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# Has International Law Hit the Wall?

## An Analysis of International Law in Relation to Israel's Separation Barrier

By  
Sarah Williams\*

### I. INTRODUCTION

In September 2004, United Nations Secretary General, Kofi Annan made a speech to the General Assembly in which he referred to his perception of the challenges facing international law. "Today the rule of law is at risk around the world," he said. "Again and again, we see laws shamelessly disregarded."<sup>1</sup> With specific references in his speech to massacres of civilians and the execution of hostages in Iraq, Iraqi prisoners being "disgracefully" treated, the displacement of populations in Sudan, suicide bombings by Palestinian terrorists and the "excessive" use of force against the Palestinians by Israel, Annan referred to violations of what could be described as international law's aspirational or "Kantian" principles.<sup>2</sup>

Whereas Annan's view implies regret at a perceived attenuation of international law's authority, other voices have accused the international legal regime

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1. CBC News, Rule of Law at Risk Around the World: Annan (Sept. 21, 2004), <http://www.cbc.ca/story/world/national/2004/09/21/kofi040921.html>.

2. This is contrasted with international law's "Lockean" rules, which are primarily aimed at solving the collective action problems of the international community.

of political irrelevance. For example, in an analysis of the Iraq crisis, Michael Glennon states that “the first and last geopolitical truth is that states pursue security by pursuing power. Legalist institutions that manage that pursuit maladroitly are ultimately swept away.”<sup>3</sup> His comment reflects a predominant approach in the analysis of international law in which the state is treated as a unitary actor, and the effectiveness of international law is judged solely by the yardstick of governmental compliance. While state practice is clearly of the utmost relevance to any consideration of international law, particularly in relation to customary international law, this article proposes a different yet complimentary framework for understanding its impact. Instead of a frame that casts international law as either effective or ineffective solely with reference to the restraint or motivation of state behavior, I offer a complex analysis that addresses not just the interstate level, but also the legal, political and societal levels within states; and, in so doing, suggests a more optimistic though diffuse role for international law. To illustrate the thesis, this article will explore these three intrastate facets of international law as they relate to the International Court of Justice’s (“ICJ”) advisory opinion concerning Israel’s construction of its Separation Barrier (“Barrier”).

## II.

### REALISM AND ITS CRITICS

The critique of international law referred to above must first be evaluated. Glennon has advanced the most popular argument, namely that the current situation is nothing new but simply a manifestation of the age-old trumping of ethics by power. His view reflects the realist school of thought within international relations, which beginning with Oppenheim, who chided realist thinkers as being the “jingoists and the chauvinists of all nations” for failing to see “the all powerful force of the good which pushed mankind forward through the depths of history [to] unite all nations under the firm roof of a universally recognized and precisely codified law,” has put international lawyers on the defensive.<sup>4</sup> According to the realist paradigm:

The international legal system is . . . voluntarist. For better or worse, its rules are based on state consent. States are not bound by rules to which they do not agree. Like it or not, that is the Westphalian system, and it is still very much with us. Pretending that the system can be based on idealists’ own subjective notions of morality won’t make it so.<sup>5</sup>

In the current international climate, it would be quite a challenge to argue that norms alone can constrain the behavior of a hegemonic power with a particular view of national security and reliant on a singularly military prescription. President Bush’s rallying call during his 2004 State of the Union Address that

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3. Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May-June 2003, at 16, 25.

4. See L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT’L L. 313, 356 (1908).

5. Glennon, *supra* note 3, at 31.

"America will never seek a permission slip to defend the security of our country" clearly threw down the gauntlet to *jus ad bellum* and the United Nations legal framework.<sup>6</sup> To reduce an evaluation of the existence and effectiveness of international law to such a consideration, however, is to misunderstand its nature. Certainly, if a direct causal relationship is sought between international law and the realization of such ideals as peace, justice, and the observation of human rights, then international law will be found to be wanting. Yet if international law's capacity to restrain the most powerful actors in the system in the face of an intense perception of military national interest is the yardstick presented by the realists, then I would argue that it is they, rather than the objects of their criticism, who are naïve. Although the value of international norms cannot and should not be assumed, they are not scientific theories to be dismissed by empirical evidence that such-and-such a norm did not appear to have been followed in this-or-that case. If every infidelity were held to be an indictment of marriage, would we throw up our hands and declare this fundamental social institution to be without value? Would we prefer to take our solemn oaths peppered with conditionality? Is marital commitment relegated to the realm of idealism? Clearly not. The laws of nations likewise embody norms. They do not work in the same way as national legislation and thus, they have to be evaluated from a different angle.

This article contributes a more nuanced approach to understanding the effect of international law than that described by realism. In my view, international law is the place on the global stage where power and morality intersect. Through discourse, conflict, and socialization, we wrestle with its concepts in an endless and fluid process that itself creates or destroys the legitimacy of the norms we consciously or subconsciously introduce. For this reason, it is difficult to draw a circumference around an area of regulation and proclaim it to be the sovereign territory of international law. Rather than an entity which alters its dimensions incrementally, international law appears more as an amoeba which continually contracts and expands, multi-dimensionally, as it manifests its nature according to a changing environment. Understanding this process requires much more than an examination of state-to-state interaction. At an absolute minimum, it requires an appreciation of the legal, political, and social dimensions of our collective life, and it is to these dimensions that this article is addressed.

In order to challenge the dogmatism of the realist perspective, I propose to take as a case study the issues surrounding the Barrier in Israel and Palestine. Viewed from a distance, this example appears to bear out the realist argument that national interests, predicated on power and survival, outweigh normative considerations. However, a closer inspection reveals how the amoeboid tentacles of international law have permeated the controversy. For this reason, the case study provides us with some useful indicators as to the impact of international

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6. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004), in 40 WEEKLY COMP. PRES. DOC. 94, Jan. 26, 2004, available at [www.whitehouse.gov/news/releases/2004/01/20040120-7.html](http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html).

law, which, in turn, will help us in our efforts to design international laws and institutions that are likely to be more effective in achieving their purpose.

First, I should note that my thesis has a specific intellectual lineage. The self-conscious counter-attack to the realist critique of international law can perhaps be traced to the champions of policy-orientated jurisprudence, the architects of the New Haven School of Legal Philosophy, Myres McDougal and Harold Laswell. In the 1960s, McDougal and Laswell challenged the prevailing Cold War approach to international studies based on naked power. Instead, they posited a framework within which international lawyers, recast as public policy experts, mixed insights and methodology from political science and other disciplines to fulfill their revised function of inventing and promoting a more effective international law that would advance human dignity.<sup>7</sup> Following in the footsteps of McDougal and Laswell, Richard Falk has given the debate a systemic orientation, positing the role of international law within the policy-making process as a crystallization of "the role of reciprocity, self-restraint, fairness, habit and inertia in the formation of national policy and in the interaction of national policies." De-emphasizing the constraint aspect, Falk foregrounds the structural role of international law as "a critical part of the ordering capability of the world community."<sup>8</sup>

In the 1980s, the efforts of international lawyers to challenge the dominant realist narrative were given an unexpected boost from within the discipline of political science itself. Regime theorists, such as Robert Keohane and Stephen Krasner, used the rationalist methodology of realism to reconceptualize the field of international institutions, thereby expanding the notion of international institutions to include norms, rules, and decision-making procedures.<sup>9</sup> In turn, their mode of explaining the role and importance of norms as a function of the solution to collective action problems, now termed "neoliberal institutionalism," paved the way for such scholars as Anne-Marie Slaughter, who created a more self-conscious linkage between the fields of international law and international relations. As a result, the debate has shifted beyond consideration of the action and motives of the state as a unitary entity, to a more "liberalist" emphasis, which brings in the role of individual actors and interest groups within states.<sup>10</sup> Most recently, new insights have been brought to the fore on the political scien-

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7. See generally MYRES S. MCDUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER* (1960); Myres S. McDougal, *Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOL. 337 (1960); Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1967-1968).

8. RICHARD FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 37 (1960).

9. See generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983).

10. See, e.g., Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1994); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

tific front through the approach of the constructivists—with their emphasis on norm development and dissemination through intersubjective processes<sup>11</sup>—and from the international law camp through scholars such as Harold Koh who have developed the notion of international law as “internalized restraint.”<sup>12</sup>

The assessment proposed here differs from the realist approach in a number of important respects. My approach overlaps with the liberalist paradigm, but also fuses constructivist insights<sup>13</sup> regarding discourse and norm diffusion. First, it does not take the state as the sole unit of analysis but instead unpacks the ‘black box’ to reveal a pluralist picture. Second, it highlights the fluidity of normative development across state boundaries. Third, it acknowledges the dialectical nature of international law. From this perspective, any analysis of international law that focuses exclusively on its inter-state dimension will fail to capture its full topography. Such an inquiry will only perceive what happens at the geographical and thematic margins and will thereby miss the permeation of norms through the state boundaries. My analysis thus reflects the liberalist position to this extent. However, it also builds upon liberalist insights by highlighting the relevance of discourse as ideas and norms percolate through the system via a societal dialectic. Whereas liberalist arguments emphasize the effect of international law on formal domestic structures, in my metaphorical conception, the state serves as a filter through which international legal concepts interact with domestic political, social, and legal forces only to return to the international level as part of an ongoing, dynamic, and circulating process. This article, however, will primarily focus on the domestic realm.

Rather than present this analysis in the abstract, I make my argument using a contemporary issue of international law in relation to which the realist argument seems particularly strong. In so doing, I demonstrate both that a surface analysis is insufficient to understand the way in which international law makes an impact and that a judgment of its “failure” or “success” is as inappropriate as, say, trying to pass judgment upon the value of culture. How we choose to insti-

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11. See, e.g., John Gerard Ruggie, *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, 35 WORLD POL. 261 (1983); John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT’L ORG. 139 (1993); Friedrich V. Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT’L ORG. 753 (1986); FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS (1989).

12. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997); Harold Hongju Koh, *Bringing International Law Back Home*, 35 HOUS. L. REV. 623 (1998).

13. Within the field of international relations, constructivism is an approach, which challenges the realist assumptions that the international structure is simply about the distribution of material capabilities and that state behavior is motivated principally by material considerations, such as increasing power and economic status. Constructivists see the structure as also comprising social relationships and believe that the manner in which the material world shapes and is shaped by human action and interaction depends on normative and epistemic interpretations of the material world. Put more crudely, constructivists consider “reality” to be socially and/or cognitively constructed. See, e.g., Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 EUR. J. INT’L REL. 319 (1997).

tutionalize either phenomenon could rightly be the subject of a more rigid critique, yet the phenomena themselves have an ephemeral nature that defies crude analysis.

I ground my inquiry by examining the so-called "Separation Barrier" or "Wall" being erected in Palestine. This constitutes one of the "hard cases" since, on the face of it, the pronouncements of international law do not appear to have been effective in preventing what the International Court of Justice has held to be a clear violation of its principles. However, I propose that the effects of international law are felt in a number of different ways—legally, politically, and socially. Although the stark fact that the Barrier remains in situ tends to overshadow these effects, they contribute, both on the domestic and international levels, to a political and societal shift in the direction of norm observance.<sup>14</sup>

### III.

#### THE BACKGROUND TO THE SEPARATION BARRIER

In June 2002, the Israeli government decided to erect a physical barrier to separate Israel and the West Bank. The official rationale provided was control of the entry of Palestinians into Israel to prevent terrorist attacks.<sup>15</sup> The Barrier is comprised of an electronic fence with dirt paths, barbed wire fences, and trenches averaging about 60 meters apart on each side. Along some stretches of the Barrier, there is a concrete wall, six to eight meters high, in place of the lower fence.<sup>16</sup> It is estimated that, when finished, the Barrier will be 670 kilometers in length, penetrating some 22 kilometers into Palestinian territory at one point, to include the settlements of Ariel, Immanuel, and Kedumim. As of September 2005, approximately 242 kilometers of the Barrier have been constructed.<sup>17</sup> The route will run from the northern Jordan River in Eastern Tubas to the southern-most tip of the West Bank in the Hebron Governorate. Because of its meandering path into the West Bank, the Barrier's length is approximately twice the length of the 1949 West Bank Armistice Line adjacent to Israel, known as the Green Line, itself 315 kilometers long.

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14. Naturally, it is not possible within the context of this article to do justice to the huge theme I am attempting to address, and it requires considerably more attention and research. Because the study of international law is not metaphorically comparable to the scrutiny of a photograph but to the analysis of a perpetual and complex movie, a single-issue study can give little more than hint at its potential. Nevertheless, unless scholars address, in every forum, the complexity of the normative dimension of international politics in a way that does not neglect but rather synthesizes power with ethics, then international law will be forced onto the defensive. This could lead to a damaging triumph of cynicism in international relations or, at the very least, to sub-optimal institutions directed at achieving international peace and justice.

15. See Isr. Ministry of Foreign Aff., *Saving Lives: Israel's Anti-Terrorist Fence - Answers to Questions* (Jan. 1, 2004), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Saving+Lives-+Israel-s+anti-terrorist+fence+-+Answ.htm>.

16. B'Tselem, *Separation Barrier*, [http://www.btselem.org/English/Separation\\_Barrier/](http://www.btselem.org/English/Separation_Barrier/) (last visited Oct. 31, 2005).

17. HCJ 7957/04 *Mara'abe v. Prime Minister of Israel* [2005] IsrSC 38(2) 393, ¶ 3, 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).

A considerable amount of criticism has been leveled against this scheme. On December 8, 2003, the United Nations General Assembly adopted a resolution by a majority of 90 to 8 with 74 abstentions asking the International Court of Justice to issue an advisory opinion on the legal consequences of Israel's construction of the Barrier in the West Bank.<sup>18</sup> In doing so, the Assembly expressed grave concern at the commencement and ongoing construction of the Barrier "disrupting the lives of thousands of protected civilians and the de facto annexation of large areas of territory."<sup>19</sup> On July 9, 2004, the International Court of Justice issued an advisory opinion, declaring that the Barrier was in violation of international law. The advisory opinion also indicated that Israel should forthwith cease construction of the Barrier, dismantle what had been thus far constructed, and make reparations to the Palestinians for all damages caused by the project.<sup>20</sup> On July 20, 2004, at the Tenth Emergency Session of the General Assembly, Resolution ES-10/15 was adopted by a vote of 150 in favor, 6 opposed, and 10 abstaining, demanding that Israel comply with the legal obligations specified in the ICJ advisory opinion. Israel rejected the ruling of the ICJ as a "politically motivated maneuver" that Israel could not accept and called upon the international community not to lend a hand in the "ongoing Palestinian attempts to use international forums to avoid fulfilling their own commitments to fight terrorism."<sup>21</sup> In a recent submission to the Israeli Supreme Court made at the court's request, the Israeli government responded formally to the ICJ advisory opinion, arguing that an advisory opinion from the ICJ is not binding upon the State of Israel and that the factual background before the ICJ when it wrote its opinion was "lacking, inexact and now irrelevant."<sup>22</sup>

On its face, the articulation of international law by the ICJ regarding the Barrier does not appear to have been effective in enjoining its construction. However, the following analysis peels away some of the layers of this surface failure and, using theoretical insights, takes an in-depth look at the penetration of international law within the Israeli State in its legal, political, and social dimensions. My analysis is therefore organized in three parts. The first concerns the legal sphere and evaluates the liberalist argument for the impact of international law upon formal domestic structures. The second examines the political sphere and considers the notion of legitimacy and the role international law plays in domestic and international politics. The third part explores the social

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18. Illegal Israeli actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory, G.A. Res. ES-10/14, at 3, U.N. GAOR, 10th Emergency Special Sess., 23d plen. mtg., U.N. Doc. A/Res/ES-10/14 (Dec. 12, 2003).

19. *Id.* at 2.

20. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9) [hereinafter *Legal Consequences of the Construction of a Wall*], available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

21. Isr. Ministry of Foreign Aff., ICJ Advisory Opinion on Israel's Security Fence - Israeli Statement (July 9, 2004), <http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2004/Statement+on+ICJ+Advisory+Opinion+9-July-2004.htm>.

22. Isr. Ministry of Def., Israel's Response to the ICJ Advisory Opinion on the Security Fence (Feb. 28, 2005), <http://www.securityfence.mod.gov.il/Pages/ENG/news.htm#news27>.

dimension and analyzes the role of social movements and resistance in the institutionalization and enforcement processes. Collectively, I will demonstrate that, at a minimum, international law must be seen in its legal, political, and social dimensions.<sup>23</sup> Only then can we begin to understand the depth of the penetration of international norms within our collective conscious.

#### IV.

##### THE LEGAL DIMENSION OF INTERNATIONAL LAW

Liberal theory addresses the legal dimension of international law by focusing on the role of adjudication by domestic courts in establishing an international legal regime. According to Slaughter, "the global rule of law depends on the domestic rule of law."<sup>24</sup> As one of the main proponents of the liberalist approach, Slaughter believes that domestic institutions give weight to international law through the mediation of its rules and norms within state borders. Rather than a "top down" approach through international tribunals such as the ICJ, Slaughter envisages a network of municipal courts synthesizing the applicable national and international laws and building the regime of international law from the "bottom up."<sup>25</sup>

The case of Israel and the Barrier provides an interesting empirical case study for this approach. On June 30, 2004, the Israeli Supreme Court decided a case concerning the legality of the Barrier brought against the Israeli Government and the Commander of the Israeli Defense Forces in the West Bank by the Village Council of Beit Sourik, a Palestinian village gravely affected by the Barrier's construction.<sup>26</sup> The Court considered various arguments advanced under international law, and though it reached conclusions quite different from those of the ICJ, it nevertheless applied international law in a manner that was at clear variance with the legal position adopted by the Israeli Government.<sup>27</sup>

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23. I do not address some of the more abstract theories of international law, such as David Kennedy's relational and rhetorical conceptions. See, e.g., David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209 (1985-1986); David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT'L L. & POL'Y 1 (1987); David Kennedy, *Theses about International Law Discourse*, 23 F.R.G. Y.B. INT'L L. 353 (1980); David Kennedy, *A New Stream of International Law Scholarship*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 230-50 (Robert J. Beck et al. eds., 1996). This analysis is part theoretical, part empirical and, although valuable, frameworks such as Kennedy's do not lend themselves easily to the consideration of discrete case studies.

24. Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 246 (2000).

25. *Id.* at 241.

26. HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807.

27. Unlike the ICJ, the Supreme Court supported the validity of the construction of the Barrier ("the Separation Fence") under international law on the basis that it was not motivated by political considerations but by considerations of security. However, the court was prepared to call into question the legality of the route on the basis of the principles contained in the Hague Rules, the Geneva Conventions, and Israeli Administrative Law. In applying these laws the military commander must balance the needs of the army and the needs of local inhabitants. This balance is achieved by applying the Principle of Proportionality, that is, the liberty of the inhabitant of an occupied territory can be restricted provided that the restrictions are proportionate.

The most important point of divergence between the ICJ and the Israeli Supreme Court relates to the legality of settlements protected by the Barrier. The ICJ held that, in relation to the West Bank settlements, Israel was in violation of Article 49(6) of the Fourth Geneva Convention, which states that the Occupying Power "shall not deport or transfer parts of its own civilian population into the territory it occupies."<sup>28</sup> According to the ICJ, this provision prohibits deportations or forced transfers of population from an occupied territory, as well as transfers by the Occupying Power of its own population into the occupied territory.<sup>29</sup> This position has been adopted by the United Nations Security Council,<sup>30</sup> the United Nations General Assembly,<sup>31</sup> the International Committee of the Red Cross,<sup>32</sup> and many international legal scholars,<sup>33</sup> but has been resisted by Israel on the grounds that the Fourth Geneva Convention does not apply to its presence in the West Bank.<sup>34</sup>

The Israeli Supreme Court, on the other hand, while hearing petitions regarding the legality of settlements since the formal settlement policy began during the Begin Government in 1977, has never taken a position on whether the settlements constitute a violation of international law per se. Although the Court has been prepared to examine the legality of particular settlements on narrow grounds, it has always refused to rule on the legality of the settlement under Article 49(6) of the Fourth Geneva Convention, maintaining that this provision was not customary international law and was therefore not binding on domestic courts until it was incorporated into the municipal system via parliamentary legislation.<sup>35</sup> The *Beit Sourik* case was no departure from this position. The Israeli Supreme Court did not challenge the opinion of the military commander that "the fence [was] intended to prevent the unchecked passage of inhabitants of the area into Israel and their infiltration into Israeli towns located in the area."<sup>36</sup> Since the *Beit Sourik* case and the ICJ Advisory Opinion, these issues have again come before the Israeli Supreme Court in the case of *Mara'abe v. Prime Minister of Israel*, where the Court adopted a similar approach.<sup>37</sup> In this case,

28. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 3548, 75 U.N.T.S. 287, 318.

29. Legal Consequences of the Construction of a Wall, 2004 I.C.J. at 183.

30. S.C. Res. 452, at 8, U.N. Doc. S/INF/35 (July 20, 1979).

31. See, e.g., Illegal Israeli actions In Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, G.A. Res. ES-10/3, at 2, U.N. GAOR, 10th Emergency Special Sess., 5th mtg., U.N. Doc. A/Res/ES-10/3 (July 30, 1997).

32. Beit Sourik Vill. Council v. Israel, *supra* note 26, ¶ 29.

33. See, e.g., EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 140 (1993); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 84-85 (1990).

34. See ISR. NAT'L SECTION, INT'L COMM'N OF JURISTS, THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL 54-55 (1981).

35. HCJ 606/78 Ayoub v. Minister of Def. (Beth El Case) [1978] IsrSC 33(2) 113, *reprinted in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 371, 389 (Meir Shamgar ed., 1982).

36. Beit Sourik Vill Council v Israel, *supra* note 26, ¶ 29.

37. Mara'abe, *supra* note 17, ¶ 19. The Supreme Court sitting as the High Court was asked to rule upon the legality of a section of the Barrier, which encloses the settlement of Alfei Menashe

the Supreme Court declared that the legality of a settlement within the West Bank that had been encircled by the Barrier was not relevant to the issue of the legality of the Barrier per se.

The Israeli government and the Israeli Supreme Court, however, diverge on one of the most fundamental issues of all, namely whether the regime in Palestine constitutes an "occupation" per se. The Israeli Government takes the position that the West Bank and Gaza Strip should not be labeled as "occupied territory" for the purposes of *jus in bello* but should instead be seen as territory over which there are competing claims that should be resolved in peace negotiations. From the perspective of the Israeli government, certain Palestinian claims to the land should be acknowledged but, at the same time, Israel has valid claims to this land based "not only on its historic and religious connection to the land, and its recognized security needs, but also on the fact that the territory was not previously under the sovereignty of any state and came under Israeli control in a war of self-defense, imposed upon Israel."<sup>38</sup> Conversely, in *Beit Sourik*, the Supreme Court declared, as it has done previously, that Israel has been holding the areas of "Judea and Samaria"—that is the West Bank—in belligerent occupation since 1967.<sup>39</sup> According to the Court, the authority of the military commander flows from the provisions of public international law regarding belligerent occupation, principally customary international law under the Hague Regulations and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.<sup>40</sup> The government, meanwhile, claims that its presence in the West Bank and Gaza is as an administrator, a position that renders the Fourth Geneva Convention inapplicable and has declared that it will only abide by the "humanitarian provisions" of the Convention.

Nevertheless, in spite of its non-acceptance of the underlying legal rationale, the *Beit Sourik* case politically compelled the Israeli government to change the route of the Barrier. According to government officials, the changes were not limited to those sections the Court ruled illegal. Rather, the Barrier route was redirected over a much larger section, from Elkana in the center of the country, down to the Judean desert in the south, in accordance with the principles set out in the Court's ruling. Defense Minister Shaul Mofaz told Army Radio on September 6, 2004 that "in the wake of the High Court Decision, we had to prepare

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and also encompasses five Palestinian villages creating a Palestinian enclave separated from the rest of the West Bank.

38. Isr. Ministry of Int'l Aff., Israeli Settlements and International Law (May 2001), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Settlements+and+International+Law.htm>.

39. *Beit Sourik Vill Council v Israel*, *supra* note 26, ¶ 1.

40. This is well-established in Israeli jurisprudence since the question of the application of the Fourth Geneva Convention has come up more than once before the Supreme Court. *See* HCJ 390/79 *Dwaikat v. Israel* [1979] IsrSC 34(1) 1; HCJ 698/80 *Kawasme v. Minister of Def.* [1980] IsrSC 35(1) 617; HCJ 393/82 *Jam'iyat Ascan el-Malmun el-Mahdudeh el-Masauliyeh v. Commander of IDF Forces* [1982] IsrSC 37(4) 785, 794; HCJ 7015/02 *Ajuri v. IDF Commander* [2002] IsrSC 56(6) 352, 364; HCJ 3278/02 *Ctr. for the Def. of the Individual v. Commander of the IDF Forces* [2002] IsrSC 57(1) 385, 396.

another line for the fence that would nearly completely match the Green Line.”<sup>41</sup>

If we examine this chain of events from the perspective of strict compliance with the broad declarations of international law as articulated by its highest judicial authority, the ICJ, then clearly there are many disappointments. First, the Barrier remains on the Palestinian side of the Green Line, cutting deeply into the West Bank in certain sections and causing immense daily suffering to many Palestinians.<sup>42</sup> Second, the Supreme Court failed to find that the settlements, perhaps the gravest violation of the occupation, are illegal. Third, the Israeli Government, though forced to make some modifications that alleviate the burdens imposed on some Palestinian population centers, is able to claim compliance with the rule of law and the Supreme Court’s decision while refusing to alter the basic nature of the project.<sup>43</sup> Finally, new Israeli settlements are now springing up in many places between the Barrier and the Green Line.<sup>44</sup> From a purely instrumental point of view, international law has not yet been substantively observed in relation to Palestine.

Nevertheless, it is possible that the then-pending opinion of the ICJ may have influenced the Israeli Supreme Court in *Beit Sourik*. Moreover, the Supreme Court has now specifically taken the ICJ’s opinion into consideration in the recent case of *Mara’abe v. Prime Minister of Israel*.<sup>45</sup> In *Mara’abe*, the President of the Court, Justice Barak, allocated a significant portion of the judgment to a consideration of the substance and impact of the ICJ’s advisory

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41. Aluf Benn, *New Fence Route to be Presented to U.S. First, then Cabinet*, HAARETZ, Sept. 7, 2004, at 1, available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=474587>.

42. U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF., OCCUPIED PALESTINIAN TERRITORY, PRELIMINARY ANALYSIS: THE HUMANITARIAN IMPLICATIONS OF THE FEBRUARY 2005 PROJECTED WEST BANK BARRIER ROUTE 1, 4 (Update 3, February 2005), available at <http://www.reliefweb.int/library/documents/2005/ocha-opt-analysis-22mar.pdf>.

43. In a statement to the Tenth Emergency Special Session of the UN General Assembly on July 16, 2004, Israeli Ambassador Dan Gillerman stated that,

[a]s always, Israel as a country that respects the rule of law, will fully comply with the decisions of its Courts. Following the judgment of the Israeli Supreme Court, the Government announced that it would not only re-route those parts of the fence that were the subject of the petition, but re-examine the entire routing of the fence, so as to ensure that it complies with all the requirements of international law.

Dan Gillerman, Israeli Ambassador to the United Nations, Statement on Illegal Israeli actions in Occupied East Jerusalem and the Rest of the Occupied Territories at the UN General Assembly (July 16, 2004) (transcript available at [http://www.israel-un.org/gen\\_assembly/pal\\_issues/gil16jul04.htm](http://www.israel-un.org/gen_assembly/pal_issues/gil16jul04.htm)).

44. Human Rights Watch has cited plans for substantial settlement expansion in the Zufin and Alfei Menashe settlements, into the so-called “Seam Line” around the Palestinian city of Qalqiliya in the northern West Bank. Hum. Rts. Watch, Israel: Bush Should Lay Down the Law on Settlements (Apr. 11, 2005), <http://hrw.org/english/docs/2005/04/11/isrlpa10462.htm>. On December 14, 2004, the Guardian newspaper reported that at least six sites alongside the barrier had settlement building work going on. Chris McGreal, *Israelis Hasten Land Grab in Shadow of Wall*, GUARDIAN, Dec. 14, 2004, at 12, available at <http://www.guardian.co.uk/international/story/0,,1372918,00.html>.

45. *Mara’abe*, *supra* note 17.

opinion, contrasting it with the Supreme Court's decision in *Beit Sourik*.<sup>46</sup> Contrary to the Israeli government's claims of its irrelevance,<sup>47</sup> Barak stated that, while the advisory opinion had a factual basis different from that before the court and was thus not *res judicata*,<sup>48</sup> "the opinion of the International Court of Justice is an interpretation of international law performed by the highest judicial body in international law. The ICJ's interpretation of international law should be given its full appropriate weight."<sup>49</sup> Therefore, in terms of the dissemination of the norms of international law within the domestic structures of Israel, there has been a material impact. Although the Supreme Court regarded the ICJ as having erred in failing to examine properly the security needs behind the Barrier,<sup>50</sup> it nonetheless acknowledged a "common normative foundation" in the approaches of the two tribunals.<sup>51</sup>

Useful insight into the judicial consideration of international law within the Israeli domestic sphere is provided by Barak himself.<sup>52</sup> In a 2002 Harvard Law Review article, Barak described his role as a judge.<sup>53</sup> While stressing several times that international law comprises part of the binding legal rules that bear upon a case,<sup>54</sup> Barak wrote:

I have emphasized that it is the role of the judge to give effect to democracy by ruling in accordance with democratic values and foundational principles. In my view, fundamental principles (or values) fill the normative universe of a democracy. They justify legal rules. They are the reason for changing them. They are the spirit (*voluntas*) that encompasses the substance (*verba*). Every norm that is created in a democracy is created against the background of these values. . . . My position is that every norm—whether expressed in a statute or in case law—lives and breathes within this normative world replete with values and principles. These values create a "normative umbrella" for the operation of the common law and a framework for interpreting all legal texts.<sup>55</sup>

Within Barak's matrix, therefore, international law has relevance for domestic (or in this case quasi-domestic) issues either directly, such as the application of Hague and Geneva law in the *Beit Sourik* and *Mara'abe* cases, or indirectly under the "normative umbrella" that may be used as a framework for interpretation.

Of course, the overall underpinning of the liberalist theory is a distinction between "liberal" and "non-liberal" states. This division builds on the purport-

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46. *Id.* ¶¶ 37-74.

47. Isr. Ministry of Def., *supra* note 22.

48. *Mara'abe*, *supra* note 17, ¶ 74. President Barak stated that the fact that the ICJ's Advisory Opinion did not constitute *res judicata*, did not, therefore, oblige the Supreme Court of Israel to rule that each and every segment of the fence violates international law.

49. *Id.* ¶ 56.

50. *Id.* ¶ 68.

51. *Id.* ¶ 57.

52. It was President Barak who delivered the judgment in the *Beit Sourik* case.

53. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

54. *Id.* at 68, 151.

55. *Id.* at 41-42.

edly unique characteristics of legal relations between liberal democracies to claim that “functioning democracies” (among which Slaughter considers Israel to be in the second tier) strengthen and expand international norms and institutions. Liberalist theory rests firmly on the “democratic peace” theory, which posits that “liberal states”—those with some form of representative government that enshrines constitutional rights and the rule of law through the separation of powers—tend not to go to war with each other.<sup>56</sup> Both Slaughter and Michael Doyle, the progenitor of the democratic peace literature, share the same definition of “liberal states.” Therefore, although liberalism would embrace my Israeli case study, it does not purport to explain the role (if any) of international law within the domestic institutions of non-liberal states. Moreover, the liberalist theory has now shifted from a descriptive to a more prescriptive theory for binding and expanding the normative network of “liberal” nations, which is clearly open to criticism as a culturally hegemonic “one size fits all” approach.

Nevertheless, I share the view of José Alvarez, who agrees that “internal political structures relate to the enforcement of international law and that strategies of ‘embedded internationalism’ that build on these structures hold the greatest potential for regulatory effectiveness,”<sup>57</sup> yet contends that this insight should not be limited by the parameters drawn by the liberalists, namely formal structures within “liberal states.” For one thing, in the light of evidence to the contrary, one cannot presuppose the law-abiding tendencies of “liberal” nations.<sup>58</sup> Such an approach, moreover, “shrinks rather than expand[s] the domain of law.”<sup>59</sup> Rather, the essence of the liberalist theory should also be applied to a “variety of grassroots groups, individuals and social movements that serve as agents of institutional transformation even when operating within ‘non-liberal’ regimes.”<sup>60</sup> However, in arguing the case against a state-centric, causal view of international law, the evidence derived from formal legal institutions is powerful. This view is clearly one important prism through which to understand the impact of international law.

## V.

### THE POLITICAL DIMENSION OF INTERNATIONAL LAW

The political dimension is another key perspective from which international law takes its context. It is the arena in which power and law appear to enjoy their closest relationship. Sometimes that relationship appears competitive, such as where the decisions of powerful actors challenge the authority of legal norms. Sometimes it appears symbiotic, as in cases where customary international law

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56. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 222-23 (1983).

57. José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 241 (2001).

58. *Id.* at 204.

59. *Id.* at 241.

60. *Id.* at 242.

can be ascertained from the clear consensus of the international community. However, to see power and law as discrete poles around which international political life is organized is not the only way to understand the relationship between these two key variables.

Increasingly, scholars contend that international law is capable of being a source of political power per se. Such a concept calls into question an assessment of international law that simplistically conceptualizes compliance with international legal norms as just one amongst various competing policy options available to states. It correspondingly challenges approaches to international relations that characterize power solely in military and economic terms<sup>61</sup> and that accord a secondary status to normative considerations. These approaches tend to utilize the definition of power given by the influential sociologist Max Weber, who characterized power as "the chance of a man or a number of men to realize their own will in a communal action even against the resistance of others who are participating in the action."<sup>62</sup> Accordingly, ethics are not considered as a source of power but merely a possible basis for its exercise.

However, political science has started to focus more attention on non-material sources of power. Political scientist Joseph Nye has made a compelling case for the concept of "soft power" to compliment traditional notions of military and economic strength.<sup>63</sup> "A country may obtain the outcomes it wants in world politics because other countries want to follow it, admiring its values, emulating its example, aspiring to its level of prosperity and openness . . . it co-opts people rather than coerces them."<sup>64</sup> From this perspective, international law presents an important means of establishing shared values and providing a yardstick against which conduct worthy of admiration and loyalty can be judged. In other words, it can furnish legitimacy by providing a focal point for moral authority. The use of such concepts of non-material power can elevate international law within political discourse to what is, arguably, its rightful position.

Although a synthesis of the concepts of power and legitimacy might be relatively novel within the nascent discipline of international relations, Rodney

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61. Foremost amongst these approaches is neorealism, a variant of classical realism. Neorealism is a systemic theory, which predicts that within an anarchic world system characterized by self-help states are preoccupied with survival. They worry about a division of gains and capacities that favors others more than themselves and about becoming dependent on others. Hence, they compete in ways that tend to create balances of power. At a minimum, they seek preservation and, at a maximum, domination. States, or those who act for them, try to use the means available to them to achieve the ends in view. Military and economic competition is the overriding dynamic. See Kenneth N. Waltz, *Anarchic Orders and Balances of Power*, in *NEOREALISM AND ITS CRITICS* 98-130 (Robert O. Keohane ed., 1986).

62. Max Weber, *The Distribution of Power within the Group: Class, Status, Party*, in *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (Guenther Roth & Claus Wittich eds., 1978), reprinted in *MAX WEBER: READINGS AND COMMENTARY ON MODERNITY* 151 (Stephen Kalberg ed., 2005).

63. See generally JOSEPH S. NYE, *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004).

64. Joseph S. Nye, Jr., *Limits of American Power*, 117 *POL. SCI. Q.* 545, 552 (2003).

Bruce Hall argues that moral authority as a power resource is nothing new.<sup>65</sup> Indeed, in his historical analysis of feudal Europe, he reveals how moral authority was employed as a power resource to:

construct and define the rules of a hieratic, feudal-theocratic social order. It was employed to domesticate a troublesome and belligerent class of vassal-knights. It was employed to place the material power resource that this class constituted at the service of the Church and crown at the end of the "feudal revolution." It was employed by the high medieval papacy to launch a military invasion of the Muslim Middle East with the preaching of the crusades [and] it was employed by the high medieval papacy to assert ecclesial supremacy over temporal rulership so effectively as to abet papal deposition of the Holy Roman Emperor during the Investiture Controversy.<sup>66</sup>

Hall founds his argument on the constructivist premise that interests are defined in terms of identities instead of the obvious power resources that actors may display in their social interactions. Thus, what could be described as "social power" is embedded in the socially constructed interests of actors.<sup>67</sup> Through the constructivist lens, what constitutes a power resource in a given context is contingent upon history and culture. From a global perspective, therefore, it is easy to understand that international law has a capacity to articulate common values or aggregated preferences where there might otherwise be social and cultural divergence. Of course, as has been noted previously within the context of the liberalist approach, international law also has the potential to become the dominant narrative by means other than through free-willed universal acceptance as a common moral denominator, and much has been written upon this topic by scholars from the post-colonial and subaltern schools.<sup>68</sup> However, the fact that states try to control the dominant ethical narrative is proof positive of the soft power of legitimacy.

International legal scholar, Thomas Franck, has written extensively on the linkage between legitimacy and international law and suggests that legitimacy has two aspects in this regard that should be understood as discrete factors: "First, there is the legitimacy of national governments. Secondly, there is the legitimacy of the *international validation* of the governance and the rules and processes of that validation."<sup>69</sup> Although the former relates more to the domestic sphere and the latter to the international, a strong connection exists between the two. Franck argues that in Western democracies legitimacy has been achieved largely by subjecting the political process to rules and notes that citizens have shown themselves willing to revoke the governmental mandate for power where those rules are not reliably grounded in social and legal institu-

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65. Rodney Bruce Hall, *Moral Authority as a Power Resource*, 51 INT'L ORG. 591 (1997).

66. *Id.* at 592.

67. *Id.* at 594.

68. See, e.g., Eve Darian-Smith, *Post-Colonialism: A Brief Introduction*, 5 SOC. & LEGAL STUD. 291 (1996); Dianne Otto, *Subalternity and International Law: The Problem of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337 (1996); Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory*, 45 VILL. L. REV. 1195 (2000).

69. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 89 (1995).

tions. It is for this reason, he considers, that sovereign powers have actively sought the validation of elections through the endorsement of their fairness by foreign observers.<sup>70</sup> This observation clearly shows that, as far as legitimacy is concerned, the boundaries between the domestic and international are increasingly blurred.

Take, for example, the recent elections in Ukraine. The initial election declared the incumbent Yanukovich to be the winner, but the credibility of the results and the fairness of the procedures were contested by both international observers and large sections of the population who turned out in large numbers to protest. This so-called “Orange Revolution” led to a re-run of the elections, which brought to power the challenger Yushchenko. During the crisis, there were varying reactions from the international community. Some of those reactions could be said to be motivated by considerations of power.<sup>71</sup> However, the reaction from the global community was also instrumental in bringing considerable pressure to bear on the Ukrainian authorities not to accept the initial outcome.<sup>72</sup>

Leaders not only draw upon international norms to claim international legitimacy, but also use them to shore up their own claims to legitimacy vis-à-vis their own citizens. Interestingly, this phenomenon can be witnessed from leaders who are widely regarded as “normative pariahs.” For example, the Libyan leader Mu’ammar Qadhafi, who in his New Year address to the Libyan people in January 1998 had called the UN “one of the greatest farces in history,”<sup>73</sup> nevertheless told Libyan TV the following month that a military strike against Iraq by the Coalition Forces would be in violation of the legal principles of the UN Charter.<sup>74</sup> Saddam Hussain, when addressing the Iraqi cabinet on January 3, 1999, said with regard to the imposition of the No Fly Zones: “This action is a blatant and flagrant violation of international laws, charters and norms, especially the UN Charter.”<sup>75</sup> In both cases, the leaders in question were not addressing fellow UN member states but were talking to their own people. In the former situation, one would expect references to a common set of rules; in the latter, however, the shared focus of both speaker and audience is the national interest. This strongly suggests that international law norms, whether individually

70. Franck cites, for example, the 1988 elections in Senegal, which were widely perceived to have been rigged and failed to secure the consent of the governed. *Id.* at 90.

71. Russia, for example, quickly endorsed the outcome of the first ballot since Yanukovich was decidedly ‘old guard’ and an ally of Putin. The United States, on the other hand, favored the Western-orientated Yushchenko and was accused of meddling in the outcome. See BBC News, US Denies Ukraine Interference (Dec. 7, 2004), <http://news.bbc.co.uk/1/hi/world/europe/4076227.stm>.

72. CNN, World Pressures Ukraine on Poll (Nov. 25, 2004), <http://www.cnn.com/2004/WORLD/europe/11/24/ukraine.reax/>.

73. BBC News, Gaddafi Calls for Reform of UN in Message to World Leader (Jan. 5, 1998), <http://news.bbc.co.uk/1/hi/world/monitoring/44661.stm>.

74. BBC News, Qadhafi Says US Violating UN Charter Over Iraq, (Feb. 19, 1998), <http://news.bbc.co.uk/1/hi/world/monitoring/57988.stm>.

75. BBC News, Saddam Condemns No Fly Zones (Jan. 3, 1999), [http://news.bbc.co.uk/1/hi/events/crisis\\_in\\_the\\_gulf/latest\\_news/247669.stm](http://news.bbc.co.uk/1/hi/events/crisis_in_the_gulf/latest_news/247669.stm).

or as a corpus, have status within the domestic arena, which, in turn, indicates a degree of popular desire for, or even a requirement for, compliance.

Is this view of international law borne out in the case of Israel and the Barrier? Certainly, there is evidence that, despite its strong public rejection of the opinion of the ICJ, the Israeli government understood that the opinion carried political consequences. Following the ICJ's ruling, a top-level inter-ministerial team presented the Prime Minister's Office with an 84-page classified report analyzing the implications of the ICJ's opinion.<sup>76</sup> The report, which had been approved by the Attorney General Menahem Mazuz, said that the ICJ's ruling had created "a different legal reality for Israel" and could serve as a catalyst for anti-Israel moves. It therefore recommended Israel declare that it "respects" the ICJ's decision, despite misgivings, and implement the modifications to the fence's route and arrangements in accordance with the principles set forth by the Israeli Supreme Court as quickly as possible. While some of the concern would undoubtedly have been focused on the reaction from overseas, the internal perception matters in this regard too. Indeed, in the case of Israel, perhaps more than any other country, they are sometimes hard to separate since the diaspora carries great political weight both domestically and internationally.

It is also of interest to note that some of the domestic opposition to Prime Minister Sharon's policy for the unilateral disengagement of Israel from Gaza was couched with reference to international norms. For example, Yoram Shiffatan, a member of Professors for a Secure Israel, made a case for the "monumental illegality of international law involved in the selective uprooting of Jews."<sup>77</sup> Since there was little opposition to Sharon's plan from the international community, this argument was purely for domestic consumption. It highlights the degree of penetration of international norms into domestic debate—even for those who reject its dominant interpretation on a particular issue.

There are other indications that the Israeli Government is loath to confront international law head on by arguing that the national interest simply supersedes international norms. In March 2005, for example, it emerged through an official report by former State Prosecutor, Talia Sasson, that Israeli state bodies have been secretly diverting millions of dollars through the international World Zionist Organization ("WZO") to build unauthorized Jewish outposts in the West Bank.<sup>78</sup> The report, commissioned after the United States pressured Israel to do something about the illegal outposts,<sup>79</sup> caused a furor domestically and much embarrassment for the WZO.<sup>80</sup> It indicates, *inter alia*, that the government con-

76. Joshua Brilliant, *New Route for Israel's Security Barrier*, UNITED PRESS INT'L, Aug. 23, 2004, available at LEXIS, News Library, UPI File.

77. Yoram Shiffatan, A Legal Challenge to Sharon's Uprooting Policy, <http://www.think-israel.org/shiffatan.uprooting.html> (last visited Oct. 31, 2005).

78. BBC News, Israel 'Funded Illegal Outposts' (Mar. 9, 2005), [http://news.bbc.co.uk/1/hi/world/middle\\_east/4328817.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4328817.stm).

79. Herb Keinon, *PM Reassures US Envoy on Ma'aleh Adumim*, JERUSALEM POST, Aug. 6, 2004, at 1.

80. Nathaniel Popper, *Jewish Officials Profess Shock over Report on Zionist Body*,

sidered it important to hide those activities that are indefensible under international law. Furthermore, reinforcing the point made earlier, the report and its findings highlight both Israel's institutionalized links to its diaspora and the fact that international opinion, particularly international Jewish opinion, is not something that the state can disregard. The latter is also relevant to its stance on international law, because Israel's avowed status as a democratic and law-abiding nation forms a central point of identification with its non-national supporters. For example, the American Jewish Committee, acknowledged as one of the most important and powerful Jewish organizations in the United States, responded last year to a Supreme Court ruling upon activities of the Israeli Defense Forces in the Gaza Strip, quoting approvingly the following section from President Barak's judgment:

The State of Israel . . . is founded on Jewish and democratic values. We established a state that upholds the law – it fulfills its national goals, along the vision of its generations, while upholding human rights and ensuring human dignity. Between these – the vision and the law – there lies only harmony, not conflict.<sup>81</sup>

Robert S. Rifkind, chair of the AJC's Jacob Blaustein Institute for the Advancement of Human Rights, said that the most impressive aspect of the opinion was the court's determination that "the military operations of the IDF are not conducted in a legal vacuum . . . . The ruling affirms a standard that Israel can be proud of and other nations can aspire to."<sup>82</sup>

Another common way of expressing this aspect of Israel's self-identity is the description, "a light unto the nations,"<sup>83</sup> a biblical reference much used by Israel's founding fathers. It refers both to Israel's achievements and to its moral standing, and has become an article of faith that has percolated into the fabric of Israel's identity. Arguably, it is one of the most important tenets of Israel's relatively young national identity since it constitutes one of the key ties unifying a complex and ethnically heterogeneous society and it comprises part of the way that Israeli citizens understand the moral foundation of their country. Its use as a beacon for political cohesion stretches back from the founding of the state in 1948 until the present day. The phrase continues to be used both by those on the right<sup>84</sup> and on the left,<sup>85</sup> as well as in broader expressions of contemporary Zi-

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FORWARD, Mar. 18, 2005, at 1, available at <http://forward.com/main/printer-friendly.php?id=2828>.

81. See Press Release, Am. Jewish Comm., AJC Commends Israeli Court Decision on Rule of Law (June 9, 2004) (quoting HCJ 3451/02 Almandi v. Ministry of Def. [2002] IsrSC 56 (3) 30, ¶ 9), <http://www.ajc.org/site/apps/nl/content2.asp?c=ijIT12PHKoG&b=837277&ct=873055>.

82. *Id.*

83. "I the Lord have called you in righteousness and will hold your hand and will keep you and give for you a covenant of the people, for a light unto the nations." *Isaiah* 42:6.

84. Natan Sharansky, former Minister of Trade in the Netanyahu government, who rallied with Israel settlers against Ariel Sharon's Gaza Disengagement Plan and is known as a far-right "hawk" wrote:

Israel and the Jewish people share something essential with the United States. The Jews, after all, have long held that they were chosen to play a special role in history, to be what their prophets called "a light unto the nations". What is meant by that phrase has always been a matter of debate, and I would be the last to deny the mischief that has sometimes been done, including to the best interests of Jews, by some who have raised it as their banner. Nevertheless, over four

onism.<sup>86</sup> Indeed, at last year's state memorial for David Ben Gurion, Prime Minister Sharon used these words to draw the link between Israel's past and present, saying that, "[b]eyond [the current problems], there is a promising future for the State of Israel, one which David Ben Gurion envisioned; a nation loyal to its Jewish destiny in accordance with the vision of Israel's prophets; a nation which will strive to be exemplary, 'a light unto the nations.'"<sup>87</sup> So, despite any criticism that may be leveled against Israel regarding its attainment of this aspiration, or the duplicity with which that standard may be used rhetorically by individual actors, the fact remains that being "a light unto the nations" continues to be an articulated aspiration for the nation as a whole.

International law, as the embodiment of many secular aspirational norms, has great political salience within Israel's domestic political and societal dialogue. Whether or not particular individuals within Israel may be rightly accused of flagrant violations, or of being disingenuous or in denial about Israel's record on the observance of international norms, being law-abiding remains one aspect of international legitimacy Israel has set for itself and of which it has not lost sight, at least rhetorically and aspirationally. Whether such norms develop from a sense of "Jewishness" or whether they come from a universal moral intuition filtered through Jewish and Israeli culture is unclear. Regardless, articulated attachment to norms and values is prevalent within Israeli social and political culture. Although the substantive and contextual interpretation of such norms and values may differ widely across the political and social spectrum, they clearly provide a conduit for the dissemination and development of principles of international law through the domestic medium.

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millennia, the universal vision and moral precepts of the Jews have not only worked to secure the survival of the Jewish people themselves but have constituted a powerful force for good in the world, inspiring myriads to fight for the right even as in others they have aroused rivalry, enmity and unappeasable resentment.

Natan Sharansky, *On Hating the Jews*, COMMENTARY, Nov. 2003, at 26, 34.

85. Avraham Burg, Speaker of the Knesset from 1999 to 2003 and former chairman of the Jewish Agency and currently a Labor Party Member of the Knesset wrote the following as part of a much-debated article entitled *A Failed Israeli Society Is Collapsing*, INT'L HERALD TRIB., Sept. 6, 2003, at 4:

[T]he Zionist revolution has always rested on two pillars: a just path and an ethical leadership. Neither of these is operative any longer. The Israeli nation today rests on a scaffolding of corruption, and on foundations of oppression and injustice. As such, the end of the Zionist enterprise is already on our doorstep. There is a real chance that ours will be the last Zionist generation. There may yet be a Jewish state in the Middle East, but it will be a different sort, strange and ugly.

See also Avraham Burg, *A Failed Israeli Society Collapses While Its Leaders Remain Silent*, FORWARD, Aug. 29, 2003, at 1, available at <http://www.forward.com/issues/2003/03.08.29/oped3.html>.

86. See Matt Plen, Hagshama Dep't of the World Zionist Org., *A Light Onto the Nations? Social Justice in Israel* (Dec. 1, 2000), <http://www.wzo.org.il/en/resources/view.asp?id=10>.

87. Prime Minister Ariel Sharon, Statement at the State Memorial for David Ben Gurion (Nov. 21, 2004) (translated transcript available at <http://www.pmo.gov.il/nr/exeres/2B331FD2-FD2C-48A3-A155-C6A02EA23151.htm>).

## VI.

## THE SOCIAL DIMENSION OF INTERNATIONAL LAW

The argument surrounding the political dimension of international law provides a cogent basis for understanding the role of discourse in opening access for international legal norms to move from the state to the individual level. However, it does not reveal much about how such norms can provide legal and political leverage to affected individuals whose government is otherwise impervious to claims of violations. This is provided by an understanding of the impact of social movements and resistance.

Balakrishnan Rajagopal argues that global norms are increasingly being produced and shaped through “an interaction between States, international institutions and rebellious networks of peasants, farmers, women and environmentalists, while legal enforcement is increasingly influenced by the everyday resistance of ordinary people.”<sup>88</sup> Rajagopal considers that the domination of international law by lawyers and judges has led to a “juro-centric” approach that over-emphasizes the role of lawyers and the decision-makers of formal institutions and neglects the contribution of the masses to the origins of legal rules and institutions. For example, environmental lawyers are more concerned with the regulatory behavior of the state than with the rise of environmental consciousness or the mass action, which may have led to the regulatory behavior of the state.

To free itself from the artificial narrowness that the “juro-centric” approach has created, Rajagopal argues for international law to incorporate a “theory of resistance.”<sup>89</sup> The mechanism that he uses as the basis for such a theory involves “social movement organizations.” While such organizations do not form a social movement in themselves, they can “provide the glue for the coordination of actors with multiple motives to join the movement.”<sup>90</sup> One example is the role of Amnesty International within the larger social movement against the death penalty. Another is the anti-globalization protests, a large, aggregated social movement that combines many issues, including human rights, loss of jobs, and unaccountability of large corporations, under a single banner. “Exploring and understanding these different motivations” of such movements is, Rajagopal argues, “crucial to a proper appreciation of how international legal norms and processes work in practice.”<sup>91</sup>

Rajagopal’s theory correlates with the fourth branch of Michael Barnett and Raymond Duvall’s recently presented “taxonomy of power.”<sup>92</sup> In addition to compulsory, institutional, and structural forms of power, Barnett and Duvall de-

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88. Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT’L L. 397, 400 (2003).

89. *Id.*

90. *Id.* at 409.

91. *Id.*

92. See Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT’L ORG. 39, 43 (2005).

fine a category of "productive power" as "the socially diffuse production of subjectivity in systems of meaning and significance."<sup>93</sup> In contrast to more tangible forms of power, productive power is the "constitution of all social subjects with various social powers through systems of knowledge and discursive practices of broad and general social scope."<sup>94</sup> It can be conceptualized as a network of social forces, perpetually shaping each other through discourse, social processes, and the "systems of knowledge through which meaning is produced, fixed, lived, experienced and transformed."<sup>95</sup> Richard Falk considers such a phenomenon a "globalization from below [that] extends the sense of community, loosening the ties between sovereignty and community but building a stronger feeling of identity with the wider 'we.'"<sup>96</sup> I would suggest that, on a theoretical level, both Rajagopal's theory of resistance and Barnett and Duvall's concept of productive power can be harnessed to enhance our understanding of the role of social movements in mobilizing productive power to leverage the institutionalization of international legal norms at a domestic level.

The example of Israel and the Barrier provides an interesting illustration of Rajagopal's theory. Although there is strong public support for the Barrier domestically, civil society also pressures the government with respect to the occupation in general and the Barrier in particular. From the perspective of direct civilian activism, there has been little public resistance of significance to the Barrier. Small numbers of activists engage, together with Palestinians, in protest and/or direct action.<sup>97</sup> Peace Now, the largest extra-parliamentary movement in Israel, and the only peace group with a broad public base, has come out publicly against placing the Barrier within the Occupied Territories, but has not initiated any substantive campaigning against it.<sup>98</sup> B'Tselem, the Israeli Center for Human Rights in the Occupied Territories, which was established in 1989 by a group of prominent academics, attorneys, journalists, and Knesset members, pursues a strategy of documentation and education with the goal of creating a human rights culture in Israel. Its supporters number in the hundreds<sup>99</sup> and are involved in setting up information stands, distributing printed material, lobbying decision-makers, and participating in protests.<sup>100</sup> However, they are not en-

93. *Id.*

94. *Id.* at 55.

95. *Id.*

96. FALK, *supra* note 8, at 89.

97. These groups include the Stop the Wall Campaign, Gush Shalom, the Israeli Committee Against Housing, Demolitions, and Anarchists Against the Wall (also known as Anarchists Against the Fence and Jews Against Ghettos). See Stop the Wall Campaign, <http://www.stopthewall.org.il> (last visited Oct. 31, 2005); Gush Shalom, <http://gush-shalom.org/english/actlist.html> (last visited Oct. 31, 2005); Israeli Committee Against Housing Demolitions, <http://icahd.org/eng/> (last visited Oct. 31, 2005); Zububa, Apartheid Wall Removal, <http://squat.net/antiwall/pictures/index.htm> (last visited Oct. 31, 2005) (photographs of an Anarchists Against the Wall action).

98. See Peace Now, Peace Now Positions: In Favor of a Fence on the Green Line - Against Sharon's Fence (May 25, 2003), <http://www.peacenow.org.il/site/en/peace.asp?pi=69&docid=552>.

99. See B'Tselem, About B'Tselem, [http://www.btselem.org/English/About\\_BTselem/Index.asp](http://www.btselem.org/English/About_BTselem/Index.asp) (last visited Oct. 31, 2005).

100. See B'Tselem, [www.btselem.org](http://www.btselem.org) (last visited Oct. 31, 2005).

gaged in mass mobilization as an organization. There are also other "social movement organizations" that, like B'Tselem, provide a focus for such resistance to the Barrier as currently exists within Israel and have the capacity to coordinate action if and when there is a seismic shift of public opinion.<sup>101</sup>

What can be observed, however, is how the formal and informal structures interact as a mechanism for normative change. For example, Rabbis for Human Rights, which identifies itself as the rabbinic voice of conscience in Israel "giving voice to the rabbinic tradition of human rights,"<sup>102</sup> engages in physical protests, as well as advocacy within the Jewish community. Recently, its head, Rabbi Arik Ascherman was convicted for standing in the path of a bulldozer that was being used to demolish a Palestinian house. During the trial, the judge agreed to hear arguments for the defendant under international law. As a result, two international organizations and two domestic organizations presented amicus curiae on the illegality of Israel's house demolition policy under international law.<sup>103</sup> The judge did not adopt their arguments in that case, and Rabbi Ascherman was found guilty of impeding the work of the authorities.<sup>104</sup> Nevertheless, this provides a fascinating example of how social action creates the possibility of institutional change.

Recently, another human rights organization has taken an important step in protesting against the Barrier. The Association for Civil Rights in Israel ("ACRI") was founded in 1972 with the goal of protecting human and civil rights in Israel and in the territories under Israeli control. ACRI grounds its vision in the principles and rights articulated in the Declaration of Independence and in the United Nation's Universal Declaration of Human Rights. On May 5, 2005, ACRI presented a statement to the Israeli Supreme Court to the effect that the route of the Barrier is a clear violation of international law as laid down by the ICJ and therefore must be moved from the West Bank into Israel.<sup>105</sup> Noting

101. Although many of these groups are not specifically focused on the Barrier, they work directly or indirectly to monitor or alleviate its impact. For example, Yesh Din, a group of volunteers, organize to oppose violations of human rights in the Occupied Palestinian Territories. See Yesh Din, <http://www.yesh-din.org/site/index.php?page=about.us&lang=en> (last visited Oct. 31, 2005). Machsom Watch, a group of 400 Israeli women, monitors checkpoints in response to reports of human rights abuses of Palestinians who cross army and border police checkpoints. See Machsom Watch, <http://www.machsomwatch.org/eng/aboutUsEng.asp?link=aboutUsEng&lang=eng> (last visited Oct. 31, 2005). With 1150 members, Physicians for Human Rights works to protect human rights, in particular the right to health, in Israel and the Occupied Territories. In February 2005, it launched a campaign on the health impact of the Barrier. See Physicians for Human Rights, Campaign - Health and the Wall: Human Rights and Art (February 8, 2005) <http://www.phr.org.il/phr/article.asp?articleid=20&catid=41&pcat=5>.

102. See Rabbis for Human Rights, <http://www.rhr.israel.net/> (last visited Oct. 31, 2005).

103. The organizations in question were Centre on Housing Rights and Evictions, the International Commission of Jurists, the National Lawyers Guild, and the Jerusalem Centre for Human Rights. See Rebuilding Alliance, Court Refuses to Take Stand on Housing Demolitions (Mar. 24, 2004), <http://www.rebuildingalliance.org/wl/pj-rabbis-for-human-rights/archives/000281.html>.

104. See Sheera C. Frenkel, *Rabbi Convicted for Protesting Demolitions*, JERUSALEM POST, Mar. 22, 2005, at 2, available at <http://www.jpost.com/servlet/Satellite?pagename=Jpost/JPArticle/ShowFull&cid=1111461690538>.

105. Ass'n for C.R. in Isr., Separation Barrier Route Violates International Law (May 8,

that Israel's status and powers in the Occupied Territories are drawn from international law, ACRI argued that the normative framework upon which the actions of Israel in these areas should be examined should therefore be subject to the rulings of the ICJ. Because "the Hague Court is the highest international judicial authority and serves as a body that is authorized to interpret and determine what international law is," its ruling on the Barrier is binding.<sup>106</sup>

How influential is such an intervention? ACRI is an organization with credibility within mainstream Israeli society. ACRI is Israel's largest human rights organization and is funded by donations from individuals and organizations originating from both inside and outside Israel. Its largest donor is the New Israel Fund ("NIF"), a large philanthropic partnership of Israelis, North Americans, and Europeans committed, among other things, to promoting long-term social change based on human rights. In 2003, the NIF announced a \$20 million partnership with the Ford Foundation under which it will administer approximately \$3.5 million annually for "peace and social justice" grants. Moreover, in 2000, ACRI won the Israeli Bar Prize for Contribution to Law and Society in Israel presented by Aharon Barak. Thus, ACRI is not a marginal organization but one which can galvanize and focus other social organizations and activate a certain amount of productive power.

Within the societal dialectic regarding the Barrier, there are also voices arguing the contrary, such as Professors for a Secure Israel. In addition, the Jerusalem Post reported on a conference where various scholars of international law criticized the ruling of the ICJ on substantive legal grounds.<sup>107</sup> However, within Israeli society, the majority reaction to the ICJ's advisory opinion has not been on legal grounds but based on the reasoning, articulated by Benjamin Netanyahu in the New York Times, that: "the court's decision makes a mockery of Israel's right to defend itself . . . Israel will never sacrifice Jewish life on the debased altar of 'international justice.'" <sup>108</sup> Therefore, within the fabric of social discourse in Israel, there are social movements that apply pressure for and against the applicability and relevance of international legal norms, and that also debate their proper interpretation within a domestic context. This is clear evidence for Rajagopal's claim that "international laws and institutions provide important arenas for social movement action as they expand the political space available for transformative politics."<sup>109</sup>

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2005), <http://www.acri.org.il/english-acri/engine/story.asp?id=210>.

106. *Id.*

107. Dan Izenberg, *Academics Across the Spectrum Decry ICJ Fence Decision*, JERUSALEM POST, Jan. 17, 2005, at 2, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1105845487512&p=1078027574097>.

108. Benjamin Netanyahu, Op-Ed., *Why Israel Needs a Fence*, N.Y. TIMES, July 13, 2004, at A19.

109. Rajagopal, *supra* note 88, at 432.

## VII. CONCLUSION

The case study of Israel and the Barrier clearly shows us that international law, as articulated by the ICJ, has had an impact upon Israel's legal, political, and social community. Although Israel has not yet followed the ICJ's core advice, when we look beyond its statements and actions at the international level, we can see, through a number of mechanisms, that international law has become woven into the fabric of political action and social discourse. Through legal actions, such as the *Beit Sourik* and *Mara'abe* cases and, at a lower level, through the Ascherman trial, international law has started to become internally institutionalized within formal domestic structures. This is no "debased alter of international justice" but the gradual acceptance of a set of principles, which, though presented as universal at the international level, are being given authenticity and context by their journey through the national realm. Furthermore, as they acquire salience through this process, they become politically powerful as symbols of legitimacy used by both government and civil society. Consequently, the Israeli government, whose political objectives are at odds with its legal responsibilities, is not able to declare flatly that political imperatives trump legal obligations but is instead obliged to find ways to interpret, distinguish, and even dissemble those norms whose deep foundations make them impossible to sweep under the carpet.

The examination of Israel and the Barrier thus reveals international law in its true character, not as a binding set of rules but as a combination of legal, political, and social phenomena embodying a complex set of practices, ideas, and interpretations. This type of analysis has broad implications. With the illumination of a nuanced understanding of the international legal regime, we begin to stand a better chance of creating effective and stable institutional forms. Moreover, if we stop viewing international law either as a tap that can be switched on or off, depending on the preferences of political actors, or as a set of restraints that can be accepted or broken, depending on the strength of the party being bound, then we avoid sterile debate. Such interpretations are not only incorrect, but are also malignant. They merely force international lawyers and supporters of a strong and effective international legal regime onto the defensive.

If those international norms that structure our collective life are violated, then it should not immediately be seen as a failing of international law. More likely, it is the result of a political failure. As we have seen from the case study, Israel's reaction at the governmental level to the ICJ's advisory opinion does not equate to a lack of impact upon the state as a whole. It is possible, of course, that the institutional mechanisms for the promotion of international law may be defective or that, in a given situation, the hierarchy of conflicting applicable international legal rules is ambiguous. But to argue that international law is itself irrelevant or ineffective is to confuse cause with effect. The so-called failings of international law are not the cause of the political situation, although the gulf between the attempt to create a peaceful and well-regulated world and the facts

on the ground is certainly an effect. Instead, the breach of the fundamental principles of international law lies at the root of the problem. I cannot put it better than Hersch Lauterpacht, who said, "[i]t is misleading in point of fact to create the impression that the limitation of the place accorded to law is due to the very nature of international relations or of international conflicts. Actually, it is not due to any lack of content in international law, but to a refusal to recognize its authority."<sup>110</sup> Let us not argue for or against international law or juxtapose it with conceptions of material power. Instead, let us see it for what it is: an ongoing and fluid dialectic from which alternative sources of moral authority flow. Israel has provided us with a clear example of the way in which state government and its institutions are forced to react to principles that confer and diminish political legitimacy.

More assertively, the above analysis adds weight to the arguments of those who see a constructive role for international law in the ordering of an international community according to principle rather than raw power. Further, or alternatively, it supports the view that international law can be seen as an important source of "productive power," "soft power," or some other conception of power that extends beyond traditionally recognized sources. Although this article has not focused on international law as a variable in international politics, it is important to highlight another important case that can be made for the impact of law within the international community. While individual interest groups, cultures, and other collectivities will doubtlessly continue to debate the interpretation of legal principles, the fact that the discourse takes place around tenets that are capable of being agreed upon in the abstract even if they are contested in the particular, gives structure to the interaction of international actors. It keeps us speaking the same language even when we are using a different dialect. In a fast-paced globalized environment, an international legal architecture that reflects generally agreed upon norms has the potential to make an important contribution to peace and stability.

As can be argued in the case of a country such as Israel, this has both an internal and an external effect. Such a heterogeneous society needs a normative center of gravity, and a state that greatly relies on its diaspora could find strategic value in creating resonance between its values at home and those it proclaims abroad. Moreover, by attempting to harmonize its own legal interpretations with that of the wider community, a state with an internalized sense of perpetual self-defense such as that felt by Israel could decrease not only the volume of international criticism it received, but also its corresponding sense of isolation and security tension. It is to be hoped, therefore, that international legal and political scholarship is able to move away from a somewhat stagnant formulation of attack and defense, relevance and irrelevance, and evolve into a more nuanced and worthwhile examination of the role of international law in interna-

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110. Hersch Lauterpacht, *The Doctrine of Non-Justiciable Disputes in International Law*, 24 *ECONOMICA* 277, 304 (1928).

tional politics. For those committed to understanding the complexity of causation at the international level as a pre-condition of progressive change, that moment cannot come too soon.