The Wall at the ICJ

The International Court of Justice was asked by the Special General Assembly in December 2003 to advise on the following question:

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 Wall and International Humanitarian Law*

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In their pleadings submitted to the International Court of Justice (“the Court”) in relation to the request submitted by the General Assembly for an advisory opinion on the Legal consequences of the construction of a wall in the Occupied Palestinian Territories, some States – for instance, Australia, Belgium, Cameroon, Canada, Israel, Italy, the Netherlands, Spain, the Marshall Islands, Micronesia, Palau and the United Kingdom – have argued that the Court should decline to deliver an opinion. Others – notably the United States – while arguing that there are reasons why the Court should decline jurisdiction, have perhaps taken a more nuanced view, indicating issues that should not be addressed by the Court if it decides to deliver a substantive opinion in order to avoid prejudice to the Peace Process. A third group of States – including Brazil, Egypt, France, Jordan, Palestine, Sweden and Switzerland – have presented pleadings addressing both the Court’s competence to deliver the opinion and the substance of the case. Should the Court be persuaded by the arguments of the first group of States and refuse to deliver an opinion, this will contradict its settled jurisprudence regarding the exercise of its advisory competence.2

As France observed, however, should the Court deliver an opinion, it must necessarily address the prior question of its legality:

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1 All the pleadings in the proceedings, with the exception of Israel’s submission that Judge Elaraby should be disqualified (see the Court’s 30.01.04 Order on the composition of the Court), are available on the Court’s website: www.icj-cij.org.
2 See, for instance, Scobbie, I, Legal consequences of the construction of a wall in Occupied Palestinian Territory: request for an advisory opinion. An analysis of issues concerning competence and procedure, available at www.soas.ac.uk/lawpeacemideast/.
[The] question concerns solely the legal consequences of the construction of the disputed wall in the Occupied Palestinian Territory . . . It is not about the conformity of the construction of the wall with international law. Determining its lawfulness is however prerequisite to responding to the question posed:

- first, the consequences of the construction of the wall along the chosen route are obviously very different depending on whether or not the construction is deemed in compliance with international law;
- secondly, in order to determine those consequences, it is necessary to ascertain not only whether the construction of the wall along the chosen route is lawful but also, if it is not, which exact rules of international law have been violated.¹

This article considers an aspect of the second point raised by France, by considering whether the construction of the wall violates any rules of international humanitarian law in particular. Some of the pleadings submitted to the Court have identified various rules which, it is claimed, have been breached by the construction of the wall. I shall concentrate on the protection afforded to privately owned property by the rules of international humanitarian law, and conclude by considering whether there are any legal justifications available to exculpate Israel for any breaches it has committed.⁴

Relevance of humanitarian law

To argue that international humanitarian law is relevant to the construction of the wall in occupied territory pre-supposes that it is applicable. Israel, notoriously, has denied this, although this is not a view shared by other parties to the Fourth Geneva Convention, relative to the Protection of Civilian Persons in Time of War, nor of the International Committee of the Red Cross. As Kuttner records:

The International Committee of the Red Cross (ICRC), in a note handed to the Government of Israel on 24 May 1968, indicated that its interpretation of [common Article 2 of the 1949 Geneva Conventions] was that an occupation such as to effect the automatic application of the Convention exists “where territory under the authority of one of the parties passes under the authority of an opposing party”. Israel, in its reply to that note on 16 June 1968, indicated its willingness to permit the Committee to continue its humanitarian work in the territories, but expressly declined to accept its interpretation of Article 2.⁶

More recently, during the December 2001 Conference of the High Contracting Parties to the Fourth Geneva Convention, convened by Switzerland (as depository) pursuant

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¹ Written statement of France, p. 2, para. 9: emphasis in original; translation by the Registry of the International Court.

² Conferences of the High Contracting Parties to the 1949 Geneva Conventions have repeatedly expressed their concern about the application of the Convention in respect of territories occupied by Israel. More recently, during the December 2001 Conference of the High Contracting Parties to the Fourth Geneva Convention, convened by Switzerland (as depository) pursuant

³ The first two paragraphs of common Article 2 provide:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

⁴ Kuttner, T.S., Israel and the West Bank: aspects of the law of belligerent occupation, 7 Israel Yearbook on Human Rights 166 (1977) at 169-170: footnotes omitted.