



PALESTINIAN CENTRE FOR HUMAN RIGHTS

**Securing the Wall from International Law: an initial response to
the Israeli State Attorney**

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Background

The International Court of Justice (ICJ) on the 9th of July 2004 issued an advisory opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory (OPT).¹ This represented a watershed for the campaign to enforce the inalienable human rights of the Palestinian people to have the 37 year Israeli occupation of their land brought to an end. The decision involved the ICJ, the principal judicial organ of the United Nations and the “supreme arbiter of international legality”², assessing the ‘military exigencies’ (security considerations) of the Israeli state and balancing them with the obligations of Israel as an occupying power, as detailed in international humanitarian human rights law.

The attempt by Israel, thus-far immensely successful, to annex Palestinian territory through the use of settlements and through construction of the ‘Annexation Wall’ was determined to be in breach of international law by the ICJ. So was the “associated regime” of the Wall which the ICJ remarked had resulted in hundreds of thousands of Palestinians being directly effected and deprived of a litany of their human rights as well as the observed violations of international humanitarian law. Despite this, to date, Israel has refused to implement the clear legal decision of the Court which held that Israel has an obligation to put an end to the violation of its international obligations flowing from the construction of the Wall.³ Instead Israel accelerated the pace of construction of the Wall, announced expansion of existing settlements and continued to impose this “associated regime”.

The Advisory Opinion was also important because it confirmed the clear legal obligations of third states including the High Contracting Parties of the Fourth Geneva Convention (the ICJ confirmed the applicability of both the Geneva Convention *de jure* and international human rights treaties to which Israel is a party to in the OPT). All states must act through the UN Security Council (UNSC) and through the General Assembly (UNGA) (among other fora) to ensure that Israel respects international humanitarian law in the OPT.

To date none of this has happened.

The Response

Rather, the international community has failed to ensure Israeli respect and Israel has utilized this failure to continue with its policies. However, the Israeli High Court was compelled to request Israel’s response to the ICJ’s Advisory Opinion as a result of challenges which have been taken by various NGOs on behalf of effected individuals.⁴ This would be the first official Israeli response to the ICJ Advisory Opinion on the Wall and was issued on 23 February 2005. It came in the form of a 180 page statement from the State Attorney, prepared by Osnat Mandel, Head of the High Court Section of the State Attorney’s Office, and Avi Licht, a Senior Deputy to the State Attorney.

The document, thus-far released only in Hebrew, is divided into two sections. The first part explains the Israeli rationale in building the Wall (referred to as ‘separation fence’ by Israeli officials and ‘wall’ by the ICJ) and

¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ 9 July 2004), available at www.icj-cij.org.

² ICJ Advisory Opinion, separate opinion of Judge Koroma, at paragraph 10.

³ ICJ Advisory Opinion, at paragraph 150.

⁴ The Israeli High Court justices asked for the State's response to the ICJ Advisory Opinion during a hearing on a detailed petition on the construction of the Wall regarding the West Bank villages of Shukba and Boudrous.



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challenges the Advisory Opinion's balancing between the military necessity of the Wall and the impact on the Palestinian population. The second section responds to the ICJ Advisory Opinion and addresses the Boudrous and Shubka petitions. This section maintains that the current location of the Wall is appropriate and the advisory position has no effect on the petitions.

Not surprisingly, the Israeli response to the Advisory Opinion degrades the status of the ICJ and dismisses the Advisory Opinion. The response reiterates again, against all evidence, that the ICJ had no jurisdiction in dealing with this particular case and therefore refuses to endorse the legal implications of the construction of the Wall in the West Bank drawn by the International Court. Secondly, the statement reports that the ICJ relied on a small number of inaccurate facts which had been submitted to the ICJ in an unbalanced manner. Further the statement affirms that the factual situation has dramatically changed since the Advisory Opinion was taken, and that the judgment is therefore not relevant anymore. In particular, statistics are provided by the two Israelis which claim that Israel will now only include a small part of Palestinian territory on the Israeli side of the Wall. Worryingly, some international media have already started to display these completely inaccurate figures.

This position paper aims at providing an initial countering of the State Attorneys' statement, in an attempt to clarify the latest developments regarding the Wall and to show that despite Israeli claims, the ICJ's Advisory Opinion not only remains relevant, but is in need of urgent implementation.

I. Israel's refusal to take part in the proceedings and Jurisdictional Issues

For a better understanding of the context in which the Advisory Opinion was taken by the ICJ, it has to be remembered that Israel refused to take part in the proceedings, even though in no sense would its participation have rendered the Court's decision binding upon it: "The Court's Opinion is not given to the States, but to the organ which is entitled to request it. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p.71*"⁵. From the very start, Israel attempted to deny the ICJ's jurisdiction over the case and this old contention is again relied on in the response.⁶ Israel has consistently held the opinion that the dispute was of a political nature and could not be solved by legal means but only through negotiations outside any legal framework.⁷

However, in its judgment the ICJ first addressed the question of jurisdiction and the Israeli contention that it lacked jurisdiction or should decline to exercise its discretionary power to issue an advisory opinion. The ICJ unanimously established that it had jurisdiction, as only the ICJ is entitled to do in accordance with its charter which states that an advisory opinion may be requested:

on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.⁸

The ICJ detailed 'long-standing jurisprudence' that the Court has jurisdiction in cases where there are political implications in addressing legal issues and does not prevent the ICJ from giving "an assessment of the legality of

⁵ ICJ Advisory Opinion, at paragraph 47.

⁶ See paragraph 548, State Attorney's Response to ICJ Advisory Opinion

⁷ In so holding this position Israel ignores the fact that the very purpose of international law is the provision of regulations and solutions to political disputes.

⁸ Article 65, Statute of the ICJ, available at www.icj-cij.org



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the possible conduct of States with regard to the obligations imposed upon them by international law”⁹.¹⁰ Further, the ICJ notes that the object of the request from the UNGA is to obtain assistance in the form of a legal opinion in order for it to properly exercise its functions in the maintenance of international peace and security. The construction of the Wall is of direct concern to the United Nations and thus the ICJ should not decline to respond to the request for an advisory opinion.¹¹ However, having confirmed jurisdiction, the ICJ in the Advisory Opinion shies away from involving itself in politics – rather it examines the facts of Israel’s position in light of its activities when compared to international legal standards.

Israel’s refusal to take part in the proceedings is in fact more evidence that Israel ignores international law and international institutions and refuses to be held accountable to international standards.¹² It is, then, surprising to hear Israel complaining in the State Attorney’s response that its standpoint has not been understood and that its security interests have not been taken into account by the Court. The Israeli conclusion is that the lack of concrete details before the ICJ on the military necessity and on suicide attacks inside Israel resulted in it making a superficial and unsupportable conclusion on the balance between military necessity and rights of the Palestinian population. “Factual infrastructure”, as the Israeli authorities describe it, was in fact submitted to the ICJ by a number of independent organs not controlled by specific political interests: in particular various organs, institutions and offices of the United Nations submitted information to the Court detailing the facts of the Wall.

The decision by Israel not to participate in the Court’s proceedings means that Israel has isolated itself even further and, again, tried to portray itself as a state which is beyond the law and legal remedy.

II. Advisory or binding: the Legal implications of the ICJ Advisory Opinion

The Israeli authorities’ statement argues that the ICJ Advisory Opinion is not a ruling and is not binding and that it was given in response to a request by the UNGA, in accordance with Article 96 of the UN Charter. The Israelis categorically state that the foremost judicial body on the earth, with powers given to it by the international community, is not relevant to their own internal affairs and thus the rulings that Israel has violated international law do not have any effect on the petitions before the Israeli High Court.¹³

This is a distraction tactic by the Israeli legal establishment which has chosen to subvert elements of truth in order to mislead the international community. In the context of the ICJ the Court may issue two types of rulings: a substantive opinion and an advisory opinion. A substantive opinion occurs only when two states agree to submit the case to the Court and to be bound by the decision of the Court. An Advisory Opinion occurs when the agreement of submission between the parties in dispute does not exist. The advisory nature of the ICJ opinion does not change the fact that the questions (and answers) provided by the Court, from a legal perspective, hold precisely the same weight in each case. That is, the ICJ would have come to exactly the same opinion in a substantive case. It follows from this that because the ICJ was dealing with matters of *binding imperative* in

⁹ ICJ Advisory Opinion at paragraph 41.

¹⁰ See paragraph 550, State Attorney’s Response to ICJ Advisory Opinion

¹¹ ICJ Advisory Opinion at paragraph 49-50.

¹² This despite the numerous statements throughout the response that the State of Israel is committed to the rules of international law and respects United Nations bodies, including ICJ. See paragraph 547, State Attorney’s Response to ICJ Advisory Opinion

¹³ See paragraphs 550-2, State Attorney’s Response to ICJ Advisory Opinion



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international law (in particular the Fourth Geneva Convention) that although the opinion is advisory, the law upon which it stands is not – it is as a function of this law that the opinion is implemented:

The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general in international law, and the Court has on a number of occasions confirmed the existence of that obligation.¹⁴

In paragraph 549 of their response, the Israelis argue that the ICJ is not in a position to promulgate international law and that it is only competent to recognise the existence of international legal principles. The Israeli State Attorney's Office has introduced a confused application of logic to blur the distinctions between two key principles of any law, including international law.

The key is the distinction between promulgation and judgment as sources for international law. In international legal terms there are broadly three sources which can actually produce international law: the UNSC (particularly under Chapter VII actions) produces binding resolutions which have the same effect as laws, States Parties (or signatories) to a treaty produce law that is binding on those States which sign it (in the same way as a legal contract between two individuals is also binding to those individuals) and finally there is, in some cases, the UNGA.

The ICJ, as a Court, is not designed to produce law - rather it is designed to comment on the existing laws as promulgated by the above mentioned bodies. This does not make it a source of international law, rather the Court is mandated to make a judgment on the application of international law. The Israeli response, which is designed to undermine the significance of the Court's decision, seeks to imply that the Court is a secondary source of international law. In fact, the Court is a primary source of interpretation of international law and not a source of promulgation at all. Of course the interpretation of the law has particular bearings on those who are responsible for implementation of the law – in this case the ICJ Advisory Opinion makes it clear that the international community, High Contracting Parties to the Fourth Geneva Convention, the UNSC and the UNGA all have particular responsibilities for implementing its decision. The ICJ strongly advised the international community to take steps against the construction of the Wall, saying that States were “under an obligation not to recognize the illegal situation resulting [from it] ... [and] not to render aid or assistance in maintaining the situation created by such construction”¹⁵. Also, the UNGA and the UNSC should consider “what further action is required to bring to an end [this] illegal situation”¹⁶.

So when the Israeli response states that the ICJ's production of law is secondary – in fact the Israelis have designed this statement to indicate that the Court's judgment somehow is a lesser judgment than other judgments on international law. This, the Israelis state, makes the judgment less powerful.

However, even if it were true that the Advisory Opinion is not legally binding on either the UNGA or the Israeli authorities, it must be pointed out that “In this respect, in an advisory opinion as much as in a contentious case, the Court is entrusted with the responsibility of issuing an authoritative determination of the bearing of

¹⁴ ICJ Advisory Opinion, at paragraph 150.

¹⁵ ICJ Advisory Opinion, at paragraph 159

¹⁶ ICJ Advisory Opinion, at paragraph 160.



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international law on the dispute or legal question”¹⁷. Professor Richard Falk goes on to argue, “When this Court speaks with one voice, or almost does, on such matters, it is time to move forward and repudiate the remnants of Westphalian perspectives on state sovereignty that seem to allow states to self-interpret their obligations under international law and cavalierly disregard ‘advice’ emanating from the ICJ.”¹⁸

Israel is trying to escape all consequences which the construction of the Wall might have, politically or legally speaking. It is worth recalling, however, that, according to the international judges, since “the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to a variety of Israel’s international obligations, it follows that the responsibility of that State is engaged under international law”¹⁹. Following this assertion, the Court further reads that Israel has a duty to put an end to the violation of its international obligations, i.e. cease the construction of the Wall and dismantle the existing segments. Moreover, Israel is under an obligation to compensate those Palestinians who have lost their property and had their land destroyed or confiscated, and to return the properties which have been seized to their owners.

Israel continues to argue that the world is flat when all around it can see the truth – as such the Israeli High Court and the State Attorney’s Office become part of a system designed to support the activities of the Israeli military-political complex rather than, as in any independent and genuinely democratic country, to scrutinize that political and military establishment and to hold them accountable in accordance with the law. Israel’s response that the Court’s decision is not relevant was as inevitable as the ICJ’s finding that the Wall is illegal.

III. Wall, fence, barrier?

As to how the Wall should be called, the Israeli statement vilifies the ICJ for using the word “wall”. The international judges state that the Wall is a complex construction, and it indeed comprises fences with electronic sensors, ditches, trace roads, concrete walls, etc. Their reasoning is that the terms used by either Israel or the Secretary-General, are not more accurate than the word “wall”. From a legal perspective, however Israel has decided to ignore the primary role of the UNGA in promulgating the resolution to the ICJ, which used the term “wall”.

However, the structure which Israel is constructing should not be described simply in terms of how it is physically manifested²⁰ rather in respect of its political intentions – annexation of settlements, establishing facts on the ground. The use of the term ‘wall’ did not in fact spring from the imagination of the UNGA. Rather, in fact through UN reports which examined the neighbourhoods of towns like Jerusalem, Bethlehem, Tulkarem or Qalqilyia, where indeed it is a wall which has been built, with a height of up to eight meters in some parts. Israel, of course, is very reluctant to acknowledge this reality and very eager to portray the Wall as a ‘non-violent anti-terrorism fence’.

¹⁷ *Toward Authoritativeness: The ICJ Ruling on Israel’s Security Wall*, [The American Journal of International Law](#); Vol.99:42, p48, by Richard A. Falk (2005).

¹⁸ *Ibid.*, pp 51 & 52.

¹⁹ ICJ Advisory Opinion, at paragraph 147.

²⁰ On the issue of an accurate physical description - would the Israelis prefer the wall to be described as a series of electronic fences, ditches, electric fences, movement sensors, CCTV cameras, connected eight metre high concrete block - all of which are protected by heavily fortified Israeli military watchtowers which contain soldiers overseeing the local Palestinian population with heavy artillery?



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IV. Aim of the Wall: Annexation not “security”

This leads the State Attorney to affirm in its statement that the ICJ has committed a gross mistake in stating that the Wall “and its associate regime 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”²¹. The Israeli authorities continue to affirm that the Wall is not of a political nature and but a temporary structure aimed at preventing more attacks being committed inside Israel as a result of porous borders. According to the recently-issued statement, the Wall does not in itself attempt to define the future border of the State of Israel. But as the ICJ Advisory Opinion has extensively explained, the Wall will have long-term consequences on the demography of the areas which will be included in Israeli territory, both by denying access to Palestinians on their former lands and by allowing more Israeli citizens to settle in these confiscated territories. This is a strategy of *facts on the ground* and this has proved to be a deliberate and longstanding policy of the State of Israel even before its establishment.

The Israeli claim that the Wall is preventing attacks by Palestinians inside Israel must be seen in the context of the Israeli security realities to date:

- (i) at the height of the suicide bombing period, in 2002, large numbers of the attackers passed through Israeli military checkpoints. The Wall will use checkpoints as the only point of passage for Palestinians out of their Bantustans.
- (ii) The effectiveness of the Wall as a barrier to entry from the OPT to Israel must also come under question given that thousands of Palestinians will, once the Wall is constructed, have freer access to the territory of Israel than previously. Those Palestinians in the so-called “seam zone” will not be subjected to the same restrictions on movement as those behind the Wall and will still be able to walk across the Israeli border. If the Israelis had wanted to build a security fence then they should have – by their own logic - encompassed all of those who supposedly pose a threat to them and extended the collective punishment policy to all Palestinians.
- (iii) Finally, on the question of “security”, it should be recalled that the West Bank Wall is modelled on the Gaza Strip electronic fence policy. Since the building of the Gaza electronic fence the number of Israeli attacks (military incursions, shootings, killings of civilians, extra-judicial executions, house demolition and land razing incidents) has continued, until the *Sharm el Sheikh* summit, to rise dramatically. In fact, since the Gaza fence was constructed, the Israeli military escalation has caused the single worst year of the Intifada in Gaza - including two of the largest and bloodiest and most destructive incursions (in Rafah and Jabalya). This dramatic rise indicates that the Israeli security policy of building fences and walls has failed in the Gaza Strip and is set to fail in the West Bank. The tired old claim that there is no military solution to the occupation of Palestine seems to need constant reiteration.

Besides this, the context in which the Wall is being constructed gives further clear indications of the current Israeli strategy. The ‘disengagement plan’, which should be implemented in the coming months, aims at strengthening control over parts of the West Bank in return for a dismantlement of the settlements and a redeployment of the IOF in the Gaza Strip. President Bush and Prime Minister Sharon already agreed, in an

²¹ Paragraph 121 of the Advisory Opinion



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exchange of letters, that there would never be a return to the 1967 borders. In other words, the Wall certainly prefigures the minimum territories Israel would demand continued control over in any future peace agreement with the Palestinians. Such a costly and sophisticated construction hardly looks like a temporary defensive measure. Indeed, had the Wall been built along the Green Line, the cost would have been halved indicating that this overwhelming financial investment could have been limited if it were not for Israel's expansionist plans.

It is clear, given the route of the Wall, that the Wall is designed to impose permanent borders on any future Palestinian state by annexing Palestinian land and securing control of the illegal Israeli settlements – annexation, not security.

V. One-sided sources of information?

The Israeli State Attorney also complains about the sources of information used by the ICJ's judges in the course of their work. It argues that the Advisory Opinion rests primarily on the information made available to it by the United Nations, whereas they had received more than 1000 pages of information on the Wall from other sources.

The Israeli experts show a deeply rooted mistrust, familiar to Israel, for the work of the United Nations on the Israeli-Palestinian conflict. They charge that the Secretary-General's report was "unbalanced", while those of Special Rapporteurs for the UN Commission on Human Rights, Professor John Dugard and Jean Ziegler, were what the Israelis have labelled as being both brutal and one-sided. They also complain that the reports contain little detailed information, and that despite these flaws the judges' decision was influenced by them to a great extent.

Yet, given the Israeli decision to isolate itself from the proceedings of the ICJ, one can wonder why the ICJ, part of the United Nations system and its highest judicial organ, would feel guilty about using materials written by representatives of the UN. There is great respect among the international community for the UN's efforts to bring the conflict to an end and for its repeated attempts to find a peace settlement based on respect for international humanitarian and human rights law, except in Israel and the United States of America. There is, therefore, no reason why the Court should not use the materials available to it which have been collected by UN staff across the OPT – to do so would be a double standard approach to dealing with this conflict, which is not employed by the UN when addressing other conflicts around the world.

VI. Statistics on the Wall

The statement by the State Attorney also shows a great disrespect for facts in its calculation of the percentage of Palestinian territory *de facto* annexed by the construction of the Annexation Wall. Mandel and Licht assume that only 3.3% of the West Bank lies on the Israeli side of the actual route of the Wall authorized by Attorney General Menachem Mazuz. The authors complain that The Hague judges cited the figure of 16.6%, and reproach them for this inaccuracy.

It has to be reminded firstly that the annexation of foreign territory is a blatant violation of international law, regarding both the right to self-determination of the Palestinian people and the law of war as embodied in a series of internationally ratified treaties and other legal instruments. Whatever the percentage of occupied land in question, the illegality will persist, and therefore the ICJ Advisory Opinion remains applicable.



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Secondly, the Israeli State Attorney uses flawed methodology in the calculation of its statistics. 3.3% is actually far from being the accurate figure for several reasons. The Israeli authorities do not take into account East Jerusalem, which was formally annexed by the Israeli Parliament, the Knesset, in 1980. Under international law and according to several UN resolutions, East Jerusalem remains occupied territory and should be included in the statistics. A high Wall now surrounds the eastern Jerusalem area (part of Jerusalem Municipality under Israeli law), forbidding access to the holy city for Palestinians from the West Bank.

The statistics provided by Israel deal only with the already approved route of the Annexation Wall, however, many sections are still to be added. The areas which will be on the Israeli side of the Wall will, certainly, significantly increase the overall percentage of *de facto* annexed land. A further matter of concern might arise over the fate of the Jordan Valley, which the Israelis consider as a strategic area not to be handed over to the Palestinians. So far, Israel seems to have put aside the idea of building a wall isolating the valley from the rest of the West Bank, but it nonetheless remains an area for settlers only. As Israel does not include these illegal settlements in its calculations this means that it does not consider them to be Palestinian land.

Instead of the declared 3.3%, and according to our statistics, 7.4% of Palestinian land will be on the Israeli side of the Wall. A further 2.1% should be added to this figure if a wall was to be erected around the Ariel Bloc of settlements, which is very likely. The other settlement blocs which will remain behind the Wall will represent another 8%, while the Jordan Valley, a prohibited area for Palestinians, counts for 28.5% of the West Bank. As of yet the Israeli authorities have not announced any decision regarding the future path of the Wall in the Jordan valley. However, the land here has effectively been annexed already and the continued construction of the Wall along the 'obvious' north-south link path would only seek to confirm this annexation. Altogether, the remaining areas on which the Palestinian Authority will have control will reach a small 54%. In fact, the ICJ's Advisory Opinion remains, today, up to date.

Conclusions

The Israeli attempt to distort words and figures is part of an ongoing campaign of misrepresentation which the Israeli state has been engaged in since the occupation began. This campaign is designed to thwart international efforts to establish the truth about the Israeli strategy and to buy Israel the political space to continue with its annexation programme. Their lip service to international law throughout the response does nothing to change this.

It is imperative that the international community acts to implement its own obligations under international law which are clearly reiterated by the ICJ – to ensure respect for the Geneva Conventions. Until such time as that occurs, Israel will continue to be a state which behaves above the law. This impunity is destroying the lives of Palestinian civilians on a daily basis and only the full implementation of international law will make a clear difference.

Recommendations to the International Community

1. The High Contracting Parties to the Fourth Geneva Convention immediately take steps to “ensure respect” for the Convention – in particular – to ensure the implementation of the ICJ's judgment on the Wall.
2. The UNGA and UNSC take immediate and effective measures to implement the ICJ Advisory Opinion.