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The ICJ advisory opinion on *the legal consequences of the construction of a wall in the occupied Palestinian territory: The Scope of Application of the International Covenant on Civil and Political Rights*

Replies and Comments

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Focus

International Court of Justice, *The legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion*, 9 July 2004

"111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."

The Advisory Opinion of the International Court of Justice also provides us with an interesting insight in the definition of the word "jurisdiction" found in human rights treaties. Several States, amongst them Israel, had claimed that human rights treaties were not applicable to the case at hand (see Bofaxe No. 282); yet, they added that should these treaties be applicable in times of armed conflicts (competence *ratione materiae*), they would not in the occupied territories (competence *ratione loci*).

The ICJ methodically examines whether the two international covenants (ICCPR and ICESCR) as well as the convention on the rights of the child are applicable outside the State borders of Israel. In fact, the answers lie in the interpretation of the notion of "jurisdiction" that is found in the ICCPR, subject of this bofaxe. In the past this concept gave much headache to the members of human rights bodies such as the European Court of Human Rights, the Human Rights Committee and the Inter-American Court of Human Rights.

As States have become more and more involved in issues beyond their national territory, the definition of "jurisdiction" altered over time so as to meet the new challenge. The ICJ recognises that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory." (para. 109) Using a teleological interpretation of the ICCPR, the ICJ concludes that States are bound to comply with its provisions even beyond their national territory. In particular, the ICJ refers to several cases in which the Human Rights Committee, the implementation body of the ICCPR, declared that "the Covenant was applicable where the State exercises its jurisdiction on foreign territory". (para. 109) The analysis of the *travaux préparatoires* comes to the same conclusion. As an ICCPR commentary (Nowak (ed.)) notes, the inclusion of the word "territory" was meant to avoid nationals living abroad to assert rights towards its own State while the human rights violations would occur on the territory of the State of residence. Further, the ICJ examines the reports submitted by Israel to the ICJ and the observations of the Human Rights Committee that expressly enounce that the ICCPR is applicable to the occupied territories "in respect of acts done by the State in the exercise of its jurisdiction". (para. 111)

One of the most surprising aspects of the reasoning of the International Court of Justice is that it does not use a particular standard. It simply relies on the observations and decisions of the Human Rights Committee and on the *travaux préparatoires*. Unfortunately, the Human Rights Committee has never much elaborated on the scope of application of the ICCPR. For example, relying on a contextual as well as purpose and object interpretation of the ICCPR, the Human Rights Committee stated in 1981 that "it would be unconscionable to so interpret" this provision "as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." (*Saldias de Lopez v. Uruguay*) In this case a State was found to be in breach of the ICCPR because its agents, acting on foreign soil, had ill-treated an individual. Other cases, notably those mentioned by the International Court of Justice, refer to similar situations. On some occasions, the Human Rights Committee also refers to the fact that the State is present on a certain territory and that it "exercise[s] [...] effective jurisdiction" (see observations on the report of Israel in 1998) but without much explaining what it means.

The main problem lies in the adjective "effective" which the Human Rights Committee at no stage defined. In particular the combination "effective jurisdiction" does not allow having recourse to the interpretation made by the European Court of Human Rights that speaks of "effective control". Usually, jurisdiction is divided into three components: personal jurisdiction, functional jurisdiction and territorial jurisdiction. The exercise of effective jurisdiction requires all three components. To adopt such a stance would signify that in the eyes of the Human Rights Committee "effective jurisdiction" means: that the State exercises power over certain persons (personal jurisdiction), that the acts must be carried out by the State in its function as a State (functional jurisdiction, see e.g. *Montero v. Uruguay* and *Saldias de Lopez v. Uruguay*), and that the State is physically present on the territory (territorial jurisdiction, see e.g. the observations on the report of Israel in 1998).

However, such an interpretation of "effective jurisdiction" would lead to a more restrictive approach than that expounded by the Human Rights Committee which, oftentimes, only points at one type of jurisdiction (functional). This may, hence, explain why the International Court of Justice eventually only referred to functional jurisdiction inasmuch as it declared that "the Court considers that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory". (para. 111, emphasis added) In any case it appears that international law bodies, with the only exception of the European Court of Human Rights, prefer to remain as vague as possible in defining the scope of applicability of human rights instruments.

Responsibility

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