The ICJ's Advisory Opinion on the Occupied Palestinian Territory

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by Tamer Morris | Sep 3, 2024

Twenty years after the International Court of Justice (ICJ) issued its advisory opinion on the consequences of the Israeli Wall, the UN General Assembly asked the ICJ to issue another advisory opinion regarding Israel's practices and policies in occupied Palestinian territory. Like the conflict itself, the latest advisory opinion has polarised academics and the public.

A recent *Articles of War* post discussed the Advisory Opinion and questioned the jurisdiction of the Court, suggesting that the Court should have dismissed the General Assembly's request for an opinion. Relying on Judge Sebutinde's dissent, the post highlighted three reasons why the ICJ should not have exercised its jurisdiction: (1) Israel's lack of consent to the jurisdiction of the Court; (2) insufficient information to make a legal assessment; and (3) the political nature of the request by the General Assembly. Although supported by Judge Sebutinde, I believe these arguments were rightly dismissed by the Court. Giving credence to them would have weakened the international legal order and eroded international law, especially in armed conflict.

In this post, I will examine these concerns and demonstrate that the Court took the correct approach to the General Assembly's request.

The Issue of Israel's Consent

According to Judge Sebutinde, the questions posed by the General Assembly concerned "a bilateral dispute between Israel and the Palestinian people" and, therefore, required Israel's consent to the Court's jurisdiction (para. 46). However, this position fails to appreciate the standing and *raison d'être* of international humanitarian law (IHL), the *jus ad bellum*, and self-determination. Violations of these bodies of law are concerns that affect the overall international order. As correctly illustrated by the Court in its advisory opinion, the "Palestine Question" has been on the UN agenda since 1947 and, therefore, cannot be considered "bilateral."

As stated in Article 1 of the UN Charter, the very purpose of the UN is to "maintain international peace and security" for "the prevention and removal of threats to the peace" (art. 1(1)). The UN is also responsible for "develop[ing] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" (art. 1(2)). As such, risks to international peace and security and the self-determination of peoples concern all members of the UN by their entrance into the UN Charter, including Israel.

To claim that questions of IHL, the *jus ad bellum*, and self-determination are "bilateral" in nature fundamentally undermines the significance of these principles in the law. Suggesting that the situation in Israel and Palestine does not involve the collective security framework is a dangerous path to follow. In drafting the Geneva Conventions, States understood that the "High Contracting Parties undertake to respect and to *ensure* respect for the present Convention in all circumstances" (common art. 1, emphasis added). Therefore, to insist that questions of legality and the application of IHL, specifically the laws of occupation, are solely "bilateral" is an alarming assertion. The *raison d'être* of IHL is undermined when it is claimed that one State's violation, or in this case the assessment of that violation, has no effect outside that State.

The question posed to the Court cannot be considered bilateral. The Court confirmed and emphasised that any violation of IHL or the *jus ad bellum* does not implicate only the States immediately affected but, rather, all States. The Court made this clear by examining the legal consequences not only for Israel, but for other States and the UN.

The Issue of Insufficient Information

The suggestion that there is "insufficient" information contends that the information provided to the Court was "one-sided" and "failed to take into account the complexity of the situation and the security needs of Israel." However, this raises the issue whether the information

provided to the Court was insufficient to make a legal assessment or was it lacking because it failed to consider political matters? This criticism of insufficient information includes both an accusation of bias and an accusation that Israel's security concerns were overlooked.

The argument that the information submitted to the Court was "one-sided" is based on the notion that Israel had no opportunity to present its "side" other than what was included in its written submission. This critique implies that the Court would only consider submissions from States that are on the opposing side. This would be a fair assessment, however, the "Palestine Question" has been on the UN agenda since 1947 and there have been numerous UN reports and fact-finding missions on this issue. It must be reiterated that Israel would have had ample opportunity to contribute to or contradict any UN findings, as part of UN procedure. Accordingly, the Court employed multiple sources of information, as this is a well-documented situation.

UN reporting mechanisms that find a State in violation of the law does not make them one-sided. Other than security concerns, there has been no other evidence of bias. To insist that UN findings are one-sided simply because the investigated State does not agree with them is a dangerous course for international law. International law becomes neutralized if decision-makers cannot use reports that contest the permissibility of State action.

This leads to the second criticism of the advisory opinion: failure to acknowledge Israel's security concerns. This criticism suggests that the Court should have considered Israel's security concerns before assessing the legal merits of the questions posed. This argument implies that these "security concerns" are not part of the existing legal framework, for if they were, the Court would have to have considered them as part of their legal analysis. As such, these concerns would be in the realm of politics or morality.

As Judge Charlesworth stated in her separate opinion, "the existence of 'security concerns' is not a legal ground for the maintenance of an occupation, nor indeed for its establishment, unless it can be translated into the currency of the accepted grounds for the use of force, for example self-defence" (para. 16). The argument, therefore, asserts that Israel's moral or political justification should have been considered before assessing legality and that "just cause" (in this case, security) can and should have excluded the application of the law. Consequently, this argument can also be made by Russia in suggesting that the global condemnation of its invasion of Ukraine is one-sided because the international community did not considered its security concerns with NATO.

However, the Court should only consider legal justifications when deciding questions of law. Here, the question presented was whether the law "authorize[s] Israel to maintain a permanent presence in the Occupied Palestinian Territory for such security needs" (*OPT Advisory Opinion*, para. 263). As perfectly stated by Judge Charlesworth, "while security threats to Israel may well be real, they alone do not suffice to justify the use of force, unless they amount to an armed attack … ." (para. 22).

However, this does raise an interesting question. When is information sufficient for scholars or the Court to make a legal assessment? One of the greatest rebuttals in this conflict is the "insufficient information" defence. However, as international lawyers, how much information is needed to make a legal assessment? Because we can never know all the information, at what point are we allowed to make a legal assessment? As this is an extremely well documented issue, I must ask, as questioned by Professor Marc Schack, "with all the information available one could ask: If not here, then when?"

If we allow this form of defence to take hold, then no legal assessment could ever be made because it is impossible to have all the information. To give effect to the law and to protect civilians, a legal assessment must be made on the balance of probabilities. The level of information required should be enough for the decision-makers to determine the likelihood of an international wrongful act. In particular, in armed conflict the onus is on the State to provide information regarding its legal considerations. The "insufficient" information defence shifts the onus of providing evidence and information away from the State. As IHL requires the State to make legal assessments while engaging in conflict, it is the State that must provide evidence of the legality of its actions. However, this evidence of the State's assessment must be based on the law, rather than moral justifications.

Notwithstanding Israel's security concerns, some scholars have asserted that "there is no agreement about the facts" and that "whether Gaza was occupied before the October 7, 2023 attacks is debated." I completely agree that Israel's occupation of Palestinian territory is disputed. However, this is the exact reason the Court should, and did, engage with the General Assembly request. The question regarding Israel's occupation is not factual but legal, and the Court was, and is, in a position to answer this question.

The Political Nature of the Question

The criticism of the politics behind the advisory opinion conflates international law with international relations, although all applications of international law involve some element of politics. Some have argued that the General Assembly's request was intended to resolve "the political differences within the UN regarding Palestine and Israel or scoring points between UN organs." However, nothing in the Court's opinion was referenced to demonstrate the Court's involvement in political affairs. While there is a fine line between international law and international relations, I believe in examining the merits the Court masterfully walked that line.

The significance of the Court's opinion is that it answered legal contentions on the laws of occupation and self-determination. Before the advisory opinion, there was disagreement regarding the assessment of effective control to determine occupation, particularly, whether occupation requires the control of a military force or can be exercised without military

presence. Resolving this important legal question was critical to determining whether, since 2007 and the removal of Israeli forces from occupied territory, the Palestine territory was still considered occupied under the law.

Interestingly, the court took a functional approach to effective control. In paragraph 93, the Court stated that Israel,

remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip, including control of the land, sea and air borders, restrictions on movement of people and goods, collection of import and export taxes, and military control over the buffer zone, despite the withdrawal of its military presence in 2005.

As Judge Charlesworth articulated further, “Physical military presence in the occupied territory is not indispensable for the exercise by a State of effective control, as long as the State in question has the capacity to enforce its authority, including by making its physical presence felt within a reasonable time” (para 91).

Concluding Thoughts

While it is completely acceptable for scholars to deliberate and disagree with the Court’s legal analysis, we must be careful not to fundamentally undermine the legal order. As the collective security framework is currently being questioned, we must ensure that in discussing the law we are not concurrently disabling it. I believe that the Court took the correct approach in answering the questions posed by the General Assembly. The Court focused on the legal aspects of the questions submitted, even though the situation is so politically charged.

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