The International Court of Justice and the Israeli "Fence":

The General Assembly Referral on

"Legal Consequence of the Construction Of a Wall in the Occupied Palestinian Territory"

A White Paper
by
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Executive Summary

The conspicuous absence of the major states from the hearing on the Israeli fence now being held in the Hague – all of Europe, the United States, Russia, Japan, and China – should be taken by the International Court of Justice as a sign of the dangers of going forward. Interference with the Road Map peace process, the implicit challenge to the authority of the Security Council, the one-sided characterization of the human equities at stake, and the unavailability of necessary fact-finding, make this dangerous ground for the Court. We should preserve the integrity of international courts for circumstances where they can make a genuine contribution. This is not such a case.

On February 23, 2004, the International Court of Justice began hearings on a contested referral from the U.N. General Assembly challenging the legality of the Israeli plan to construct a security fence on the West Bank.[1] Approximately 100 miles of the fence have been constructed, and upon completion, it would have a length of 200 miles or more. The hearing in The Hague may be Hamlet without the prince: Israel has declined to appear at the hearing, and has declined to debate the legality of the fence in its written submission to the Court, on the ground that the Court lacks appropriate jurisdiction over the case. The

[1] The question submitted by the General Assembly is "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?" See General Assembly Resolution A/RES/ES-10/14 (Dec. 8, 2003).

United States and the European Union have also taken the view that the Court should not hear the case, because of the delicacy of the Middle East peace process. Procedurally, though, the hearing process will be wide-open and potentially anarchic, for the Court has permitted participation by any state that wishes to file statements or make arguments. The Court has also allowed the direct participation of the Palestinian Authority, citing Palestinian "Observer Status" at the United Nations, as well as the Arab League and the Organization of the Islamic Conference. The setting may be emotional, with public demonstrations near the ICJ's Peace Palace, a most unusual event in the calm precincts of The Hague.

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What are the Merits of the Claims?

The reader should be aware that this is a political and legal argument in which even the vocabulary is in dispute – "fence" versus "wall," "borders" versus "armistice lines," and "occupied" versus "unallocated" territories. The underlying arguments on the merits of the dispute are reasonably well known from prior political debates on the same issues. However, the Court has declined to permit states to make their jurisdictional and substantive submissions available to the public in advance of the argument, and Israel is not appearing at the hearing.[2] It is noteworthy that only 12 states will take part in the oral hearings.[3] All but two were co-sponsors of the Assembly resolution referring the case. No European state nor the United States will appear.

The following description of the underlying arguments is not intended to endorse the veracity of either side's claims.

On the merits (in debates outside the ICJ), Israel takes the view that the fence is the only practicable way to thwart suicide bombings. The Palestinian Authority is said to have encouraged a cult of "Shahada" martyrdom, through media broadcasts and curricula, and at a minimum, has failed to police terrorist activity planned in the towns and refugee camps of the West Bank. Too often, young men and women have crossed into Israel, wearing explosive belts under their clothes and detonating the devices that are filled with nails and ball bearings for maximum effect, in areas thick with civilians. One can't "harden" the targets of the bombings, for the targets are civilians riding on

[2] Written filings were submitted by the United Nations, 44 member states (Australia, Belgium, Brazil, Cameroon, Canada, Cuba, Cyprus, the Czech Republic, Egypt, France, Germany, Greece, Guinea, Indonesia, Ireland (on its own behalf and, separately, on behalf of the European Union), Israel, Italy, Japan, Jordan, the Democratic People's Republic of Korea, Kuwait, Lebanon, Malaysia, Malta, Marshall Islands, Federated States of Micronesia, Morocco, Namibia, the Netherlands, Norway, Pakistan, Palau, the Russian Federation, Saudi Arabia, Senegal, South Africa, Spain, Sudan, Sweden, Syria, Switzerland, the United Kingdom, United States of America, and Yemen), the Palestinian Authority, the Arab League, and the Organization of the Islamic Conference.

[3] Algeria, Saudi Arabia, Bangladesh, Belize, Cuba, Indonesia, Jordan, Madagascar, Malaysia, Senegal, South Africa, and Sudan.

buses, sitting in cafes, or shopping in marketplaces. Such acts of terrorism are illegal, not only under domestic law, but are crimes under international law. It is a war crime to target a civilian for the sake of creating terror. It is also a serious violation of human rights that, as a systematic practice, may amount to a crime against humanity.

The Palestinian Authority has failed to counter this activity. Even if the Palestinian Authority had taken steps, and was assumed not to be complicit in its continuation, the militants of Hamas, Islamic Jihad, the Popular Liberation Front for the Liberation of Palestine, and the Al-Aqsa Martyrs' Brigades still operate with relative impunity. Another bus bombing in Jerusalem occurred on February 21, 2004, two days before the hearings in The Hague were to open.

The fence is a "passive" defense, and may reduce hardship for both communities by lessening the need for Israeli military forays into West Bank towns, looking for explosives and cell members. As a matter of law, a sovereign state has the right and obligation to defend its citizens against armed attack, so long as the means employed is necessary and proportionate. The fence will undoubtedly burden Palestinians who live to the west of the barrier, since they may be separated from their farmland, local hospitals and friends. But Israel says it is working to reduce the inconvenience, and that the burden of delay in crossing the fence at monitored checkpoints has to be balanced against the terrible cost to human lives from the terrorist bombings.

On the other side, the Palestinian Authority argues that the "wall" imposes great hardship on thousands of Palestinians cut off from the necessities of life. The wall restricts their freedom of movement, interfering with the basic activities of life, and amounts to a prohibited seizure of land from the occupied territories. Even if a fence were permitted on the Green Line – the 1949 Armistice Line that separates the West Bank from Israel proper – this fence deliberately incorporates several major Israeli settlements beyond the Green Line, and in so doing, also leaves an extraordinary number of Palestinians on the "Israeli" side of the barrier. Monitored crossing points are miles apart, often closed, and slow to traverse. When the wall is completed, the Palestinian Authority argues, the number affected will be 95,000 Palestinians in the Territories and 200,000 in East Jerusalem. Furthermore, visitors from the rest of the West Bank are not permitted to cross to the western side of the wall without special permission or permits, which makes ordinary community life near impossible.

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This is an "apartheid wall," the Palestinian Authority will argue, and trenches on the norms of human rights law and the norms of the 1949 Geneva Convention that governs occupied territories. The evident ambition of the

project is to carry out a de facto annexation of territory that rightfully belongs to a future Palestinian state. It is wrong to impose a collective punishment on thousands of Palestinians because of the violent acts of a few. The wall has been criticized by a great many governments around the world either as illegal or as an obstacle to the peace process. The United Nations General Assembly has taken the view that the wall is illegal. The December 8 resolution cites the "unanimous opposition by the international community to the construction of that wall."

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Israel's reply might argue that the barrier is temporary, and not intended to create any territorial claim. It runs along the only route that will provide safety to a reasonable number of Israeli settlers. Security Council Resolution 242 calls for the return of "territories" in exchange for peace, but it does not settle what portion or what configuration of land is to be given to a future Palestinian state. It would fatally prejudge the "permanent status" negotiations to attempt to determine one portion of the peace package in isolation from the others. In particular, Israel cannot be asked to suffer continued attacks on its civilians while waiting for the Palestinian Authority to take serious action to quell the terrorism they have previously encouraged. On a technical basis, Israel would argue, the Fourth Geneva Convention does not apply, because the territories are not "occupied" in the sense that there was never another sovereign. So, too, Israel argues, the human rights treaties to which Israel is signatory do not apply outside its traditional territory. But in any event, the response of building a fence should be seen as a proportionate measure to save human lives, even under the standards of the law of armed conflict and human rights law.

What is the Appropriate Role of the International Court of Justice?

If there were parties appearing on both sides, a major part of the argument in The Hague would center on whether the judges of the International Court of Justice are entitled to hear and resolve this dispute. This is a matter the Court is also obliged to address on its own motion. There are several challenges that may be mounted to the Court's jurisdiction, claiming that the General Assembly acted outside its powers. In addition, the Court has discretionary power to decline a request for an advisory opinion where there are "compelling reasons." Compelling reasons might include the likelihood of interference with an ongoing diplomatic process, and it is noteworthy that both the United States and the European Union have apparently taken this position.

Most cases come to the ICJ by agreement of the contending parties. This can be an agreement tailored to the particular case, where the referral is called a "compromis," or can be a treaty agreement to refer all questions of

interpretation to the court. Some states have also agreed to "compulsory jurisdiction," where all disputed issues of international law can be submitted to the court. But the matter of the "fence" or "wall" has instead come to the fifteen-judge court by a referral from the U.N. General Assembly, over the objection of Israel. Under Article 96(1) of the U.N. Charter, either the Assembly or the Security Council "may request" an advisory opinion from the court "on any legal question."

The implicit purpose of an advisory opinion on issues of law is to aid the requesting political organ in the discharge of its own work. An advisory opinion is not technically binding on the affected states. But any opinion by the ICJ has considerable impact, because it represents the considered views of the "principal judicial organ" established by the U. N. system. A decision by the Court would enable critics of the "wall" to claim the aegis of the law, with greater weight in many quarters than a mere political opinion. Some observers expect that the Court's opinion may be the prelude to a political campaign to seek the imposition of multilateral economic sanctions against Israel. This would have a potential impact on an economy that is already stressed, and would counter any strategy by which Israel might simply choose to disengage entirely from Gaza and the West Bank.

Unlike other forms of ICJ jurisdiction, a request for an advisory opinion does not require the consent of the affected parties. It also deprives the affected states of an important prerogative. In consensual jurisdiction, each party is permitted to nominate a special "ad hoc" judge to sit on the court together with the other fifteen judges, in cases where no judge of the party's nationality is already serving on the court. An ad hoc judge can write a separate opinion. The role of ad hoc judges is seen as a way of allowing the court to gain some local perspective on a dispute, and assuring each party that its views will be heard by at least one willing set of ears. But in an advisory opinion referral, there is no ad hoc judge. (Israel may attempt to highlight the fact that there is an Egyptian judge on the court. Israel's motion asking the Egyptian judge to recuse himself from the case was rejected.)

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First, the device of an Advisory Opinion should not be used to avoid the limitations of consent-based jurisdiction. Israel has not agreed to submission of the case, and would not do so in any controversy unless, at a minimum, a legal question was framed in an even-handed fashion. (Here, the referral makes no mention of ongoing terrorism against Israeli civilians, even though that is seen as the reason for the construction of the fence.) The strength of the court as an international judicial institution depends upon the commitment of the parties to abide by

the judgment. That is why, unlike a domestic judicial system, states are permitted to decide whether to submit a case in the first place. The use of the General Assembly as a back door for the submission of disputes could jeopardize the court's relationship with many other countries as well. There are no vetoes in the General Assembly. Thus, if advisory opinions could be sought on any subject and for any reason, including matters that are essentially disputes between two states parties or a state and an entity, then France, England, Russia, China, and the United States could also find that issues important to their self-defense or foreign policy are under review in the International Court of Justice in the guise of a General Assembly "legal question."

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Even apart from the issue of consent, there is a question whether contentious legal issues are properly resolved in a court hearing in which any and all states can participate. Ordinarily, in a case concerning a dispute between two states, only those two states are entitled to appear. Other states may seek to intervene if they have a particular stake in the case, but the right of intervention has been quite limited and strictly construed. In part, this helps to protect the court from the political hydraulics of powerful states that have protégés or regional ambitions. In the *Eastern Carelia* case, the Permanent Court of International Justice (the ICJ's predecessor) expressed doubt that an advisory opinion was the proper mode to resolve a bilateral boundary dispute, especially where one party would not admit representatives of the court to survey the contested property, although some writers assert that this opinion has lost much of its force in light of later practice. It is true that the Palestinian Authority is not a state as yet, and thus could not appear directly in a contentious case. But Jordan could have brought the case on its behalf, by negotiating a "compromis" with Israel. In consent-based jurisdiction, it is highly unlikely that political caucuses such as the Arab League or the Organization of the Islamic Conference could have taken part in the argument, since the Court does not accept amicus briefs in such cases and these groups are not state parties to the statute of the Court.

Second, the General Assembly referral may violate Article 12(1) of the U.N. Charter, interfering with the work of the Security Council. It is the Security Council, not the General Assembly, that has primary responsibility to address "threats to the peace" and to "maintain or restore international peace and security." See Articles 26 and 39 of the U.N. Charter. Under Article 12(1) of the Charter, the General Assembly is

[4] Article 21(1) of the U.N. Charter reads: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

precluded from making any "recommendations" on issues of international peace and security, where the "dispute" or "situation" is already before the Council.[4] The vicissitudes of the Middle East peace process have been a constant agenda item in the Council, including the U.N.'s role as a member of the Quartet in the Roadmap. One might thus argue that the Assembly's action is precluded by Article 12(1).

To be sure, there have been exceptional circumstances in the past where the Assembly has acted in apparent derogation of the Council's power. In the famous "Uniting for Peace" resolution of 1950, a Russian veto seemed to threaten further Council action to sustain the defense of South Korea against the Communist invasion from the north, and the General Assembly recommended to member states that they offer military assistance. The General Assembly's Uniting for Peace resolution declared the competence of the General Assembly to act where "the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security." In the Suez crisis of 1956 and the Congo crisis of 1963, the Assembly again acted under the precedent of the Uniting for Peace resolution in establishing peacekeeping missions. But this form of exercise of Assembly power has fallen out of favor. And here, the Security Council has remained actively engaged on the subject of the Middle East. There was no "failure to exercise" its responsibility or use of a Council veto. On November 19, 2003, less than three weeks before the General Assembly's referral, the Security Council *unanimously* adopted Resolution 1515, which "Endorses the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" and calls on both parties "to fulfill their obligations under the Roadmap."

The General Assembly may be risking its own future role in this. The case could give one or more ICJ judges the opportunity to opine on the limiting strictures of Article 12(1), and the General Assembly could walk away stripped of powers it has assumed in the past. In 1996, the World Health Organization sought an advisory opinion from the Court on the legality of nuclear weapons. The Court clipped the wings of the WHO by ruling that the request for an advisory opinion fell outside the delegated competence of the WHO – the legality of nuclear weapons was not, as such, an issue of public health, and the referral was "ultra vires." This was a striking outcome, because the ICJ ordinarily does not sit in judicial review of the powers exercised by other U.N. organs. But a referral for an advisory opinion gives one of the few occasions for such scrutiny. An ill-founded referral can actually redound to the detriment of the requesting agency.

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Third, there is a question of voting procedure. Article 18 of the U.N.

Charter requires that a General Assembly decision on any "important question" must be taken by two-thirds of the countries "present and voting." Here, the vote on the December 8 resolution for a referral to the ICJ recorded 90 states in favor, 8 states opposed, and 74 states abstaining. This opens up the possibility of an inadequate tally. The referral may be construed as a decision on an important question, and the referral enjoyed the support of only slightly more than 52 percent of the states. To be sure, under the General Assembly's procedural rules, abstentions are not counted as votes. But the referral opens up the possibility of critical scrutiny of this practice as well. **The intention of the Charter may be read as limiting decisions on "important questions" to instances where an undisputed two-thirds majority of states affirmatively support the measure.**

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Fourth, it is important to protect the integrity of the Court. It is doubtful that the Court should take a case when the answer to a proffered legal question has already been prejudicially proclaimed by the General Assembly. This goes both to whether the referral is truly a "request" for an advisory opinion, and whether the Court should feel obliged to give an answer, if it cannot do so consistently with its own independence of judgment. Former ICJ president Stephen Schwebel, an American, has long pointed to the danger of self-serving requests for legal advice. The "appearance of telling the Court what the answer is to the question put to the court," noted Judge Schwebel, "is not consonant with the judicial character and independence of the Court."[5] The Assembly referral seeks the Court's opinion on the "legal consequences arising from the construction of the wall." But the General Assembly has already concluded in the resolution that "Israel, as the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all "its detrimental implications and consequences." The Court is thus being asked to ascertain the "legal consequences" of an act which it must take on the Assembly's authority, as a starting point, to be unlawful. This may lead some observers to ask whether the question is even put in good faith, since the Court is being dared to disagree. The practical dependence of the ICJ on the decisions of the General Assembly for budget and staff make this an especially unwelcome form of confrontation.

Fifth, the question as put to the Court may not be susceptible to a judicial answer. If the question is framed in loaded or prejudicial terms, then a Court could not answer the question without acceding to those conclusions. The resolution characterizes the barrier as a "wall" and speaks of the "Occupied Territories." It does not ask

[5] See Stephen Schwebel, Justice in International Law (1994), at p. 20.

whether the fence is lawful in light of the security threat of suicide bombings. It recites that "the international community unanimously considers the construction to be illegal" – thus leaving little for the Court to decide. The Court, at a minimum, would have to reframe the question, but a Court's power to do so may also be subject to dispute by the General Assembly.

Sixth, the decision to put the judicial proceedings on a forced-march schedule for arguments and briefing is inconsistent with the momentousness of the issues, and the need for dispassionate inquiry. The General Assembly voted on December 8 to request that the Court "urgently consider" the "legal consequences" of the "wall being built by Israel." The Court gave the interested states only until January 30 to file full statements on jurisdiction and the merits, with arguments three weeks later. This is an extraordinarily short length of time to prepare a case that may involve intricate arguments on a host of questions. Even apart from the jurisdictional issues noted above, there are serious substantive legal questions pertinent to the merits. These may include questions of law including (i) the interpretation of the law of armed conflict and human rights law, (ii) whether the formal treaties that Israel has entered into extend to the West Bank, and (iii) the status of the West Bank territories as occupied or unallocated territory. In addition, there may be factual inquiries pertinent to the resolution of the case, *see infra*. In a contentious case, heard by consent of the parties, the Court usually breaks the matter into separate arguments on "provisional measures" (akin to a temporary injunction), jurisdiction and the merits, extending over several years. Here, the schedule is swift, perhaps alarmingly swift for the integrity of the Court's processes.

Seventh is the Court's limited capacity for fact-finding. The International Court of Justice has no trial chamber, and thus cannot easily conduct an inquiry into factual matters, including the route of the fence, or the adequacy of the transit gates, or the availability of other means of controlling Palestinian suicide bombings. If the Palestinian Authority is in fact complicit in the funding and organization of terrorist groups, as many believe, that would obviously diminish Israel's ability to rely on the Palestinian Authority's pledges to control terrorism without a fence. Factual issues cannot be resolved in a truncated proceeding. The question of human rights, as here, often presents the dilemma of balancing rights on both sides. It requires a solemn exploration of the facts, and available ways to protect the equities of both communities. The Court must safeguard its reputation for careful work by not entertaining a discretionary request where it is not equipped for the necessary fact-finding. This has been a point of criticism of the court on a number of occasions.

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Eighth is the danger of interference with the peace process and the Road Map. Quite apart from any formal preemption by the Security Council, there is a very real concern that the Court's decision will prejudice the discussions on settlements, territory, and boundaries that are at the heart of the Road Map peace process, as well as the alternative private diplomacy of the Geneva Accord. It is taking a single sliver, one diplomat has remarked, of an interconnected problem, and may harden positions and limit available options in negotiations. Security Council Resolutions 242 and 338 seek a mutually beneficial exchange of land for peace. Israel is to withdraw from "territories" and in return gain real guarantees of security and normalization of relations. Some states supporting the referral may hope that the hearing and opinion will permit one or more judges to give their own opinions on the status of the territories on the West Bank, and to offer an ad hoc "demarcation" of Israel's boundaries. But at least one Western diplomat has privately remarked that it would be "outrageous" to do so. The 1948 U.N. plan was rejected by the Arab states long ago, and three wars have since ensued. **It could disrupt the peace process and an orderly determination of acceptable boundaries to put the court in the *de facto* role of demanding the return of land without any reciprocal guarantee of peace or recognition for Israel's right to exist – sweeping off the table the reciprocal duties of the Road Map process.**

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On International Courts Generally

International courts have a delicate role, and are appropriately reticent. The first problem is the **anarchic setting**: international courts do not adjudicate disputes within a stable social system, but rather amidst a disorderly set of relationships in which power still matters. The second problem is the **gravity of the stakes**: the contest may involve supremely important interests, such as the defense of a state against its military adversaries or the preservation of minimum economic viability. These may be areas in which judges have little practical experience; judgments may risk a discrediting naïvete; and parties may be less willing to comply.

The third problem is **enforcement**. Lacking any marshals to execute judgments, international courts appropriately limit their intervention to the occasions when the parties have indicated a willingness to accept and abide by the decision rendered. Because of the absence of police power, international law also allows an unusual degree of self-help by the parties. **This includes a limited right of "retorsion" – protecting oneself against an adversary's harm through a responsive act that would otherwise be wrongful.** This is a principle that has some evident force in the present case.

The fourth problem is **sources of law**. Customary law is often the only

available source – distilled from what states have practiced and professed, but never entirely plain, and always in the process of change. Where there is treaty law, it may be antique or retrospective in its view, formed to solve the last war, but harder to update than domestic legislation.

A fifth problem is the **credibility of the court.** Domestic courts are usually located within a society that enjoys some sociability and a common worldview. A court is ideally the instrument for dispassionate application of shared principles. But internationally, such convergence may not be possible. The parties may doubt that all members of a court share their normative commitments. Credibility is crucial to enforcement. Ultimately, under the U.N. Charter, the ICJ depends upon the Security Council for enforcement of its judgments. That, in turn, requires that the judgments be seen as reasonable and well founded.

Finally, there is the problem of **politicization.** The idea of judicial independence is sometimes not so strictly maintained in international settings, where it is only 'natural' to talk to the ambassador or countrymen of one's own land and where fewer people are watching. International courts also remain dependent on parallel political entities for budgets, elections, or support of the court itself. The deep weeds of the finance and budget committees of an organization such as the United Nations can be of some importance to a funded court, and the professional support of the practicing bar may not be sufficient guard against the delicate attentions of an unhappy assembly of states parties. A court such as the International Court of Justice needs to be particularly sensitive to the appearance of being pressured by the General Assembly.

Conclusion

The conspicuous absence of the major states from the hearing on the Israeli fence now being held in the Hague – all of Europe, the United States, Russia, Japan, and China – may well be taken by the Court as a sign of the dangers of going forward. Interference with the Road Map peace process, the implicit challenge to the authority of the Security Council, the one-sided characterization of the human equities at stake, and the unavailability of necessary fact-finding, make this dangerous ground for the Court. We should preserve the integrity of international courts for circumstances where they can make a genuine contribution. This is not such a case.

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