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Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory Editors' Introduction

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EDITORS' INTRODUCTION

By Lori Fisler Damrosch and Bernard H. Oxman[*]

Only rarely does an international judicial opinion attract attention on the front pages of newspapers around the world, and spur activism—or condemnation—from diverse segments of global civil society. The advisory opinion of the International Court of Justice *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[1] is such a case. As the Court recognized in addressing the question put to it by the United Nations General Assembly, the choice of the term "wall" to designate the subject matter of the proceeding already opens up an area of debate, since not all of the contested structure is a wall in the physical sense.[2] The Court chose to follow the lead of the General Assembly on this terminological question, as well as on other matters. By a 14-1 margin, the Court found the construction of the wall in the occupied Palestinian territory to be contrary to international law and declared that Israel is under an obligation to cease its construction and dismantle it forthwith.

The fact that all five paragraphs of the *dispositif* elicited support from at least thirteen judges (fourteen judges on three dispositive paragraphs and all fifteen on the Court's jurisdiction to decide the request) would appear to indicate a high coherence of view on the main points addressed. Yet this broad support came at the price of a lowest-common-denominator approach to the reasoning of the opinion: on many of the key issues, the Court offered only a few terse sentences of explanation.

In parallel to the proceedings in The Hague, the Israeli Supreme Court, sitting as the High Court of Justice, was also considering legal challenges to what was there called the "separation fence,"[3] in one of the few (but accumulating) instances where a national tribunal has had to consider how much attention to pay to a proceeding of the International Court. After the ICJ advisory opinion was handed down, the Israeli Supreme Court asked for the views of the government on the import of the International Court's opinion for the questions pending before the Israeli court; at the time this Agora went to press, those views had not yet been formally tendered.

The contributions to this Agora offer diverse perspectives on several of the most controversial aspects of the General Assembly's request for an advisory opinion, the International Court's response, and related developments in the Israeli Supreme Court and in the quest for a negotiated solution to the Israeli-Palestinian conflict. The main common themes include:

[*] Editors in Chief.

[1] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (Int'l Ct. Justice July 9, 2004), 43 ILM 1009 (2004) [hereinafter Advisory Opinion].

[2] Advisory Opinion, paras. 67, 82. On the terminology of "wall," "fence," or "barrier," see the contributions in this Agora of Geoffrey R. Watson, *The "Wall" Decisions in Legal and Political Context*, 99 AJIL 6, 7 n.3 (2005); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AJIL 52, 52 & n.1 (2005); Iain Scobbie, *Words My Mother Never Taught Me—"In Defense of the International Court,"* 99 AJIL 76, 76 n.1 (2005); and David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AJIL 88, 88 n.3 (2005).

[3] HCJ 2056/04, Beit Sourik Village Council v. Israel (June 30, 2004), 43 ILM 1099 (2004).

—*Competence and judicial propriety.* Did the International Court have competence to answer the General Assembly's question, and if so, was it proper for it to have done so?

—*Facts.* Did the Court adequately investigate or appreciate the facts of the situation?

—*Interaction with political processes.* How did the Court understand its role in relation to those of the UN political organs and other political processes for dealing with the Israeli-Palestinian conflict?

—*Self-defense.* What is the significance of the aspects of the advisory opinion that reject Israel's position that the barrier is a legitimate measure of nonforcible self-defense against ongoing attacks? Did the Court mean to suggest that lawful self-defense must relate to attacks attributable to a state? If so, is that view correct? Does it adequately reflect the response to the threat of nonstate terrorism by states and competent UN organs under the UN Charter? Even if such a condition exists under the applicable law of self-defense, was the Court correct in concluding that this condition was not met in the case of terrorism emanating from the occupied Palestinian territory?

—*Settlements in occupied territory.* What are the implications of the Court's finding that the Israeli settlements in the occupied territory were established in violation of international law?

—*International humanitarian law.* Does the advisory opinion contribute constructively to the jurisprudence of the Geneva Conventions and other sources of international humanitarian law (IHL)?

—*International human rights law.* Was the Court correct in its analysis of the applicability of UN human rights treaties (the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child) to Israel's conduct in the occupied Palestinian territory?

—*Evaluation.* Will the Court's opinion be accepted as authoritative by those who are expected to implement its conclusions? Will it contribute to a just and peaceful settlement? What will its future impact be on the Court itself?

The contributions to the Agora focus respectively on one or sometimes several of these themes. An overview by *Geoffrey R. Watson* explains the General Assembly's request and the International Court's response, with attention to the political context of engagement of the United Nations and other actors in the Palestinian situation. *Watson* also compares the International Court's treatment to that of the Israeli Supreme Court in the parallel proceeding. The Agora then turns to a set of differing perspectives on the controverted themes, with the following emphases.

Competence and Judicial Propriety

Michla Pomerance argues that the General Assembly never should have asked for an advisory opinion on this matter and that the Court should have declined to give one.[4] She finds in the *Wall* advisory opinion an evident rejection of earlier jurisprudence of the Permanent Court of International Justice under which the advisory jurisdiction could not be used as a back-door route to deciding a dispute over the objection of a state that had not consented to judicial jurisdiction. Here, Israel had not agreed to adjudicate a matter touching so closely on its very existence and vital security; nor was the Court competent to opine on Israel's conduct in isolation from the Palestinian terrorism to which the challenged measure responds. *Pomerance* sees the International Court's participation as essentially rubber-stamping the political positions of the General Assembly, to the detriment of the Court's authority as a judicial body.

Among the other contributors, *Ruth Wedgwood* also expresses concern about the Court's determination to entertain the General Assembly's request, especially in light of lack of support from the Security Council (most of whose permanent members did not favor the request) and the

[4] Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial,* 99 AJIL 26 (2005).

apprehension that an opinion on one legal question divorced from the context of interconnected legal and political considerations could undermine ongoing efforts to negotiate a comprehensive political solution on the basis of what is known as the "Roadmap."

Richard A. Falk, by contrast, finds that the Court's decision to reject Israel's challenge to jurisdiction was well-grounded in the Court's advisory jurisprudence, and that there was no reason for the Court to exercise discretion to decline the request.[5] Falk believes that answering the question put by the General Assembly is consonant with the Court's role as "principal judicial organ" within the UN system and should enhance the ability of UN bodies to contribute to a just solution of the Israeli-Palestinian conflict within the framework of international law.

Facts

Several of the authors who consider issues of judicial competence and propriety likewise address the Court's ability to deal with complex factual matters. Those who consider that the Court should not have answered the question at all (*Pomerance*) or who question whether the Court should have done so (*Wedgwood*) point to the absence of a proper factual record and flaws in the Court's fact-finding as one aspect of their critique, and observe that Israel was not obliged under the Court's Statute and Rules to come forward with evidence in an advisory proceeding. On the other hand, the contributors who are generally supportive of the Court's handling of the matter (*Richard Falk, Iain Scobbie, Ardi Imseis*) consider that Israel made a deliberate choice not to offer factual details in support of its position.

The Court's fact-finding capabilities also figure in the contributions dealing with the Court's substantive approach to the use of force. Those who see the merits of the Court's reasoning on self-defense as problematic (*Ruth Wedgwood, Sean D. Murphy*[6]) similarly find that the Court fell short in its appreciation of the ongoing terrorist assault against Israel, as well as the specific factual considerations relevant to the choice of this particular route for a separation barrier as a reasonable and necessary defensive measure. Other contributors (*Geoffrey Watson, David Kretzmer*) observe that the Israeli Supreme Court engaged in a detailed factual examination as a predicate for ruling that certain segments of the barrier did not satisfy the legal test for proportionality under humanitarian law, while the International Court made its decision essentially on abstract grounds.

Interaction with Political Processes

Watson addresses the advisory opinion in the context of continuing efforts to reach a negotiated settlement of the conflict, most recently through the road map approved by the UN Security Council in late 2003. He finds it striking that neither the International Court nor the Israeli Supreme Court directly referred to the Oslo Accords, Camp David Accords, or other instruments through which the Israeli and Palestinian sides had previously organized their interactions, even though in his opinion those accords were and remain legally binding. He concludes with reflections on whether the wall itself, and the judicial decisions concerning it, will make it more or less difficult to achieve a comprehensive settlement of the conflict. *Wedgwood* also canvasses developments in peace negotiations from the early 1990s through the time of the Court's ruling and expresses concern that the advisory opinion might prejudge the road map negotiations, where issues of the definitive borders between Israel and Palestine are reserved for the last phase of the process leading to a final and comprehensive agreement. On these matters, *Falk* maintains that the Oslo peace process largely excluded law from the framework of negotiations, as has the subsequent road map, and that a salient contribution of the

[5] Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AJIL 42, 45 (2005). Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ* Wall *Advisory Opinion*, 99 AJIL 102, 102 (2005), also endorses the Court's decision to answer the General Assembly's question.

[6] Sean D. Murphy, *Self-Defense and the Israeli* Wall *Advisory Opinion: An* Ipse Dixit *from the ICJ?* 99 AJIL 62 (2005).

advisory opinion is its affirmation of the need for a negotiated solution on the basis of international law.

Self-Defense

Wedgwood and *Murphy* both criticize the Court for its summary rejection of Israel's position on self-defense, especially the Court's cryptic assertion that the terrorist attacks on Israel were not claimed to be imputable to a foreign state. *Wedgwood* points out that the legal framework for appraising terrorist activities has changed dramatically in recent years, and that in any event foreign state sponsorship of Palestinian terrorism has been widely reported. She also addresses the claim (an apparent assumption of the Court's interpretation of Article 51 of the UN Charter) that an occupying power could not invoke self-defense in respect of a threat originating in occupied territory: she observes that Israel as an occupying power has both the authority and the duty to maintain security for its own forces and for the civilian population, under circumstances where the Palestinian Authority was incapable or unwilling to exercise the policing authority given to it under the Oslo Accords.

Murphy analyzes the Court's treatment of self-defense under Article 51 of the UN Charter in light of international practice and jurisprudence from the 1837 *Caroline* incident through the Court's own precedents in the *Nicaragua* and *Oil Platforms* cases, and also addresses the Court's rejection of Israel's contention that the barrier could be justified with reference to Security Council Resolutions 1368 and 1373 adopted in the aftermath of the attacks of September 11, 2001. *Murphy* criticizes the Court for ignoring ample evidence that the law of self-defense embraces measures of protection against attacks emanating from nonstate actors.

Scobbie's treatment of self-defense, which is sympathetic to the Court's conclusion, addresses three interrelated issues: the Court's finding that Article 51 was irrelevant because of the absence of a claim that the attacks on Israel were imputable to a state; the relevance of Israel's control over the occupied Palestinian territory; and the arguments deriving from Resolutions 1368 and 1373. On these points, Scobbie justifies the Court's basic position and provides a fuller statement of the kinds of reasons on which the Court might have relied. In brief, the fact of Israel's continuing occupation renders the applicable law the *jus in bello* (the 1949 Fourth Geneva Convention) rather than the *jus ad bellum* (Charter Article 51), and Israel's conduct must therefore be judged under the law of occupation rather than the law of self-defense. Moreover, the wall could not be justified as a measure of protection against nonstate terrorism under the cited Security Council resolutions, since those resolutions contemplate very different kinds of measures to guard against terrorism and certainly not the construction of a wall with a severe impact on the civilian population in occupied territory.

Settlements in Occupied Territory

As *Watson* explains, the Court found that Israel's establishment of settlements in occupied territory violated obligations owed under international law, by impeding the exercise of the Palestinian people's right to self-determination and by tending to alter the demographic composition of the territory contrary to the duties of an occupier under the Fourth Geneva Convention. Several other contributors then assess the implications of this finding in relation to the self-defense and humanitarian law aspects of the advisory opinion.

Wedgwood notes the assumption of all members of the Court that the settlements in the West Bank are illegal under the Geneva Conventions, yet contrary arguments have been proffered and the Court did not address them. She recalls that Oslo and the road map have reserved the questions of settlements and borders for the last phase of negotiations. Pending a final status agreement to resolve these matters, the Court was on shakier ground in concluding that Israel could not implement a nonforcible, temporary, defensive measure to protect the lives of civilians in the settlements.

Scobbie underscores that Israel bears responsibility for the policy of illegal settlements. Israel therefore cannot be allowed to invoke self-defense or necessity to exculpate itself for protecting what it had no right to establish in the first place.

The lawfulness under the Geneva Conventions of measures to protect civilians within the settlements is also addressed in the two contributions dealing mainly with international humanitarian law, discussed immediately below.[7] *Kretzmer* finds that the Court was on firm ground in deciding that the establishment of West Bank settlements violated Article 49(6) of the Fourth Geneva Convention, but that the effect of this violation on the legality of the separation barrier was not so clear. He examines three possible theories for connecting the illegality of settlements with illegality of the route of the barrier and concludes that the Court should not have jumped to its conclusion without engaging in a careful examination of factors bearing on necessity and proportionality. *Imseis* takes issue with *Kretzmer*'s analysis of the settlements question and maintains that a wall to protect settlements could not be justified under a strict test of military necessity.

International Humanitarian Law

Kretzmer and *Imseis* address their contributions mainly to the Court's treatment of IHL embodied in the Fourth Geneva Convention on the Protection of Civilian Persons, other humanitarian treaties, and customary international law. *Kretzmer* compares the International Court's relatively cursory treatment of these topics with the detailed examination of the Israeli Supreme Court on corresponding matters, with respect to both the legal analysis and factual considerations. The ICJ painted with a broad brush, finding the wall as a whole to be illegal even when the relevant provisions of IHL cannot properly be understood as establishing rules of per se illegality.

Imseis observes that the International Court has now endorsed the position overwhelmingly held by the international community (apart from Israel) that the Fourth Geneva Convention applies to the Israeli occupation of Palestinian territory. He then turns to Article 6 of the Fourth Geneva Convention, which provides that only certain enumerated articles of the Convention apply beyond "one year after the general close of military operations"; under the Court's interpretation of this article, military operations leading to Israel's occupation of the West Bank "ended a long time ago" and thus only the enumerated provisions remain applicable. *Imseis* finds this interpretation insufficiently protective of the civilian population in the occupied Palestinian territory, in view of the ongoing Israeli military operations there.[8]

Imseis likewise finds that in dealing with the concept of military necessity in IHL, the Court should have scrutinized Israel's actions more rigorously. Finally, *Imseis* points out that the Court's conclusion on the responsibility of third states not to render aid or assistance in maintaining the illegal situation created by construction of the wall was so vaguely articulated as to leave the international donor and aid community without practical guidance on how to implement the decision.

International Human Rights Law

Michael J. Dennis argues that the Court erred in finding that Israel's obligations under international human rights treaties extend to its conduct in occupied territory. From the terms of the two International Covenants and the Convention on the Rights of the Child, the *travaux préparatoires* of these treaties, and the jurisprudence of UN treaty bodies (with comparisons to regional human rights courts), he concludes that the UN human rights treaties were never intended to have extraterritorial application—except perhaps as regards a state's own citizens—

[7] Kretzmer, *supra* note 2, text at notes 8–47; Imseis, *supra* note 5, at 112 n.52.

[8] For other references in the Agora to the Article 6 issue, see Kretzmer, *supra* note 2, at 91 n.23; Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AJIL 119, 133–34 (2005).

nor do they apply to situations governed by the laws of armed conflict. Rather, when states act outside their own territory in a military context, the relevant law is international humanitarian law, not human rights law. *Dennis* contends that states parties to human rights treaties have never acted as though the provisions of such treaties (including those on derogations) were applicable to extraterritorial military action, and that in contrast to the *lex specialis* of international humanitarian law, human rights law does not supply workable and properly tailored guidance for the conduct of military operations.

Evaluation

The contributors offer divergent points of view on the likely effect of the advisory opinion on the quest for a just resolution of the Israeli-Palestinian conflict, the substantive law on the several subjects addressed, and the Court's own authority within the UN system and as a judicial organ. At one end of the spectrum, *Falk* perceives the ruling as highly significant for efforts to reorient the peace negotiations within the framework of international law; in light of the Court's capacity to speak with virtual unanimity, he goes so far as to contend that the formal view of advisory opinions as technically nonbinding is "outmoded and regressive" and that the authoritativeness of this ruling should approach that of a binding judgment. For her part, *Pomerance* asserts that a Court bent on aggrandizing its own role beyond consensual jurisdiction jeopardizes its own authority, which poses a threat to the search for a peaceful settlement.

Throughout the Agora, the contributors bring out ways in which the Court could have done a much better job of discharging its obligations under Articles 53, 56, and 68 of its Statute to render decisions that are well-founded in fact and law and to state the reasons on which the advisory opinion was based. Not only those who disagree with the Court's general approach to the questions addressed (for example, *Wedgwood* and *Murphy* on self-defense, and *Dennis* on human rights), but even those generally supportive of the decision (for example, *Scobbie* and *Imseis*) question the quality of judicial reasoning in aspects of the advisory opinion and offer alternative explanations (of the law of self-defense and humanitarian law, respectively) that are more precisely reasoned than those stated by the Court. In this vein, *Kretzmer* asserts that the Court's failure to articulate the legal reasons underlying its conclusions on humanitarian law may negatively affect the prospects for compliance.

Our hope is that the reasoned critiques of the advisory opinion expressed in this Agora will contribute to informed debate on the role of international judicial proceedings, including advisory proceedings, in an ongoing violent conflict, especially from the perspective of promoting international peace and security, the peaceful settlement of disputes, and the authority of the Court.

THE "WALL" DECISIONS IN LEGAL AND POLITICAL CONTEXT

By Geoffrey R. Watson[*]

In June 2002, the Israeli cabinet approved a plan to construct a continuous "security fence" separating much of the occupied West Bank of the Jordan River from Israel proper.[1] The stated purpose of the barrier was to prevent Palestinian terrorists from entering Israel and killing Israeli civilians. Construction began in 2002, and a significant portion of the structure had been completed by early 2004. The current route of the wall deviates significantly from the "Green Line"—the 1949 armistice line that separates the West Bank from Israel. The fence frequently enters and traverses the West Bank, encircling Jewish settlements there. Eventually, about

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[1] Herb Keinon, *Cabinet Okays 'Security Concept,'* JERUSALEM POST [JM. POST], June 24, 2002, at 1.