



LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY: A CASE ANALYSIS

By *Khushal Gurjar*
LLM from National Law University Delhi

INTRODUCTION

In both international politics and national law, the legal framework underlying the Wall's construction in occupied Palestinian territory has been extensively debated. The advisory opinion of the ICJ is intended to be an authoritative declaration of law aimed at resolving this contentious issue.

It was written in response to a request from the United Nations General Assembly. It addresses critical issues of international law, including the court's authority to issue advisory opinions and the substantive law that applies to the legal consequences of the Wall's construction in Palestinian territory. According to Israel, the Wall is being built to protect citizens from terrorist attacks and divide some portions of the occupied Palestinian territories from the rest of the country. The court's analysis covers a wide range of international law issues, including the court's competence to issue advisory opinions, on which it overrules the objections raised, the legality of the Wall in Palestine in terms of jus ad Bellum, the principle of self-determination, human rights, and humanitarian law, as well as the legal implications. Given the vast number of relevant legal concerns, it appears that specific priorities for the current study must be established.

FACTS AND HISTORY OF THE CASE

The General Assembly passed Resolution ES-10/14 on December 8, 2003, during its Tenth Emergency Special Session, requesting that the ICJ issued an advisory opinion on the following issues:

What are the legal ramifications of Israel, the occupying Power, building the Wall in the Occupied Palestinian Territory, particularly in and around East Jerusalem? In light of the rules and principles of international law, including the Fourth Geneva Convention of 1949 and applicable Security Council and General Assembly resolutions, as outlined in the Secretary-report?

This opinion must be viewed in the context of Israel's long-standing struggle with its Arab neighbors. The Empire controlled the land that is now Palestine. Following WWI, Palestine became a British mandate; in 1947, the British announced its departure. A Partition Plan was presented, dividing the region into two autonomous states- one Arab and Jewish. The Arab governments were opposed to the plan; hence Israel was founded in 1948. Following the statehood declaration by Israel, an agreement was signed that divided the country along a line, resulting in tension between Israel and Arab governments. The line of Armistice was violated in the year 1967, when soldiers of Israel took the entire territories that had made up Palestine under administration of British.

In its Resolution 242 (1967), the United Nations Security Council demanded that Israel relinquish the seized areas. Instead, Israel undertook moves to alter Jerusalem's status. In 1980, Israel approved a fundamental law designating Jerusalem as the country's undivided capital. The Security Council issued a resolution declaring the



measure illegal and void. The Security Council looked into "Israel's policies in other Arab regions occupied from 1967 and constructing the Palestine region in 1979. The Security Council of the United Nations declared in *Res. 446* that such settlements had "no legal legitimacy."

Some of these colonies would be included in Israeli territory as part of the proposed barrier. In 2002, Israeli started construction of a wall or fence in the middle of the Israel and West Bank, with most of the work occurring inside Israeli-occupied land instead of along the green line. By January 2004, 190 kilometers of work had been finished, with ambitions to build a 720-kilometer continuous line along with the West Bank. A new administrative structure has also been established. However, the space between the wall and the green line was a restricted zone that required a permit to enter or dwell in. As a result, the majority of Palestinians in the region had only been granted temporary immigration cards. Israeli citizens, on the other hand, were free to come and go as they pleased.

The Court handled this matter quickly due to the speed with which the work was completed. The Court had to decide on Elaraby, that he should join the opinion as a preliminary matter. Israel had protested in two letters, claiming that he had been "actively involved in hostility to Israel in his prior career, particularly on subjects that pertain directly to features of the dispute currently before the Court," as well as in a media interview in August 2001. The Court found that Judge Elaraby had ceased to be Egypt's diplomatic representative many years ago he did not give any opinion on the question put in the present case in a newspaper interview; and that "as a result,

Judge Elaraby could not be regarded as having "previous connection".

Judge Buergenthal dissented, criticizing 'What Judge Elaraby has to say in the part of the interview I quoted above, creates an appearance of bias that, in my opinion, requires the Court to preclude Judge Elaraby's participation in the case,' wrote the Court, not on the problem regarding Judge Elaraby's previous career in diplomacy, but related to the interview in newspaper. Because Judge Elaraby's media appearance from 2001 demonstrated a significant predisposition toward the Palestinian position, Judge Buergenthal's disagreement warrants significant consideration.

The Court heard the arguments and issued its decision on July 9, 2004. It unanimously decided that possessed jurisdiction for providing the opinion in advisory nature and that it should have cooperated with the request for the opinion by fourteen votes to one. The Court ruled that Israel's occupying Power's building of the wall in the Occupied Palestinian Territory, Eastern Part of Jerusalem, and its related regime violated international laws. Judge Buergenthal was divided on the question of whether or not to issue the advisory opinion along with the majority of the substantive international law problems raised in the request. On one substantive question, joined by Judge Kooijmans. Before going to the merits, the Court devoted a significant portion of the opinion addressing jurisdiction, as it does in most advisory opinions.

JURISDICTION OF THE COURT AND ITS DECISION NOT TO REFUSE TO GIVE AN OPINION

The Court considered two key concerns in determining whether it had jurisdiction to



deliver an opinion in response to the General Assembly's request: whether the General Assembly had the authority to request the Opinion, and whether the request raised a legal matter.

The Court evaluated five more important reasons in deciding whether to decline to issue an opinion in the exercise of its discretion: that Israel had not agreed to the rendering of an opinion; that offering an opinion may effect movement toward a negotiated settlement based on the Roadmap; that the Court lacked sufficient evidence on the security threat that the Wall was being built to address; that issuing an opinion would be pointless; and that the Palestinians' lack of "clean hands" should prevent the Court from issuing an opinion that could provide them with some recourse against Israeli actions.

These seven points will be discussed in order, starting with the question of the Court's jurisdiction and the General Assembly's competence to obtain an opinion from the Court, and then moving on to the other concerns. As previously stated, the Court received statements from a number of UN Members expressing strongly held views on the issue of its jurisdiction, and was forced to navigate a steady course across competing concerns raised in those submissions.

ARGUMENTS AND COURTS RULING ON JURISDICTION

The European Union, Israel, the US, and Russia were among the countries that challenged jurisdiction. The Court examined several grounds for objection.

The first argument was that the General Assembly acting excess *visu* under the

Charter through a resolution seeking an opinion of advisory nature was owing to the Security Council's active participation with the situation in the Middle East. While the Security Council has "primary responsibility for maintaining international peace and security" under Article 24 of the Charter, the Court concluded that it did not have exclusive authority. Both bodies were considered to be progressively dealing with the same challenge of maintaining world peace and security at the same time. As a consequence, the Court found that the General Assembly did not breach the Charter's provisions mentioned in art. 12, para 1, despite the fact that Resolution ES-10/14 seeking an opinion had been passed. The General Assembly did not go beyond with its powers.

The second objection argued that the General Assembly's Tenth Emergency Special Session's process did not fulfil the two requirements outlined in Resolution 377 A (V), the "Uniting for Peace Resolution." Only if the Security Council fails to fulfil its primary responsibility of ensuring international peace and security may the General Assembly step in. There appears to have been a threat to the peace, a violation of the peace, or an act of hostility in the circumstance.

According to the Court, the Council was in a position of deadlock regarding a resolution involving the Occupied Territories of Palestine when the extraordinary session was initially held in 1997. There was a threat to world security & peace, according to *GA Res. ES-10/2*. Following the rejection of a resolution concerning the wall by the Security Council in 1997, the session was reconvened on the identical premise as in 1997. The Court correctly determined that no particular request for an advisory opinion to



be made to the Security Council was immaterial.

The third point of contention stated that the subject in front of the Court was not essentially a question of legal nature. This criticism had 2 components: For one thing, the question was too wide, and for another, it was more of a political, rather than an issue of legal nature. Because the International Court has often issued adequate interpretive explanations, the Court determined that an issue in clarity was not the reason for prevention of the problem being addressed. The issue was regarding the situation being political and involving both jurisdiction and appropriateness. In jurisdictional terms, the International Court did not have any problem to rely on its earlier jurisprudence to find its potential to deal with a legal issue with political ramifications.

The appropriateness was examined to see if exercising it would be improper and incompatible with the Court's judicial mission if it had jurisdiction. The wall's construction was part of a more significant conflict between Israel and Palestine, and former had refused to allow the Court to play a role. It maintained that the problem should be resolved by diplomacy rather than forced arbitration. In the Western Sahara case, the question of whether the advisory opinion breached the principle that "a State is not compelled to allow its conflicts to be exposed to judicial resolution without its consent" was raised. The Court acknowledged that Israel and Palestine had diametrically opposed legal perspectives on the wall's construction. The Court, on the other hand, thought that the issue was more than just a bilateral issue, and that it raised issues of international peace and security that the UN was interested in.

Concerns were also expressed that an advisory opinion would jeopardise the 'Roadmap' for peace, which required Israel and Palestine to fulfil specified commitments, and that any decision would jeopardise the talks. This topic was also explored in the case of the Legality of Threatening or Using Nuclear Weapons. The opinion's influence would give a distinct element in the discussion, and the effect would be unknown, according to the verdict. Israel further stated that the Court would be forced to make educated guesses about critical facts such as the extent of the security danger, the efficacy of the wall as a response, and the impact of the project on Palestinians.

The Legality of Threatening or Using Nuclear Weapons also touched on this subject. According to the decision, the influence of the viewpoint would add a unique element to the conversation, but the impact would be uncertain. Israel went on to say that the Court would be compelled to make informed estimates regarding crucial facts including the magnitude of the security threat, the usefulness of the wall as a response, and the project's effects on Palestinians.

Judge Buergenthal expressed his dissatisfaction with the verdict in his declaration. However, he cited Western Sahara with approval: whether the Court has sufficient information and evidence before it to reach a judicial conclusion on any disputed questions of fact, the resolution required the resolution requiring it to provide an opinion in a manner consistent with its judicial status.

The Court's conclusions on the merits, he believes, were tainted by the lack of necessary information and evidence in this instance.



The ruling also addressed the argument that the Court's judgment would be useless because the General Assembly had previously declared the wall to be illegitimate. The Court argued that the General Assembly should be permitted to evaluate all of the probable repercussions of its resolution.

Finally, the Court considered whether it should decline to provide an opinion since Palestine is a perpetrator of violence and does not come before the Court with "clean hands." This argument was also disregarded since the advisory opinion was written for the General Assembly rather than a specific country or organisation.

However, jurisdiction was debated extensively; the Court's conclusions were eminently rational and consistent with the Court's past jurisprudence in decisions such as Western Sahara and the Legality of the Threat of Nuclear Weapons Use by a State. By their very nature, advisory opinions will raise ethical concerns because they deal with political and legal matters as well as international disputes. The Court in this instance, as well as the others referenced, was very careful to limit its authority to international law concerns deriving from political disagreements.

ANALYSIS OF ISSUES AND RESPECTIVE OPINIONS

The Court looked into the pertinent areas of international law that applied to the case, after studying the backdrop to the wall's construction. In this scenario, there were four significant issues to examine.

1. Prohibition against the use of force

The first issue was the prohibition on the use of force in the conquest of land. The Court acknowledged the prohibition's customary character, which covered the question of territorial acquisition's illegality, in addition to Article 2(4) of the United Nations Charter. In book, 'A New War for a New Century,' Gray argued that the most challenging issues was whether Article 51 could be extended to assaults by non-state actors without any state cooperation. But, unfortunately, the question of the concept of armed attack could be extended to terrorists remained unanswered. On the other hand, the Court did not provide the necessary care and thought to this crucial jus ad Bellum law area.

Israel had maintained that it has the right to self-defense, but only in the context of non-State actors, according to Article 51 of the Charter. The Court considered the provision's breadth, concluding that "there exists an inherent right of self-defense in the case of an armed attack by one State against another State." Article 51 did not apply to this action since Israel refused to assume responsibility for the strikes and retained control over the Occupied Palestinian Territory. The situation was different from that described in Security Council Resolutions 1368 (2000) and 1373 (2000).

The most disappointing aspect of the judgement is that the judges did not take advantage of the opportunity to discuss self-defense and its connection to the threat of terrorism. While Judge Burgenthal may agree that some or perhaps all components of the wall breached international law, he could not agree that this result could be justified without considering all relevant factors pertaining to Israel's right to self-defense, military necessity, and security needs. He



singled out the "continuous lethal terrorist strikes" in the Occupied Palestinian Territory. Judge Higgins indicated that she did not agree with all the Court said on self-defense, particularly the necessity that an attack be launched by another country. Despite acknowledging that the restriction may be due to the Court's decision in *Military and Paramilitary Activities in and Against Nicaragua*, which held that irregulars' actions could be considered an armed attack if they were sent by or on behalf of the government, she remained opposed to this position. Despite this, she presented a compelling case. I don't understand why the Court believes that an occupying Power loses the right to protect its civilian populations at home if the assaults come from the occupied area that the Court has determined is not annexed and is unquestionably "other than" Israel. Furthermore, Palestine cannot be considered international enough to be invited to these procedures and benefit from humanitarian law, but not sufficiently international to be subject to the ban on armed assault on others. This is a formality with a rough hand. The question is undoubtedly who is to blame for the deployment of organizations and individuals to attack Israeli people and the cumulative intensity of such attacks. International terrorism was the subject of Judge Kooijmans' investigation. He said that Resolutions 1368 and 1373 endorsed the right to self-defense without specifying an armed assault by a state, and that international terrorism represented a threat to world peace and security. He asserted that the Court had missed this unique component of self-defense law in this case. Nonetheless, Kooijmans was willing to accept the conclusion since Israel had not shown any evidence that the terrorist assault originated outside of the area controlled by the State that

was attacked and did not threaten international peace and security.

Judge Owada said that the Court should have conducted a thorough investigation into the legitimacy of Israel's claim that the wall's primary purpose was to prevent terrorist assaults successfully. He further claimed that the question of mutual recourse to indiscriminate violence against civilians should have been investigated. Thus, the Court should have taken a more balanced approach to the problem.

2. Self-determination in International

Judges Higgins and Kooijmans were particularly critical of the verdict's treatment of self-determination, a crucial issue in human rights. The impact of the wall's construction on the Palestinian people's right to self-determination was examined by the Court. According to the Court, the right of peoples to self-determination is a right *erga omnes*. According to the position, the existence of a separate Palestinian people was no longer an issue. The wall's route, on the other hand, restricted 80 percent of Israeli settlers in the Occupied Palestinian Territory. The wall's erection would substantially restrict the Palestinian people's exercise of their right to self-determination because of its location, which would result in 160,000 Palestinians living in completely circular communities alongside 320,000 Israelis.

Judge Higgins disagreed, arguing that the Court was "out of touch with reality" if it assumed that the wall was the only obstacle standing in the way of self-determination. Because self-determination was entangled with the greater context, Judge



Kooijmans ruled that the Court should have left it to the democratic process.

Although this topic was not covered in-depth, the conclusion cannot be refuted. The combination of the wall and the demographic shift produced by Israeli settlements have significantly impacted the Palestinian people's capacity to exercise self-determination. The United Nations Charter and the two Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights all protect the right to self-determination. Although the wall is only one part of the problem, it is a considerable hindrance to exercising this crucial privilege.

3. International Humanitarian Law

The Court looked at international humanitarian law, notably the law of occupation, as the third field of international law. According to Article 42 of the 1907 Hague Regulations, "area is deemed occupied when it is genuinely put under the control of the enemy army, and the occupation extends only to the territory where such authority has been established and may be exercised." The Court's categorical judgment that the Palestinian land between the green line and the historic eastern boundary of Palestine under the Mandate was occupied by Israel and international humanitarian law applied was one of the most critical features of this judgment.

The Court held that the Fourth Hague Convention and its principles constituted part of customary international law even though Israel was not a party to them in 1907. The 1949 Fourth Geneva Convention was the second major body of law, with Israel opposing its de jure applicability to the

occupied Palestinian territory. The reason given was that the region had not been recognised prior to Jordan and Egypt annexing it, hence it was not a Contracting Party's territory as required under the Convention. Palestine unilaterally agreed to implement the Convention in 1982. Israel had also stated that the Convention's provisions would be applied to the area. The Court, on the other hand, held that the law of occupation applied since two Geneva law prerequisites had been satisfied. There had been an armed war between two Contracting Parties (Israel and Jordan), and one of the Contracting Parties had occupied land as a result of that conflict. Furthermore, regardless of the state of the territory, the Fourth Geneva Convention made the protection of people a priority.

The Court discovered several violations of international humanitarian law. Article 49, paragraph 4 of the Fourth Geneva Convention, states: 'The Occupying Power must not deport or transfer sections of its civilian population into the area it occupies,' was a significant violation. 38 The Court found that Israel had followed a program that breached this clause since 1977 and that Israeli settlements were illegal under international law.

In addition to the above-mentioned demographic changes, the Court determined that the construction of the wall would harm property, in breach of The Hague Regulations Articles 46 and 52, as well as the Fourth Geneva Convention Article 53. The need of the destructions had not been proven because of military activity. Even though the Court acknowledged other Articles of the Hague Regulations and the Geneva Convention, notably concerning survival circumstances, it did not go into great detail



about them and instead focused on the human rights implications.

Even though this was the most extended section of the ruling, it is unsatisfactory in its shortness. Under international humanitarian law, the law of occupation is a complex topic, and a more thorough consideration of the occupation's obligations, notably the interplay between security concerns and the supply of basic requirements of life, would have been beneficial."

4. International Protection of Human Rights

The issue of human rights protection was the fourth domain of international law. Israel claimed that the ICCPR and the ICESCR did not apply to Palestinian land. It contended that international humanitarian law provided protection. Except for the derogations stated in Article 4 of the ICCPR, the Court upheld its view in Nuclear Weapons case that the protection provided by HR instruments did not stop in armed conflict. In an armed confrontation, there are three conceivable outcomes. Some rights may fall under the purview of IHL, while others may fall within the ambit of both departments.

This section of the ruling analyzed the geographic dimensions of the two Covenants and the CRC, concluding that there are occasions when the State's human rights duties under these treaties continue when it exercises its authority on foreign territory. First and foremost, the Court agreed with the conclusions of the Human Rights Committee in its review of Israel's reports that its duties under the ICCPR extended beyond its borders and into the occupied territories. Second, the Court looked at the ICESCR and determined that, notwithstanding the lack of a clause defining the extent of its

applicability, Israel had duties to Palestine under the ICESCR due to the 37-year occupation. Finally, the Court determined that the Convention on the Child's Rights applied to the Occupied Palestinian Territory. The Court cited two articles in the ICCPR regarding particular violations: Articles 17 and 12 deal with privacy and family life, respectively. Israel's freedom of movement was increased in these circumstances to include access to religious places, as agreed in the General Armistice Agreement. The Court examined the qualifying circumstances pertaining to legislative limitations imposed to protect national security, public order, public health, or morality, or other people's rights and freedoms, and determined that the proportionality test had not been met. The Court ruled that the creation of a restricted zone between the green line and the wall, as well as the establishment of enclaves, severely limited the freedom of movement of people of the Occupied Palestinian Territory. The region's restricted number of access gates, as well as their short opening periods, compounded these restrictions.

The right to work; the right to family protection and support, including children and young people; the right to a decent quality of life, including good food, clothes, and shelter, as well as the right "to be free from hunger; the right to health; and the right to education Articles 16, 24, 27, and 28 of the United Nations Convention on the Rights of the Child were also discussed. These rights were affected by the wall's construction, which resulted in the loss of fertile agricultural land and water wells. The annexation of the Western aquifer system, which contributed 51% of the West Bank's water supplies, led to food poverty in the region. The wall also cut off 30 communities from health facilities, 22 communities from



schools, eight communities from essential water supplies, and three communities from power networks. Many Palestinians living in these regions would be compelled to flee if they lost access to their fields and water. As a result, the Court determined that the wall violated the rights to labor, health, and a sufficient standard of living guaranteed by the ICESCR and the CRC, as detailed above. This section of the judgement may be the most appealing to international law students since it analyses human rights in the context of armed conflict and explains how an occupying power's human rights obligations extend to all accords to which it has agreed. In her dissent, Judge Higgins claims that "one would question about the propriety of asking the Court for advisory views on compliance by States parties with such responsibilities, which are reviewed, in much more detail, by a treaty body formed for that purpose." On these fundamental problems, the opinion might be criticized once again for its shortness.

5. Necessity

A consideration of the customary law notion of necessity was the final major international law topic. The Court considered whether Israel may rely on a state of need, as established by customary international law, to avoid constructing the wall illegally. Article 25 of the International Law Commission's Articles on States' Responsibility for Internationally Wrongful Acts, which states that the challenged behaviour must be "the sole means for the State to preserve a vital interest against a grave and imminent threat," was mentioned in the decision. In this instance, the ruling rejected necessity, holding that, given the evidence before the Court, building the wall

along the specified path was not the only way to protect Israel from a severe and urgent threat. 45 Although brief, this section of the ruling is significant for its reliance on an implicit recognition of the International Law Commission's work in the vital issue of state responsibility law.

CONSEQUENCES OF THE BREACHES OF INTERNATIONAL LAW

The Court ruled that Israel has a legal responsibility to stop building the wall right away. Furthermore, the Palestinian people should get reparations or other kinds of compensation for the harm they have caused to all-natural and legal persons. The notion of restoration was established in the *Chorzow Factory* case before the Permanent Court of International Justice. As a result, Israel would be required to restore the land, and other valuable security, as well as provide financial compensation when possible.

The decision's concluding section dealt with the implications of this ruling for other countries. Given the nature and importance of the rights and responsibilities at stake, the Court determined that all states had an obligation not to acknowledge the unlawful situation created by the wall's construction. They were also forbidden from assisting or assisting in the maintenance of the problem. They must also guarantee Israel's adherence to IHL. The Court then recommended that the UN, particularly the GA and Security Council, take additional measures to "put to an end the unlawful situation resulting from the building of the wall and the regime that goes with it." This aspect of the judgment is also disappointing, as it might have taken into account In this situation, the Draft Articles of State Responsibility.



This aspect of the ruling was voted down by Judge Kooijmans in dissenting Opinion, he held that determining the legal repercussions for additional states was not required by requesting an opinion. 47 He disagreed with the grounds offered in paragraphs 155-8 of the conclusion that breaches of the responsibilities erga omnes included other States' responsibility. Judge Kooijmans, in contrast to the majority, spoke on the ILC's Articles of State Responsibility. He especially mentioned Article 41, which said that states should work together to stop any severe violations and not accept them as legal. Article 41, according to Kooijmans, does not pertain to particular duties of foreign countries. He further claimed that the responsibility not to acknowledge was just a symbolic commitment. In terms of the Geneva Conventions, he could not accept the Court's conclusion that States parties to the Fourth Geneva Convention are obligated to guarantee that Israel complies with humanitarian law even though they are not parties to the war.

As Kooijmans properly pointed out, the Court should have accorded the Articles of State Responsibility a lot of weight. However, several instances were cited in the commentary to the Articles on other States' duty not to recognise an illegal situation arising from a major breach of an international law commitment and to assist in putting an end to these breaches. Given recent developments in the law of state responsibility and the concept of serious violations of obligations under international law's peremptory rules, the Court should have given this issue more thought.

CONCLUSION

This advisory opinion will make an important contribution to international law jurisprudence, particularly in the area of occupation law and the connection between this aspect of international law and human rights protection. The ruling will serve to define the nature of human rights and humanitarian law in occupied territory, notwithstanding the fact that these two themes should have been discussed in greater depth. Nonetheless, the decision's failure to evaluate the crucial question of self-defense in the face of terrorism is undoubtedly the most disappointing part. To be sure, the expense of creating such a barrier would be prohibitive when compared to the potential of terrorist attacks, but discounting this argument because the attacks were not carried out by another country ignores the reality of modern armed conflict.
