

International Court Rules against Israel's wall

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Annex: Advisory Opinion in the Case of South Africa in Namibia (Synopsis of the Opinion which led to sanctions against South Africa and eventual independence for Namibia)

This Bulletin aims to provide a brief overview of issues related to Palestinian Refugee Rights

1. Findings of the Court

a. Main Finding

The construction of the wall constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.

b. Secondary Findings

Rule of Law

International humanitarian and human rights law apply to the Occupied Palestinian Territories. Israel, as a party to relevant international instruments, is bound to comply with their provisions.

*Israel contends that the parts of the West Bank and Gaza Strip transferred to the Palestinian Authority are no longer occupied. The Clinton administration considered the West Bank, eastern Jerusalem, and the Gaza Strip 'disputed territories'. **The court reaffirmed that the West Bank, including eastern Jerusalem, and the Gaza Strip remain under Israeli military occupation.***

*Israel contends that international human rights law does not apply to West Bank and Gaza and refuses to submit reports on the implementation of international human rights instruments to relevant United Nations treaty bodies monitoring state compliance with them. **The court reaffirmed that Israel is bound to comply with international human rights instruments not only within its territory but also where it exercises jurisdiction—West Bank and Gaza Strip.***

Right to Self-Determination

The right of the Palestinian people to self-determination is no longer in question. Construction of the wall (along with measures previously taken) severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.

*The Oslo agreements (Declaration of Principles and related Interim agreements) provide for a change in the status of territory but do not recognize the right of the Palestinian people to self-determination. **The court reaffirmed their right to self determination.***

Annexation

The construction of the wall and its associated regime create a 'fait accompli' on the ground that could well become permanent, in which case, [...] it would tantamount to *de facto* annexation.

Israel claims the wall is a temporary measure designed for security rather than political reasons. The court, which considered itself bound to view the construction of the wall "in a more general context" (Para. 162) recognized that based on past practice, including the construction of settlements, the wall could create a fact on the ground which would prevent

the Palestinian people from exercising their right to self-determination with the 1967 Occupied Palestinian Territories.

Israeli Settlements

Israeli settlements in the Occupied Palestinian Territories, including eastern Jerusalem, have been established in breach of international law.

Israel has sought to create a distinction between 'illegal outposts' (i.e., settlements constructed outside the official planning process) and settlements in general. The Clinton administration considered the settlements as 'obstacles to peace' rather than illegal. The Bush administration, in the 14 April 2004 letter of assurance to Ariel Sharon, referred to Israel's settlements as 'population centers'. The court reaffirmed that the settlements are illegal under international law.

Right to Self-Defense

Israel has the right and duty to protect the life of its citizens but the measures taken have to conform with applicable international law.

The Court considers that Israel cannot rely on a right to self-defense or on a state of necessity to preclude the wrongfulness of the construction of the wall.

2. Recommendations

Israel is obliged to:

1. Comply with the international obligations it has breached by building the wall in the Occupied Palestinian Territory. It must comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. It must ensure freedom of access to the Holy Places that came under its control following the 1967 War.
2. Cease construction, dismantle those parts of the wall situated with the OPTs, in and around eastern Jerusalem, and repeal and render ineffective related legislation and regulatory acts adopted with a view to building the wall and establishing its associated regime.
3. Make reparation for the damage caused to all persons concerned. It must return the land, orchards, olive groves and other immovable property seized from any natural or legal person to build the wall in the Occupied Palestinian Territory. If such restitution is materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.

Other States:

1. Must not recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around eastern Jerusalem.
2. Must not aid or assist in maintaining the situation created by such construction.
3. While respecting the United Nations Charter and international law, other states are to prevent any impediment, resulting from the wall's construction, to the exercise by the Palestinian people of its right to self-determination.
4. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 must, while respecting the UN Charter and international law, ensure Israel's compliance with international humanitarian law as embodied in that Convention.

United Nations:

Especially the General Assembly and the Security Council, should consider the need for further action to end the illegal situation resulting from the construction of the wall and its associated regime.

3: Jurisdiction of the International Court of Justice

The Court concluded that it has jurisdiction in the matter of providing an advisory opinion on the building of the wall. Below are the objections to its jurisdiction and the court's view of its role (in italics).

Competence of the UN General Assembly

Given the engagement of the Security Council with the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the UN Charter by asking for an advisory opinion.

The General Assembly and the Security Council have been increasingly dealing in parallel with the same matter concerning the maintenance of international peace and security, for example Cyprus, South Africa, Angola, Southern Rhodesia, Bosnia and Herzegovina and Somalia. The Court considers that the evolved practice of the General Assembly is consistent with the Charter and concludes that the General Assembly did not exceed its competence in submitting its request to the Court.

Lack of Due Process

The request for an opinion did not fulfill the conditions of resolution 377 A (V), under which the 10th Emergency Special Session was convened and continues to act: the Security Council was never involved with a draft resolution proposing that the Council itself request an advisory opinion from the Court on the current matters and, that having never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request; in adopting resolution 1515

(2003), which endorsed the "Roadmap", before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the 10th Emergency Special Session, especially the Session's "rolling character" and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly was meeting in regular session, has also been questioned.

The procedure provided for in resolution 377 A (V) is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situation is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression.

When the 10th Special Session was convened in 1997, the Council had not been able to decide on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2, there existed a threat to international peace and security. The Court further notes that, on 20 October 2003, the 10th Special Session was reconvened on the same basis as in 1997 after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution on the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the wall's construction nor adopted any resolution about it. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the 10th Special Session was duly reconvened and could properly deal with, under resolution 377 A (V), the matter now before the Court.

The Court also emphasized that, during this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court's opinion. It is irrelevant that no proposal had been made to the Security Council to request such an opinion.

The “rolling” character of that Session, the fact of its having been convened in April 1997 and reconvened 11 times since, has no relevance to the validity of the request by the General Assembly. While it may not have been originally contemplated appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule has been identified that would be violated, so as to invalidate the resolution adopting the request for an advisory opinion.

Legal Nature of the Question

It has been contended that the request for an opinion by the General Assembly is not on a “legal question” under the UN Charter and the Statute of the Court. To be “legal”, it must be reasonably specific, otherwise the court could not respond. With regard to this request, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons:

The question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the “Fourth Geneva Convention”) and relevant Security Council and General Assembly resolutions. The question from the General Assembly has, to use the Court’s phrase in its Advisory Opinion on Western Sahara, “been framed in terms of law and raise[s] problems of international law”; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character.

Lack of clarity in drafting a question does not deprive the Court of jurisdiction. Rather, such uncertainty requires clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

The Question is of a Political Character

Because of the “political” character of the question, the Court has no jurisdiction.

The fact that a legal question also has political aspects, “as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a ‘legal question’ and to ‘deprive the Court of a competence expressly conferred on it by its Statute’. Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law.

The Question is Inconsistent with the Court’s Judicial Function

The Court should not exercise jurisdiction because specific aspects of the General Assembly’s request would render the exercise of the Court’s jurisdiction improper and inconsistent with the its judicial function.

The Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met. The Court however is mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused.” Given its responsibilities as the “principal judicial organ of the United Nations” (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only “compelling reasons” should lead the Court to refuse its opinion.

The Request Concerns a Contentious Matter

The Court should not exercise its jurisdiction on a contentious matter between Israel and Palestine as Israel has not consented to the exercise of that jurisdiction.

The lack of consent on the Court’s jurisdiction by interested States has no bearing on its jurisdiction to give an advisory opinion.

The Court realizes that Israel and Palestine have radically divergent views on the legal consequences of Israel's construction of the wall. However, as the Court has itself noted, "Differences of views...on legal issues have existed in practically every advisory proceeding".

The Court does not consider that the subject of the request is only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the UN in questions of international peace and security, the Court sees the construction of the wall of direct concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (Resolution 181), a responsibility described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy."

The aim is to obtain an opinion which the General Assembly deems of assistance to it for properly exercising its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. So, the Court considers that to give an opinion does not circumvent the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

A Court Opinion Could Impede a Negotiated Solution

An advisory opinion on the wall's legality and legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict.

It is unclear what influence the Court's opinion might have on those negotiations: participants in the present proceedings have expressed differing views. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

The Question of the Wall Must be Addressed in Larger Context

The wall's construction was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings.

The Court does not however consider this a reason it should not reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

Lack of Adequate Information

The Court should not exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions.

The Court has the report of the Secretary-General and a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted a written statement updating his report supplementing information contained in it and numerous others have submitted written statements containing information relevant to a response to the question put by the General Assembly. The Court notes that Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's security concerns and was accompanied by corresponding annexes; many other documents issued by Israel on those matters are in the public domain.

The Court finds that it has sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly.

The Opinion Would Serve No Purpose

The Court should not give the requested opinion on the legal consequences of the construction of the wall because such an opinion would lack any useful purpose.

The Court cannot decline to answer on the grounds that its opinion would not be useful. It cannot substitute its assessment of the usefulness of the opinion requested for that of the organ seeking such an opinion, the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction may then draw and the Security Council of the wall, while the General Assembly conclusions from the findings.

Palestine is Responsible for the Wall's Construction

Since it is responsible for violence against Israel which the wall aims to address, Palestine cannot seek a remedy for a situation resulting from its own wrongdoing.

The Court does not see this as pertinent. The General Assembly requested the advisory opinion, and it is to be given to the GA, not to a specific State or entity.

**Annex: The ICJ on South Africa/Namibia
Case Summary, Advisory Opinion, 21 June 1971**

Question: What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?

Opinion:

13 votes to 2: The continued presence of South Africa in Namibia being illegal, South Africa is under the obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory.

11 votes to 4: States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts of behalf of or concerning Namibia, and to refrain from any acts in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to such presence and administration.

(The full decision is available on www.icj-cij.org)

In summary, the advisory opinion said that Member States of the United Nations are:

Obligated to abstain from having treaty relations with South Africa in all cases where the Government of South Africa purports to act on behalf of or concerning Namibia;

Under the obligation to abstain from ending diplomatic or special missions to South Africa including in their jurisdiction the territory of Namibia;

Under the obligation to abstain from entering into economic and other forms of relations with South Africa which may entrench its authority over the territory. (As in the Trade Association Agreement between the EU and Israel).

However, non-recognition should not result in depriving the people of Namibia of any advantages derived from international cooperation.
