Non-Compliance with the International Court of Justice

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Tomorrow the International Court of Justice will issue its non-binding advisory opinion on Israel's Security Fence. How might Israel react to an adverse decision? Detonate a nuclear device? Attack the enemy? Send 350,000 civilians into the disputed territory?

So responded France, Iceland and Morocco, respectively, to ICJ decisions against them. Ignoring the ICJ ruling would not be original either. The United States, Albania, Argentina, Guinea-Bissau, Iran, Malaysia, Nigeria, Romania, South Africa and Thailand have all followed that path.

If Israel does not accept the ICJ's conclusions, Palestinians and their supporters will argue that the Security Council should enact sanctions against Israel, as it did against apartheid South Africa. Lawyers for the Palestinians made this argument explicitly in their oral presentation to the court:

> This is a classic case in the light of the opinion issued by the Court in the *Namibia* case. As a result of the serious breaches of international law by the State of Israel, other states are obliged to co-operate with one another and with the United Nations and other competent international organizations, in order to put a stop to these violations; not to recognize the unlawful situations arising from these violations; not to assist in the maintenance of these situations. If Israel persists in its refusal to apply the above-mentioned rules of international law and does not accept the consequences of its responsibility, the General Assembly is entitled to expect the Security Council to take the necessary coercive measures which, in the case of violations of mandatory legal rules, should not be amenable to the use of a veto by any member of the Council.[1]

Their argument does not stand up to scrutiny. Just as the general comparison between Israel and South Africa is specious, so is the specific linkage of the Namibia and Security Fence cases.

The history of the ICJ not only contradicts the Palestinian argument, it leads to the opposite conclusion: states have *not* been subject to Security Council sanctions for non-compliance. The ICJ's judges have issued decisions in various formats: in contentious cases between two states, as advisory opinions for other UN agencies, and as an arbitration panel. Though the circumstances of each case differ from Israel's and from one another, all of the states cited above adopted policies of non-compliance with an ICJ ruling.

Four cases – France, Iceland, Morocco and South Africa – are described below. The first three cases have important similarities to the Security Fence issue, while the South African case has important differences. The other cases of non-compliance are noted briefly to provide additional context.

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Defying ICJ rulings on national security issues: France and Iceland

On May 9, 1973, New Zealand (and Australia in a parallel case) asked the ICJ to order France to end atmospheric nuclear testing in the South Pacific. France responded that it did not consider the ICJ competent to hear the cases, did not accept ICJ jurisdiction, and would not participate in any proceedings. On June 22, the ICJ issued an Order, which stated that there was a *prima facie* basis for jurisdiction and, as an interim measure, "the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on New Zealand Territory." [2]

France then conducted five atmospheric tests in July and August 1973.[3] In a June 10, 1974 note to the New Zealand Foreign Ministry, the French government wrote: "France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground firings as soon as the test series planned for this summer is completed." France then conducted seven atmospheric tests from June to September 1974. Both in 1973 and 1974, New Zealand reported to the ICJ that radioactive fall-out had been detected in their territory. Subsequent French tests were conducted underground, and therefore did not violate the Order of 22 June 1973.

On an important national security issue – its nuclear weapons program – France was unapologetic about defying an ICJ decision.

The case of Iceland[4] has a more mundane subject – cod fish. Since fishing accounted for over 70% of its exports, cod was national security issue for Iceland. In July 1972, Iceland unilaterally extended its area of exclusive fishing rights from 12 miles to 50 miles, prompting complaints to the ICJ from the United Kingdom and Germany. Iceland responded that it did not accept its jurisdiction and would not participate in the hearings. In August 1972, the ICJ issued an interim Order of protective measures. The UK continued to send fishing boats into the zone claimed by Iceland. The Icelandic Coast Guard attacked the boats and cut their trawling lines.

In July 1974 the ICJ ruled that Iceland's unilateral extension of its exclusive fishing area was invalid and that the UK had fishing rights outside the 12-mile limit. Iceland still refused to comply. There were additional clashes between the Icelandic Coast Guard and British frigates that had been dispatched to protect their fishing fleet. In 1975, Iceland claimed an even larger exclusionary area, out to 200 miles and clashes continued. Shots were fired and ships rammed each other, though no fatalities resulted. The dispute ended in 1976 with an agreement that granted Iceland almost all of its demands.

Iceland – a liberal democracy and advocate of international law – deemed the threat to its economic national security so serious that the ICJ decisions were simply ignored.

Neither France nor Iceland was the target of international sanctions for their clear defiance of the ICJ.

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Defying the ICJ in territorial disputes: Morocco and South Africa

On December 13, 1974, the General Assembly asked the ICJ for an advisory opinion on the legal status of Western Sahara, the former Spanish colony known as Spanish Sahara, and the legal ties of Morocco and Mauritania to the area. Both countries had made claims to Western Sahara in the context of decolonization by Spain, while the indigenous Saharawi population wanted an independent state. On October 16, 1975, the ICJ returned its advisory opinion that both countries had some legal ties to Western Sahara, but they were not sufficient to claim sovereignty and the status of Western Sahara should be determined by "the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."

King Hassan II of Morocco responded to the ICJ opinion with the Green March. Three hundred and fifty thousand Moroccan civilians were sent towards Western Sahara with the intent on settling there and doubling the population.

Morocco then defied a series of Security Council resolutions. On October 22, the Security Council passed resolution 377, requesting the Secretary-General to start consultations and appealing to all parties to exercise restraint. On October 31 the Moroccan military crossed the border. After receiving the Secretary-General's report on November 2, the Security Council passed resolution 379, again urging an end to "unilateral actions" that would "escalate tensions." On November 5, King Hassan II ordered the 350,000 civilians to cross the border. On November 6 the Security Council passed resolution 380, which "deplore[d] the holding of the march; [and] call[ed] upon Morocco immediately to withdraw from the Territory of Western Sahara all the participants in the march."

In 1976 Morocco annexed the area under its administration and then annexed the rest in 1979 when Mauritania withdrew its claim to the southern region. Twenty-five years later neither annexation has been recognized nor have Morocco and the Saharawi reached an agreement.

Though construction began six years after the ICJ opinion, it should be noted that Morocco built a thousand-mile security barrier through the middle of Western Sahara to protect against Saharawi attacks. The "berm," as it is known, is a three-meter high earthen rampart, fortified with an estimated one to two million landmines.[5] It divides the Moroccan-controlled northwestern two-thirds of Western Sahara – rich in oil and minerals, whose coast contains the territory's fertile land and fishing industry – from the southeastern third that is mostly desert and controlled by the Saharawi.

Despite disregarding both the ICJ opinion on Western Sahara and the related Security Council resolutions, Morocco has not suffered serious diplomatic repercussions. The UN's latest peace plan for Western Sahara, the "Baker Plan II" of 2003, does not mention the ICJ opinion. Israel's continued construction of the fence would pale in comparison to Morocco's response to the Western Sahara advisory opinion. Suggestions of sanctions on Israel would be yet another case of the double-standard applied to Israel.

South Africa's case before the ICJ on Namibia has only a superficial similarity with the Security Fence case. In both instances the ICJ was asked for an advisory opinions on "legal consequences." In substance and circumstance, the two cases have important differences that invalidate the comparison.

South Africa was in defiance of several Security Council resolutions demanding their immediate withdrawal from Namibia. Resolutions 264 (1969), 269 (1969), 276 (1970), 283 (1970) all declared the occupation illegal. In Resolution 284 (1970), the Security Council asked the ICJ for an advisory opinion about "the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)."

In their 1971 opinion, the ICJ reiterated the Security Council's call in Resolution 276 (1970). It found "that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory; [and] that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration."

Israel's case differs substantially. The Security Council, the only UN body authorized to declare sanctions, decided not to condemn the Security Fence during its debate of October 15, 2003. The General Assembly with its automatic anti-Israel majority requested the opinion.

The territorial claims are also not comparable. South Africa's claim to continued rule over Namibia was universally disavowed as entirely illegitimate. The status of the areas where the Security Fence is built or planned is subject to negotiations, as noted in Resolutions 242, 338, 1515, the Oslo Accords, the Camp David II negotiations, and the Road Map.

The Security Fence has significantly reduced terror attacks, saving lives and improving the chances for renewed negotiations. No legitimate argument could be made for South Africa's occupation of Namibia.

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Comparisons with the United States

Two instances in which the United States has defied the ICJ provide additional context to consider Israeli non-compliance in the Security Fence case.

In 1986, the United States lost the jurisdictional decision on the complaint brought by the Nicaraguan government. The US then withdrew its consent to compulsory jurisdiction and effectively its consent for the remainder of that case. Abraham Sofaer, the State Department Legal Advisor at the time of the decision, explained the US position: "For the United States to recognize that the ICJ has authority to define and adjudicate with respect to our right of self-defense, therefore, is effectively to surrender to that body the power to pass on our efforts to guarantee the safety and security of this nation and of its allies … We believe that, when a nation asserts a right to use force illegally and acts on that assertion, other affected nations have the right to counter such illegal activities. The United States cannot rely on the ICJ to decide such questions properly and fairly. Indeed, no state can do so." At the same time, Sofaer reiterated the US commitment to "to use the Court for the resolution of international disputes whenever possible and appropriate."[6]

Similarly, the Security Fence is a self-defense measure against an illegal use of force – terrorism – and Israel "cannot rely on the ICJ to decide such questions properly and fairly." Still, Israel may take the position that it does not reject a role for the ICJ in future disputes that would be appropriate to the ICJ. This position of selective acceptance is the majority position among UN member-states, only 64 of which have accepted compulsory ICJ jurisdiction and some with reservations.[7]

The United States Supreme Court has also disregarded an ICJ Order. On May 3, 1999, Walter LaGrand, a German citizen, was scheduled to be executed in Arizona for first-degree murder. Germany asked the ICJ for an interim measure to stay the execution, pending resolution of Germany's complaint that the State of Arizona had violated LaGrand's right to be advised that he could contact the German consulate. The ICJ issued an Order the same day that the "United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these [ICJ] proceedings."[8] Germany then appealed to the US Supreme Court for a stay of execution, a request that was denied immediately: "With regard to the action against the United States, which relies on the *ex parte* order of the International Court of Justice, there are imposing threshold barriers. First, it appears that the United States has not waived its sovereign immunity."[9] LaGrand was executed the same day.

Like the US, Israel will likely decide that its Supreme Court takes precedence over the ICJ. The Israeli Supreme Court ruled on June 30 that "it is the security perspective – and not the political one – which must examine the route on its security merits alone, without regard for the location of the Green Line." The court also decided: "It is permitted, by the international law applicable to an area under belligerent occupation, to take possession of an individual's land in order to erect the separation fence upon it, on the condition that this is necessitated by military needs. To the extent that construction of the fence is a military necessity, it is permitted, therefore, by international law. Indeed, the obstacle is intended to take the place of combat military operations, by physically blocking terrorist

infiltration into Israeli population centers. The building of the obstacle, to the extent it is done out of military necessity, is within the authority of the military commander."[10]

The Israeli government has indicated that it will respect the Supreme Court's decision.[11]

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Other Cases of Non-Compliance

While Israel's reaction can best be judged in comparison to those of France, Iceland, the United States and Morocco, several other (mostly non-democratic) states have disregarded ICJ rulings.

In 1949, Albania was ordered to pay Britain £843,947 in compensation for damage to two warships and the death of 44 sailors.[12] Albania finally paid $2 million to Britain in 1996 (though the award was worth roughly $26 million without interest by that time), in exchange for Britain's release of 1.5 tons of gold (worth $19m) that had been stolen by the Nazis in WWII and recovered by the Allies.

In 1977, an ICJ arbitration court ruled that three islands in the Beagle Channel belonged to Chile, not Argentina. Argentina rejected the decision. The dispute almost degenerated into a military confrontation, but was eventually resolved by Vatican mediation.

Guinea-Bissau rejected a 1991 ICJ decision[13] that favored Senegal in a maritime boundary dispute. Guinea-Bissua and Senegal then entered negotiations, which resulted in a 1995 agreement.

Iran has twice ignored the ICJ. In 1951, Iran violated an Order for interim measures regarding the nationalization of the Anglo-Iranian Oil Company.[14] On November 4, 1979, Iranians entered the US embassy and took the staff hostage. The US filed a complaint with the ICJ, which issued an Order on December 15 to release American hostages immediately and to restore the embassy to US control.[15] Iran disregarded the Order and the case was eventually dropped in 1981 with the resolution of the hostage crisis.

Malaysia and Romania both ignored ICJ advisory opinions (Romania in 1989[16] and Malaysia in 1999[17]), regarding diplomatic immunity for their citizens who were also UN officials.

Nigeria rejected a 2002 decision[18] that awarded the Bakassi Peninsula to Cameroon and accused the ICJ president, Gilbet Guillaume of France, of bias. UN Secretary-General Kofi Annan then mediated the establishment of the Cameroon-Nigeria Mixed Commission to resolve the issue. The Commission continues today.

Thailand has been accused by Cambodia of blocking access to the Preah Vihear temple ruins that had been awarded to Cambodia in a 1962 ICJ decision.[19]

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Israel is likely to continue to build the Security Fence beyond the Green Line despite an ICJ advisory opinion to the contrary. Since Israel's decision would be based on justifiable national security interests, legitimate claims in disputed territory, and the ruling of its own Supreme Court, valid comparisons can be made to France, Iceland, Morocco and the US, but not to South Africa.

Israel will also be in the company of states from five continents, including democracies and dictatorships, East and West Europeans, North and South Americans, Arabs and Black Africans, none of which have been subjected to Security Council sanctions for non-compliance with the ICJ.

The recent Israeli Supreme Court case proves once more that Israel respects the rule of law. The court ruled that the security fence can be built legally in the West Bank, but the negative impact on the Palestinian population must not be disproportionate.

In the epilogue to their June 30 decision, the Israeli Supreme Court judges offered the following observation:

> We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law.

The Israeli government's acceptance of this decision is best rejoinder to Israel's critics who claim that Israel should be sanctioned.

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[1] http://www.icj-cij.org/icjwww/idocket/imwp/imwpcrs/imwp_icr2004-01_20040223_Translation.PDF
[2] Nuclear Tests Case, New Zealand v. France
[3] Government of Australia, http://www.ga.gov.au/oracle/nukexp_query.html
[4] Fisheries Jurisdiction Case, United Kingdom v. Iceland
[5] Landmine Monitor Report 1999 http://www.icbl.org/lm/1999/western_sahara.html
[6] *The World Court*, 80 American Society of International Law Proceedings 201 (1986)
[7] ICJ website, http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm
[8] LaGrand Case, Germany v. United States
[9] The Federal Republic of Germany et al. v. United States et al., on Application for Temporary Restraining Order or Preliminary Injunction and on Motion for Leave to File a Bill of Complaint, March 3, 1999.

[10] Beit Sourik Village Council v. The Government of Israel, June 30, 2004
[11] Ilil Shahar, "Sharon pledges to respect court decision on barrier," *Maariv International*, July 4, 2004.
[12] Corfu Channel Case, United Kingdom v. Albania
[13] Arbitral Award of 31 July 1989 Case, Guinea-Bissau v. Senegal
[14] Anglo-lranian Oil Co. Case, United Kingdom v. Iran
[15] United States Diplomatic and Consular Staff in Tehran Case, United States v. Iran
[16] Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (1989)
[17] Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights (1998 - 1999)
[18] Land and Maritime Boundary between Cameroon and Nigeria Case, 2002
[19] Temple of Preah Vihear Case, Cambodia v. Thailand