Contentious Matters and the Advisory Power: The ICJ and Israel's Wall

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The International Court of Justice ("ICJ"), the judicial arm of the United Nations, recently issued an advisory opinion concerning the legal consequences of Israel’s construction of a wall separating it from the Occupied Palestinian Territory.¹ Although issued under the auspices of advisory power, this case concerned the interests of two entities: the state-like Palestinian Authority and the state of Israel. The subject matter was contentious, with the entities engaged in a politically charged border dispute. In a traditional contentious matter, the ICJ may only adjudicate cases between consenting states. However, a truly contentious proceeding was not possible in this case. Palestine was and remains incapable of consenting to contentious jurisdiction because it is not a member of the UN, and Israel has steadfastly refused to offer its consent.

In choosing to resolve the legal questions submitted by the General Assembly, the ICJ has created two distinct problems. First, the legal ramifications of issuing an advisory opinion in a contentious matter establish opportunities for future entities, through the use of the General Assembly, to achieve favorable judgments ex parte. Second, because Palestine may not actually appear in a contentious proceeding, the Court’s opinion here can only be understood as a political statement. Each problem raises issues of the relevancy and the continued vitality of the Court, and each may give significant pause to those states who continue to consent to the ICJ’s jurisdiction.

I. BACKGROUND TO THE ISRAELI WALL OPINION

Palestine and the General Assembly sought this advisory opinion following a failed Palestinian attempt to achieve a resolution from the Security Council. The draft of the October 2003 resolution would have “condemned as illegal the

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² Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ (July 9, 2004), available online at <www.icj-cij.org> (visited Mar 14, 2005).
construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. Instead, by virtue of its “special status of observer,” granted by the General Assembly, Palestine had more success in co-sponsoring a resolution requesting the ICJ to issue an advisory opinion on the matter.

Unlike Article III courts in the United States, the ICJ has competence and jurisdiction to render advisory opinions on “legal questions” submitted by any authorized body. By statute, such bodies include the General Assembly, the Security Council, and other organizations the General Assembly so chooses. Parties appearing before the Court in advisory cases need not be Members of the UN nor even states at all. The practice of issuing advisory opinions began in the Permanent Court of International Justice (“PCIJ”), predecessor to the ICJ and created along with the League of Nations. After some debate, UN founders granted advisory power to the ICJ under essentially the same terms as that of PCIJ.

II. THE LEGAL ARGUMENT

A. CONTENTIOUS NATURE OF ENTITIES INVOLVED

In the procedural sense, the Court was certainly correct that this was not a contentious case. In fact, the same issue could not have been presented in a contentious case before the Court for two reasons. First, Palestine is not a member of the United Nations, a qualifier necessary to appear as a party in a contentious case before the ICJ. Second, Israel has steadfastly asserted it would not submit to jurisdiction before the Court for issues related to the occupation of Palestine.

Beyond these technical distinctions, however, the case bore many similarities to a contentious matter. Although many parties presented before the Court, this matter involved essentially two entities, engaged in a border dispute.

2 Id at ¶ 20.
3 Id at ¶ 4.
7 Advisory Opinion, Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ at ¶ 12 (cited in note 1).
Border disputes in particular are a common source of contentious cases before international courts. Against this backdrop, the ICJ decided a matter which looks thoroughly like a contentious case under the auspices of advisory power.

By rejecting American and Israeli challenges over the undeveloped fact pattern, the Court implicitly reasoned that this case was not abstract, but rather quite specific. Indeed, the case involved two adverse parties at a specific moment over specific behavior, namely the building of a wall claimed by one to be illegal. The US argued in its brief that the Court was adjudicating precisely a contentious matter, claiming, “... it would be incompatible with the purpose of the advisory opinion procedure for it to be used for dispute-resolution between non-consenting parties, or in a way that effectively determines the substantive


9 See Advisory Opinion, Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ at ¶ 57 (cited in note 1).

The traditional arguments against advisory opinion authority often focus upon the lack of contention between those petitioning the court. As a consequence, courts in advisory posture would lack the necessary fact development to render a meaningful opinion. Felix Frankfurter argued that “... advisory opinions are bound to move in an unreal atmosphere” and that they are “rendered upon sterilized and mutilated issues.” Felix Frankfurter, A Note on Advisory Opinions, 37 Harv L Rev 1002, 1006 (1923–1924). To Frankfurter, the best means of ensuring adequate factual development was to require two adverse parties in a contest. The US Supreme Court has itself refused advisory power, adhering to the practice of “never... anticipat[ing] a question of constitutional law in advance of the necessity of deciding it” and “never... formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement, 93 Harv L Rev 297, 302–03 (1979), quoting Liverpool, NY & Philadelphia SS Co v Commrs of Emigration, 113 US 33, 39 (1885).

In the ICJ opinion, both the United States and Israel proffered arguments similar to those of Frankfurter. Indeed, for both Israel and the US, these were the only issues briefed for the Court. Neither the US nor Israel chose to address the merits in their briefs to the Court. See Advisory Opinion, Construction of a Wall in the Occupied Palestinian Territory 2004 ICJ at ¶¶ 55, 57 (cited in note 1); Sean D. Murphy, ICJ Advisory Opinion on Israeli Security Fence in Sean D. Murphy, ed, Contemporary Practice of the United States Relating to International Law, 98 Am J Intl L 361, 363 (2004). Since Israel declined to present an argument before the court and did not reach the merits in its brief, it was effectively absent from the case. The US argued such absence prevented the Court from adequately developing the fact record, and may otherwise deprive the Court of “necessary information.” Id. Israel asserted that without its participation, the factual basis for the Court's decision would be incomplete. Advisory Opinion, Construction of a Wall in the Occupied Palestinian Territory 2004 ICJ at ¶ 55 (cited in note 1). The Court was not persuaded, however, asserting that such objections only apply to contentious cases.


9 See Advisory Opinion, Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ at ¶ 57 (cited in note 1).
outcome of a particular legal dispute between parties.”¹⁰ By asserting its authority to sufficiently establish the facts, the Court transformed the controversy from abstract to discrete.

Palestine appeared before the Court in a fashion akin to that of an adverse litigant. The General Assembly has granted Palestine “special status of observer” since 1977, and it was co-sponsor of the resolution submitting the question for advisory opinion.¹¹ As such, the ICJ permitted Palestine to submit a written statement (brief) and present six representatives for oral argument, the most of any participant.¹²

The Court strongly dismissed suggestions that this case was really contentious. Beyond the procedural posture, the Court argued that the security of Palestine and Israel’s construction of the wall were matters of concern for the entire UN.¹³ Citing a “permanent responsibility” to Palestine by virtue of the institutional framework which permits its “special status of observer,” the ICJ asserted this was an appropriate use of an advisory opinion.¹⁴

Similarly, the Court did not concern itself with the absence of Israel from the proceeding. Again, because this was an advisory opinion, the Court did not find it necessary for Israel to participate, despite objections to the contrary.¹⁵ Critics argued that because this case looked so contentious, the Court’s decision to proceed without the participation of Israel “brushed aside weighty questions about [the Court’s] own jurisdiction.”¹⁶ This, coupled with the fact that Palestine is not a Member of the General Assembly, and could not appear before the court in a contentious matter, casts potential doubt as to the Court’s wisdom in issuing the decision.¹⁷

¹⁰ Murphy, 98 Am J Intl L at 363 (cited in note 9) (this was, of course, an alternative argument to that proffered earlier that the Court could not effectively adjudicate this matter because the fact pattern remained incomplete by virtue of Israel’s conspicuous absence from participating).
¹¹ Advisory Opinion, Construction of a Wall in the Occupied Palestinian Territory 2004 ICJ at ¶ 4 (cited in note 1).
¹² Id at ¶¶ 9, 12. Israel and the US did not participate in oral argument.
¹³ Id at ¶ 49.
¹⁴ Id.
¹⁵ Id at ¶¶ 46–47.
¹⁶ Andrew C. McCarthy, The End of the Right of Self-Defense? Israel, the World Court, and the War on Terror, Commentary 17 (Nov 2004).
¹⁷ Id.
B. THE EASTERN CARELIA PRECEDENT AND ADVISORY POWER IN THE WORLD COURTS

Traditionally, world courts have been reluctant to issue advisory opinions in cases that otherwise appear contentious. The PCIJ established this important precedent in the often-cited Eastern Carelia matter. The case involved a dispute solely between Russia and Finland. Operating under rules of jurisdiction similar to those of the ICJ, the PCIJ held that because the League of Nations had not obtained consent to jurisdiction from the USSR, rendering an advisory opinion would effectively impose jurisdiction upon a non-consenting party. The PCIJ refused to reach the merits, stating “the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties.”

Members of the Informal Inter-Allied Committee of 1944 (a formative body for the UN), debating the scope of ICJ authority, recognized the wisdom of the Eastern Carelia principle. The Committee reasoned that a State should not be permitted to request advisory opinions, explaining:

> [G]iven the authoritative nature of the Court’s pronouncements, *ex parte* applications would afford a means whereby the State concerned could indirectly impose a species of compulsory jurisdiction on the rest of the world. In addition, the Court must have an agreed basis of fact on which to give its opinion.

While the precise concern was that of individual states seeking advisory opinions, the general fear of the Court using advisory power to circumvent traditional contentious proceedings and render *ex parte* decisions remains apt. This is particularly important considering the precedential value of advisory opinions. Although there is no *res judicata* effect to an advisory opinion, it remains an “authoritative statement of the law.” Hence an advisory opinion carries precedential value comparable to that of a judgment.

In the past, the ICJ had been reluctant to issue any opinion in which an absent party’s legal interests form the subject matter of a dispute. Yet the ICJ

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18 Von Glahn, *Public International Law* at 530 (cited in note 8).
20 See Rosenne, *Law and Practice of the International Court* at 286 (cited in note 5).
21 Id (quoting Informal Inter-Allied Committee of 1944).
22 Penegar, 113 U Pa L Rev at 556 (cited in note 4).
23 Rosenne, *Law and Practice of the International Court* at 310 (cited in note 5); see also Mohamed Shahabuddeen, *Precedent in the World Court* 168 (Cambridge 1996).
may have begun to move away from the Eastern Carelia rule. In the Court’s pivotal advisory opinion, Legality of the Threat or Use of Nuclear Weapons (in which the court declared Iran’s threat to use nuclear weapons to be illegal under any circumstances), the Court assumed a position of fact finder in a manner that arguably had not been seen in the advisory context. Following this decision, the Court may choose to play an active role in developing factual records, and issue advisory opinions in cases lacking affected parties. Indeed, those who advocated use of the advisory power regarding the Israeli wall issue pointed to the Iran decision as an authority. Coupling the Iran and the Israeli wall decisions, the Court seems to have eroded the per se rule against issuing advisory opinions in de facto contentious matters.

C. THIS OPINION IS UNENFORCEABLE

Despite its willingness to “adjudicate” the legality of Israel’s wall, the ICJ will likely encounter difficulty enforcing this opinion. The Court incorporated strong language to mandate that “all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory . . . [and to] ensure compliance by Israel with international humanitarian law . . . ” Effective enforcement, however, depends upon the voluntary compliance of willing states. Despite the strong language from the Court, only through volitional action will the UN or individual states implement any of its commands.

This is troublesome because Israel and the US have publicly vowed not to comply with or recognize the ruling. Israel did not even admit to jurisdiction for this issue. Consequently, Israeli Prime Minister Ariel Sharon was swift to

27 Advisory Opinion, Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ at ¶ 159 (cited in note 1).
28 Alan Isenberg, A Ruling that Will Undermine International Law, Fin Times (London) 13 (July 22, 2004).
29 As a legal matter, the court may not bind any party which is not before the court. Indeed the Court’s own statute, at Article 59, expressly prohibits legal obligations derived from an advisory opinion. Perez, 18 Mich J Intl L at 418 (cited in note 24).
30 McCoubrey, Address at the United Nations (cited in note 26).
denounce the Court's command. Sharon stated unequivocally that he "totally rejects" the non-binding opinion. Similarly, the United States indicated it would not abide by the ruling, maintaining its assertion that the ICJ lacked jurisdiction, and that the Court "was not the appropriate forum to resolve this conflict."

Consequently, Palestine retains few options for possible enforcement of the judgment, none of which seem plausible. First, the General Assembly may adopt the Court's language in a resolution, which it did one week following the release of the advisory opinion. The General Assembly, however, lacks the authority to do more than call upon Israel to abide by the ruling and remove the wall. Second, Palestine could press the UN Security Council to impose sanctions or even military action based upon the ruling. Given the strong opposition to the ruling by the US, and its veto power within the Council, this option seems highly unlikely to succeed. No doubt the Court was aware of these shortcomings when it issued the advisory opinion. Yet the decision to proceed despite questions of its authoritative power reveals underlying uncertainty as to the long-term relevancy of the Court.

D. THIS OPINION LACKS A LEGAL PURPOSE

The threatened viability of this precedent recalls a general critique of advisory opinions. The Court should not be permitted to bind the hands of future courts through premature advisory opinions. Advisory opinions permit judges to proclaim law by giving precedential value to controversies not present before the Court. This is a feature unique to judicial systems, for legislatures may always repeal laws they find unworkable in the future. In this case, the precedent upon the merits will likely never come before the Court, for Palestine and Israel are highly unlikely to appear as parties in a contentious matter. The general practice sanctioned here, however, of issuing opinions with strong

31 Joel Greenberg, Sharon Defies World Court; Blames Barrier Ruling for Fatal Tel Aviv Attack, Chi Trib 4 (July 12, 2004).
32 Chris McGreal, Sacred Right to Fight Terror Overrides Court, Says Sharon, Guardian 11 (July 12, 2004).
34 Isenberg, A Ruling that Will Undermine International Law, Fin Times (London) at 13 (cited in note 28).
36 Id.
37 Brilmayer, 93 Harv L Rev at 304 (cited in note 9).
38 Of course, courts may overrule arcane precedent. However, courts traditionally give considerable deference to their own precedent, and may feel compelled or persuaded to follow it. Conversely, legislatures may repeal old laws without preconceived thresholds or notions of countervailing evidence necessary for reversal.
precedential value, may constrain future courts faced with contentious cases involving similar issues.  

Ambiguity over whether a similar case is advisory or contentious would create a myriad of problems for future courts trying to apply its precedent. The Court would have two options in applying such precedent to a contentious matter, neither of which is desirable. It would have to determine whether the case is truly advisory or contentious. Rules opined under advisory power are generally regarded as binding or heavily persuasive authority in future advisory opinions. Such rules, however, are not binding in traditional contentious cases. If the Court holds that the case is advisory, it may decline to apply its rule in a future contentious case, rendering the initial ruling meaningless. On the other hand, if it holds that the opinion was in fact contentious, or otherwise finds it authoritative, the ICJ will have created an opportunity for States to procure binding judgments ex parte. Such a rule would expressly contravene the intentions of the Informal Inter-Allied Committee when it granted the Court advisory power.

The Court rebuked this challenge in the opinion, asserting that it did not regard a challenge that its opinion would have no useful purpose to be dispositive. Instead, the Court asserted it will not decide how its opinion will be used. In doing so, however, the Court cannot be understood to claim it is not concerned about how it will use its own advisory opinion. Nevertheless, because the ICJ did not specifically address how it would regard its own precedent with regard to the authority created here, such issue would remain for a future court.

III. THE POLITICAL OR PRUDENTIAL ARGUMENT

A. THE IMPOSSIBILITY OF A PROCEDURALLY CONTENTIOUS CASE CONCERNING ISRAEL’S WALL

However favorable the Court’s opinion may have been toward it, Palestine may not appear before the Court in any contentious matter. Palestine is not a member of the UN and may not seek redress of actual grievances in the ICJ.

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39 While an advisory decision is never binding upon the parties, the precedential authority of the legal conclusions remain accurate statements of international law, and do demand compliance by the requesting party at minimum. Shahabuddeen, Precedent in the World Court at 168 (cited in note 23).

40 Brilmayer, 93 Harv L Rev at 309 (cited in note 9).

41 Advisory Opinion, Construction of a Wall in the Occupied Palestinian Territory 2004 ICJ at ¶ 59, 61 (cited in note 1).

42 In this case, of course, it is likely this matter will never present itself before the court again, as Israel has contended it will not submit to ICJ jurisdiction over the matter.
Furthermore, Israel has emphatically asserted that it would not consent to jurisdiction over this matter with Palestine. Consequently, as a procedural matter, this case could not come before the Court despite the de facto contentious nature of the dispute.

While the court certainly had legal authority to accept the case and render an opinion, a prudential argument militates against issuing this opinion. Through the procedural mechanism of advisory power, the Court has ultimately issued an opinion with no legal consequence. Although this jurisdictional solution may have allowed Palestine to appear before the Court in a dispute it would not otherwise have standing to bring, it permitted the Court to enter a non-justiciable debate, issuing an opinion with no legal value.

B. THIS OPINION IS OF POLITICAL VALUE ONLY

The value of the Court’s opinion is ultimately political only. By definition, the advisory opinion is not binding upon the entities. As well, its precedential value on the merits is nullified by Palestine’s inability to bring this matter before the Court in a contentious case. The Court likely assumed this case as an opportunity to advance the debate on Israel’s construction of the wall. Nevertheless, the prudence of issuing political pronouncements under the guise of an advisory opinion remains debatable. While international courts are often involved in issues that lean closer to political than justiciable, this case presented purely political issues for the ICJ.

Consequently, in this context the Court more closely resembled a diplomatic agency instead of a judicial body. As such, the ICJ acts as a lobbying arm of the General Assembly, whose purpose is to pressure the Security Council and individual States to act in compliance with its “pronouncements” of international law. In such a role, the traditional distinctions between the judiciary and the legislature begin to break down. While certain parties—such as Palestine, who may not otherwise appear before the Court—may welcome this

43 Imseis, 44 Harv Intl J at 131 (cited in note 6).
44 Over time, the Court has trended toward using its advisory power to “stimulate reasoned debate” and advance the political dialogue on certain issues. As such, the Court may view its opinions as invitations to the political actors involved to revisit a certain debate, focusing the actors on international legal principles as announced by the Court. For an example involving sovereignty in East Timor, see Perez, 18 Mich J Intl L at 423 (cited in note 24).
46 Indeed, international judges are often forced into diplomatic roles when faced with politically charged issues. See id at 418.
alternative method of courting sympathetic opinions, their adversaries may begin to question the authority and relevance of the ICJ. Faced with a Court that injects international law into a politically charged debate in an ex parte manner, many states may question whether the ICJ is able to decide legal questions without political influence. Accordingly, states may question the wisdom of all ICJ decisions, re-evaluating their interest in consenting to the Court’s jurisdiction.

C. POSSIBLE COMPLIANCE AND VINDICATION

Perhaps the Court will ultimately be vindicated if substantive policy changes result. Following the initially unequivocal denouncement of the opinion by Ariel Sharon, Israel has softened its position on the wall. Indeed, Israeli Supreme Court President Barak has pressured Israel to address the advisory opinion on its merits. At a minimum, Barak will not permit the government to dismiss the opinion as predicated upon bias toward Palestine. And, if Israel re-examines its policy toward the wall, or modifies future behavior, the advisory opinion may well be heralded as a success.

IV. CONCLUSION

Unfortunately, such aspirations remain hopeful at best. The Court may not be able to rely on such cooperation in the future. Over the long run, the Court will likely face a similar contentious matter, brought to it under the auspices of an advisory opinion, and it will look to this example for guidance. If the Court begins a practice of issuing advisory opinions in similar matters, the important rule established in Eastern Carelia will be lost. In addition, the Court will transform itself into a quasi-political entity, lobbying for a particular course of action in matters the ICJ itself can not enforce. Once that transition is complete,
consenting nations—in particular those of the Security Council, for whom the Court directs this type of action—will re-examine their interest in ICJ jurisdiction. Should the relevancy of the Court begin to wane, the UN may lose the benefit of its independent judiciary.