



A Reading of the International Court of Justice Advisory Opinion on the Legality of Israel's Wall in the Occupied Palestinian Territories

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I Introduction

On July 9, 2004, the International Court of Justice (ICJ) rendered its advisory opinion in response to the request made to it by the General Assembly through Resolution ES-10/14,¹ which sought the Court's opinion of the 'legal consequences arising from the construction of Israel's wall in the Occupied Palestinian Territories.' The Court drew seven conclusions by overwhelming majority of the fifteen sitting judges:

1. By unanimous vote, the Court found that it had jurisdiction to render the advisory opinion requested;
2. By 14-1 vote, the Court decided it would comply with the request for the opinion;
3. By 14-1 vote, the Court found that construction of the wall in the Occupied Palestinian Territories and in East Jerusalem contravened international law;
4. By 14-1 vote, the Court found that Israel was obliged to stop construction, to dismantle the wall, to terminate its breaches of international law involved in the wall regime, and to nullify all related legislation and policies;
5. By 14-1 vote, the Court found that Israel was obliged to make reparations for all the damage caused by construction of the wall;
6. By 13-2 vote, the Court found that all states were obliged not to recognize the illegal situation resulting from construction of the wall, and to cease any assistance or aid to Israel in maintaining the illegally constructed wall. The Court on this point further found that state parties to the 4th Geneva Convention of 1949 had additional obligations to ensure that Israel complied with the provisions of international humanitarian law in the Occupied Palestinian Territories.
7. By 14-1 vote, the Court found that the United Nations (UN) General Assembly and the Security Council should consider further actions to terminate the illegal situation resulting from the wall construction in light of its advisory opinion.

The sole dissenter on points 2 – 5 and 7 was the American judge, Thomas Buergenthal. However, his dissenting opinion made clear that his differences with the majority were on the basis of his belief that there were insufficient facts before the Court on Israel's security concerns, and the Court should not have rendered an opinion without full consideration of those facts.

My negative votes...should not be seen as reflecting my view that the construction of the wall by Israel on the Occupied Palestinian Territory does not raise serious questions as a matter of international law...I share the Court's

¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Rep__ (9 July, 2004), available at: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

conclusion that international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel. I accept that the wall is causing deplorable suffering to many Palestinians living in that territory. In this connection, I agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.²

On point 6, Judge Buergenthal was joined by the Dutch judge, Pieter H. Kooijmans, who did not agree that the opinion should encompass a determination of the obligations of other states besides Israel.³

Thus, by overwhelming consensus, the ICJ found that Israel's construction of the wall in the Occupied Palestinian Territories violated a number of international humanitarian and human rights law provisions. The Court's findings are encapsulated in paragraphs 134 and 137 of the opinion.

...[T]he Court is of the opinion that the construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated regime, by contributing to the demographic changes referred to [above], contravene Article 49, paragraph 6, or the Fourth Geneva Convention and the Security Council resolutions [cited above].⁴

Concerning Israel's main justification for constructing the wall, that it is necessary on security grounds, the Court concluded:

...[T]he Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order...⁵

² See generally, *Declaration of Judge Buergenthal*. Id, at 1.

³ See generally, *Separate Opinion of Judge Kooijmans*. ("The request as formulated by the General Assembly did not make it necessary for the Court to determine the obligations for States which ensue from the Court's findings,") at 1.

⁴ Para. 134.

⁵ Para. 137.

The Court's opinion is divided into two main aspects: the jurisdictional issues and the merits. The basis for its conclusions on these two aspects, and the analysis underlying its key conclusions, are discussed below, followed by some observations on the potential ramifications of this opinion.

II The Jurisdictional Issues

Addressing the numerous objections to its jurisdiction and the prudence of exercising jurisdiction over the matter that Israel and other states raised, the ICJ found both that it had jurisdiction to render an opinion, and that there were no compelling reasons for the Court to decline to issue an opinion.⁶ The Court relied on Article 65(1) of its Statute and Article 96(1) of the UN Charter to find that it clearly had the legal authority to render an opinion on any matter referred to it by an organ of the United Nations.

Concerning whether the General Assembly's Resolution ES-10/14 was *ultra vires* its authority under the UN Charter, the Court reviewed the procedural history of the Security Council and General Assembly's actions on the matter in light of their respective Charter powers. Drawing some important conclusions on aspects of the relative competencies of the Security Council and General Assembly, the Court found that although the Security Council has primary responsibility over maintaining peace and security, such responsibility is shared with the General Assembly.⁷ The General Assembly acted in this situation under the authority of Article 14 of the Charter to take certain measures in cases of threats to peace, limited only by Charter Article 12.

Addressing the issue of whether the Security Council was already acting under Article 12 to deal with the same matter, thus precluding General Assembly action, the Court found that the Council's Resolution 1515 (2003) on the roadmap did not address the wall, and subsequent Council inaction on further draft resolutions that did address the wall meant that the Council was not seized of the matter. Thus, the General Assembly was free to act in the manner it did, whether through its regular session or Emergency Special Session, without contravening Charter Article 12.⁸ The Court found that the requirements of the Uniting for Peace Resolution, authorizing the General Assembly to take up the issue, were met by the Council's inaction.⁹

The Court also addressed each of the other objections to its jurisdiction, finding that the request was a legal question; that it was precise enough for a response from the Court; and the fact that the question had political ramifications was not sufficient to preclude the Court from responding to the legal aspects of the question.¹⁰ The Court also rejected

⁶ See paras. 13-65.

⁷ Para. 26, citing UN Charter art. 24.

⁸ The Court noted that the Tenth Emergency Special Session of the General Assembly was reconvened numerous times on the situation in the Occupied Palestinian Territories due to repeated negative votes of a permanent Security Council member (the US), thus preventing Security Council action in a situation where there clearly existed a threat to international peace and security. See paras. 30-31.

⁹ See paras. 29-31.

¹⁰ Paras. 36-42.

additional arguments raised by a number of states: that it was imprudent for the Court to give an opinion because Israel had not consented; that it would interfere in the political process of the Roadmap; that there were insufficient facts before the Court; or that an opinion would serve no useful purpose. The Court reviewed its own jurisprudence to conclude on all points that it not only had jurisdiction, but that there was no reason for it to refuse to render an opinion on the question posed to it.¹¹

III The Merits

The Court began its discussion of the substantive legal issues underlying the question by reviewing the historical and legal status of the Occupied Palestinian Territories, including the effect of the League of Nations Mandate, key UN Resolutions and the conflicts of 1948 and 1967. By virtue of the 1949 Armistice Agreements and UN Resolutions, the Court concluded that those areas between “the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan.”¹² Thus, these areas, including East Jerusalem, were occupied territories under international law, and Israel was an occupying power with concomitant legal obligations.¹³

From this, the Court describes in detail the route of the wall and its consequences to the Palestinians living along its route. The Court relies for its factual information primarily on the Secretary-General’s report.¹⁴ The Court makes a number of observations about the route of the wall: first, that the wall is being constructed within the Occupied Palestinian Territories for almost all of its length; second, that the wall isolates huge numbers of Palestinians from their communities; third, that the wall incorporates over 300,000 Israeli settlers into the ‘Israeli’ side; and fourth, that the wall’s construction includes not just a physical structure, but an entire regime of gates, permits, closed areas and other restrictions on movement, instituted on a basis that favored Jews and discriminated against Arab Palestinians.¹⁵

The Court then set out its key findings concerning the Israeli-Palestinian conflict, putting to rest some of the most contentious legal issues raised by the parties to the conflict since 1948. Dismissing Israel’s longstanding argument that the 4th Geneva Convention is not binding on Israel in the Occupied Palestinian Territories, the Court found that the Hague Regulations and the 4th Geneva Convention were fully binding on Israel, and governed all Israeli actions in the Occupied Palestinian Territories.

The Court’s conclusion that the Hague Regulations applied to Israel was based on the recognition that they have acquired the status of customary international law and are thus

¹¹ Paras. 46-65.

¹² Para. 78.

¹³ Id. The Court cited the Hague Regulations of 1907, art. 42, to find that territory is occupied simply when the factual situation exists of a hostile army exercising authority over a territory.

¹⁴ Written Statement of the Secretary-General.

¹⁵ Paras. 83-85.

binding on Israel as on all other nations.¹⁶ The Court found the 4th Geneva Convention applicable because it was ratified by Israel as well as Jordan in 1951, the Israeli Supreme Court had itself found the Hague Convention and 4th Geneva Convention applicable in the Occupied Palestinian Territories, and because the requisite conditions for finding an occupation under that Convention were fulfilled.¹⁷ In conclusion, the Court found “the 4th Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line...”¹⁸

Another set of key findings made by the Court concerned the applicability of human rights provisions to Israel in the OPT’s. The Court focused on three international human rights instruments to determine their applicability to the issues it was addressing, the International Covenant on Civil and Political Rights (CCPR), The International Covenant on Economic, Social and Cultural Rights (CESCR), and the Convention on the Rights of the Child (CRC). The Court noted that Israel ratified and is a party to all three instruments. To Israel’s longstanding position that human rights law does not apply in times of armed conflict, the Court responded that human rights conventions apply both in peacetime and in situations of armed conflict. The applicability of human rights conventions is only limited by their derogation clauses.

Addressing specific arguments about the applicability of each of the cited conventions in turn, the Court found that the language in CCPR Art. 2(1) clearly extended that Convention’s provisions to ‘all individuals within its territory and subject to its jurisdiction.’ The Court relied on the Human Rights Committee’s interpretation of the language as well as the drafting history of the provision to find that the CCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”—hence, fully applicable to Israeli actions in the Occupied Palestinian Territories.¹⁹ Turning to the CESCR, the Court noted that it does not have a provision defining the scope of application. The Court referred to the interpretation placed on the CESCR’s scope by its monitoring body, the Committee on Economic, Social and Cultural Rights, to find that it applied to all territory under Israel’s effective control.²⁰ The Court found the provisions of the CRC also applicable to Israel in the Occupied Palestinian Territories under Article 2 of that Convention.²¹

The last set of key findings in the opinion concerned the legal status of the Palestinian people, their self-determination rights, the status of Israeli settlements in the West Bank, Gaza and East Jerusalem, Israel’s acquisition of territory in those areas and its changes to

¹⁶ Para. 89.

¹⁷ Paras. 90-101.

¹⁸ Para. 101. By this finding, the Court discredits once and for all, as a legal matter, Israel’s ‘missing reversioner’ argument.

¹⁹ Para. 111.

²⁰ Para. 112.

²¹ See para. 113, citing CRC art 2: “States Parties shall respect and ensure the rights set forth in the...Convention to each child within their jurisdiction...”

the character of occupied land and resources. The Court found that “the existence of a ‘Palestinian people’ is no longer at issue.”²² The Court observed that aside from UN Resolutions recognizing the Palestinians as a people, Israel’s own agreements with the Palestinians establish that it recognizes them as such.²³ The Court explicitly stated that the rights possessed by the Palestinians as a people “include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions...”.²⁴ Recalling that the UN Charter and customary law prohibit the acquisition of territory by force, the Court reiterated that Security Council and General Assembly resolutions condemned Israel’s use of force to expand its territory, and those Resolutions required Israel to withdraw from the Occupied Palestinian Territories.²⁵ The Court refers to UN Resolutions and the 4th Geneva Convention to find that “Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”²⁶

The Court then discussed the specific provisions of international humanitarian and human rights law that were breached by Israel’s construction of the wall in the Occupied Palestinian Territories. In paragraphs 134 and 137, quoted at the outset, the Court listed specific violations of a number of provisions in human rights treaties, and in humanitarian law. It said that liberty of movement is violated, and the right to work, to health, to education, and to an adequate standard of living. By contributing to the maintenance of Israel’s West Bank settlements, the wall, in the Court’s view, violates the prohibition in the 4th Geneva Convention against forcibly removing the inhabitants of occupied territory.²⁷

The Court considered whether, despite these violations, the wall construction could be justified on security grounds. It said that it “is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives.”²⁸ The Court dismissed Israel’s self-defense justification on the ground that the suicide attacks Israel cites are not “imputable to a foreign State.”²⁹

Finally, the Court considered, although Israel did not make this argument, whether the violations of human rights and humanitarian law could be justified on a plea of necessity. That concept excuses a state from an international obligation if it acts to prevent a peril that cannot be averted by other means. Citing its own precedent and the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the Court said, however, that it “is not convinced that the construction of the wall along

²² Para. 118.

²³ *Id.*

²⁴ *Id.*

²⁵ The Court explicitly referred to UNSC Res. 242 (1967), UNGA Res. 2625 (XXV) (1970) and UNSC Res. 298 (1971) as evidence that the UN regarded Israel as legally obligated to withdraw from all Palestinian territories occupied by force. See para. 117.

²⁶ Para. 120.

²⁷ Para. 134.

²⁸ Para. 137.

²⁹ Para. 139. By making this finding, the Court rejected the contention that Israel’s actions were justified by the self-defense provision of Article 51 of the UN Charter.

the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked."³⁰

In a final paragraph, *dicta* to the decision, the Court drew some larger conclusions about the conflict as a whole, representing the Court's position that the underlying conflict could not be resolved without adherence to international law. After reiterating its more narrow decision, the Court opined:

Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, *on the basis of international law*, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.³¹ (*emphasis added*)

IV Some Conclusions and Observations

Immediately following the issuance of the ICJ's Advisory Opinion, Israeli government officials and supporters, and US officials inside and outside the current government, denounced it as a political decision, as one which the Court had no jurisdiction to render, and which has no legal merit or consequence.³² This strategy—seeking to discredit or limit the opinion of the ICJ – may contribute substantially to a short-term deadlock between the General Assembly and the Security Council as the former moves to take action implementing aspects of the decision while the latter seeks to limit it.

³⁰ Para. 140, *citing*, *Case Concerning the Gabcikovo-Nagymoros Project (Hungary/Slovakia)*, I.C.J. Rep. 1997 (25 Sept. 1997) and International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, art. 25.

³¹ Para. 162.

³² See, for example, statements by Israeli officials in "Israel firmly rejects ICJ fence ruling" by Aluf Benn, Shlomo Shamir and Yuval Yoaz in *Haaretz Daily*, July 11, 2004; Alan Dershowitz, "Israel follows its own law, not bigoted Hague decision" in *The Jerusalem Post*, July 11 2004; Senator Hillary Clinton in "Powell says Israel proved fence reduces terror," by Shlomo Shamir, *Haaretz*, July 11, 2004; Senator John Kerry and Secretary of State Colin Powell in "US dismisses ICJ ruling" by Janine Zacharia, in *The Jerusalem Post*, July 11, 2004; and House Resolution 713 available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:hr713eh.txt.pdf

However, in the long-term, such a strategy will have less influence over the actions of the rest of the world community than the force of the opinion itself. There are several reasons why this is so. First is the increasing isolation of Israel and the US in their unilateral rejectionism of the constraints of international law. Very similar to the position South Africa took in rejecting the international community's decades-long effort to implement international law prohibiting apartheid,³³ Israel, backed by the US, stands against a large corpus of international treaty and customary law that the international community through the UN is seeking to enforce. The ICJ decision on the wall, much like the ICJ's advisory opinions in the Namibia/South West Africa situation, strengthens the position of the global community as it seeks to enforce international law in the Palestine-Israel situation, and further isolates the Israeli and US position.

Second is the unusual unanimity of the judges of the ICJ on all of the findings in the opinion. This Court, comprising highly eminent jurists representing all geographical areas of the world, is widely considered extremely conservative—not 'judicial activists' in any sense of the term.³⁴ The 14-1 votes on almost all the points can fairly be said to reflect the weight of legal authority on the key conclusions and principles underlying the opinion. The geographical, religious and ethnic diversity of the Court's membership commonly contributes to greater disagreement in most cases and on most issues than is reflected in this opinion.³⁵

Third, much like the effect of the South Africa advisory opinions, the ICJ opinion here gives legal authorization to states to take individual and collective action against Israel to force a dismantling of the wall and its associated regime. This aspect of the opinion, declaring what other states must do to ensure compliance with international law, was much debated by the judges, as evident by the 13-2 vote and in their separate opinions.

The Court's decision has been characterized by the press as "non-binding." That statement is true in a technical sense. The decision comes as advice to the General Assembly. However, what the General Assembly sought was an opinion as to what is legally required in regard to the wall, whether it can lawfully be constructed. Thus, the

³³ For a thorough discussion of the relevance of the opinions/decisions of the ICJ on the struggle for Namibian independence and sanctions on South Africa, see Henry J. Richardson, III, 78 *American Journal of International Law* 76 (1984).

³⁴ See Robert Y. Jennings, *The International Court of Justice after Fifty Years*, 89 *American Journal of International Law* 493 (1995); for a short critique of the court, see Monique Chemillier-Gendreau, *Le Monde Diplomatique*, *The International Court of Justice between Politics and Law* (Nov. 1996).

³⁵ Judges are nominated by states members of the UN, and are voted on separately by both the General Assembly and the Security Council. The Security Council 'veto' is not applicable to this process. A judge must receive an absolute majority in both the Council and GA to be seated on the Court. The current composition of the Court includes nationals of the Netherlands, the UK, Russia, Sierra Leone, France, Madagascar, China, Slovakia, Germany, Japan, Egypt, the U.S., Jordan and Brazil. There was no attempt by any participant to recuse either of the two Jewish judges, but Israel sought to preclude one of the two Arab judges from sitting in the case, which the Court rejected. See para. 8 of the opinion. Israel did not exercise the prerogative under Art. 102 of the Rules of the Court to appoint a judge *ad hoc* of its own choosing. See *Separate Opinion of Judge Owada*, para. 19.

Court was indicating what it views as being required by international law. That law is binding on Israel, as it is on all states. Thus, while the advisory opinion itself is not binding, the propositions the Court sets forth represent law that is binding.

In sum, the most far-reaching consequence of this opinion is best summarized by Judge Lauterpacht in the *Voting Procedures Case*:

[A state]...which consistently sets itself above the solemnly and repeatedly expressed judgement of the [UN], in particularly in proportion as that judgement approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to the consequences legitimately following as a legal sanction.³⁶

³⁶ *Voting Procedures on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion*, ICJ Rep. 1955, p. 67 at 120, cited in Written Statement of the Government of the Republic of South Africa to the ICJ in the Request for Advisory Opinion on the Legal Consequences of the wall, at para. 11, p. 5.