

The ICJ Advisory Opinion and its Wider Implications for International Law

Comment by **Georg Nolte**^{*}

The Advisory Opinion has been heavily criticised for mainly two reasons:

- a) lack of evenhandedness and
- b) lack of reasoning

Perhaps the Court has shown a lack of evenhandedness with respect to its description of the factual situation in the occupied territories. But even if this has been the case it would not call into question the Court's position on the most important general points of law.

- a) The restrictive interpretation of Article 12 of the UN-Charter and the confirmation of the wide powers of the General Assembly to act in parallel with the Security Council would not have come out differently if the underlying issue would have concerned an actor who is internationally more popular than Israel. It suffices to think of the case of Bosnia and Herzegovina which the Court expressly refers to.
- b) It was not seriously disputed that the Hague Regulations express binding customary international law and that the Fourth Geneva Convention applies also in situations as the West Bank.
- c) Concerning the relationship of humanitarian law and human rights law the Court has merely reiterated and refined its holding in the Nuclear Weapons case.
- d) While it is a matter of considerable dispute whether human rights treaties also oblige states in their activities outside their national territory, the Court has followed the general approach of the Treaty Bodies which was not developed with the situation of Israel and the occupied territories primarily in mind.
- e) While the Court has used rather condemnatory general language concerning the compliance of Israel with humanitarian law, the interpretation of the few provisions with respect to which it actually determined a violation commanded unanimous support among the judges, or at least no dissent.
- f) It is questionable whether the much-criticised paragraph 139 on self-defense would have come out much differently if the General Assembly had sought advice with respect to another situation of military occupation, such as Iraq.
- g) And finally, while one can argue about the effect of obligations *erga omnes* on third states, what the Court says about the obligations of third states is a plausible understanding of Article 41 of the ILC Articles on State Responsibility without the Court having explicitly mentioned this source.

Thus, my conclusion is that any possible lack of evenhandedness by the Court with respect to the evaluation of the situation on the ground does not affect the judgment on the legal issues in the Advisory Opinion.

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The harder question is whether the lack of extensive reasoning means that there are actually no good reasons for the respective positions which the Court has adopted. Here I think that the presumed vice is really virtue. The Court had a nearly impossible task: to deliver a clear and preferably unanimous message to the international community at large, both with respect to the situation in Israel and the occupied territories, but also with respect to the applicability and content of the most important rules for the fight against global phenomena such as civil unrest and terrorism. In my view it would have been impossible to deliver a clear, unanimous and fully reasoned message on both levels. The best the Court could hope for was to deliver a unanimous message which appears clear at first sight and with respect to the basic approach, but which leaves room for limitations and exceptions. I think that the Court has been successful in doing this, and some of the criticism consciously or unconsciously overlooks this. I give three examples:

- a) The right of self-defense: The Court has been criticized for unnecessarily adopting an old-fashioned inter-state concept of self-defence and of overlooking relevant recent developments in international practice, in particular Resolutions 1368 and 1373. In my view the critics overlook the ultimately vague and flexible concept of „imputability“ which the Court refers to and which leaves room to integrate these new developments. The Court has merely closed the door to a concept of self-defense which would legitimise to disregard the position of third states.
- b) The relationship between humanitarian law and human rights law: The Court has been criticized for creating artificial abstract rules, or boxes of rules, such as characterizing humanitarian law as *lex specialis*. I see the Court as describing a general framework for thinking about the relationship between these two bodies of law that must be specified and differentiated with respect to different rules and situations.
- c) The applicability of human rights treaties: The Court has been criticised for making a sweeping assertion which is not grounded in the practice of states. Here again, the critics overlook that the ambiguous practice of states can and should be debated *within* the term „jurisdiction“ which leaves much room for the logic of military operations.
- d) I disagree, however, with the Court in respect of its finding that a declaration of derogation is a substantive condition for the validity of the derogation.

In conclusion, I think that the Court sounds clearer and more determined than it is on closer inspection. The Advisory Opinion has set the terms of the future debate, and has created argumentative presumptions, but it has left large areas unresolved and open to debate. I do not think that we could expect more of the Court in such a case.