

LEGAL CRITIQUE OF THE ICJ ADVISORY OPINION PROCEEDING

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ICJ PROCEEDINGS

- Contentious proceedings
 - Only if parties have agreed (either in a treaty or ad hoc)
 - Binding
- Advisory opinions
 - On request by a UN body
 - “on any legal question” – *but ex facto jus oritur*
 - Not binding (in theory)
- Participation limited to States and Intergovernmental Organisations.
- NGOs can submit observations under Practice Direction XII but they are not placed on the Court file. Generally not considered at all by Judges

CONCERNS WHERE ADVISORY OPINIONS RELATE TO BILATERAL DISPUTES

- One or both parties may not have consented to ICJ jurisdiction over the dispute
- Determination by ICJ may be contrary to agreement between the parties specifying different resolution
- May make the dispute more difficult to resolve
- ICJ may not be provided with full and accurate facts

THE UNGA'S REQUEST I: THE RESOLUTION

- Kitchen sink of false allegations
 - *“Recalling with grave concern the United Nations country team report of August 2012, entitled “Gaza in 2020: a liveable place?””*
 - Gaza pop. 2012: 1.64m 2022: 2m
 - Main issue was water, solved by desalination (who developed the technology?)
 - Will the ICJ pay any attention to the content of the Resolution outside the questions?

THE UNGA'S REQUEST II: THE QUESTIONS

“(a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?”

“(b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?”

OBJECTIONS

- Bilateral dispute; Israel has not consented to ICJ determination
- Contradicts Oslo Accords in which Israel & PLO agreed to resolve issues by negotiation
- False / contentious assumptions in questions
- Undefined questions
- Inaccurate, unreliable and partial information
- Resolution results from / forms part of UN's unlawful discrimination against Israel
 - UN Charter Art 2(1): UNO *"is based on the principle of the sovereign equality of all its members"*

ASSUMPTIONS IN THE QUESTIONS

“ongoing violation by Israel of the right of the Palestinian people to self-determination”

- 93% of Arabs of East Jerusalem prefer Israeli rule of united city – poll by SHFA Palestinian news agency, December 2021

“prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967”

- Gaza (particularly before October 23 and even now)
- Only annexation has been East Jerusalem

“measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem”

- Arab population of Jerusalem has increased 5.5x since 1967, from 26% to 39%
- More muslims than ever before pray on Haram al Sharif (10m pa)

UNDEFINED QUESTIONS

“(a) What are the legal consequences arising ... from its adoption of related discriminatory legislation and measures?”

“(b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?”

ICJ has expressed disapproval of slanted questions in some cases, but has been prepared to address them

But undefined questions are more difficult

INACCURATE, UNRELIABLE AND PARTIAL INFORMATION

- UN Sec Gen has a responsibility to provide information & documents; has provided all UN documents relating to Palestine since 1967 - 29k pages
- Mostly inaccurate, unreliable and partial – cf Qalqilya hospitals in the “Wall” case
- No documents prior to 1967 - so history starts with Israel’s invasion of the Palestinian territory in the West Bank and Gaza
- Israel has not participated except to submit that Court should not give an opinion
- No other country has attempted to correct or balance the information or supported Israel’s rights; a few have argued that the ICJ should not give an Opinion

WHAT SHOULD THE ICJ DO? I: PROCEDURE

- (a) Provide an Opinion without assuming any facts? – difficult because the questions assuming various facts
- (b) Provide an Opinion on the basis that the information provided is true and complete? – the Opinion would be hypothetical, unjudicial, promote racism against Jews worldwide, and make peaceful resolution even more difficult
- (c) Investigate the facts itself? – this would be a monumental exercise and ICJ does not have power to compel production of evidence
- (d) Decline to provide an opinion
 - ICJ has said it has to decide “*whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character*” - but has not declined any UNGA request in recent years

WHAT SHOULD THE ICJ DO? II: SUBSTANCE

If it provides an Opinion at all:

- (a) There is no ongoing violation by Israel of the right of the Palestinian people to self-determination.
- (b) Israel has not adopted measures aimed at altering the demographic composition or character of Jerusalem and is entitled to exercise sovereignty over the united city of Jerusalem
- (c) In order to realise self-determination of the Palestinian people in east Jerusalem, West Bank and Gaza Strip, Israel and Palestinian representatives must ascertain the will of the Palestinian people in these areas & negotiate in good faith under the Oslo Accords to resolve remaining issues accommodating the rights of Israel and the Jewish people as well as the Palestinian people
- (d) The Court is not able to advise as to the legal consequences of the alleged discriminatory legislation, measures, policies and practices to which the GA refers since these are not identified in the questions.

WHAT WILL THE ICJ DO?

(a) Decline to provide an opinion?

(b) Advise that Israeli presence in East Jerusalem, West Bank and Gaza Strip is unlawful and must be ended immediately?

- Palestinian argument, but would make the ICJ look stupid given what happened in Gaza after Israel evacuated

(c) Advise that Israeli presence in East Jerusalem, West Bank and Gaza Strip would be unlawful but for the Oslo Accords & only as long as Palestine accepts their continuation. In the meanwhile, Israel must comply fully with the Accords & IHL, and all other States and the UN must not facilitate any violations by Israel

- Likely to result in intensification of BDS and other pressure on Israel