

Opinion

Re
Certain Legal Issues Arising from the Application of Israel to become a
Member of the Organisation for Economic Co-operation and
Development

Guy S. Goodwin-Gill
Senior Research Fellow, All Souls College, Oxford
Barrister

Introduction

1. I have been asked to advise on a number of legal issues arising or potentially arising out of the application by Israel to join the Organisation for Economic Co-operation and Development (OECD). In light of the limited time available, this Opinion is essentially preliminary and based on factual matters which I have not been able to check, but which I assume are correct for present purposes.
2. In brief, this matter concerns (1) the use by Israel of economic and statistical data deriving from the presence and activities of Israeli civilians residing in settlements in the Occupied Palestinian Territories (OPT); and (2) the failure of Israel to include economic and statistical data relating to the Palestinian people presently living under Israeli occupation.
3. In my view, this raises issues of legal concern for all States party to the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and for all States bound by the customary international law governing occupation, including the Hague Convention and Regulations of 1907. In addition, when considering Israel's application for membership, States Members of the OECD ought also to take into account the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports, 9 July 2004 (hereafter, 'Advisory Opinion, *The Wall*').
4. In drafting this Opinion, I have referred to and taken into account the following provisions of the OECD Constitution:
 - **Article 1**, which sets out the aims of the organisation and which includes the promotion of policies designed, 'to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations...': Article 1(c)
 - **Article 2**, under which States Members agree that they will, both individually and jointly, 'contribute to the economic development of both Member and non-member countries in the process of economic development by appropriate means and, in particular, by the flow of capital to those countries': Article 2(e)

- **Article 3**, under which Members agree, ‘to keep each other informed and furnish the Organisation with the information necessary for the accomplishment of its tasks’: Article 3(a); and
- **Article 16**, which provides that, ‘The Council may decide to invite any Government prepared to assume the obligations of membership to accede to this Convention.’

The Fourth Geneva Convention and customary international law: Obligations of the Occupying Power

5. Israel’s obligations as an occupying power are clear. Article 2 of the Fourth Convention provides that the Convention shall ‘apply to all cases of partial or total occupation of the territory of a High Contracting Party’, while Article 1 calls for respect of the Convention ‘in all circumstances’. Article 4 provides further that the inhabitants of a territory under occupation shall be ‘protected persons’:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
6. The applicability of this Convention is indisputable and has long been upheld, not only by the International Court of Justice in its Advisory Opinion on *The Wall* (§101), but also in relevant statements and resolutions of competent international bodies. Thirty-four years ago in 1976, the President of the UN Security Council, after consulting all the members and concluding that the majority agreed, stated that, ‘The Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967.’ UN SC Presidential Statement: UN doc. S/PV.1922, 26 May 1976. The applicability of the Fourth Convention has also been maintained by the International Committee of the Red Cross (which enjoys a special status in the interpretation and supervision of application of the conventions and of international humanitarian law

at large), and has been consistently upheld by the international community of States. Cf. *Digest of US Practice in International Law*, 1978, 1575-8; for a summary of relevant resolutions and statements, see International Court of Justice, Advisory Opinion, *The Wall*, §§96-101.

7. Article 7 of the Fourth Convention provides that the Occupying Power may enter into 'special agreements' on all matters which it considers to merit separate provision. This is sufficiently broad to include accession to the Constitution of the OECD, but the same article emphasizes that,

'No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them...'
8. During the period of occupation, Israel has frequently acted in violation of the provisions of the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* of 1949. For example, Article 49 prohibits 'individual or mass forcible transfers, as well as deportations of protected persons'. It further provides in paragraph 6 that 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'. The International Court of Justice itself has concluded, 'that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law': Advisory Opinion, *The Wall*, §120.
9. Article 46 of the 1907 Hague Regulations prohibits the confiscation of private property, and while Article 52 allows the Occupying Power to take land against compensation, this is limited by the requirement of military needs. Where government property is concerned, Article 55 of the 1907 Hague Regulations provides only for limited rights of use, since the occupier is not sovereign and may not do any act amounting to unilateral annexation of the territory or any part thereof: Dinstein, Y., *Laws of War*, 211, 220.
10. Moreover, the only permanent changes permitted are those which are intended to benefit the local population. As Article 55 of the Hague Regulations makes clear,

'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated

in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.'

11. In its Advisory Opinion in *The Wall*, the International Court of Justice found that, insofar as the construction of the wall had entailed the requisition and destruction of homes, businesses and agricultural holdings,

'Israel is... under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.' §153.

The Fourth Geneva Convention and customary international law: Obligations of the High Contracting Parties and all States

12. According to Article 1 of the Fourth Geneva Convention, 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' As the International Court of Justice observed in *The Wall*:

'It follows from that provision that every State party to that Convention, *whether or not it is a party to a specific conflict*, is under an obligation to ensure that the requirements of the instruments in question are complied with.' §158 (emphasis supplied)
13. The International Committee of the Red Cross has pointed out in its commentary to the Geneva Conventions,

'In the event of a Power failing to fulfil its obligations, each of the other Contracting Parties... should endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.' ICRC, *Commentary III*, p. 18.

International humanitarian law: Legal implications for the OECD accession process

14. From the information before me, it is not clear exactly what data has been included in Israel's efforts to comply with the OECD accession process, or what has been excluded. One possible interpretation is that Israel has sought, at one and the same time,
 - to 'maximise' its candidacy by relying on economic and statistical data generated by the unlawful Israeli settlements; and
 - to 'minimize' any potential negative effects that might be generated by its failure adequately to fulfil its legal, social and developmental responsibilities towards the four million Palestinians currently living under occupation, by excluding relevant data.
15. If that is a reasonable inference in the circumstances, then, over and above the implications under international humanitarian law, this would appear to put in issue the willingness and ability of Israel to comply in good faith with the obligations of OECD membership, including those set out above. This question is not pursued further.
16. In my opinion, however, the use and non-use of data in the above circumstances does give rise to the following legal concerns:
 1. The extent to which a 'benefit' or 'good' arising from unlawful settlement activity is effectively *recognized* in the context of a

membership process, thereby condoning or becoming complicit in the activity itself.

2. The extent to which the disregard of information relating to a population for which the Occupying Power is responsible likewise reflects a failure on the part of the High Contracting Parties involved effectively 'to respect and to ensure respect for' the Fourth Geneva Convention.
 3. The extent to which the provision of incomplete data in fact frustrates the obligation of all States not to recognize illegal situations, including that resulting from the construction of the wall in the Occupied Palestinian Territory.
17. In its Advisory Opinion in *The Wall*, the International Court of Justice emphasized also the obligation of *all* States not to render aid or assistance in maintaining the situation created by construction and, 'while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law', as embodied in the Fourth Geneva Convention.

Preliminary conclusions

18. In light of the above, I am of the view that Israel's application for membership of the OECD raises important and difficult legal questions regarding the obligations of Member States under the Fourth Geneva Convention and generally under international humanitarian law. In particular, I consider that, insofar as Israel is seeking the privilege of membership, the OECD and its Member States are obliged to ensure that the information provided by Israel in support of its application reflects the extent of its international legal responsibilities to the Palestinian people under occupation, that Israel is not accorded any 'benefit' flowing from the illegal settlements established on Occupied Palestinian Territory, and that the membership procedure does not result in the effective recognition of illegal situations created by Israel.
19. In addition, it may be argued that, in compliance with the conclusions of the International Court of Justice in paragraph 159 of its Advisory Opinion on the *Legal*

Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the OECD and its Member States have the right and the obligation so to condition its membership procedure as to ensure Israel's compliance with international humanitarian law.

20. These matters are of such seriousness and so directly related to the international legal responsibilities of the OECD and its Member States as to warrant further and deeper investigation.

GUY S. GOODWIN-GILL

**BLACKSTONE CHAMBERS
BLACKSTONE HOUSE
TEMPLE, LONDON EC4Y 9BW
6 May 2010**