

Israeli Wall on Trial

By Ian Williams | February 5, 2004

It is quite possible that Ariel Sharon's announcement about planning the removal of settlements from Gaza was wrenched from him by the U.S., in implicit or explicit trade for American support in the hearings at the International Court of Justice (ICJ) in The Hague on the legality of the Israeli Wall in the Occupied Territories. If so, it would be yet another vindication of the Palestinians' determination for the hearings to go ahead in the teeth of Israeli, American, and British disapproval.

The furious and confused reaction from Israel, and the outright illogicality of the American and British positions, suggests that the Palestinians are certainly pursuing the right course in getting the Court to advise on "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 Israelis maintain that the wall is legitimate for self-defense, even though some Israeli legal officers reportedly disagree. The rest of the world is fairly unanimous that it is clearly illegal. So, rationally, there should be no objection to this moot point being cleared up by the most authoritative body in the field of international law, the ICJ. However logic does not always win in international affairs.

In the written arguments submitted on 30 January, the U.S. and the UK and some other countries have backed Israel to the extent of saying that the Court should not take the case, even though for example, an official British Foreign Office statement also declared "Our concerns relate to the role of the court, not the legality of the route of the fence. It remains

our view that the building of the fence on Palestinian land is unlawful."

Israel has claimed many more supporters, but seems to be deluding itself. Israeli newspapers were reporting the EU, France, Russia, and even South Africa, a strong Palestinian supporter, as making submissions favorable to Israel's position. The submissions are supposed to be confidential, but diplomats from several of those countries were entirely dismissive of the Israeli claims, which they said would be rebutted in their oral pleas on February 23rd.

The process began last year, when, following an American veto, and a now wearisomely predictable British abstention, on a Security Council resolution condemning the Wall, the Arab group promptly referred it to a resumed session of the Emergency General Assembly of the United Nations. This procedure is based on the "Uniting For Peace" resolution from 1950, which the U.S. sponsored to by-pass what Tony Blair has recently, in a different context, called "unreasonable vetoes."

"Uniting For Peace," was intended to overcome Soviet vetoes, and called for the General Assembly to resolve an issue if the Security Council were deadlocked. However, since the Palestinians resurrected it a decade ago to deal with American vetoes in favor of Israel, the U.S. regards the procedure as non-binding.



For almost ten years now, the Palestinian delegation to the UN has fought a “revolutionary” road to liberation, in a way that annoys Israel, the U.S., and its friends considerably. The whole thrust of Israeli and U.S. diplomacy since Oslo has been to downplay Palestinian legal rights and to insist that negotiations between the two sides should resolve all contentious issues. Sadly, in the current balance of power, this is a little like trial by combat between a Sumo wrestler and a toddler.

The Palestinian response has ranged from calling a conference of parties to the Geneva Conventions, to restating explicitly all existing resolutions and decisions of international bodies on the case. In this case, they used the power that the General Assembly has under the UN Charter to refer issues to the ICJ for an advisory opinion.

The Israeli response has been consistently confused, but consistently indignant. It has always insisted that its actions are in accord with international law, but resists others’ interpretation of it. Despite a fairly constant stream of negative statement about the United Nations from Israel and its supporters, the state does in fact have an existential problem in undermining international law and the United Nations.

Unless they can call Jehovah into the witness box, Israeli statehood legally depends on a series of decisions made firstly by the League of Nations and culminating in the United Nations partition resolution of 1947. It could claim the right of conquest, but that leaves little moral or legal standing to resist any Arab attempt at reconquest!

The ICJ Case

So the Israeli response to the court case has been bifurcated. On the one hand, the Israeli legal team itself is led by Professor Daniel Bethlehem of Cambridge University in the UK, and has already entered written pleas. It will almost certainly address the Court in the open session on February 23rd.

Bethlehem is a smart lawyer. He persuaded the Israeli government to withdraw cooperation from Kofi Annan’s Inquiry into Jenin, since he pointed out that the IDF was indeed violating international law, and the Inquiry would show that. So the government followed his tactical advice, which was to delegitimize the proceedings in advance, and to make sure that Israel’s version was out first. He was successful in his enterprise and will try to do the same again.

His advice is that Israel should argue against the jurisdiction of the Court, and then as backup, to plead security needs, addressing itself to public opinion as much as the Court. In the U.S., especially, the Israeli tactic is delegitimize the Court. The campaign of denigration has been led by Alan Dershowitz, who has been feverishly conflating the court with the General Assembly, and who has referred to it as a kangaroo court. However his attachment to international and domestic law is such that he has favorably considered torture for suspected terrorists, and random destruction of Palestinian villages in retaliation for suicide bombing attacks, so Israel has quite wisely not made him its advocate before the Tribunal. Almost certainly as part of the same campaign, Dan Gillerman, the Israeli ambassador to the UN, held a press conference on the very day that submissions closed to attack the organization, and Kofi Annan for its anti-Israeli bias and allegedly tepid response to terrorism.

In any case, while Dershowitz and Gillerman bluster, the Israeli government has already asked the White House either to launder the State Department’s Annual Human Rights Report to delete unfavorable references to the Wall and its consequences, or at the very least to delay it until after the ICJ delivers its findings.

The Israeli government is also racing through a hearing on the Wall in the Israeli Supreme Court, which has occasionally shown small signs of independence, in order to get a judgment they can wave about before the ICJ, but reportedly the Attorney General is worried that he may not have a convincing

enough case even for the relatively tame domestic court.

The Wall and the Green Line

There is more than just a worry about political embarrassment at home and abroad for Sharon. It will be difficult for the Court to consider the Wall without considering the status of the Occupied Territories. And to do that, it may have to rule on the status of the “Green line,” the armistice line from 1948 to 1967. Israel has benefited for years from creative ambiguity about the status of its territory and boundaries. Anything that definitely clarifies them, as an ICJ judgment almost certainly will, is guaranteed to leave them in worse legal position.

Increasingly the EU and the U.S. have regarded the Green Line as the legal frontier, as did the Israelis before they occupied the West Bank. But since then the Israelis have denied its significance, saying the frontier has to be settled in negotiations.

In fact, the only internationally accepted boundary is the partition boundaries of 1947. This may seem a far-fetched legal fiction, but in fact, except for a few heavily bribed exceptions most nations have not placed their embassies to Israel in Jerusalem precisely because under resolution 181 that partitioned mandatory Palestine, the city is a “corpus separatum,” under United Nations control and not accepted as Israeli territory.

While the Israeli and U.S. spin doctors have been trying to persuade much of the world’s media that an ICJ advisory opinion is not “binding,” that is not the view of most legal experts internationally. The Court cannot enforce its judgments, but its findings are an irrefutably authoritative statement of international law. It is ICJ judgments that paved the way for detaching Namibia from Apartheid South Africa, and which have been the last bastion against Moroccan annexation of Western Sahara.

When the Court’s decision is reported back to the UN, it will almost certainly be the subject of a

Security Council Resolution on implementing its findings. The U.S. can be guaranteed to veto that. However, if the U.S., which is preaching international legality to the rest of the world, were to veto the most authoritative statement of international law, it will want serious concessions from Israel. And of course, the vetoed resolution will then go right back to another Special General Assembly. It was tactics like this that brought about sanctions against Apartheid South Africa—which it is worth remembering also had British and American support against the rest of the world.

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p. 4

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