

## **PALESTINE: ONE STEP FORWARD IN THE LAW, TWO STEPS BACK IN THE FIELD**

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Taking into consideration the International Court of Justice Advisory Opinion<sup>2</sup>, that was made public in July this year, one can say that the Palestinian conflict has one legal period before and one legal period after the Advisory Opinion. But in the field, the situation is not getting better but it is even getting worse. This is the current paradox. The wall is the climax of the illegal occupation<sup>3</sup>, but the realities on the ground are still going on.

### **1. ONE STEP FORWARD IN THE LAW**

While on the Palestinian side we celebrated the Advisory Opinion in The Hague, the Israeli government quickly refused to apply these recommendations. Is there really something to celebrate? The answer is yes and no. Yes because the Advisory Opinion contributes strongly to clarify the legal debate about the occupation.

The wall –and of course the occupation- is not an internal issue, just a matter of bilateral debate. It is a concern to be discussed indeed by the international community. The political boycott carried out by the United States (USA) as well as the European Union (EU) of the sessions in The Hague could not avoid that legal debate. The Court stated that the wall and its associated régime are contrary to international law. The wall seriously violates the Palestinians rights to freedom, residence, property, health, education, and work, among others<sup>4</sup>. But the problem is not only the wall, the wall is a part of the long process of facts on the grounds as expropriation of land arguing security reasons, construction of settlements, arbitrary "administrative detention", home demolition, and so on.

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<sup>2</sup> International Court of Justice: *Legal consequences of the construction of the wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004.

<sup>3</sup> Despite of the fact that the Fourth Geneva Convention does not consider a military occupation illegal, in the Palestinian case there are UN specific resolutions which demand the withdrawal of the Israeli army from Palestine, which means that this specific occupation became illegal. Furthermore, to extend *ad infinitum* an occupation would mean to accept, among other measures, the annexation of land by force, which is contrary to international law.

<sup>4</sup> United Nations, General Assembly: "Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13". November 24, 2003; Pengon / Anti Apartheid Wall Campaign: *Stop the Wall in Palestine*, Palestine, 2003; Dugard, John: "Question of the violation of Human Rights in the Occupied Arab Territories, including Palestine" Report of the Special Rapporteur of the Commission on Human Rights. E/CN.4/2004/6, 8 September 2003.

The ICJ goes beyond the discussion about the wall, because it practically has remarked practically all the legal arguments of the Palestinian people about the core of the occupation (except among others the right to return of the Palestinian refugees). For example, it ratifies the applicability of the Geneva Conventions<sup>5</sup> as well as the human rights law in Palestine.<sup>6</sup> It also reminds against the attempts to annex Jerusalem; it underlines the Palestinian's right to access to the holy places; it quotes the right to self determination of the Palestinian people<sup>7</sup>; and it repeats the illegal conditions of the Israeli settlements.<sup>8</sup> Therefore, the advocacy for the rights of the Palestinians has all the legal support required.

The Court has also remarked that the fulfillment of the international law is not only a matter that binds Israel but also other governments and, especially, United Nations (UN). Despite this strong legal statement against the Occupying power, Israel continues its policy against the Palestinians.

Coming back to the paradox: not only the illegality of the core of the occupation is absolutely clear (the wall, settlements, expropriation, and deportation, etc.), but also the duties of the UN members to stop this illegality. However, the reports by the human rights organizations do not bring us any hope. We are in front of two realities: the legal one and the one in the field. Here we need to talk about advocacy.

## 2. HOW TO DO ADVOCACY AND NOT DIE TRYING

My personal experience in the Colombian armed conflict<sup>9</sup> as well as in Palestine<sup>10</sup> shows me that the best framework to support any advocacy campaign is to rely on the human rights, because it is an international social contract that allows us to avoid religious, historical and political traps.<sup>11</sup> Without some clear principles, any advocacy campaign runs the risk of betraying itself.

Thomas Hobbes said that “conventions, without the sword, are just words”,<sup>12</sup> and this is the worst problem of the advocacy based on international law. We can also mention three other problems of advocacy using international law as the basis. First, the

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<sup>5</sup> It was the ratification of the Declaration of the “Conference of High Contracting Parties to the Fourth Geneva Conventions” Geneva, 5<sup>th</sup> of December 2001. Also, the UN Security Council Resolution 681, called on the Israeli government to “accept *de jure* application of the Fourth Geneva Convention” in Palestine (UN, 1990).

<sup>6</sup> See also: Al-Haq: *The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories*, Ramallah, 2003.

<sup>7</sup> The UN GA Resolution 58/292 May 17 2004, “affirms (...) that the Palestinian people have the right to self-determination and to sovereignty over their territory and that Israel, the occupying Power, has only the duties and obligations of an occupying Power under the Geneva Convention”.

<sup>8</sup> According to the international law, all the Israeli settlements in Palestine are illegal (article 49 *Fourth Geneva Convention, relative to the Protection of Civilian Persons in Time of War*, 1949) and also a war crime (article 147, *Fourth Geneva Conventions*)

<sup>9</sup> De Currea-Lugo, Victor: “Protecting the health sector in Colombia: A step to make the conflict less cruel” *International Review of the Red Cross*, num. 844, (Geneva, December 2001), pp. 1111-1126.

<sup>10</sup> De Currea-Lugo, Victor: *The Wall in Palestine and International Law*, published by the NGO “Paz y Tercer Mundo” in co-operation with the Penson / Palestinian Anti-Apartheid Wall Campaign, Bilbao, 2004.

<sup>11</sup> Rawls, John: *Political liberalism*, Columbia University Press, New York, 1993, and by the same author: “The Law of Peoples.” in: Hurley, Susan and Shute, Stephen. *On Human Rights: The Oxford Amnesty Lecture*, 1993. New York. Basic Books 1993

<sup>12</sup> Hobbes, Thomas: *Leviathan* 1651, Chapter XVII.

ignorance about international law among NGOs, governments and society in general; second, the lack of believe in international law, and third, particularly in the Palestinian case, the attitude by most of the sectors involved that it is possible to negotiate below international law or negotiate international law itself.<sup>13</sup> In almost all of the peace proposals in Palestine, including the Oslo agreements and the Road Map to Peace, human rights have been excluded.<sup>14</sup>

The legal and political advocacy in Palestine has to aim at creating the missing link mentioned in our paradox: to connect the legal world with the field. It has to focus on two targets, the political sector and the media, in the USA as well as the EU, to show them the Advisory Opinion, which is not just “an opinion”, but the legal statement by the highest tribunal of the UN. Any trade or commercial agreement, and all other kinds of agreements, between the most powerful countries and Israel have to be bound in respecting international law. At the same time we have to take into account the power of the USA and the few political compromises of the EU. As Edward Said stated, it is easier to talk about the situation in the own Israel than in the USA. And without the will of the USA government, the chances of reaching an end to the occupation are not high.

Even when we fully accept human rights, we obviously cannot blindly support Palestine as we have to include in our goals the democratization within Palestine. The rights of the people should not only be implemented against the Occupying power but also for any kind of internal power.

Besides it, any advocacy program has to face the power of the media. On the one hand it is necessary to denounce the current situation, and on the other hand to contradict all the lies about the conflict, for instance: “the wall is a security measure”, “Israel is a democracy” or “anti-Zionism is another kind of anti-Semitism”. In fact, the UN determined that: “Zionism is a form of racism and racial discrimination”.<sup>15</sup> For the regular citizens around the world there is one Palestine different from the real one but even more real for them due to the media. The media spends a significant amount of time talking about terrorism but forget, sometimes wittingly, to talk about the Occupation. In the case of Palestine, those who do not want to talk about occupation do not have any moral right to talk about terrorism. It is necessary to remark that there is not a definition of terrorism in international law. In general, terrorism is understood as ‘attacks on civilian population’. Not all the violent actions by the Palestinian side are terrorism; some of them are part of the right to resistance, recognized in the Geneva Conventions.

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<sup>13</sup> For instance, the UN accepted that the “Palestinian ambulances will wait no more than 30 minutes at any checkpoints”. (See, Catherine Bertini: “*Personal Humanitarian Envoy of the Secretary-General. Mission Report*” 11 – 19 August 2002, num. 105); for medical reasons 30 minutes is the border between life and death. Also, it contradicts the protection of the health sector stated in the Additional Protocol I of the Geneva Conventions of 1949 (1977).

<sup>14</sup> The Geneva Accord (2003) resigns to the right to return of the Palestinians. For this and other reasons, some Palestinians prefer to talk about Geneva Conventions rather than the Geneva Accord. See, in general: Human Rights Watch: “The ‘Roadmap’ Repeating Oslo’s Human Rights Mistakes”, Washington, 2003; and Mari, Mustafa: “The negotiation process: The Lack of Human Rights Component”, en: *Palestine-Israel Journal* (Vol. 10, Num. 3, 2003), pp. 5-16.

<sup>15</sup> United Nations, General Assembly: Resolution 3379. Elimination of all forms of racial discrimination, November 10 1975.

The international NGOs have their own dilemma, and that is to denounce the critical situation, without risking access to the financial sources or to follow on, what I called in our last meeting in Geneva a clearly wrong step, replacing human rights for a minimum of humanitarian aid, which is not a good contribution to the Palestinian People<sup>16</sup>. The Palestinian crisis does not need food, or the so-called “classical humanitarian aid”,<sup>17</sup> but freedom and justice.

Many NGOs pretend to do advocacy that is confusing public relation, lobby for budgets, or institutional marketing campaigns. Unfortunately, for other NGOs the dilemma does not exist: their option for budget is clear. International NGOs should not continue being contractors of the donors just to bring food. And the donors, which are member countries of the UN and the Geneva Conventions, should replace the humanitarian food policy and convert this policy into a substances policy of the real debate and that is the occupation. It is the clear case of the EU which refuses to act on Israel. As *Doctors without Borders* have said “it is not possible to stop massacres with antibiotics”.

In some ways it is the same solution offered by the UN. All the refugees have rights established in international refugee law<sup>18</sup> except Palestinian refugees who received from the very beginning special treatment, or in other words, who were excluded from international refugee law. The UN offers food through UNRWA<sup>19</sup> but does not offer rights to Palestinians. As the ICJ states: “All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction”.<sup>20</sup> It would be good to ask ourselves if this statement also is applicable to the substitution policy created by the donors in Palestine.

The only current utility of the ICJ Advisory Opinion is its use by organizations and persons that support the Palestinian struggle. This advocacy agenda has to be defined with and for the victims, not for the donors and thinking about the best interest of the victims. But this utility of the Advisory Opinion to do advocacy is not enough, especially since advocacy is, in general, a clear symbol of the failure of the justice. With justice, advocacy is not necessary.

### **3. THE FAILURE OF INTERNATIONAL LAW TO BRING DIGNITY**

We cannot expect that the Israeli judicial system will bring justice to the Palestinians. “Of the 2,235 Palestinians that have been killed by the IDF, indictments against soldiers have been handed down in only eight cases. No one has yet been convicted”.<sup>21</sup> In regards

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<sup>16</sup> De Currea-Lugo, Victor: “One report and three questions”. Paper presented in: “United Nations International Meeting on the Implications of the Construction of the Wall in the Occupied Palestinian Territory, including around East Jerusalem” United Nations, Geneva, April 2004. An excerpt of this is available on: <http://stopthewall.org/analysisandfeatures/472.shtml>

<sup>17</sup> “The crisis is not a ‘traditional’ humanitarian crisis” Catherine Bertini: “*Personal Humanitarian Envoy...*”

<sup>18</sup> The Palestinian refugees are excluded from the *Convention relating to the Status of Refugees* (UN, 1951). However, the legal support of the right to return of the Palestinian people is specified in the UN General Assembly Resolution 194 (III), and it is also supported by the *International Convention on the Elimination of All Forms of Racial Discrimination* (UN, 1965, article 5, d, ii) as well as by the *International Covenant on Civil and Political Rights* (UN, 1966, article 12, 4).

<sup>19</sup> United Nations Relief and Works Agency for Palestinians Refugees in the Near East

<sup>20</sup> International Court of Justice: *Legal consequences...* numeral 163, p. 63

<sup>21</sup> “When killing becomes routine” By Gideon Levy. Haaretz, Opinion (Israel) July 13, 2003

to the wall, the Israeli judicial system has just proposed to change to some extent the path of the wall. In regards to interrogation, the Israeli judicial system accepts “moderate physical pressures” on detainees. Furthermore, on the destruction of houses in *Rafah*, the Israeli judicial system has said that this is for “imperative military reasons”. Finally, in regards to the Israeli settlements, both old and new illegal according to international law, the Israeli judicial system has considered that some of them are legal. This is the logic of the negotiation of international law. For instance, the withdrawal from Gaza is not a concession, it is a duty. To hold a referendum about the withdrawal from Gaza is, in fact, to submit a war crime to the will of the settlers. It is not a proof of democracy but the refusal of it.<sup>22</sup>

This constant attitude by Israel is not only a systematic impunity but also a clear dare against the UN system. Our hope in international justice has to go beyond the ICJ Advisory Opinion. For the USA government and some EU governments it is sufficient to produce an UN Resolution against Israel as the only contribution to the Palestinian people. For the Palestinian people another UN Resolution is obviously good but it is clearly not enough.

Now I would like to come back to my initial question if the Advisory Opinion is something to celebrate. Considering my last statements, the answer is no. If the Advisory Opinion takes part in this long list of international condemnations ignored by Israel, the ICJ brings hope but not justice. International law needs to be more than a moral proposal to be called “law”, it needs to count on the sword mentioned by Thomas Hobbes. But the owners of the sword are trapped by their own system created to bring international peace: the Security Council. We know that the UN as well as the ICJ has its own limitations, but it is difficult to explain to the victims that the Palestinians win in The Hague but die in Gaza and West Bank, meanwhile being ignored by the rest of the world.

We cannot justify the lack of answers to the Occupation in Palestine with the internal crisis of the UN. If international law fails to bring justice, we have to ask if this failure is just a random result or if it is indeed a direct result of the structure of the UN as well as international law. After the fatal blow of the Geneva Convention in the Afghanistan war and the denial of the UN by the USA during the Iraq war, what is at stake here is the international legal system itself.

One clear possibility is to demand the implementation of the ICJ Advisory Opinion recommendations. All High Contracting Parties of the Geneva Conventions, including Israel, have a duty to respect and to ensure respect for International Humanitarian Law in all circumstances.<sup>23</sup> As the Court said, “The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion”.<sup>24</sup> It is clear that

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<sup>22</sup> Democracy is not only the will of the majority. It is also necessary that this will follows some universal principles accepting as valid as well as necessary the turning of the will of the majority into the general will. Rousseau, Jean-Jacques: *Discours sur l'origine et les fondements de l'inégalité parmi les hommes*. Chambéry, 1754

<sup>23</sup> Art. 1, Common to the Geneva Conventions (1949)

<sup>24</sup> International Court of Justice: *Legal consequences...* numeral 163, p. 64

the UN members have the legal foundation to declare an international boycott campaign against Israel.<sup>25</sup> But the problem is that there are two different levels to apply international law. The UN members require one level from the non powerful countries and other level from the powerful countries as in Guantanamo, Afghanistan and Iraq.

If the UN does not want to use Hobbes' sword, then the society as a whole has the duty to do it. Sometimes society goes beyond governments. This has been the case, for example, of the antipersonnel landmines, the Apartheid régime in South Africa, the creation of the International Criminal Court, and the fall of the Berlin wall. The societies and the NGOs can and have to denounce, but the problem of the impunity is not a fault of the NGOs but the States parties of the international agreements.

The UN members have to release that any kind of commercial agreements must be bounded in respect of international law, including the Association Agreement between Israel and the European Union as well as arms trades, and even Israel's participation at the UN.<sup>26</sup> According to the Charter of the UN, "A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization..."<sup>27</sup> The natural conclusion of this is to expel Israel from the UN. The legal measures against Israel exist, but they are not used<sup>28</sup>. The UN should not only be UNRWA and UNRWA should not be just humanitarian aid.

The UN members have to figure out that some responsibilities which must be the target of advocacy include some private enterprises. According to Amnesty International, for instance, Caterpillar Enterprise, which produces bulldozers used to demolish homes in Palestine, should take measures to avoid that its products are being used to violate human rights.<sup>29</sup>

The nature of the Israeli State is the central problem. According to the principle "*pacta sunt servanda*"<sup>30</sup> the State binds itself to guarantee some rights which constitute the core of the modern State. Also, the current system of human rights is partially a reaction to the crimes committed during the Second World War. This system sought protection of the victims of war.<sup>31</sup> Despite this attempt to protect the people, in the beginning of the new millennium, some crimes, like the Apartheid policies<sup>32</sup>, are still continuing. The sons

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<sup>25</sup> It can include sporting, cultural and economic boycott, consumer information campaign, affecting among others universities and scientific exchanges, Israeli products, etc.

<sup>26</sup> Boyle, Francois: *Palestine, Palestinians and International Law*, Clarity Press, Atlanta, 2003, pp. 153-176

<sup>27</sup> Article 6, Charter of the United Nations (UN, 1945)

<sup>28</sup> On 11 May 1949, Israel was admitted as a UN member. In admitting Israel, the General Assembly specifically referred to Israel's undertaking to implement Resolution 181 (ii) and Resolution 194 (III).

<sup>29</sup> Amnistia Internacional: "Israel y los Territorios Ocupados. Bajo los escombros: demolición de viviendas y destrucción de tierras y bienes". Londres, mayo de 2004

<sup>30</sup> *Vienna Convention on the Law of Treaties* (UN, 1969), article 26

<sup>31</sup> Everyone through the "Universal Declaration of Human Rights" (UN, 1948); civilian population, through the "Fourth Geneva Convention" (1949); European refugees, through the "Convention relating to the Status of Refugees" (UN, 1951); national, ethnical, racial or religious group, through the "Convention on the Prevention and Punishment of the Crime of Genocide" (UN, 1948).

<sup>32</sup> The term 'the crime of apartheid', which includes policies and practices of racial segregation and discrimination, is clearly applicable in the Palestinian case. Apartheid includes measures to maintain domination by one racial group over another, for instance infliction upon the members of a racial group by causing serious bodily or mental harm such as torture or cruel, inhuman or degrading treatment or punishment; imposition on a racial group of its living conditions in order to cause physical destruction in whole or in part; measures to prevent the full development of such a group, in particular by denying members of a racial group their basic

and daughters of the Holocaust do not want to respect the rules established to protect their parents and relatives. But to advocate against this Apartheid régime is interpreted as a campaign against the victims of the Holocaust as if the Geneva Conventions were anti-Semitic. The feelings of guilt in Europe and the powerful pro-Israel lobby in USA make it difficult for any advocacy campaign regarding Palestine.

The Israeli state, as a theocratic state, as a non modern state<sup>33</sup>, refuses to recognize both civil and political, and social and economical rights of the Palestinian population. With two kinds of citizenship, the core of the rights does not depend on the relationship between individual persons and the State, but religious persons and the State, which means the negation of the democracy.

Israel refuses to recognize its condition as an occupier of the West Bank and Gaza Strip. If it is their Promised Land, how is it possible to be the occupant of their own promised land? The reason may be the most important to Israel: the application of international law not only means more responsibility under the Occupation, but the negation of Israel as a Jewish state. One big dilemma is how to be a modern State –with all of its consequences- and at the same time to be a religious State. The main victims of this dilemma are the Palestinians. To advocate for real democratization of Israel is not naive but dangerous. But this goal, the goal of the democracy, does not find a big support not even in some Arab and Muslim countries which are worried about their own lack of democracy rather than a democratic solution for the Middle East.

#### **4. FINAL COMMENT**

The challenge of one effective advocacy campaign goes beyond denouncing of the current situation; it has to include the recovery of the international order according to the Charter of the UN and the acceptance of international law. The current debate to solve the conflict while, and at the same time, bringing dignity to the Palestinian people is the rule of law as opposed to the rule of religion. Let me clarify here the advocacy problem: the Palestinians ask for justice and they just receive papers; the Palestinians ask for freedom and they just get rice; the Palestinians ask for a voice of support and there is silence. Justice, freedom and support should be the advocacy agenda. Today, with the Advisory Opinion and international law in one hand and the reality in the other, the international community has to make an important decision between the principles of which it presumes, and the risk of ignoring or abandoning the Palestinian people again.

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human rights (rights to work, education, leave and return to their country, nationality, freedom of movement and residence, among other rights), or measures designed to divide the population along racial lines by the creation of separate reserves and ghettos. See: *International Convention on the suppression and punishment of the crime of Apartheid* (UN, 1973), article 2.

<sup>33</sup> The State should be, by definition to be a State, modern. See: Bobbio, Norberto: *Stato, governo, società. Per una teoria generale della Politica*. Giulio Einaudi, Turin, 1985.