CHATHAM HOUSE | INDEPENDENT THINKING ON INTERNATIONAL AFFAIRS

The ICJ Advisory Opinion on the Wall

A summary of discussion at the International Law Programme Discussion Group at Chatham House on 26 November 2004; participants included lawyers, academics and representatives of NGOs and governments.

The meeting dealt with the substantive parts of the International Court of Justice (the **ICJ**)'s *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004) (the ***Advisory Opinion*** or ***AO)***. Jurisdictional and admissibility issues were intentionally left to one side. The barrier being constructed in the Occupied Palestinian Territory is variously referred to below as the **Barrier**, the **Wall** or the **Security Fence**.

One speaker noted that while much of the *Advisory Opinion* dealt with jurisdiction and admissibility, the substantive rulings were relatively brief and were, essentially, rulings of principle that were largely detached from the specific facts on the ground. The speaker suggested that this was due in part to the way in which the case was argued before the ICJ and partly because the judges did not have enough facts before them. It was pointed out that there may be a rather simple reason for the lack of express reasoning in certain sections of the *AO*. The authoritative text of the *AO* was the French version. This suggested that the author of the opinion was from the French legal system where judgments are traditionally not as discursive as would be expected in common law judgments. Every sentence of the opinion is subject to a majority vote of the judges in the drafting stages.

Important rulings of principle

It was important to note that the judges of the ICJ were unanimous on a number of important rulings of principle. Judge Buergenthal (the US judge), who dissented from the Court's *AO*, nevertheless expressly associated himself with some of the Court's rulings of principle: first, that international humanitarian law, including the Fourth Geneva Convention, is applicable to the Occupied Palestinian Territories; second, that human rights law is applicable to the Occupied Palestinian Territories; third, that Israeli settlements in the Occupied Palestinian Territories are in breach of Article 49, para.6 of the Fourth Geneva Convention and are therefore illegal; and fourth, that the Palestinian people have a right to self-determination which must be fully protected. It was important to note these four fundamental rulings of principle, given the rarity of unanimity within the ICJ. While Judge Buergenthal did dissent from the *AO*, this was mainly because he thought that there were insufficient facts before the Court for it to reach its decisions.

The right of self-defence

The Court decided that Israel could not rely on an argument of self-defence to justify its breaches of international humanitarian law. The speaker considered that in so deciding the Court was exercising judicial caution: any extension of the law of self-

defence to the Barrier would have been reliant on Security Council resolutions 1363 (2001) and 1373 (2001), which were adopted after September 11th and likened acts of international terrorism to threats to international peace and security. As Judge Kooijmans said in his Separate Opinion, the legal implications of those resolutions are unclear. The Court found that it did not need to consider this aspect of self-defence because Israel controlled the Occupied Palestinian Territories and the international law rules on self-defence were therefore irrelevant. The speaker thought that the Court was correct in not examining this extension of self-defence as there had not yet been enough state practice to deal with the point. Moreover, the Court did not have enough argument before it in order to take such a decision.

The speaker added that even Judge Higgins, who gave a Separate Opinion, noted that Israel's inability to rely on self-defence and the question of whether attacks on Israel had to be made by another State arose not from the text of Article 51 of the UN Charter (as suggested in para.139), but rather was the result of how the law stood at the moment as stipulated in the *Nicaragua* case; attacks by non-State actors could only amount to armed attacks if they were sent by or on behalf of the State and if the activity because of its scale and effects would have been classified as an armed attack if it had been carried out by the armed forces of the State. Here it was regrettable that Israel did not argue the facts.

Another speaker noted that on the one hand, the Palestinians were held to be enough of a State to participate in the proceedings (even when the Court's Statute expressly requires that only States can participate), whilst at the same time, the Palestinians were held to be not enough of a state for Israel to have a right of self-defence under Article 51.

While the Court found that Israel could not rely on the right of self-defence, it did recognise the need for the protection of civilians (see, for example, paras. 141 and 162 of the *AO*). As such, the *AO* did not prevent Israel from proper measures to ensure its security.

Duties on third parties

The ICJ stated that the Barrier was illegal and Israel was under a duty to cease construction and remove the sections that had already been constructed. The Court also stated that this had further implications for third parties, because under Article 1 of the Fourth Geneva Convention, States parties to the Convention have a duty, in addition to the duty to respect the Convention themselves, to ensure that other parties also respect the Convention. Thus, States have a duty both (i) to ensure that Israel acts in accordance with its obligations under the Fourth Geneva Convention and (ii) not to recognise the legal situation created by the Wall and not to render aid or assistance for its construction.

Advisory Opinions as distinct from contentious proceedings

It was noted that because the Court was acting under its advisory jurisdiction, Israel did not have the benefit of appointing an Israeli judge to the proceedings, as it would have done in contentious proceedings between two parties. It was further pointed out that the Opinion was also not binding under international law. The speaker suggested, however, that the Court's reasoning in an advisory opinion is nevertheless evidence of what the Court considered to be binding international law.

Problems with the Opinion

Another speaker noted that, notwithstanding the tremendous range of opinion within the Israeli political spectrum, the *AO* had received relatively little coverage in the Israeli media and had generally fallen outside discourse within Israeli society. It was felt that the ICJ missed in this case an opportunity to play a constructive role in engaging a debate within Israeli society regarding security and humanitarian issues. It was suggested that part of the reason for this was that people in Israel saw the *AO* in a broader context , namely that the *AO* proceedings were part of and arose from a concerted political campaign. The case started life as a result of a resolution adopted in an Emergency Special Session of the UN General Assembly (the **GA**). In the debate before the GA, the Palestinian representative expressly stated that the proponents of the resolution desired to obtain an advisory opinion of the ICJ with the aim of putting pressure on Israel. The speaker noted that while that might be a legitimate aim for a Palestinian representative to the UN, it was questionable whether it was appropriate for the ICJ to play a role in such a campaign. Indeed, many of the countries that were opposed to the ICJ taking on this particular request felt that it would undermine the Court to play such a role.

The speaker submitted that the Court treated the question that was posed to it as a legal question. But it clearly did not start life as a 'legal' question, and in so far as a legal question was asked, the GA had already reached its own conclusions that the Barrier was illegal. It was also problematic to the extent that it was 'half a question': the question asked of the ICJ related to Israel's responses to terrorist attacks without in any way mentioning those terrorist attacks or the security threat to Israel.

Problems with the factual basis upon which the Court operated

The speaker noted that a second area in which an Israeli consensus is sceptical about the procedure before the Court relates to the factual basis on which the Court made its ruling. It was right to point out that the facts were not the main part of the Court's analysis or that the Court did not have all of the facts. However, the problem was that the Court thought that it *did* have all the facts - see para. 58 of the *AO* where the Court referred to the report of the Secretary General, the submissions of States and information in the public domain. Those 'facts' were both partial and inadequate. It was suggested that the main factual basis at the Court's disposal was a dossier consisting of 88 documents prepared by the UN Secretariat: not one of those 88 documents made a single reference to the terrorist attacks or any of the security threats that were stated by Israel to be the reason for building the Security Fence in the first place.

The information provided to the Court was also, the speaker submitted, factually inaccurate, for instance, it was based on outdated maps that had been presented earlier by the Ministry of Defence, when in fact, those maps had already been updated. Furthermore, some of the major findings of the case were dependent on the alleged presence of an 'eastern' fence, which was the most significant aspect of the fence and effectively went down the middle of the West Bank, leaving many Palestinians stranded and effectively created islands of Palestinian isolation. In fact, such a 'proposal' was never presented to or approved by the Israeli government. That line of evidence can be traced back to a report of John Dugard, the Special Rapporteur of the Commissioner of Human Rights, who referred to the eastern fence as 'a proposal' without giving any particular authority. On that basis, the Palestinian delegation included it in their presentation to the Court, stating that it had been reported by the Special Rapporteur of the Commissioner of Human Rights. And on

this basis, the ICJ noted that "references to an 'eastern' fence also appear in the case file."

The speaker submitted that even if the factual basis upon which the Court operated had been correct, it must be recognised that significant changes in the route of the Security Fence have occurred since then. Most dramatically, the route has changed in response to decisions by Israel's own Supreme Court acting as the High Court of Justice. The Security Fence has been seriously uprooted and moved in a number of cases. In the case of *Baka al Sharkia*, a town of several thousand people now finds itself on the other side of the Security Fence. Recently, there has also been a very important ruling of the High Court which resulted in very significant changes to the routing of the fence.

In addition to the problems regarding the facts that *were* presented to the ICJ, the speaker highlighted the problem of the facts that were *not* presented. For example, no mention was made to, or by, the ICJ of Israel's efforts to lessen the humanitarian impact of the fence, such as: the introduction of 24 agricultural gates to help Palestinian farmers separated from their fields; or the funding of school buses to commute Palestinian children where it was realised that 160 children were separated from their schools; or the building of medical infrastructure such as the kidney dialysis facility in a hospital to make sure Palestinians were not separated from necessary medical facilities; or the fact that every Palestinian is entitled to compensation for the use of the land and loss of profits from the land, including rights of objection and appeal, and direct access, to Israel's Supreme Court.

The speaker noted that while in theory the ICJ might have addressed these points and still arrived at a similar opinion, it was wrong to arrive at any opinion without taking note of these facts in the first place.

Israel's absence from the substantive proceedings

The speaker addressed the question whether Israel was under a duty to provide the facts to the Court. The speaker noted that under its advisory jurisdiction it was the Court's responsibility to decide whether it had the facts at its disposal necessary for fulfilling its role. Furthermore, with regard to participation in the substantive phase of the hearing, there was concern in Israel based on some of the preliminary decisions of the Court, that to continue to participate would be to lend legitimacy to inappropriate proceedings. Accordingly, Israel made the decision not to boycott the proceedings, but simply to submit a written submission that explained why Israel felt it would not be appropriate for the Court to hear the case. This accorded with the views of the majority of States (including the Quartet states) which made submissions to the Court, that this was not an appropriate case for the Court to hear, and thus preferable not to do so.

The Court's failure to address the issue of proportionality

In the speaker's view, the main problem with the Court's Opinion was its failure to recognise that a balance must be struck between issues of security on the one hand, and issues of humanitarian concern and the rights of the local population on the other. Thus, the real question that had to be addressed was that of "proportionality". In other words, what is an appropriate response to a security threat? Indeed, the speaker suggested that the question was not really between 'security' and 'human rights': it was between the 'human rights' of one group of people to be able to get on a bus without being blown up, against the 'human rights' of another group to be able to live their life unimpeded by security restrictions.

The UK's submission to the ICJ had urged the Court not to hear this case and to consider what they would have to take account of in order to decide the case properly: including the nature and severity of the threat of terrorism (requiring an analysis of the attacks on Israeli targets in recent years), and the likely impact of the Wall both on such terrorist attacks as well as on the Palestinian population in general.

The speaker noted that the Israeli Supreme Court acting as the High Court of Justice is the only court which has ever tried to address those issues. The Court had not hesitated in the past to send the security services back to the drawing board ordering a change to their *modus operandi.* The Court has heard dozens of petitions by Palestinians in relation to specific aspects and stretches of the fence, and has in each case had to weigh in that particular area security threats and the impact on humanitarian rights and the local population. In the most significant of those decisions to date, the Court dealt with a 40km stretch of the Security Fence north of Jerusalem. The Court engaged in a detailed proportionality test and told the security establishment that while they recognised the fence to be a security measure, as opposed to a political measure, the balance between security and humanitarian issues had not been struck correctly. Thus, the speaker noted, in some 30km out of the 40 km, the Israeli Court required the fence to be moved, something which Israel has already done, and the Court required Israel to reconsider the route over the rest of the Security Fence – a process currently being engaged with.

Discussion

In discussion, a speaker asserted that the Jewish settlements were illegal, and that the Wall was an attempt to protect the illegal settlements. As such, it amounted to colonization, annexation and an attempt to transfer people. The speaker further stated that the Wall had already resulted in some Palestinians having begun to leave certain areas, and that measures such as the provision of "24 agricultural gates" were insulting and hardly sufficient as humanitarian measures. In response, it was countered that Israel never had an intention to annexe land through construction of the Security Fence, and had gone to great lengths to emphasise that the Security Fence was a temporary measure and that it would be re-routed or taken down in accordance with any negotiated final status settlement. The only reason for building the Security Fence was that it worked. In response to the above, one speaker asked how long the Palestinians were supposed to wait before the occupation ended. Another speaker added that this was compounded by the fear that because any time line for negotiations is open-ended, Israel's actions in the meantime may affect the outcome of any negotiations. Further, the Green Line was an armistice line which indicated the maximum extent of Israel's territory. There was a principle prohibiting the acquisition of territory through the use of force. Acquiring territory by building settlements in occupied territory was a breach of that rule.

A speaker questioned whether Israel's intention to keep some of the settlements in the West Bank as part of the unilateral disengagement from Gaza amounted to annexation. With regard to annexation, the point was also made that we are looking at the deprivation of property under very specific rules of international humanitarian law and that there was a very good argument regarding "creeping expropriation" in the Jordanian submisssions, where though a person retains formal title to property their right to use it has been so undermined that their actual ownership has been denuded.

Another speaker argued that there was a danger that the *AO* was an attempt to re-write Security Council resolution 242 (1967) which left the question of borders to be settled through negotiations. In response, it was noted that there was a genuine concern that the real aim behind the *AO* proceedings was to re-write the rules of any permanent status negotiations, and to nudge international opinion in favour of the Palestinian position. This was regrettable to the extent it undermined the Quartet-sponsored Road Map which was the only agreed framework for moving forward.

Another speaker suggested that since Israel has always been the more powerful party in negotiations with the Palestinians, perhaps the Court in clarifying Palestinian rights had provided the Palestinians with some additional bargaining chips. Furthermore, to make any charge against the Court of involving itself in a political question was besides the point, since it would also have been accused of making a political decision even if it declined to proceed with the hearing. Another speaker regretted that speakers supporting the position of Israel had not addressed the substance of the Court's ruling; it was interesting that they had not in fact criticised the main priniples of the advisory opinion.