

The neglected aspects of the International Court of Justice's *Wall Opinion* on the consequences of internationally wrongful acts

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Abstract

A decade ago the International Court of Justice's (ICJ) Advisory Opinion on the legal consequences of Israel's building a wall in the occupied Palestinian territory generated considerable comment. Most of this comment focused on the political ramifications of the Opinion and on the vociferous opposition it met from the United States. Very little, if any, attention has, however, been directed at the ICJ's reiteration of its findings the *Chorzow Factory* case in which the court set out the consequences of an internationally illegal act. Scant mention has also been made of how the ICJ applied the International Law Commission's 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts in its decision on 'the Wall'. There appears to be little doubt that since the onset of the twenty-first century, political issues have overshadowed the remarkable way in which the ICJ set out the legal consequences arising from internationally wrongful acts. This note attempts to emphasise the forceful exposition by the ICJ on state responsibility – an exposition deserving far greater attention than it has received to date and which offers an excellent precedent for future decisions on international wrongs committed by one state against another.

INTRODUCTION

The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts² (Draft Articles) are generally viewed by international law practitioners as a restatement of the law.³ Article 30 of the Draft Articles provides that a state responsible for an international-

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² Annexed to UNGA Res 56/117 12 Dec 2001, reprinted in Crawford *The International Law Commission's articles on state responsibility* (2002).

³ Dugard *International law: a South African perspective* (4ed 2011) 270.

ly wrongful act is under an obligation to *cease* that act. Articles 34–37 of the Draft Articles set out various forms of reparation,⁴ while article 31 declares that a responsible state is under an obligation to make full reparation for the injury caused by its wrongful act. This reiterates what was held in the *Chorzow Factory* case⁵ where the Permanent Court of International Justice (PCIJ) declared that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed had the act not taken place. The PCIJ also referred to restitution in kind, or, if that was not possible, payment of a sum corresponding to the value which a restitution in kind would bear.

The ICJ's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁶ is an example of the application of the mandates of the Draft Articles regarding *cessation* of the wrongful act and *reparation* for that act. This aspect of the Advisory Opinion has not received the attention it deserves. The vast majority of publications on the Advisory Opinion have focussed on the political ramifications; on the opposition to it by the United States; or on the fact that the Opinion has been ignored by the Security Council, the Secretary-General, and the General Assembly.⁷

The Advisory Opinion handed down in 2004 has not been given due credit – which may be because it was a pronouncement on a very contested international law issue. It should be remembered that the ICJ, in the

⁴ Such as restitution, compensation and satisfaction. For 'satisfaction' see Barrie 'Accepting state responsibility by means of an "apology": the Australian and South African experience' (2013) 46 *CILSA* 345.

⁵ PCIJ Series A No 174 47 (1928).

⁶ 2004 ICJ Rep 136.

⁷ For examples see 'Agora: ICJ advisory opinion on *Construction of a Wall in the Occupied Palestinian Territory*' (2005) 99 *AJIL* 1; Cowling 'The relationship between the security council and the general assembly with particular reference to the ICJ advisory opinion in the "Israeli Wall" case' (2005) 30 *SAYIL* 50; Mangu 'Legal consequences of the construction by Israel of a Wall in the OPT: South Africa's contribution to the Advisory Opinion of the ICJ' (2005) 20 *SA Public Law* 86; Dugard 'Advisory opinions and the secretary-general with special reference to the 2004 *Advisory Opinion on the Wall* in Boisson de Charzournes & Kohen (eds) *International law and the quest for its implication: Liber Amicorum Vera Gowlland-Debbas* (2010) 403.

Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*⁸ pertinently avoided pronouncing on the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence in which its very survival could be at stake. In the *Wall Opinion* the ICJ did not tread as carefully and was more courageous.

It is regrettable that the *Wall Opinion* has been hamstrung by political rhetoric and recriminations. However, is understandable as the opinion was related to a conflict which has been inflaming a region for more than six decades. It would appear that – to its credit – the ICJ saw this case as an historic opportunity to render an opinion which would provide legal clarity. Unfortunately, the strictly legal aspects of the opinion have fallen by the wayside, as the Advisory Opinion has concentrated on the responsibility of states for internationally wrongful acts. The purpose of this note is to focus on the remarkable way in which some ten years ago, the ICJ focussed on the thorny issue of state responsibility in the *Wall Opinion*.

FACTS

Briefly the facts are that in April 2002 the Israeli cabinet approved a plan for the construction of a 'security fence' to halt infiltration into Israel from the central and northern West Bank. Between June 2002 and January 2003 a full route 'security fence' forming a continuous line 720 kilometres along the West Bank, was approved by the Israeli cabinet. The 'security fence' was in fact a wall. Much of the wall was to be built on territory that Israel had occupied in 1967.⁹ Many states and international human rights organisations condemned Israel for its actions. Eventually, the General Assembly in resolution ES –10/13 mandated the Secretary-General to report on the situation. In resolution A/RES/ES –10/14 of 8 December 2003 the General Assembly requested the ICJ urgently to render an advisory opinion on the legal consequences arising from the construction of a wall built by Israel, the occupying power, in the occupied Palestinian territory, including in and around East Jerusalem. Oral hearings took place and written statements were

⁸ 1996 ICJ Rep 228 par 105. See Barrie and Reddy 'The International Court of Justices' advisory opinion on the threat or use of nuclear weapons' (1998) 115 *SALJ* 457. In the *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Rep (2003) 161 the ICJ has also been criticised for not being courageous enough.

⁹ Barrie 'The international law relating to belligerent occupation at the advent of the twentieth century' 2012 *TSAR* 433; Dinstein *The international law of belligerent occupation* (2009).

submitted. After six months the ICJ delivered its Advisory Opinion¹⁰ on 9 July 2004.

THE OPINION

In its Advisory Opinion the ICJ (by fourteen votes to one) ruled¹¹ that the construction of a wall by Israel, the occupying power, in the occupied Palestinian territory, including in and around Jerusalem, was *contrary* to international law. The ICJ also ruled, by fourteen votes to one, that Israel was under an obligation to *terminate* its breaches of international law, to *cease* construction of the wall forthwith, and to dismantle the structure. Further, again by fourteen votes to one, it was held that Israel must repeal and *render ineffective* all legislative and regulatory acts relating to the wall. Also, by fourteen votes to one, it was found that Israel was under an obligation to make *reparation* for all damage caused by the construction of the wall in the occupied Palestinian territory, including in and around East Jerusalem.

By thirteen votes to two, the ICJ placed all states under an obligation *not to recognise* the illegal situation resulting from the construction of the wall. Finally, by fourteen votes to one, the ICJ requested the United Nations to consider further action to bring the *illegal situation* resulting from the construction of the wall to an end.

The Advisory Opinion was succinct and to the point in dealing with issues of compliance with international law and demanded restitution, reparation, and cessation of the illegal acts. These issues were dealt with in seven brief paragraphs.¹² This could be the reason why the significance of the Opinion has been overlooked. In fact, in its handling of state responsibility the ICJ has made highly significant findings which deserve far wider attention.¹³

Paragraph 149 of the Opinion emphasises that Israel is under a duty to *comply with the international obligations it has breached* in constructing a wall in the occupied Palestinian territory. These obligations involve

¹⁰ An important Advisory Opinion given by the ICJ, in which Israel was also involved, was the opinion on *Reparations for Injuries Suffered in the Service of the United Nations* 1949 ICJ Rep 174, 179.

¹¹ Note 5 above pars 149–153 and 162(2)–163(3).

¹² *Ibid.*

¹³ D'Argent 'Compliance, cessation, reparation and restitution in the Wall advisory opinion' in Dupuy *et al* (eds) *Common values in international law: essays in honour of Christian Tomuschat* (2006) 463.

respecting the right to self-determination of the Palestinian people; international human rights law; international humanitarian law; and the freedom of access to holy places that came under Israeli jurisdiction after the 1967 'Six Day War'.¹⁴ The ICJ's approach here conforms to article 29 of the Draft Articles which states that there is a duty on the responsible state to continue to perform the obligation it has breached. Furthermore, that the continuing duty to perform the breached obligation is not affected by the legal consequences of the internationally wrongful act. There is, therefore, a continuing duty to perform the breached obligation, despite the fact that reparations still have to be made.

In paragraph 150 of the Opinion, Israel is placed under the obligation *to put an end* to the violation of its international obligations. The ICJ regards this obligation as a well established principle of international law. In support, the ICJ referred to the *Nicaragua* case,¹⁵ the *US Diplomatic and Consular Staff* case,¹⁶ and the *Haya de la Torre* case,¹⁷ and recalls the approach followed by the United Nations Secretary-General in the *Rainbow Warrior Affair*.¹⁸

Paragraph 163 of the Opinion makes it clear that to *put an end* to Israel's violation of international law, Israel would have to comply with three obligations. First, construction works relating to the wall on the occupied Palestinian territory – including in and around Jerusalem – would have to *cease forthwith*. Secondly, Israel would have to *dismantle* the wall. Thirdly, it was required to *repeal or render ineffective* all legislative and regulatory acts relating to the construction of the wall – except acts which provide compensation or reparations for the Palestinian population for damages suffered as a result of the wall being built.

Paragraph 163 of the Opinion further makes it clear that Israel is under an obligation to make *reparation* for all damage caused. Here, the ICJ followed

¹⁴ During the 'Six Day War' the Israeli defence force occupied various territorial units. Israel took the Golan Heights from Syria, the West Bank (including East Jerusalem) from Jordan and the Sinai Peninsula and the Gaza Strip from Egypt. Except for the Sinai Peninsula Israel has occupied these territories for more than forty years.

¹⁵ ICJ Rep 1986 14.

¹⁶ ICJ Rep 1980 3.

¹⁷ ICJ Rep 1951 82.

¹⁸ 1987 (26) *ILM* 1346. See Botha 'Rainbows for goatsmeat: Ruling of the United Nations Secretary-General on the Rainbow Warrior Affair between France and New Zealand' (1987–8) 13 *SAYIL* 161.

the classic approach adopted in the *Chorzow Factory* case.¹⁹ This approach which requires that reparation for an illegal act must, as far as possible, wipe out all the consequences of the illegal act and re-establish a situation which would in all probability have existed if the act had not been committed, was also endorsed by the ICJ in the *Genocide Case (Bosnia v Serbia)*.²⁰

In paragraph 152, the ICJ set out how applying the *Chorzow Factory* case principles affected the facts in the *Wall Opinion*. Israel was to return the land, orchards, olive groves, and other immovable property seized from *all natural or legal persons* to enable the construction of the wall. Where restitution was materially impossible, Israel was obligated to compensate affected individuals. It is important to note here that the ICJ clearly stated that reparation was to be made in favour of individuals and authoritatively laid down that, in instances where they are victims of a breach of international law, *individuals* have the right to receive compensation *from the state responsible for the breach*.

In paragraph 198 the right of compensation for all natural or legal persons appears to be limited to *material* damage suffered. Questions have been raised as to why moral damage was not included.²¹ A possible explanation could be that the ICJ was specifically concerned with the seizure of property for purposes of constructing the wall, and possibly also that the ICJ was aware of the dangers in spelling out precisely how claims to moral damages must be determined.

By holding in paragraph 153 that Israel had an obligation to compensate *all natural and legal persons* who suffered any form of material damage due to the construction of the wall, the court gave concrete interpretation to article 33(2) of the Draft Articles²² the meaning of which had, until then, been somewhat obscure. ‘All natural and legal persons’ could conceivably refer to private individuals, corporations, and other private law entities, Palestine itself, or the Palestinian people as claimants.²³

¹⁹ Note 4 above.

²⁰ 217 ICJ Rep 43 par 460.

²¹ D’Argent n 12 above 476.

²² Article 33(2) declares: ‘This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue to *any person or entity other than a state*.’ (italics supplied).

²³ The Secretary-General established a registry with the purpose of registering damages claimed. See *Letter dated 11 January 2005 from the Secretary-General to the President of the General Assembly* A/ES –10/294.

CONSEQUENCES

The question consistently raised is what influence the *Wall Opinion* would have on the Israeli-Palestinian conflict? This has overshadowed the more important question: what influence has the *Wall Opinion* had on the responsibility of states for internationally wrongful acts? The emphatic findings of the ICJ on state responsibility seem in danger of being neglected owing to the historical and political contexts of the Israel/Palestine conflict. Although the *Wall Opinion* focused specifically on the legal responsibility of Israel, the findings of the ICJ have a *universal* impact regarding the general principles of the law relating to state responsibility. The findings of the ICJ in the *Wall Opinion* will be highly relevant in future claims emanating from issues relating to state responsibility – especially with regard to the question of what constitutes appropriate *reparations*.

International judicial institutions have, in the words of Schwarzenberger,²⁴ been ‘grappling’ with the issue of reparation for internationally wrongful acts. There has been very little evidence of any comprehensive rule on reparation: restitution in kind (*restitutio integrum*) as awarded in *Italy v Venezuela*²⁵ is the exception. Wiping out the consequences of the illegal act has been more common, but its application is far from clear. The *Wall Opinion* not only applied the *Chorzow* principles to the twenty-first century, it also gave meaning to the International Law Commission’s 2001 Draft Articles on State Responsibility. The Opinion was to the point in holding that Israel must *terminate* its breaches of international law; must *cease* the further construction of the wall; must *dismantle* the structure already built; must render *ineffective* any regulatory acts relating to the wall; and must make *reparation* for all damage caused in the occupied Palestinian territory.

Instead of having been lauded for its legal clarity and pertinent application of the rules of state responsibility, the Opinion has been overlooked completely by the United Nations, the European Union, the United States, and the Russian Federation. The weak response to the Opinion has undermined the authority of the ICJ, and has also called into question the relevance of its advisory opinions in general.²⁶ This could conceivably

²⁴ Schwarzenberger *International law* (1957) 653.

²⁵ 2 RIAA 975 (1930).

²⁶ Keith *The extent of the advisory jurisdiction of the International Court of Justice* (1971); Pomerance *The advisory functions of the International Court in the League and UN eras* (1993).

influence the ICJ to steer clear of highly contested international law issues in the future.²⁷

CONCLUSION

Because the circumstances of each case differ, international law cannot prescribe the precise legal consequences arising from an international wrong in advance. The basic principle, however, is clear: from an international wrong arises a right for the wronged state to request from the wrong-doing state the performance of the acts necessary to effect reparation of the wrong done. What form these acts will take will depend on the merits of each case.²⁸ The guiding principle, it is submitted, remains the *Chorzow Factory* case as refined by the ILC's 2001 Draft Articles on State Responsibility. This was precisely the approach of the ICJ in the *Wall Opinion*.

The Opinion is a major contribution to the general theory of state responsibility, but because of the confrontational issues surrounding the Opinion, this fact has gone unrecognised.

²⁷ Dugard n 2 above at 472. In the *Wall Opinion* the ICJ also found that the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 is applicable to the Israeli occupation of Palestine (paras 90–101); that Israeli settlements in the Palestinian territory are unlawful (par 120) and that Israel is obliged to comply with international human rights conventions to which it is a party.

²⁸ Jennings & Watts *Oppenheim's International Law vol 1* (9 ed 1992) 528.