

The Missing Element of the ICJ Advisory Opinion: Enforcement

By Anne Massagee¹

The ICJ Advisory Opinion on the Wall

On 9 July 2004, one year ago, legal history was made as the International Court of Justice (ICJ) issued its Advisory Opinion on the legal consequences of the construction of the Wall in the Occupied Palestinian Territories (OPT), including in and around East Jerusalem.² The impetus for this opinion was the December 2003 referral of the matter by the United Nations General Assembly (GA) to the ICJ to urgently render an Advisory Opinion on this question. After considering 48 written statements, hearing three days of oral pleadings, and deliberating for several months, the ICJ issued its Opinion, stating that the Court had jurisdiction, that the case was admissible, and that the construction of the Wall in the OPT and its associated regime were in contravention of international law. In particular, the ICJ stated that Israel had three primary obligations. These were to:

- Stop the illegal construction of the Wall in the OPT and dismantle those sections built to date.
- Undo all legislation and regulatory acts related to its construction in the OPT.
- Provide reparation for all damage caused by its construction in the OPT.

The ICJ also found that the international community had both individual and collective obligations related to this matter:

- The international community must not recognise the illegal situation resulting from the Wall's construction in the OPT.
- The international community must not provide aid or assistance in maintaining the situation created by its construction.
- All High Contracting Parties to the Fourth Geneva Convention must uphold their obligations under Common Article 1 to ensure respect for the Convention.
- The UN should consider what further action is required to bring to an end the illegal situation resulting from the Wall's construction in the OPT.

The Advisory Opinion was enthusiastically welcomed by the human rights community, many of whose members felt that it was much stronger than had been anticipated. The Opinion was clear not only on the Wall's illegality in the OPT, but also on key legal points which successive Israeli governments had challenged for decades: it confirmed the applicability of the Fourth Geneva Convention to the OPT; the characterisation of Israel as an Occupying Power in the OPT; the application of the International Covenant on Civil and Political Rights and other international human rights treaties to Israeli actions in the OPT; and the illegality of Israeli settlements in the OPT. By all accounts, the Advisory Opinion was a watershed in the struggle for Palestinian rights, giving greater legal impetus to the efforts to realise the fundamental Palestinian right to self-determination and to end Israel's prolonged belligerent occupation of the OPT.

¹ Legal Researcher, Al-Haq.

² International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf.

The Israeli Reaction to the Advisory Opinion

In light of the enthusiastic welcome which the Advisory Opinion received, the silence that has generally followed seems even starker. Predictably, the Israeli authorities (which had refused to participate in the hearings) at once condemned it. Upon the issuance of the Advisory Opinion, the Israeli ambassador to the UN went so far as to state that, "[t]his is a dark day for the International Court of Justice and the international legal system."³ The Israeli government also made clear that it would not heed the Advisory Opinion, but would instead use as its legal benchmark the Israeli High Court of Justice's *Beit Sourik* decision.⁴ While this decision found that 30 kilometres of a 40-kilometre strip of the Wall near to Jerusalem had a disproportionate impact on the local population,⁵ it held that the military commander was authorised to construct a Wall in the OPT. It further held that much of the route passed the test of military rationality, thereby realising the military objective of its construction.

Although the High Court called on the government to issue a response to the Advisory Opinion, the main findings of the resulting 180-page brief were that the factual basis for the Opinion was lacking, inexact and outdated, as well as irrelevant, owing to subsequent changes made to the Wall's route and "improvements" in providing for the needs of affected Palestinians.⁶ Ultimately, the Ministry of Justice took the position that the Opinion should have no application to the cases being considered by the Israeli courts.

As the Israeli authorities have been quick to point out, numerous legal challenges to the Wall have been brought before the High Court. The cases address everything from permits, gates, and the Wall's isolation of Palestinians in enclosures, to a principle petition on the Wall's general legality.⁷ Despite these challenges, only slight changes have been made to the Wall - including its re-routing to the effect that its length in fact increased by 48 kilometres - and its construction in the OPT continues unabated. Nor have violations resulting from its construction ceased; over the last year, the UN Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA) has documented further restrictions by the Israeli authorities on those who can obtain permits to access their land in the Seam Zone (the area between the Wall and the Green Line).⁸ Perhaps of graver concern, the Israeli Ministry of Foreign Affairs has recently indicated that it is taking steps to ensure that the issue of the Wall is not brought back to the UN agenda.⁹

The Response of the International Community

It is evident - and unsurprising - that the Israeli authorities will not undertake their obligations under international law as outlined in the Advisory Opinion. The task then falls on the international community to take action to implement international law in accordance with

³ Aluf Benn, et al., "Israel Firmly Rejects ICJ Fence Ruling," *Ha'aretz* (English Edition), 11 July 2004.

⁴ HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel, et. al.*, 30 June 2004.

⁵ *Ibid* at para. 38.

⁶ Information Department - Israeli Ministry of Foreign Affairs, "Unofficial Summary of State of Israel's Response - Security Fence," 28 February 2005.

⁷ For more information on the petitions which have been submitted to the Israeli High Court, see generally, HaMoked: Center for the Defense of the Individual at <http://www.hamoked.org.il/index_en.asp>, and The Association for Civil Rights in Israel, at <<http://www.acri.org.il/english-acri/engine/index.asp>>. See also *supra* note 4.

⁸ Presentation by UNRWA Commissioner-General Karen AbuZyad to Palestinian Ministry of Foreign Affairs at a meeting held on the one-year anniversary of the ICJ Advisory Opinion, Ramallah, Palestine, 11 July 2005.

⁹ Israeli Ministry of Foreign Affairs, "FM Shalom Meets With UN Envoy Alvaro de Soto," 10 July 2005, <<http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2005/FM+Shalom+meets+with+UN+envoy+Alvaro+de+Soto+10-Jul-2005.htm>>

their obligations outlined within the Opinion. In late July 2004, the GA passed Resolution ES-10/15, which acknowledged the Advisory Opinion, demanded that Israel comply with the legal obligations referenced therein, requested that the UN Secretary-General establish a register of damages caused to all natural or legal persons concerned, and called on the UN member states to comply with their legal obligations as referenced in the Opinion. The GA also called upon all High Contracting Parties to the Fourth Geneva Convention to ensure respect by Israel of its obligations under the Convention.

In the aftermath of this resolution, UN officials announced in October 2004 that the Secretary-General would send a letter to the President of the General Assembly outlining the structure and planned activities of this register of damages. The intent was to establish a body able to examine requests and eligibility for registration, as well as to verify the facts and extent of damage and the causal link between the Wall's construction and the damage sustained. This letter was submitted in January 2005, although no public steps have been taken on this matter since that time.

With these notable exceptions, however, the silence with which the Advisory Opinion has been met by the international community has become almost deafening. While various governmental and intergovernmental officials have made public statements that Israeli actions must be in accordance with international law, no progress has been made in giving meaning to these assertions. Indeed, during the negotiations which preceded the passage of Resolution ES-10/15, the operative clauses of the draft resolution were opposed by all European Union states.¹⁰ The GA's 10th Emergency Special Session, the convening of which led to the request for the Advisory Opinion, has not been re-convened since the passage of Resolution ES-10/15. Thus, the debate on this issue has largely been one of principle rather than performance. In light of the Israeli-Palestinian conflict's long history of statements and resolutions by intergovernmental and governmental officials alike, more statements are a hollow comfort to the Palestinian people at this time.

Enforcement - Now and in the Future

The question remains of how to give substance to the findings outlined in the Advisory Opinion. At present, the situation looks bleak, with few tangible steps being taken, and given the apparent wish of some member states to ignore the Opinion entirely. This may be due in part to the fact that the obligations outlined in the Advisory Opinion are not just relevant for Israel, but for the international community as a whole. The ICJ was clear that several of the fundamental rights of the Palestinian people which had been breached were *erga omnes* in nature, and thus are the concern of all states. Although third-party states have an obligation to ensure Israeli respect of international law, they would prefer to ignore the legal elephant in the room.

Some states, notably including Israel and the United States, have firmly held to the position that the Opinion is not binding, as it is advisory and is not a contentious case before the ICJ. However, this position neglects the *nature* of the obligations outlined therein. The legal issues raised in the Advisory Opinion, such as the right to self-determination, the illegality of disproportionate restrictions on freedom of movement, the illegality of the destruction or requisition of property without military necessity, the illegality of Israeli settlements in the OPT, and the non-recognition of unlawful acts, are themselves restatements of existing obligations under international law, and as such are binding due to their existing legal basis. The binding or non-binding nature of the Advisory Opinion itself is therefore irrelevant. What is of critical importance is the issue of the implementation of the international legal provisions it highlights.

¹⁰ Shlomo Shamir, "European Countries Divided Over UN Fence Vote," *Ha'aretz* (English edition), 21 July 2004.

To some degree, pressure from civil society organisations has been successful. International agencies have indicated concern that their actions should not be in contravention of the Advisory Opinion. Following pressure from Palestinian civil society organisations seeking compliance with the principles of international law as outlined, *inter alia*, in the Advisory Opinion, efforts by the Israeli authorities to effectively amend the European Union-Israel Association Agreement by means of the Olmert Arrangement (which would have enabled the certification of products from settlements as originating in Israel) proved unsuccessful. In addition, civil society organisations have used the Advisory Opinion as a key term of reference in bringing increased attention to the use of equipment and materials from corporations such as Cement Roadstone Holdings (CRH) and Caterpillar in the construction of the Wall.

However, progress in this regard remains limited, and so attention must be paid to the next steps to be taken. While it is impossible to accurately assess what may happen in the future with regard to the enforcement of the Advisory Opinion, there are several key issues which must be considered. The re-convening of the GA's 10th Emergency Special Session, as was recently proposed by Palestinian Minister of Foreign Affairs Nasser al-Kidwa, would provide an appropriate forum in which states could address means of implementing their obligations as highlighted in the Opinion and the proposed registry of damages. One mechanism which could be established in such a session would be the requiring of states to report on their implementation of these obligations. However, the GA will soon be overwhelmed by the internal debates regarding UN reform, and it remains to be seen whether or not the election of Israel's ambassador to the UN, Dan Gillerman, as one of the 21 GA Vice-Presidents will serve as a hindrance to the ability to re-convene the Special Session.

Third-party states must ensure that their bilateral agreements do not themselves breach their obligations as outlined in the Advisory Opinion. While such states are often most concerned about compliance with their own national or regional legal norms, it is important that their actions also be in conformity with international norms. Such compliance must be reflected both in the bilateral agreements themselves, and in state practice. One important means of ensuring compliance is the inclusion in such agreements of "safeguard" clauses, *inter alia*, those indicating that all parties will act *vis-à-vis* the agreement in accordance with the principles of public international law, including international human rights and humanitarian law.

Unfortunately, the broader international community has expressed a reluctance to exert pressure upon the Israeli authorities, as a result of the belief that the "delicate negotiations" between Israel and the Palestinian National Authority may be impaired. Many states are presently focused on Israel's unilateral Disengagement Plan. However, such reluctance neglects the reality that no real negotiations are in fact taking place, and that enforcement of the Advisory Opinion would be a significant contributing factor to the realisation of a just and durable solution to the conflict, for without a foundation based on respect for international law, no such solution will be reached. Without tangible efforts by the international community to enforce Israel's obligations under the Advisory Opinion, the Israeli authorities will persist in their ongoing efforts to create more facts on the ground through the continuing construction of the Wall and its associated regime. As noted by John Dugard, the UN Special Rapporteur on the Situation of Human Rights in the OPT:

Israel's defiance of international law poses a threat not only to the international legal order but to the international order itself. This is no time for appeasement on the part of the international community.¹¹

¹¹ John Dugard, "Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967," A/59/256, 12 August 2004, para. 42.