pdf](http://www.icj_cij.org/docket/files/131/1671.pdf).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 194–95.

<sup>97</sup> *Id.* at 157, 182, 187, 194.

<sup>98</sup> *Id.*

have occurred where sometimes the number and identity of the perpetrators and their supporters, including governments, remain unknown. Sometimes they may be known but that fact may not be revealed without jeopardizing sources of information or methods of collection. These possibilities do not change the law or diminish a State's right to use force in self-defense until the Security Council has acted effectively to bring an end to the problem.<sup>99</sup>

The I.C.J.'s prior opinions suggest another conclusion. In view of the court's insistence in *Nicaragua* that a victim of attack declare that it is under attack in order to trigger the right of collective self-defense, one reasonably may expect the court to require publicity even to the detriment of methods of collection or even specific sources. Further, as the *Nicaragua* and the *Oil Platforms* opinions show, the I.C.J. is willing to substitute its judgment for the defender's in areas where it has neither expertise nor capability. For these reasons, among others, the United States is not comfortable with I.C.J.—or any court—review of the right of self-defense and its exercise.

The Opinion contains inconsistencies. On the one hand, it suggests that the Israeli-Palestinian conflict is not international and, therefore, the international law of self-defense does not apply to it. According to this view, Israel, occupying territory the court calls, with the General Assembly, "Occupied Palestinian Territory," in fact is not engaged in international armed conflict. On the other hand, if Israel is occupying territory of a foreign entity or State, it would be engaged in an international armed conflict. Why then would it not have a right of self-defense against attack emanating from this territory? And, if the territory already is Palestinian, then Israel has no claims to it, and attacks on Israel emanating from the territory amount to attacks from a foreign State. Since the Oslo Accords of 1993, the Palestine Authority has had attributes of statehood, yet it is not generally recognized and accepted as a State. Nevertheless, the Opinion may contain a logic that seems to give rise to a right of self-defense by Israel, even to the point of standing in the shoes of the Palestine Authority if it is unable to prevent its territory from being the base for attacks against Israel. Such a

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<sup>99</sup> There is nothing in Article 51, moreover, to suggest that self-defense can only involve the use of force, and the history of warfare, particularly of defenses, is full of examples of passive defenses. *But see id.* at 215–16 (separate opinion of Judge Higgins) ("First, I remain unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood.").

conclusion would appear to be consistent with *Corfu Channel*. This view of title to the occupied territories also would lead naturally to the conclusion that Israeli settlements violate international law and that a wall defending them is illegal unless it is to meet “the needs of the army of occupation.”<sup>100</sup>

In addition, the Opinion may mean that Israel, the belligerent occupant, confronts attacks as a result of an effort by the local population to end the occupation and that effort justifies the use of any and all means by the local population.<sup>101</sup> It may be that the Opinion is suggesting that the belligerent occupant lacks a right to defend itself. If the Opinion is suggesting that the attacks are domestic in origin, then Israel is engaging in law enforcement. Such a reading would imply some sort of acknowledgement that Israel has claims at least to part of the territory or perhaps a right of self-determination.<sup>102</sup>

The law of self-defense espoused by the I.C.J. gives the advantage to those who would use force or aggression.<sup>103</sup> It encourages the use of proxies and asymmetrical warfare and correspondingly undermines deterrence. It tips the scales against the defender. Further, it seems to diminish the reality of terrorism by denying its existence as a political weapon used against Israel. As U.S. Permanent Representative to the United Nations John Danforth said on July 16, 2004,

[T]he Court opinion . . . seems to say that the right of a State to defend itself exists only when it is attacked by another State, and that the right of self-defence does not exist against non-State actors. It does not exist when terrorists

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<sup>100</sup> Convention Respecting the Laws and Customs of War on Land, art. 52, Oct. 18, 1907, 36 Stat. 2277, 2308; *cf.* H.C.J. 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. [2004] IsrSC 58(5), 807, ¶ 10, 43 I.L.M. 1099, 1103, *available at* [http://elyon1.court.gov.il/files\\_eng/04/560/020/A28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf) (noting that “the separation fence” can be built only to meet the needs of the occupying army).

<sup>101</sup> *See* 1 OPPENHEIM’S INTERNATIONAL LAW 289 n.27 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). An Irish Ambassador at the United Nations was overheard to say that Palestinian actions were not terrorism, but resistance to occupation. *See also* Human Rights Council, *Human Rights Situation in Palestine and Other Occupied Arab Territories: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, at 6, U.N. Doc. A/HRC/7/17 (Jan. 21, 2008) [hereinafter HRC Report] (*prepared by* John Dugard) (likening Palestinian terrorism against Israel to resistance against apartheid, and is the occupier’s fault).

<sup>102</sup> *See supra* notes 35–37 and accompanying text.

<sup>103</sup> “All Members 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.” U.N. Charter art. 2, para. 4.

hijack planes and fly them into buildings, or bomb train stations or bus stops, or put poison gas into subways.

I would suggest that, if this were the meaning of Article 51, then the United Nations Charter could be irrelevant at a time when the major threats to peace are not from States, but from terrorists.<sup>104</sup>

In short, the Opinion's view of the law and of reality is a disservice to everyone.<sup>105</sup> Alan Dershowitz has understood this as a fact and faced it head on.

#### IV. DERSHOWITZ

One can imagine Dershowitz zeroing in on the Advisory Opinion, taking it apart, and standing it on its head with its own inconsistencies. He would view the court's treatment of the subject as anything but accidental. Rather, in his view it is characteristic of the treatment Israel and the Jewish people have come to expect:

[T]he Jewish people—both before and after the establishment of Israel—has always been the focus of disproportionate attention, mostly negative, despite the small number of Jews in the world. Public opinion polls constantly show that non-Jews overestimate—often by a factor of ten—the proportion of Jews in any given country.<sup>106</sup>

As far as the I.C.J. is concerned, Dershowitz notes that it is an organ of the United Nations, it does not and will not for the foreseeable future include an Israeli judge “while sworn enemies of Israel serve among its judges, several of whom represent countries that do not themselves abide by the rule of law.”<sup>107</sup> Instead of the court of last resort it should be, the I.C.J. is as politicized and hostile to Israel as the U.N. General Assembly. Israel should follow its own law, articulated so well by its Supreme Court.<sup>108</sup>

Dershowitz's analysis of Israel's wall is brief but consistent with his deep understanding of criminal law and permissible safety measures. The I.C.J. was concerned with the location, not with the

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<sup>104</sup> U.N. GAOR, Emer. Spec. Sess., 25th mtg. at 2, U.N. Doc. A/ES-10/PV.25 (Jul. 16, 2004).

<sup>105</sup> The Opinion is frank in its political agenda. It states that the court issued the Opinion “being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security.” *Wall*, 2004 I.C.J. at 200.

<sup>106</sup> ALAN DERSHOWITZ, *WHAT ISRAEL MEANS TO ME 1* (Alan Dershowitz ed., 2006).

<sup>107</sup> *CASE FOR PEACE*, *supra* note 2, at 102.

<sup>108</sup> *Id.* at 102–04.



fact, of the Israeli wall. Rather than address the controversy surrounding location, Dershowitz examines the wall “within the catalog of preventive tactics that have been employed in an effort to control terrorism.”<sup>109</sup> This subject lies outside the scope of the I.C.J. Advisory Opinion, which does not use the word “terrorism” as its own.

The I.C.J.’s avoidance of the term “terrorism” separates the Court from Dershowitz’s frame of reference and concern. “Either with or without security fences,” Dershowitz wrote,

checkpoints impede legitimate traffic and make it difficult for innocent people to get to work, to hospitals, and to families. Striking the proper balance between the legitimate preventive needs and the illegitimate harassment effects of such checkpoints is never without considerable controversy. Fences and checkpoints are of course part of the larger issue of border controls.<sup>110</sup>

Fences, checkpoints, scans, mass roundups, sweeps, and preventive arrests, according to law, constitute efforts at prevention. “[H]uman imagination, current technology, the law, and morality”—in other words, the standards of necessity and proportionality—limit the content of such measures.<sup>111</sup> But the court, like the majority of the United Nations,<sup>112</sup> is not concerned with terrorism or how to prevent it (except by Israel’s capitulation) when it considers the conflict between Israel and Palestine and other neighbors.

## V. CONCLUSION

The Dershowitz *oeuvre* is a testament to the rule of law. Even when Dershowitz carves out highly controversial positions, as he has done on torture and preemption,<sup>113</sup> he has done so with the law foremost in his mind. He recognizes that, as Justice Jackson once said, the law is not a “suicide pact.”<sup>114</sup> From this perspective, Dershowitz would point to the foundation for the I.C.J. Advisory Opinion as full of fissures. Not only does it fail to acknowledge what

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<sup>109</sup> PREEMPTION, *supra* note 26, at 151.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.* at 152.

<sup>112</sup> CASE FOR PEACE, *supra* note 2, 144–48; H.R.C. Report, *supra* note 101, at 6.

<sup>113</sup> Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19. *See generally* PREEMPTION, *supra* note 26.

<sup>114</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

the international community has acknowledged—that Israel has a right to exist within secure and recognized boundaries and to use force, much less measures short of force such as the wall, in self-defense against terrorism—but it also does not acknowledge that Israel confronts terrorism at all.

At the same time, the I.C.J. hews to the view of self-defense it created in the 1980s when it considered Nicaragua's case against the United States. The right of self-defense articulated by the court will not have practical application beyond its walls because it does not correspond to the day-to-day experiences of States, large and small. As a result, the court has undermined its own credibility and utility in helping States resolve conflicts. To change this reality, the court needs to reflect on Dershowitz's comparison, admittedly hyperbolic, of the I.C.J. with a U.S. court in the south in the era of Jim Crow.<sup>115</sup>

Alan Dershowitz's prescriptions for peace and justice are rooted in the law. He thus recognizes that the rule of law is the true inalienable human right and that it is the language of peace. For his work, Alan Dershowitz has suffered severe, *ad hominem* criticism of the ugliest kind.<sup>116</sup> In acknowledging that fact, we marvel at his courage and combativeness, discharging as he does the professor's high calling and responsibility. It is a calling that demands intellectual and moral integrity. Dershowitz is deeply imbued with both.

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<sup>115</sup> See CASE FOR PEACE, *supra* note 2, at 103; see also Alan Dershowitz, *Israel Follows Its Own Law, Not Bigoted Hague Decision*, JERUSALEM POST, July 11, 2004, available at <http://www.alandershowitz.com/publications/docs/israelaw.html>.

<sup>116</sup> See *supra* note 11 and accompanying text.