



## INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION ON ISRAEL'S SECURITY BARRIER WHAT DOES IT SAY?

An Emergency Special Session of the United Nations General Assembly sent the following question to the International Court of Justice (ICJ) for a non-binding advisory opinion:

*“What are 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, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”*

The ICJ answered the request for an advisory opinion on July 9, 2004.

### What Does the Advisory Opinion Say?

The non-binding advisory opinion of the International Court of Justice on the *“legal consequences arising from the construction of the wall,”* found that the Israeli security fence violates certain international and humanitarian laws and that Israel must compensate Palestinians who lost land or property as a result of the construction of the fence. The ICJ, denounced the route of the security fence, found that construction of the fence on the route was not the only means to safeguard Israelis and that the fence infringes a number of rights of Palestinians. The ICJ stated that those infringements could not be justified on the grounds of national security.

More specifically, the advisory opinion finds that the building of the security fence is illegal because it creates a political precedent for the future border between Israel and the future State of Palestine and states that building the fence constitutes a “de-facto annexation.” The ICJ rejected Israel’s claim that the fence is temporary. Moreover, the ICJ also fully rejected Israel’s argument that the fence was necessary and justified under Israel’s right of self-defense, (recognized in the United Nations (UN) charter), finding that Israel cannot claim this right when it is building a wall outside Israel’s pre-1967 borders. At the same time, the advisory opinion avoided any direct reference to Palestinian terror

While the ICJ states quite vaguely that Israel should and is even obligated to protect its citizens from fatal hostile acts, it nonetheless rejects the fence’s very construction, because it contravened international law. The ICJ emphasized that the fence infringes on numerous rights of Palestinians in the territories - freedom of movement, freedom of occupation and the right to work, health, education and use of water sources. The court called on Israel to take the fence down, to stop the construction in the region, to restore the lands it confiscated for building the fence to pay compensation fees to all those who were damaged by its construction. Moreover, it ruled against the legality of the Israeli settlers on the West Bank, whose status was not relevant to the dispute

The advisory opinion is remarkable for its totality. It urges the dismantling of the entire fence without trying to deal with the possibility that at least certain sections are necessary for security. The ICJ’s opinion rules out building a fence in territory considered occupied by international law, whatever the security or demographic realities.

The ICJ also called on the U.N. General Assembly and Security Council to consider what further action is required to bring an end to the existence of the barrier, which it deemed illegal.

The advisory opinion, however, is of a non-binding declarative nature and is supposed to provide UN institutions with the legal basis for their future acts and guide their debates on the issue. Only the Security Council would be authorized to impose sanctions.

### **What the Advisory Opinion Does Not Say**

The ICJ advisory opinion, troubling in a number of respects, chose not to consider the Israeli Supreme Court's earlier decision even though it had the right and the ability to do so.

Moreover, it dismissed Israel's claim to a right to self-defence under Article 51 of the UN Charter despite numerous terror attacks -- and seemed to even consider the defensive role of the barrier irrelevant. The court said, the attacks originate from the West Bank, which Israel controls, so they cannot be considered external attacks against which there is a right of self-defence. However, since the court objects to the fence primarily because the West Bank is not sovereign Israeli territory, it cannot suddenly decide that the West Bank is part of Israel for the purpose of determining whether Palestinian terror is an internal or external threat.

It avoided any direct reference to Palestinian terror and ignored the fact that Israeli citizens who are killed by suicide bombers are also having a right violated: their fundamental right to life.

## Topics Dealt with in the Advisory Opinion

**Should the Issue of the Fence Be of Concern to the United Nations:** “It is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations.”

*49. Furthermore, the Court does not consider that the subject-matter of the General Assembly’s request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as “a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy” (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.*

**Will an ICJ opinion interfere with peace negotiations –** “It is not clear, however, what influence the Court’s opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.”

*53. The Court is conscious that the “Roadmap”, which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court’s opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.*

*Why does the Court not consider Palestinian terrorism against Israelis? –*

*“The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.”*

*54. It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.*

Why, again, does the Court not consider terrorism? – “[...]This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.”

*55. Several participants in the proceedings have raised the further argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, **Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.***

Was there sufficient information available to the Court without Israel providing evidence? – “[...]many other documents issued by the Israeli Government on those matters are in the public domain ...The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument.”

*56. The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance.*

*57. In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel’s Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel’s concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.*

*58. The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the*

*General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.*

*Why does the Court refer to the Israeli security fence as “Wall” even though 95 percent of it is a fence? – [...] [T]hat term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (“fence”) or by the Secretary-General (“barrier”), are no more accurate if understood in the physical sense.*

*67. As explained in paragraph 82 below, the “wall” in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (“fence”) or by the Secretary-General (“barrier”), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.*

Who was the aggressor in the 1948 War of Independence? – “The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.”

*71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which “Recommends to the United Kingdom . . .*

*and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition” of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.*

**Who was responsible for the Six-Day War?** – “In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line). [...]"

*73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line). [...]*

**Are the West Bank and Gaza disputed or occupied territories?** – “All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.”

*The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East*

*Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.*

Does the Court use case files with accurate information with regard to the route of the fence, particularly after the Israeli Government has explained that the routes and timetable as described above are subject to modification? – “[...] there are references in the case file to Israel’s planned construction of a “security fence” following the Jordan Valley along the mountain range to the west. [...]”

*According to Ministry of Defence documents, work in this sector is due for completion in 2005. Lastly, there are references in the case file to Israel’s planned construction of a “security fence” following the Jordan Valley along the mountain range to the west. [...]*

*According to the Written Statement of the Secretary-General, the works carried out under Phase B were still in progress in January 2004. Thus an initial section of this stretch, which runs near or on the Green Line to the village of al-Mutilla, was almost complete in January 2004. Two additional sections diverge at this point. Construction started in early January 2004 on one section that runs due east as far as the Jordanian border. Construction of the second section, which is planned to run from the Green Line to the village of Taysir, has barely begun. The United Nations has, however, been informed that this second section might not be built.*

*The Israeli Government has explained that the routes and timetable as described above are subject to modification.*

*119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the “Closed Area” (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in*

*paragraph 80 above that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).*

*The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.*

*121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.*

*[...] That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.*

*134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right*

*to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.*

*What about the obligation of the government of Israel to protect its citizens through necessary military operations? – However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.*

*135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.*

*Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which “the security of the population or imperative military reasons so demand”. This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception “where such destruction is rendered absolutely necessary by military operations”.*

*The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.*

*What means can Israeli employ to defend its population?— “To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.”*

*137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.*

Does the Court take into consideration Israel’s right to self-defence and the basic human right to live? – “In conclusion, the Court considers that

Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.”

*141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.*

*142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.*

*149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is 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 (see paragraph 129 above).*

*150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The*

*obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation.*

*151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.*

*152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:*

*160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should*

*consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.*

*161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.*

*162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to*

*draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.*

### Conclusions of the ICJ Advisory Opinion

For these reasons,

THE COURT,

*Finds* that it has jurisdiction to give the advisory opinion requested;

*Decides* to comply with the request for an advisory opinion;

*Replies* in the following manner to the question put by the General Assembly:

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of

Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

**ICJ Dissent of Judge Thomas Buergenthal (USA) (International Court of Justice) (Excerpts)** (<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>)

- Since I believe that the Court should have exercised its discretion and declined to render the requested advisory opinion, I dissent from its decision to hear the case.
- To reach [a] conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defense, military necessity, and security needs, given the repeated deadly terrorist attacks in and upon Israel...to which Israel

has been and continues to be subjected, cannot be justified as a matter of law.

- Article 21 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, declares: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations."
- Article 51 of the Charter provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."
- The Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security.