

Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Terrorism, Jurisdiction and the Application of International Law

Binoy Kampmark *

I. INTRODUCTION

In one of the more important decisions handed down by the International Court of Justice (the “Court”) in its time, the advisory opinion *The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory* has given much cause for comment, both for its incendiary subject matter, and for its potential impact on the Israeli-Palestinian peace process. The decision’s importance lies in two major areas: the jurisdiction of the Court in granting advisory opinions, and the reconciling of a state’s interest and obligation in protecting itself from terrorist attacks within the framework of international law. This case note finds the opinion plausible on most grounds relevant to jurisdiction but less convincing on the matter of how it assesses a state’s response to terrorism. Even if the Court was correct to proceed with giving the advisory opinion, its scant development of the law with regards to the specific context of Israeli security potentially weakens it. While it is going too far to suggest that the Court’s judicial nature was compromised in asserting its jurisdiction to provide an advisory report reference should

* B.A.(Hons.) LL.B.(Hons.) (U.Q.). The author is currently a United Kingdom Commonwealth Scholar at the University of Cambridge undertaking doctoral studies on state responses to terrorism.

have been made to the Israeli Supreme Court decision on the same facts, handed down on June 30.¹ A mutual reading of these cases, however, provides some guidance in how state responses to terrorism can be evaluated within an international law framework.

II. FACTS

The advisory opinion grew out of resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the “General Assembly”) on 8 December 2003 at its Tenth Emergency Special Session. On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that “Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law”.² The wall or security fence had been constructed in response to a dramatic rise in suicide bombings and other attacks against Israeli citizens in the aftermath of the failed Camp David talks of 2000.³

Under Article 96 of the Charter of the United Nations, the Assembly requested the Court, pursuant to Article 65 of its statute, to urgently render an advisory opinion on: “the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem ... considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions”.

The Court held that Israel was “bound to 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. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War”, cease

¹ *Beit Sourik Village Council v Government of Israel; Commander of the IDF Forces in the West Bank*, H.C.J. 2056/04, June 30, 2004 (herein *BSVC Case*); and Meir Shamgar, “The Observance of International Law in the Administered Territories” [1971] Israel Y.B. H. R. 262.

² Opinion, para. 1. Unless otherwise stated, the “Opinion” refers to the majority.

³ See *BSVC Case*, para. 2.

construction of the wall and subsequently dismantle it “in those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem” and provide reparation for parties who had been affected by the construction.⁴

III. GROUNDS

A. Jurisdiction

The Court has the discretion to decline issuing an advisory opinion even when it has the jurisdiction to entertain it.⁵ Israel and supporting states contended that the Court should not assume jurisdiction in the matter, notwithstanding its competence to do so.⁶ Such jurisdiction stems from Article 65, paragraph 1, of its Statute, according to which the Court “may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request”.

An argument in submission to the court by some parties (Israel, the United States, and Australia) considered whether the General Assembly’s resolution ES-10/14 was *ultra vires* in accordance with Art. 12(1) of the Charter, which limits the role of the General Assembly: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”⁷ This interpretation has various precedents. Thus, the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the Council remained seized of the matter.⁸ Conversely, the Security Council, on a number of occasions, had deleted

⁴ Opinion, paras 149 151, 152.

⁵ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)* [1950] I.C.J. Rep. 65 at 72; *Western Sahara Advisory Opinion* [1975] I.C.J. Rep. 12 at 21.

⁶ Written Statement of the Government of Australia, 29 January 2004, p. 3.

⁷ *Ibid.*

⁸ *Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September - 7 December 1949, 56th Meeting, 3 December 1949, p. 339, para. 118.*

items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question, in connection with incidents on the Greek border and matters affecting the Island of Taiwan (Formosa)).⁹

The court decided that the General Assembly's request was not *ultra vires*. While the Security Council was the organ most appropriately adapted to the maintenance of international peace and security, the role is not exclusive.¹⁰ The Security Council and General Assembly have in time evolved in their respective functions to assume more complimentary roles, notably in dealing with such crises as the Bosnian civil war and Somalia.¹¹ The request by the Assembly was therefore consistent with the evolutionary framework of international cooperativeness between both U.N. organs, and is particularly relevant where a permanent member of the Security Council has stalled over an issue, thereby affording the Assembly a chance to step in.¹² Nor had the resolution been affected by the staggered meetings that had ultimately produced it.

B. Clarity, Politics and Facts

Israel argued that the resolution posed no clear legal question in terms of who it would effect and what precisely it was addressing. The court made it clear that a lack of clarity was no bar to jurisdiction, and in fact, oblique issues constituted the gist of many legal questions submitted to the court.¹³ The request by the Assembly warranted a juridical response, for it had been framed with a view to examining the consequences of Israel's actions at international law, the logical outcome of a question stating what "legal consequences" were at stake.¹⁴ The fact that the question might also be

⁹ *Official Records of the Security Council, First Year: Second Series, No. 21*, 79th Meeting, 4 November 1946, p. 498; *Official Records of the Security Council, Second Year, No. 89*, 202nd Meeting, 15 September 1947, pp. 2404-2405; *Official Records of the Security Council, Fifth Year, No. 48*, 506th Meeting, 29 September 1950, p. 5.

¹⁰ U.N. Charter, Art. 24(1); and Opinion, para. 26.

¹¹ Opinion, paras. 27-28.

¹² Opinion, para. 30.

¹³ Opinion, para. 38.

¹⁴ *Western Sahara* [1975] I.C.J. Rep 18, para. 15; and Decision, para. 39.

political was not of itself sufficient to take it outside the court's jurisdiction as "a legal question also has political aspects".¹⁵

The submission by Israel and contending parties that its refusal to accept the Court's contentious jurisdiction would be a bar to providing an opinion was rejected, given that a request for an advisory opinion is not to be equated to the settling of a dispute between states.¹⁶ Had the dispute over the separation fence been a patently bilateral matter without international significance, the decision might have been different, but, given "the powers and responsibilities of the United Nations in questions relating to international peace and security", the Court found an issue of general concern to the United Nations.¹⁷ Judicial propriety was not therefore compromised, and arguments citing a potentially negative impact of such a decision on the peace negotiations between Palestinians and Israelis lacked sufficient weight.¹⁸

Of significance was the submission by Israel and supporting parties that the Court could not render an informed opinion without the requisite facts behind the construction of the wall, much of which was in Israel's possession. The Court, notwithstanding Israel's refusal to adduce evidence, did not regard it as a bar to granting the opinion. The Court found that the U.N. Secretary-General's report detailing the socio-economic impact actual and potential of the wall including a dossier of other findings by U.N. special rapporteurs, was sufficient.¹⁹

C. Human Rights and Humanitarian Law

Israel's assertion that human rights law and international humanitarian law were to be considered two distinct areas of jurisprudence was qualified by the Court. Rights may lie concurrently in the province of human rights and humanitarian law.²⁰ The fact that Israel was a party to the International Convention for Civil and Political Rights, the

¹⁵ Opinion, para. 41.

¹⁶ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* [1950] I.C.J. Rep. 71; noted in Opinion, para. 47.

¹⁷ Opinion, para. 48; Judge Koroma, para. 3; Judge Kooijmans, para. 27.

¹⁸ Opinion, para. 53.

¹⁹ Opinion, para. 57.

²⁰ Opinion, paras. 105-6.

International Convention for Economic and Social Rights and the U.N. Convention for the Rights of the Child precluded them from asserting that such human rights law did not apply to the Occupied territories jointly with humanitarian instruments.²¹ A state could still exercise its jurisdiction in a foreign territory yet fall within the scope of the I.C.C.P.R. It also clear that Israel was recognised as a power in occupation, which made the I.C.E.S.C.R. and Convention of the Rights of the Child apply within Israel's jurisdiction.²²

The Court found that the wall unduly impeded movement of the inhabitants of the Occupied Territories with the exception of Israeli citizens, therefore violating Article 12 of the I.C.C.P.R.²³ Such a reading was implicit in the assumption that the Palestinians were a recognised national "collective" with the right to self-determination.²⁴ Rights to work, health, education and an adequate standard of living noted in the I.C.E.S.C.R. and the U.N. Convention on the Rights of the Child were also violated. Notably, the demographic changes wrought by the wall contravened Article 49, paragraph 6 of the Fourth Geneva Convention and various Security Council Resolutions through enacting a *de facto* annexation of the territory in favour of Israel.²⁵ The argument that the wall was a purely security measure was dismissed. The construction was also found to have resulted in the destruction or requisition of properties in contravention of Articles 46 and 52 of the Hague Regulations (1907) and Article 53 of the Fourth Geneva Convention.²⁶

D. Self-defence and Necessity

Israel submitted that the wall squared with its inherent right to self-defence against terrorist agents enshrined in Article 51 of the U.N. Charter, and Security Council resolutions 1368 (2001) and 1373 (2001) passed in the aftermath of the September 11 attacks on the United States.²⁷

²¹ Opinion, para. 103.

²² Opinion, para. 109, 113.

²³ Opinion, para 134.

²⁴ Opinion, para. 118.

²⁵ Opinion, para. 121.

²⁶ Opinion, para. 132.

²⁷ Opinion, para 139.

The Court found that Article 51 only applied to attacks by one state on another. To extend the article's application to defensive measures against terrorism was to unduly extend its scope.²⁸ The state of necessity that might have absolved the state of wrongfulness surrounding the wall's construction was not considered sufficiently perilous for Israel, notwithstanding "numerous indiscriminate and deadly acts of violence against its civilian population."²⁹

IV. DISSENT

The only broad dissent came from Judge Buergenthal of the United States, who opined that the Court should refuse to entertain the Assembly's question. The opinion was based mainly on the inadequate facts present before the court to make an appropriately informed decision.³⁰ However, the Judge made it clear that international law was still applicable to the occupied territories while accepting that various provisions of human rights law remain non-derogable, irrespective of any argument on the part of Israel that the fence was proportionate. Segments of the wall within the occupied territories built for protecting the settlements were ipso facto in violation of Article 49, paragraph 6 as Israel had potentially deported or transferred "parts of its own civilian population into the territory it occupies."³¹ Notwithstanding the cogency of such observations, he would have declined to hear the case given the material presented before the Court. Israel's reluctance to provide the information could not be held against it, since the proceedings were not contentious.³²

On the issue of Israel's defensive measures against terrorism, Judge Buergenthal demurred on the Court's reading of Article 51 and its purported non-application to non-state terrorist agents. The judge argued that the current security climate, accepted by the Security Council,

²⁸ Opinion, para. 139.

²⁹ Opinion, paras 140-1.

³⁰ Judge Buergenthal, para. 1.

³¹ Judge Buergenthal, para. 9.

³² Judge Buergenthal, para. 10.

extended the state's inherent right of self-defence to combating incursions by non-state actors from neighbouring occupied territories.³³

V. COMMENT

The decision to proceed with the advisory opinion reveals the readiness on the part of the Court to render an opinion on disputes of significant international concern. Resort by the Court to an evolutionary concept of the General Assembly's role in the international system, as an organ of the United Nations, is a logical one given the interrelated nature of international disputes and resolutions. Indeed, the opinion enunciated an alternative course of action where the Security Council is delayed in reacting to a threat to international peace and security, recalling the unity for peace resolution 377V that encourages the General Assembly to step in where the Security Council has stalled on hearing an issue. If anything, the Court could have been more precise in enunciating the principle.³⁴ It would be unrealistic to cling to the notion of mutually exclusive functions in the U.N. between various bodies when all ultimately came into existence under the same rubric of preserving international peace. The Court, by its decision, encouraged the parties to forge ahead with the Road Map, a view that is entirely consonant with the position taken by the U.N. itself, and Security Council members.

While the "judicial character" of the body was not compromised by proceeding with the opinion, the weakness of the decision rather lies in what, in the words of Judge Higgins, "was not said."³⁵ Sacrifices were made to the factual matrix available to the Court, whether in evidence on the matter of Israeli security, or the historical circumstances surrounding the dispute, which proved to be "two-dimensional" in character.³⁶ The Court opinion would have been more effective had it considered the existing jurisprudence on the fence enunciated by the Israeli Supreme Court in the *BSVC Case*, which applied sophisticated tests of proportionality. Aspects of the fence were found to be disproportionately adapted to their security purpose. The Israeli court was critical that

³³ Judge Buergenthal, para. 6.

³⁴ See Judge Kooijmans, para. 14.

³⁵ Judge Higgins, para. 21.

³⁶ See for instance, Judge Higgins, paras. 15-16; Judge Kooijmans, para. 7.

measures to alleviate harm to the residents in question were not sufficient.³⁷ Notably, the Israeli reaction to the occupied territories has tended to accept the application of principles of international law to lands held “in belligerent occupation (*occupatio bellica*).”³⁸ Thus, both the Court opinion and the *BSVC* ruling hold true to the basic acceptance that the military commander’s authority in the zone of occupation is governed by the Hague Regulations and the Geneva Conventions.³⁹ In contrast to the Court opinion, *BSVC* accepted the argument by the government that the Fence was motivated by “security reasons” rather than political reasons as claimed by the petitioners.⁴⁰ The Fence, the court noted, was not a permanent feature, but an expedient tactical measure to combat infiltration.⁴¹ A combined reading of both cases is therefore required to understand the rights and obligations of the parties concerned.

More complicated is the issue of squaring self-defence with the issue of humanitarian and human rights law. While the argument by Israel citing the necessity of the wall is one that merited serious consideration, the security of Israel could not be bought in the absence of international law, despite the assertion that, “The solution lies in Ramallah and Gaza, not in The Hague or Manhattan.”⁴² Such measures of defence must remain consonant with international law, and the continued application of human rights law in times of conflict is consistent with its modern evolution.

Expanding the meaning of Article 51 in the Charter seems at first instance to stretch the intended meaning of the provision. However, the current security climate involving non-state actors operating across international borders may require a revision of accepted wisdom that the article is dependant on an armed attack by one state on another. The literature on the subject remains divided, especially in light of Security Council pronouncements after the attacks of 11 September 2001, which did not

³⁷ *BSVC Case*, para. 60.

³⁸ *BSVC Case*, para. 23.

³⁹ Specifically, Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907; IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 [Fourth Geneva Convention].

⁴⁰ *BSVC Case*, paras. 28, 30.


⁴¹ *BSVC Case*, para. 30.

⁴² Shuli Davidovich, “The Wall is Working”, 26 July 2004.

expressly exclude non-state actors as a threat to international peace and security.⁴³

VI. CONCLUSION

The success or effectiveness of the decision has yet to be gauged, but the Israeli government, despite some hostility to the ruling, has tentatively developed an integrated approach to both the *BSVC* ruling and the I.C.J. opinion. The policy, which is only advisory at this stage, accepts the legitimacy of the wall, but seeks to abide by the Court's ruling and *BSVC* determination that the "the Fourth Geneva Convention [applies] to the territories de jure, while retaining for the state the necessary powers for exercising its responsibility for security there."⁴⁴

The advisory opinion has emphasised the position and importance of international law in its application to lasting disputes such as that which exist in the West Bank and Gaza. It also signals a division between key powers on what role the International Court of Justice should have when certain facts are alleged to be out of its possession. The inclination of the court to continue to provide an advisory judgment should be encouraged; thereby making parties such as Israel seek a full accounting of their actions at international law. But in the words of Judge Higgins, the Court should have stated the positions of both parties with greater force, saying "in clearest terms, what regrettably today needs constant reaffirmation even among international lawyers, namely, that the protection of civilians remains an intransgressible obligation of humanitarian law, not only for the occupier but equally for those seeking to liberate themselves from occupation."⁴⁵ 

⁴³ Thomas Franck, "Terrorism and the Right of Self-Defense" (2001) 95 A.J.I.L. at 839-840; and Judge Buergenthal, para. 6.

⁴⁴ Yuval Yoaz, "End to Terror could make Fence Illegal", *Haaretz*, 25 August 2004.

⁴⁵ Judge Higgins, para. 19.