
PART I: JURISDICTION

The International Court of Justice (ICJ) has opened hearings on the legality of the wall being constructed by Israel on Palestinian territory. The ICJ meets at the request of the United Nations General Assembly for an advisory opinion on “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 …” The Court has received to date 48 responses from governments including Israel, the United States, the Russian Federation, the major European and Arab states, Japan, and even Cuba, although not China. After much internal debate, Israel submitted a written statement objecting to the Court’s jurisdiction but explicitly refusing to address the merits of the case. The United States also objected to the Court’s jurisdiction. But William H. Taft IV, Legal adviser to the State Department, never mentions in his statement whether or not the United States will participate in hearings on the merits of the case in the event that the Court decides to hold hearings on the merits. Apparently the United States has decided to keep its options open.

The first question we should ask is the most obvious, namely, how can the United States and Israel object to the ICJ’s consideration of whether to issue an advisory opinion? Such an opinion has no binding effect. It is simply a request made by the General Assembly for help on the complex legal issues involved in Israel’s construction of a wall which, at present, is approximately 120 miles in length. To be sure, the General Assembly’s motives are hardly neutral; it is visibly upset by Israel’s acts and wants an authoritative statement as to their legality. However, everyone knows that the General Assembly and the Security Council are political bodies. That political considerations would motivate their resolutions is neither shocking nor legally disabling.

Although the United States couches its arguments in polite terms, various relatively unsubtle threats are included. It cautions the ICJ not to upset the ongoing politically sensitive and delicate negotiation process (the “Road Map”). The Court is urged especially to stay away from “permanent status issues” (translation: who owns what territory?) because addressing them would place “substantial, new constraints” on the ability of Israel and Palestine to negotiate with one another. Indeed, the United States goes on, if the Court deals with territorial issues, the Court itself would be creating “new obstacles to peace-making efforts.” And if the Court does not heed the United States’ advice on these matters, it “could further reduce the prospects for ending violence.” Is the United States actually threatening to hold the judges of the ICJ morally responsible for lives that may be lost to suicide bombers if the Court dares to issue an advisory opinion that interferes with the negotiation process? If so, is this any different from the general position of the Bush Administration on matters of international law—an attitude most recently exemplified by its attempt to deny the prisoners in Guantanamo their right to legal counsel and their right of habeas corpus, and in the Administration’s unrelenting
campaign to eviscerate the jurisdiction of the newly established International Criminal Court?

I think the United States is correct in saying that an advisory opinion by the ICJ on the explosive issue of the legal consequences of the wall being erected by Israel will have a noticeable impact upon the negotiation process. After all, the substance of much of the negotiations is devoted to lawyers’ arguments about the rights of the parties under international law. An opinion by the ICJ on this legal issue will obviously improve the negotiating position of one of the parties and diminish the negotiating position of the other party. A legal opinion cannot help but impact the negotiation process. How much weight the opinion carries will depend on its own legal persuasiveness. If both sides fervently believe that their own legal position is correct, they should expect that the ICJ will vindicate their stance. To withdraw from arguing the case (as Israel has) implies that it believes its own legal position may be weak.

The United States makes a somewhat better argument that territorial issues concern only Israel and Palestine and that the ICJ should not use the apparatus of an advisory opinion to render what could be taken as a definitive legal decision on the demarcation of the border between Israel and Palestine. However, this argument assumes that the General Assembly itself has no stake in this bilateral controversy. In my view, the controversy does not solely concern Israel and Palestine. Palestine, it will be recalled, was a Mandate under the League of Nations. Unlike the League’s other mandated territories, it was not transferred to the UN Trusteeship Council when the League dissolved in 1946. But the lack of transfer does not mean that the mandate expired, any more than the death of a trustee would terminate a trust. The “administration” of the Palestine Mandate legally devolved upon the General Assembly. In 1947, the General Assembly passed a resolution partitioning the Mandate into two areas, one to be governed by a new Jewish state and the other to be governed by a new Arab state. Although Israel became a state in 1948, Palestine did not become a state. In my reading of this (admittedly complex) history, the Palestine Mandate has therefore never legally been terminated. Until it is terminated—that is, until a new Arab state is created—the General Assembly retains its supervisory powers over the Palestine territory. While the extent of that supervisory power is disputable given all the events that have occurred since 1947, at the very minimum it entitles the General Assembly to retain a legal interest in the proper disposition of the mandated territory. Hence its request for an advisory opinion in this case—unlike the various precedents cited by the United States on the issue of refraining from dealing with territorial questions in advisory opinions—stems from a present legal interest actually residing in the General Assembly.

This legal interest—expressed in the question the General Assembly asked regarding the “legal consequences arising from the construction of the wall”—necessarily includes the issue of who owns the land upon which the wall is being constructed. It’s hard to see how the question put to the Court could be answered if it took seriously the United States’ argument that it should stay away from the territorial issue.
Israel’s Legal Adviser, Alan Baker, submitted a written statement to the ICJ that is almost four times as long as the statement of the United States. Baker also argues that the advisory opinion would interfere with the Road Map process. However, in addition he attacks the legal right of the General Assembly to request the advisory opinion, contending that the Security Council is seised of the matter and therefore the General Assembly has no right to encroach upon the powers of the Security Council. Although the argument is well-researched, it is hard to see how it could have any persuasive power when it is raised by Israel. If the Security Council raised the matter and asked the ICJ for a ruling that the General Assembly has no power to ask for an advisory opinion on the Palestine issue, that would raise interesting constitutional issues of the proper interpretation of the Charter of the United Nations. But in the absence of a complaint by the Security Council, I do not see how Israel has standing to raise such an objection.

Israel makes some terminological objections which I think are well-taken. It argues that the term “wall” is prejudicial since it connotes a kind of imprisonment of the Palestinian people. However, Israel’s own term “security fence” would also have prejudicial connotations. Even if Israel argues that the wall was erected solely for security reasons, the Palestinians argue that it is a land-grab scheme. Perhaps the Secretary-General’s term for the wall in a short statement filed with the Court—“the Barrier” should have been used by the General Assembly in framing its question.

Israel also objects to the terms “occupying Power” and “Occupied Palestinian Territory” in the General Assembly’s question to the Court. The territorial issue seems to be subsumed within the term “occupied,” for if Israel is occupying the land upon which the Barrier is being erected, then ownership of that land belongs to Palestine. I am a great believer in the power of words. Israel ought to participate in the merits of the case and rise to object every time the words “wall” or “occupied” are uttered during the course of oral argument. (Because the concepts represented by these words need to be articulated, Israeli counsel could insist that the phrases should be “the alleged wall” and “the alleged Occupied Territory.”)

Instead Israel has submitted its statement objecting to jurisdiction and promptly walked away. Perhaps it refused to participate out of fear that participation in the ICJ’s hearings would lend legitimacy to them. Two decades ago the United States refused to participate in the case of Nicaragua v. United States; the result was a resounding defeat. The defeat was not due to the American boycott of the proceedings, but active argument by the United States could have changed the result and at least would have produced a written opinion that was more sensitive to the American position. Yet the United States refused to participate in the Nicaragua case out of fear of lending legitimacy to the ICJ.

PART II: THE MERITS

In Part I of this essay, I looked at the question of whether the International Court of Justice has jurisdiction over the “legal consequences of the construction of a wall in the Occupied Palestinian Territory.” At the time of this writing, all the governmental submissions have been made and the Court is deliberating the case.
Since the Court is asked to render an advisory opinion, it is difficult to see how it could not have jurisdiction. Nevertheless, the parties asserting a lack of jurisdiction rely primarily on the contention that the question is so thoroughly political that it cannot be resolved by a court. Justice Frankfurter once referred to the “political thicket” involved in gerrymandering cases as a decisive reason for the Supreme Court to decline jurisdiction. For many years the Supreme Court stayed away from such cases. Nevertheless, when the Justices finally decided that abstaining was counterproductive, their foray into the political thicket was carefully circumscribed. The Court simply and wisely, decided only one question among all the intertwined political issues, namely, whether deliberate political redistricting that deprives citizens of “one man, one vote” is constitutionally permissible. Its answer was “No.”

The ICJ faces a similar political thicket in its consideration of the legal consequences of the construction of the West Bank wall. The 49 written statements and the 15 oral arguments presented by various governments and to the Court are themselves compromises between governmental lawyers and officials with the latter having final authority. Indeed, the arguments are so firmly grounded in political considerations as to invite a political decision by the Court. If such a decision is forthcoming, it will contribute nothing toward a solution of the Palestine problem. A judicial decision based upon governmentally proffered arguments will probably be rejected by the international legal community on the grounds of ambiguity and internal incoherence.

If the Court in its deliberations were to consider only the legal issues and eschew all political posturing, it should discard at the outset the terms “occupied Palestinian territory,” “war,” and “territorial acquisition by conquest.” Not only do these terms beg the ultimate question of whether the line created by the wall is an illegal demarcation, but the legal meanings of the terms grow out of a long history of international conflicts that are legally irrelevant to the Palestinian situation. Take the term “occupying power.” This term did apply to Israel’s occupation of southern Lebanon up to the time of Israel’s withdrawal in 2000. But it does not apply to Israeli presence in the West Bank and Gaza Strip because Palestine is a mandated territory in which both Arabs and Jews have rights until the Mandate is terminated. For the same reason, there has been no “war” between Israel and Palestine. The wars that did occur since 1948, and which are argued at length in the written statements before the ICJ, were international wars involving states such as Syria, Egypt, Jordan, and Israel that were fought in large part on Palestinian territory. But there was no war with Palestine itself because Palestine was not a state.

The reader will have noted that I used the term “mandated territory” in the preceding paragraph without justifying it. Indeed, to me the present existence of the Palestinian mandate is so clear that it stands out as perhaps the only legal constant in the entire complex galaxy of the Arab-Israeli dispute. Many people miss its significance because they are unaware of the concept of a trust, which was invented by the equity courts in early English history. A “mandate,” as the League of Nations meant it to be, was precisely an international trust. It is not a term familiar to lawyers from civil law societies.
The area known as Palestine was part of the Ottoman Empire. In the aftermath of the Peace Treaty of Versailles ending World War I, the Palestine area was given over to Great Britain to administer as a Class A Mandate. The Preamble to the Mandate provided for “the establishment in Palestine of a national home for the Jewish people.” This national home was to be without “prejudice the civil and religious rights of existing non-Jewish communities in Palestine.” This farsighted provision meant that Jews from all over Europe could move to Palestine and settle there, subject of course to their purchase of the land upon which they would build their new homes. If they could not afford to buy land, they could apply for land to be allotted from public lands and waste lands not required for public purposes.

The Mandate instrument, just quoted, stems from the Class A mandate provision of Article 22 of the Covenant of the League of Nations, which requires the Mandatory (Great Britain in this case) to give “administrative advice and assistance . . . until such time as they [the inhabitants of the territory] are able to stand alone.” The Palestine Mandate continued without legal change through the end of the second World War.

In 1945, when the United Nations Charter was adopted, its Trusteeship Council was unable to negotiate a new trusteeship agreement with Great Britain over the Palestine mandate. Thus, in 1946 when the League of Nations was formally dissolved, the old Palestine Mandate devolved upon the United Nations General Assembly. Just as an ordinary trust survives the death or abandonment of a trustee, the Mandate continued its legal existence. The only way that the Palestine Mandate could be terminated would be for its population to be adjudged by the International Court of Justice to be able to “stand alone” within the meaning of Article 22 of the Covenant of the League of Nations.

But the ICJ has never made such a ruling, and under the facts, it could not have done so. The inhabitants of Palestine were sharply divided along religious lines. In consequences, the Mandate still exists and continues to exert its legal power over the territory of Palestine—a territory that of course includes the State of Israel, the West Bank, and the Gaza Strip.

Many people who are unfamiliar with the trust concept think that the Palestine Mandate, if it hadn’t ended with the dissolution of the League of Nations, surely ended when Great Britain in February 1947 withdrew its administration of the Mandate and referred the entire question to the United Nations. But a trust (or mandate) is a very special situation in the law: it continues its existence as a legal entity even if the grantor of the trust and the trustee and the beneficiaries are all dead. Let us take each of these three actors in turn.

(1) The grantor sets up the trust; from then on, his presence is irrelevant to the administration of the trust (unless the trust instrument itself provides to the contrary). In the case of Palestine, the grantor was the Ottoman Empire that relinquished its sovereignty over the Palestine area in the Versailles Peace Treaty. It agreed to transfer this sovereignty to the League of Nations which thereupon resided the sovereignty in a Mandate for Palestine.
(2) There are many cases in which trustees voluntarily or involuntarily relinquish administration of a trust; when that happens, the court having jurisdiction over the trust simply appoints a new trustee. When Great Britain withdrew from the Mandate in 1947 (to be effective in 1949), the Mandate simply devolved as a matter of law upon the United Nations and its two relevant specialized organs, namely, the General Assembly and the International Court of Justice. No new Mandatory was ever appointed.

(3) The death of beneficiaries does not terminate a trust; the trust property either passes to the heirs or devisees of the beneficiaries, or in the case of some trusts (for example, a trust establishing a public park for the use and enjoyment of the people of a community) continues indefinitely.

A reader might concede the foregoing and yet argue that the Palestine Mandate came to an end when the United Nations General Assembly passed the Partition Resolution of November 29, 1947. This resolution, if implemented, would have amounted to a legal resolution of the “stand alone” requirement of the Covenant of the League of Nations. It divided Palestine into a Jewish State and an Arab State, and provided that Jerusalem become an international city. It also set out exact boundaries for each of these three major allocations. This was enough, in principle, to assure that all the inhabitants, as citizens of their respective states, could “stand alone” within the meaning of Article 22.

However, as everyone knows, the resolution was only one-third implemented: only the State of Israel was established in 1948. The ensuing armed hostilities and the great shifts in territory and in displaced persons made it clear that the Mandate was not in fact terminated. Consider the analogous case of a trust where a trustee allocates the trust property among a group of beneficiaries. Immediately the beneficiaries dispute the allocation and start fighting. As a logical matter it would be possible to conclude that the trustee was right and the beneficiaries were wrong—that their fighting made no difference. But as a matter of the equitable law of trusts, a court would more likely conclude that the trustee made a mistake since his allocation was in fact so badly received by the people who really count (the beneficiaries). A court might thereupon replace the trustee with one who is more sympathetic with the aggregate wishes of the beneficiaries, or take it upon itself to supervise (through the appointment of a magistrate) a new allocation.

The General Assembly’s allocation in 1947 was denounced by Arab states (purportedly speaking on behalf of the politically silent Palestinian people) as overly generous to Israel. In the present hearings before the ICJ, those same Arab states would clearly welcome a return to the 1947 Partition Plan, inasmuch as they even accept the “green line” of 1949 which is less generous to Palestine than the Partition boundaries. The current Arab position ratifies my argument that, despite Israel’s acceptance of the Partition boundaries of 1947, the Arab world’s rejection of those boundaries at that time estops it now to contend that the 1947 demarcation should be given legal effect.

Of course we must not lose sight of the fact that the people of Palestine have been victimized by these political machinations and by Yassir Arafat’s opportunistic lust for power. Many Israelis have also been victimized by the lust for power of their own
leaders. The Mandate for Palestine focuses our attention upon the inhabitants of the territory and not their political leaders. The people of the territory are the true legal beneficiaries, and all external events that have been taken in their name does not detract from their legal standing as wards of the world community. They are legally designated wards under the terms of a Mandate established by the League of Nations and continued in force by the United Nations. Their interests are paramount. This is another reason why I believe that the ICJ is being led astray by the political statements and oral arguments of self-interested states.

If the ICJ wants to steer a legal course through the rocks and shoals of the written statements and oral arguments of the governments of the world, what exactly should it do? In my opinion, it must begin by looking at the entire question from the internal perspective of the Mandate. It must resist all the governments who urge it to look at the Mandate from an external perspective, namely, as an instrument that was part of the legal history of Palestine but has little if any present vitality. Instead, the Court should view as the beneficiaries of its advisory opinion the inhabitants of Palestine, including Jews, Arabs, and Christian minorities. They are the ones to whom the entire complex scheme was intended to benefit from the Balfour Declaration of 1917, through World War I, through the emigration of Jews to Palestine between the wars, to the Partition Plan, and through numerous peace conferences and two intifadas. They, and not the states submitting written statements and oral arguments, are the true parties in interest. The real question is not the legal consequences of the construction of the wall, but rather the legally protected interests of all the Jews, Arabs, and Christians affected by the construction of the wall.

The next and final step, which is subtle and difficult and which I am unequipped to state in any detail, is to address these legally protected interests. The Court must figure out where the parties would be today within the aegis of the governing Mandate and taking into account the changed relationships since 1948 among the beneficiaries. In other words, the legal standard should be: what would a Court today, in its proper role as supervisor of the Mandate, regard as a just demarcation line of the wall being built by Israel. The general answer is: the demarcation line must be reasonable in light of the interests of the inhabitants.

A Mandate, like a trust, is a dynamic instrument; it “does equity over time” (as perhaps only those who understand the rise and development of equity courts as opposed to law courts in England can fully appreciate). There is no doubt that Israel can build a barrier on its own territory, as Ireland’s written submission to the ICJ makes abundantly clear. But the mandated territory is neither Israel’s “own” territory nor Palestine’s “own” territory. A “reasonable” path for the wall is that which maximizes the interests of all the inhabitants. This maximization is not quantitative only; it is not to be measured on a per capita basis (unlike “one man, one vote”), but rather on a “values” basis. Thus, a portion of the wall that divides an Arab town, or separates an Arab farmer’s house from his own farm, is extremely costly from an equitable point of view. The wall becomes less costly the closer it approaches the green line. But flexibility has to be given to the need for a continuous wall; a discontinuous barrier is an oxymoron. This is a general problem in
cost-effective boundary-drawing. There are many lessons in such expertise that one can derive from the League of Nations’ redrawing of the boundaries of the Ottoman Empire after the first World War.

Thus, as I see it, the forthcoming advisory opinion could be placed on its firmest legal footing if the Court were to decide provisionally that the interests of the inhabitants of Palestine under the Mandate are paramount, and to appoint various international jurists and experts to consider each segment of the wall in light of that paramount interest. Their decisions—to dismantle a segment, remove it further toward the green line, or leave it in place—would ideally become incorporated into the final advisory judgment of the ICJ to be forwarded to the United Nations.

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