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COMMENTARY

Ill-Advised Advisory

By RUTH WEDGWOOD

The sullen debates of the U.N. General Assembly rarely crack the headlines. Working groups, subcommittees and regional caucuses meet in basement rooms, and at most, produce "resolutions" -- non-binding ones, of course.

But the General Assembly has now decided to broadcast its rancor over the state of Middle East politics by throwing a spitball to the International Court of Justice (ICJ). It has asked the judges in The Hague to cast aside the rest of their docket, including cases that have been pending for years, to "urgently render an advisory opinion" on the Israeli security fence. Hearings will begin on Feb. 23, and so far, all the filings are secret.

Obviously, Palestinian civilians need freedom of movement to tend their farms and visit family members across the fence. Equally obviously, Israeli Jews and Israeli Arabs have a human right not to be blown to pieces by suicide bombers who slip quietly into Israeli towns and cities with explosives strapped under their clothing.

The fence presents hard questions of proportionality and balancing, and a quest for workable alternatives. Judging the reasons for its particular route requires ground-level facts on routes of attack and topography. The need for a fence would diminish if Syria and Iran cut off funding for Hezbollah and Hamas, or if the Palestinian Authority stopped celebrating the cult of martyrdom in its media and school curricula. The ICJ has no trial chamber for on-the-ground fact-finding. It has no ability to extract promises from Syria and Iran.

The General Assembly has not bothered to mask what it wants from the Court. Its resolution seeking an Advisory Opinion on the Israeli fence invokes "the unanimous opposition by the international community to the construction of the wall." It simply wants to know "the legal consequences" of Israel's original sin.

It is well to be clear on some fundamentals. Every state has the right to build a fence on its international borders. Finland keeps a minefield on its border with Russia, marking the memory of its 1940 war. International objections to the Israeli fence are thus coherent only to the extent that the barrier goes beyond established borders. Israel argues that final borders have never been drawn, that the Green Line is simply the armistice line where the armies stopped after the 1948 war. And even an occupying power has the right to take measures strictly necessary to maintain security, under the Fourth Geneva Convention.

In practice, the fence has been sited so that it protects several of the largest Israeli settlements. The implicit claim of the General Assembly is that Israel has no right to self-defense of those settlements. But this begins to sound like the heart of the Road Map peace process -- how to implement Security Council Resolutions 242 and 338 so that both Semitic nations will have enough territory for viable states. A negotiated solution may involve swapping territory; any stable solution must be founded on consent.

The demand for an Advisory Opinion amounts to an open vote of "no confidence," setting aside the Road Map, the role of the Quartet, and the private diplomacy of the Geneva Accord. Yet peace will not be aided by hurling legal brickbats or seeking to use the U.N. as a club to reduce Israel to pariah status.

The ICJ's British judge, Rosalyn Higgins, has noted that the "relationship between Advisory Opinions and existing disputes has been one of the most problematic areas for the Court over the years." Advisory opinions may not legitimately be used to side-step the ICJ's consent-based jurisdiction. Former ICJ president Stephen Schwebel, an American, has pointed to the equal danger of self-serving requests for legal advice: The "appearance of telling the Court what the answer is to the question put to the Court is not consonant with the judicial character and independence of the Court."

The danger is not just to the court. The U.S. has no veto in the General Assembly, and we need to be concerned about the evasion of consent-based rules for international adjudication. The next request for an Advisory Opinion could ask the court, without U.S. consent, to pronounce on the legality of the war in Iraq or American attempts to stop the proliferation of nuclear material. Such opinions -- even though non-binding under the U.N. Charter -- are dangerous, because they are seen by the "victors" as conferring legitimacy on their position.

The court has discretion to refuse requests for Advisory Opinions in compelling circumstances, and after hearing arguments, it should do so here. At a minimum, the court is obliged to broaden the question at hand, to explore the correlative "legal consequences" of suicide bombings.

In 1996, the World Health Organization asked for an advisory opinion to ban nuclear weapons as unlawful. Instead, the court decided that WHO's referral was illegal, exceeding the agency's competence over questions of public health.

The General Assembly hasn't taken the lesson. But it's worth noting that Article 12 (1) of the U.N. Charter prohibits Assembly "recommendations" where the Security Council is already considering a situation. The Assembly's request could be rebuffed as *ultra vires*. So, too, its voting rules could be scrutinized. Decisions on "important questions" require a two-thirds majority of states "present and voting." The Israeli fence resolution had 90 states in support, eight against, and 74 abstaining. The General Assembly chooses not to count abstentions. But the "legal consequences" of this convenience could also generate an interesting opinion.

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