



Israel: Construction of a Barrier in the West Bank: Legal Ramifications

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ISRAEL

CONSTRUCTION OF A BARRIER IN THE WEST BANK: LEGAL RAMIFICATIONS

EXECUTIVE SUMMARY

On July 20, 2004, the United Nations General Assembly passed a resolution demanding that Israel dismantle the barrier it is constructing in the West Bank, in accordance with the July 9, 2004, advisory opinion by the International Court of Justice (ICJ). The ICJ's advisory opinion had been requested following an earlier resolution in a special General Assembly emergency session. Both resolutions were controversial with Member States expressing different views on the subject. Israel objected to the ICJ's adjudication and to the U.N. resolutions on the subject, claiming it needed to construct "an anti-terrorist fence" to protect its citizens from a rampant wave of terror which started in September 2000. Palestinians claimed that the construction of what they refer to as a "wall" was motivated by political considerations, namely, Israel's intent to annex land belonging to their future state. They claimed that the barrier causes them severe harm and deprives them of their basic rights. In its advisory opinion, the ICJ recognized the Palestinians' claims and rejected those made by Israel.

The legality of the barrier's construction also has been the subject of judicial review by the Israeli High Court of Justice. Unlike the ICJ, the Israeli Court recognized both the humanitarian rights of Palestinians affected by the barrier, as well as the authority of the military commander in the West Bank to construct a barrier for military exigencies. After a thorough evaluation, the Israeli Court ordered rerouting of the barrier in a way that balances humanitarian considerations with security considerations. The issues of the ending of terror, as well as the normalization of Palestinian life, are essential elements of the Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict adopted by the Quartet (the United States, the European Union, Russia, and the United Nations). There are conflicting views regarding the impact of the ICJ's opinion and U.N. resolutions for its implementation on future progress in implementation of the Roadmap and the peace process.

I. Introduction

The legal developments surrounding the construction of a barrier by Israel in the West Bank are complex and reflect partisan views regarding the Arab-Israeli conflict and its resolution.

In 2002 Israel began the construction of a barrier along the West Bank region in a proclaimed effort to protect the lives of its citizens from Palestinian terrorism, which it argues claimed the lives of 927 and injured 6137 people between September 29, 2000 and February 1, 2004.¹ Israel maintains that the idea of constructing a barrier along the West Bank was inspired by the success of the existing barrier around the Gaza Strip that since the beginning of the recent wave of violence has prevented Palestinians from crossing the barrier and killing Israelis. Israel further maintains that the path of the barrier, both

¹ See "The Anti-Terrorist Fence," THE ISRAELI GOVERNMENT OFFICIAL WEBSITE, available at <http://securityfence.mfa.gov.il> (last visited March 18, 2004); see also "The Right to Live-Video Clip," ISRAEL DEFENSE FORCES-IDF NEWS AND INFORMATION, available at <http://www.idf.il/newsite/english/022204> (last visited Mar. 18, 2004).

west or east of the 1949 General Armistice line (popularly known as the “green line”)² is legal since the latter does not constitute a permanent, recognized border. Furthermore, the barrier itself is temporary as evidenced by the past removal and rerouting³ and will be completely removed when violence ceases. Israel maintains that it has made every attempt to minimize the impact on residents of the area.

Palestinians strongly object to the construction arguing that it negatively impacts their quality of life and that the construction was designed to annex land they claim as part of their future State, rather than defend Israeli lives.⁴ They maintain that contrary to the Israeli government’s approved map,⁵ the barrier’s path will eventually create “walled enclaves” that “will create harsher conditions of isolation.” They further object to the permit system implemented in the area by the Israeli Defense Force (IDF), because it denies access to many residents, especially to young Palestinians.⁶ They point to the significant impact of the barrier on the social fabric of communities and mostly on those living to the west of the barrier. The Palestinians maintain that any construction east of the barrier is illegal since it would be on occupied territory.

On October 21, 2003, the U.N. General Assembly adopted a resolution which demanded that “Israel stop and reverse” the building of the barrier, which, according to the General Assembly, “is in contradiction” of international law (an earlier similar proposal had been vetoed in the Security Council). On December 8, 2003, the U.N. General Assembly, which represents the world’s 191 nations, convened in a special emergency session and voted 90-8 in favor with 74 abstentions⁷ to request that the International Court of Justice (hereinafter the ICJ) “urgently render an advisory opinion” in accordance with article 65 of the Statute of the Court on the question detailed in Section III, below.⁸ As evident by the split vote, the text of the request itself, and statements submitted to the ICJ from different states, the issue of adjudication of this matter by the ICJ has been highly controversial.

² Hashemite *Jordan Kingdom-Israel: General Armistice Agreement* (signed at Rhodes, Apr. 3, 1949), *The Arab-Israel Conflict and its Resolution: Selected Documents* 87, R. Lapidoth & M. Hirsch, ed. (1992).

³ See, e.g. J. Stahl, *Israeli Army Modifying Security Fence As it Goes Along*, CNSNEWS.COM Jerusalem Bureau Chief (Feb. 24, 2004), available at <http://www.cnsnews.com/ViewForeignBureaus.asp?Page=%5CForeignBureaus%5Carchive%5C200402%5CFOR20040224d.html>, (last visited Apr. 12, 2004).

⁴ See “Israel’s “Security” Wall,” PLO Negotiations Affairs Department, available at <http://www.nad-plo.org/wprimary.php> (last visited Mar. 18, 2004).

⁵ Approved map posted on the Israel Defense Forces Official Website, at <http://www.securityfence.mod.gov.il/Pages/ENG/route.htm>

⁶ See Written Statement Submitted by “Palestine” on “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for an Advisory Opinion), at 101 (Jan. 30, 2004) available at <http://212.153.43.18/icjwww/idocket/imwp/imwpframe.htm> (last visited Mar. 23, 2004).

⁷ See Wurst J. *General Assembly Seeks World Court Opinion on Israeli Barrier*, U.N.WIRE (Dec.8, 2003) available at http://www.unwire.org/UNWire/20031208_11096.asp (last visited Mar. 9, 2004); see also Robb P. *Battle Over Barrier Heats Up: Canada Joins Israel in Push to Stop World Court from Ruling on Legality of Security Fence*, OTTAWA CITIZEN (Jan. 31, 2004), available at <http://www.globalpolicy.org/wldcourt/ici/2004/0131join.htm> (last visited Feb. 17, 2004).

⁸ A/RES/ES-10/14 (Dec. 12, 2003), text provided in appendix 1, available at <http://domino.un.org/UNISPAL.NSF/85255e950050831085255e95004fa9c3/f953b744269b9b7485256e1500776dca!OpenDocument> (last visited Apr. 6, 2004).

On June 30, 2004, Israel's High Court of Justice issued a landmark ruling recognizing the applicability of international humanitarian law to the West Bank as well as the authority of the military commander in the area under belligerent occupation to order the construction of a barrier based on military considerations.⁹ The Court recognized that the path selected by the military commander in the petitions before it had been selected based on military and not political reasons. The Court, however, voided the decrees that were the subject of the petitions after balancing humanitarian considerations with security considerations. After exercising a comprehensive review of all relevant evidence, the Court determined that the selected path of the barrier was disproportional to the harm caused to the Palestinian petitioners. Recognizing the criterion set by the Court, the Israeli government has been reviewing the path of the barrier and is in the process of issuing new guidelines accordingly.¹⁰

On July 9, 2004, the ICJ issued its advisory opinion.¹¹ While recognizing, like the Israeli Court, that international humanitarian law applies to the West Bank as being under belligerent occupation, the ICJ also recognizes the applicability of human rights law to the region. The Court held Israel was in breach of international humanitarian and human rights law, and that it could not rely on the right of self-defense to preclude wrongfulness. According to the ICJ, "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State."¹² Furthermore, "Article 51 has no relevance in this case," because "Israel exercises control in the Occupied Palestinian Territory and ... the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory."¹³ The ICJ also determined that Israel had not established necessity in constructing the barrier, stating "the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction."¹⁴ The ICJ determined legal consequences for Israel, and established operative measures for other States to take in this case. The ICJ issued its majority opinion with Judge Buergenthal of the United States dissenting.¹⁵

The following report is intended to provide an overview of the legal ramifications of the construction of the barrier, and particularly focus on the approaches taken by the ICJ as a principal organ of the United Nations, compared with those of Israel's High Court of Justice. The term "barrier" will be

⁹ H.C. 2056/04 *Beit Surik Village Association et al. v. State of Israel and Chief IDF Commander in the West Bank*. Available at the website of the Israeli court system <http://62.90.71/Files/04/560/020/a28/04020560.a28.HTM>, (last visited June 30, 2004).

¹⁰ New Guidelines: The Fence will not "cage in" Palestinian Villages, available at <http://ynet.co.il/articles/0,7340,L-2946689,00.htm> by subscription, (last visited July 13, 2004); see also Report: Fence route to approximate Green Line, Jerusalem Post Online edition, available at <http://www.jpost.com>, (visited day of posting July 13, 2004).

¹¹ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Decision by the ICJ (hereinafter the "decision," available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited July 14, 2004); see also Summary of the Advisory Opinion of 9 July 2004 (hereinafter the "summary"), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited July 13, 2004). Text is provided in Appendix 8.

¹² *Id.* at 56.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Declaration of Judge Buergenthal available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited July 14, 2004), text provided in Appendix 9.

used in this brief to describe what the Palestinians and supporters of the resolution term “a wall,” and Israel terms “the Anti-Terrorist Fence.”

II. The International Court of Justice

The ICJ was established in 1945 under the Charter of the United Nations (hereinafter the U.N.) as its principal judicial organ. The court has two functions:¹⁶

- To settle disputes between States by binding judgments. This function may be exercised only if both States have agreed to the submission of the case to the court.
- To give advisory opinions on legal questions submitted to it by a major organ of the U.N. or another international organization authorized thereto by the U.N. General Assembly. Advisory opinions are not binding. Moreover, the court has discretion to refuse to give an opinion.

In the absence of Israeli consent and State status to the Palestinians, as the first function requires, a request by the U.N. General Assembly was submitted to the ICJ for an advisory opinion, rather than for a formal settlement of dispute resolution.¹⁷

III. The Text of the Request for an Advisory Opinion

The ICJ was asked to respond to the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?¹⁸

IV. The Controversial Barrier: Context and Impact

The latest controversy over construction of a barrier in the West Bank reflects the major problems associated with the Arab-Israeli Middle East conflict.¹⁹

Proponents of the resolution argued that the barrier is being built in “occupied Palestinian territory.” According to the Palestinians, “it clearly aims at the de facto annexation of large areas of the Occupied Palestinian Territory and makes the viability of a Palestinian State and the implementation of the two-State solution almost impossible.”²⁰ The Palestinians argue that the construction “encircles entire

¹⁶ Statute of the International Court of Justice, International Court of Justice Basic Documents, *available at* <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm> (last visited Feb. 18, 2004).

¹⁷ R. Lapidot, “*Should the International Court of Justice Give an Advisory Opinion on Israel’s Separation Fence?*” 3 JERUSALEM ISSUE BRIEF, Jerusalem Center for Public Affairs (Feb. 23, 2004) *available at* <http://www.jcpa.org/brief/brief3-18.htm>, (last visited Apr. 8, 2004).

¹⁸ A/RES/ES-10/14, *supra* note 8.

¹⁹ For an historical and legal background of the Middle East conflict, *see* Appendix 2.

²⁰ *Supra* note 6, at 101.

communities in walled enclaves, and, if completed, will wall-in almost all of the Palestinian population. It has resulted in vast destruction and entailed the confiscation of thousands of dunums of Palestinian land and has already imprisoned thousands of Palestinians between it and the Green Line.”

As an occupying power, proponents of the resolution maintain that international humanitarian and human rights laws bind Israel. The ICJ, therefore, should render a decision to protect the humanitarian and economic rights of the affected West Bank Palestinian population. Rights viewed as violated by the construction of a barrier include the right to freedom of movement and to ownership of land. Construction of the barrier, they argue, will likely result in future displacement of Palestinians resulting from the intensification of “the economic, social, and cultural hardships they already face as a result of a strict closure policy that has been in effect since the beginning of the second Palestinian *intifada* in September 2000.”²¹

Israel maintains²² that the barrier is being built on disputed territory, rather than on occupied territory, and that final borders had been agreed to by the parties to be determined at the conclusion of peaceful negotiations. Israel maintains that the 1949 Hashemite Jordan Kingdom-Israel General Armistice Agreement²³ does not define the legal borders in the West Bank. The latter Agreement specifically provides that no provision of the agreement will in any way prejudice the rights, claims, and positions of either party in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement having being dictated exclusively by military considerations.²⁴

Israel further points to the total silence of the resolution on Palestinian terrorism, including chilling threats of “mega-terror” attacks, as the reason for the barrier. Emphasizing that its people are entitled to the inherent right to life, Israel argues that “terrorist actions are violations of the laws and customs of war ... breach of the principle of distinction, which requires differentiation between civilians and combatants ... in breach of the rule against perfidy and the injunction prohibiting the use of booby traps ... [and] amount to crimes against humanity, contrary to principles enshrined first in the Nuremberg Charter.”²⁵

According to Israel, “the fence is intended solely as a temporary, non violent, defensive measure ... [and] is not intended to prejudice the outcome of political negotiations on borders, Jerusalem, settlements or any other issue. Israel expects, in due course, when the terrorist threat has ceased, that the fence will be moved ... it has moved such fences before on its borders with Egypt, Jordan, and Lebanon in the context of peace agreements or other arrangements.”²⁶

²¹ *Supra* note 6, at 122-123. The second Palestinian *intifada* refers to the violent uprising that started in 2000, following the failure of the peace negotiations in Camp David and Ariel Sharon’s (head of the Likud party at the time and currently Prime Minister) visit to the Temple Mount (the holiest place for Judaism), also called Haram al Sharif by Moslems who consider the al-Aksa Mosque and the Dome of the Rock built at the same place as Holy Places.

²² See Written Statement of the Government of Israel on Jurisdiction and Propriety, at 39 (30 Jan. 2004), available at <http://212.153.43.18/icjwww/idocket/imwp/imwpframe.htm> (last visited Apr. 8, 2004).

²³ *Supra* note 2.

²⁴ *Id.* art. II.

²⁵ *Supra* note 22, at 51.

²⁶ *Id.* at 5.

Accordingly, the construction area is not intended to annex territories to the State of Israel, nor is it intended to change their status, their ownership, or the status of the residents of these areas. In an effort to avoid harming agriculture, the land on which the barrier is being constructed is mainly unused public land. Israel maintains that only:

if this is not possible, then private land is requisitioned, not confiscated, and it remains the property of the owner. Legal procedures allow every owner to file an objection to the use of their land. When private lands are used, owners are offered full compensation, in accordance with the law; this compensation is offered both as a lump sum and also on a monthly basis.²⁷

Israel further maintains that it has made efforts, to the extent possible, to avoid causing hardship and interfering with the lives of the Palestinians, most of who will be on the eastern side of the barrier, by establishing dozens of crossings, replanting trees affected by the construction, and compensating owners of requisitioned land on either a lump sum or monthly basis.²⁸

V. The Debate over Jurisdiction and Appropriateness of Adjudication

The opposing views expressed in the vote in the General Assembly, and in written statements submitted to the ICJ, reflect the deep division among States over the appropriateness of the requested adjudication. Supporters include the Palestinians, all Arab and Moslem States, Cuba, and South Africa. States sharing the view that the ICJ should refrain from adjudicating the case include the United States, Canada, Russia, Japan, the European Union (E.U.), new E.U. Member States, Singapore, Australia, Cameroon, and the Federated States of Micronesia.

The following is a summary of arguments raised by different states regarding the ICJ jurisdiction and propriety of adjudication.

A. Request for Advisory Opinion as Affecting Sovereign Rights of States

One of the underlying reasons for the objections made by several States to the above process is the view that the request for an advisory opinion is an improper circumvention of “the rights of States to determine whether to submit their disputes to judicial settlement ... this principle is important to preserve the independence and sovereign rights of States and to maintain the appropriate judicial character of the [ICJ] in an advisory opinion context ... [and] this principle has special importance where there is an established framework for addressing disputed issues through a negotiating process.”²⁹

B. The Advisory Opinion Will Not Provide Guidance to the General Assembly

Several States are of the view that there is no need to request the ICJ’s opinion, because in ES-10/13 the General Assembly has already asserted the construction to be in violation of international

²⁷ The Anti- Terrorist Fence, The Israeli Government’s Official Website, by the Ministry of Foreign Affairs, at <http://securityfence.mfa.gov.il>, (last visited Mar. 3, 2004).

²⁸ *Id.*

²⁹ See Written Statement of the United States of America, at 2 (Jan. 2004) available at <http://212.153.43.18/icjwww/idoctet/imwp/imwpframe.htm> (last visited Mar. 23, 2004), see also Written Statement of the Government of Australia, *id* at 5.

humanitarian law resulting in the legal consequences of a demand to Israel to stop and reverse the construction. Therefore, an opinion by the ICJ would provide no guidance to the General Assembly, as that body has already pronounced itself on the issue.³⁰

C. The Question Is Unclear

Israel contends that the ICJ lacks jurisdiction to consider the case based on the U.N. Charter, which provides that an advisory opinion can only be given on a “legal question.” In this case, it argues, the question “gives no indication whether the [ICJ] is being asked to find that a given situation is unlawful, or merely to assume its illegality.” Further it asks the ICJ to ascertain “legal consequences” without indicating for whom.³¹

D. The Question Is Political in Nature

While asserting that the construction of the barrier is causing further humanitarian and economic hardship to the Palestinians,³² Israel’s right to protect its citizens from terrorist attacks is also recognized.³³ Some states have asserted that involving the ICJ is not appropriate since “[t]he underlying dispute is one concerning territorial boundaries. This should be settled by negotiations among the parties concerned.”³⁴

Proponents of the adjudication disagree and say that “[t]he mere fact that the question may have political aspects, be related to an on-going political process or have been politically motivated, or that the opinion may have political implications, cannot deprive it of its character as a legal question, nor prevent the Court from rendering its advisory opinion.”³⁵

In the view of some states, such as the Republic of Cuba, “for more than 50 years, Israel, the occupying Power, has been responsible of continuous and flagrant violations of human rights, of international Humanitarian Law and of International Law in said territories.”³⁶ Considering that Israel was established fifty-six years ago, but gained control of the West Bank only in 1967, the latter statement may reflect a more general attitude by Cuba on the Middle East conflict, not strictly connected to the issue at hand.

³⁰ See, e.g. Statement of the Government of the Federal Republic of Germany on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Jan. 2004) available at <http://212.153.43.18/icjwww/idocket/imwp/imwpframe.htm> (last visited Mar. 3, 2004).

³¹ See Written Statement of the League of Arab States, at 20 (Jan. 2004) available at <http://212.153.43.18/icjwww/idocket/imwp/imwpframe.htm>, (last visited Apr. 8, 2004).

³² See, e.g. Written Statement of Spain (Jan. 30, 2004).

³³ See, e.g. Written Statements of the Government of Canada and of Japan, available at <http://212.153.43.18/icjwww/idocket/imwp/imwpframe.htm>, (last visited Apr. 8, 2004).

³⁴ See Written Statement of the United Kingdom of Great Britain and Northern Ireland, at 6-8 (Jan. 2004), with references to the positions of Singapore, Uganda, etc.

³⁵ *Supra* note 6, at 20.

³⁶ See Written Statement of the Republic of Cuba to the International Court of Justice (Filed in the Registry on Jan. 30, 2004) available at <http://212.153.43.18/icjwww/idocket/imwp/imwpframe.htm>, (last visited Apr. 21, 2004).

While siding with the Palestinians in the matter, the Democratic People's Republic of Korea (North Korea) uses the opportunity "to draw the attention of the International Court of Justice to the fact that there has long existed the wall aimed at partitioning Korea artificially It is desirable that ... [it] should be also concerned about the removal of the reinforced concrete wall which represents the symbol of the division of the Korean nation."³⁷

E. Adjudication of Political Questions Will Undermine the Roadmap³⁸

Most States objecting to the ICJ adjudication view the request as predominantly political in that it deals with a single isolated aspect of the complex and sensitive matter of the Middle East peace process. The general view expressed is that the rendering of an opinion on a single issue in contention, outside of the context of the entire complex of issues to be negotiated between the parties concerned, could undermine meaningful comprehensive negotiations, as called for by numerous resolutions of both the Security Council and the General Assembly of the United Nations.³⁹

Proponents of the request, however, argue that pronouncements by the ICJ on the matters requested, "cannot harm the ongoing or future negotiations aimed at settling the Middle East conflict. On the contrary, a pronouncement by the [ICJ] would likely facilitate such settlement."⁴⁰

F. Fairness

Israel maintains that the choice of terms in the resolution such as "wall" and "Occupied Palestinian Territory" reflects a calculated media campaign to raise pejorative connotations to its defensive measures.

Israel further maintains that the request is totally biased, as manifested by the deliberate use of the term "wall" to describe what it calls a "defensive anti-terrorism fence," ninety-five percent of which is comprised of a system of wire fences, and not a wall.⁴¹ Sensitivity over the usage of the term "wall" in the request to the ICJ is reflected in some statements submitted to the Court. The Swiss Confederation states that it "is aware of the current discussion about the correct term for the structure in question."⁴²

Similarly, Israel points to the use of the term "Occupied Palestinian Territory" in the request to describe an area outside of the Hashemite Jordan Kingdom-Israel General Armistice Agreement.⁴³ According to the Agreement:

³⁷ See Written Statement of the Government of the Democratic People's Republic of Korea (filed January 30, 2004) available at <http://212.153.43.18/icjwww/idocket/imwp/imwpframe.htm> (last visited Mar. 23, 2004).

³⁸ For information on the Roadmap, see Appendices 3 & 4.

³⁹ See, e.g. Germany's position, *supra* note 30, at 9. See also UN Security Council Resolution 1515 (2003), text provided in Appendix 5.

⁴⁰ See Written Statement of the League of Arab States, *supra* note 31, at 26.

⁴¹ *Supra* note 22.

⁴² See e.g. Written Statement addressed to the International Court of Justice by the Swiss Confederation.

⁴³ *Supra* note 2.

It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations.⁴⁴

According to Israel, the use of the term “Occupied Palestinian Territory” is therefore misleading, since it assumes the existence of “a border of a putative Palestinian State. This, however, is to prejudge the outcome of a settlement between the parties in a manner that has never before been accepted by the U.N., by the parties themselves, or by the sponsors of the Roadmap.” The Roadmap is an internationally sponsored plan, providing a concise and goal-driven plan for peaceful resolution of the Israeli- Palestinian conflict.⁴⁵

Israel further argues that the request “is a travesty, challenging Israel’s right to defend itself against on-going attacks, but saying not a word about the (Palestinian) perpetrators of the terrorist violence.”⁴⁶

G. Appearance of Judicial Bias

An objection was also made to the participation of Judge Elaraby in the adjudication by the ICJ based on his prior involvement in the underlying dispute⁴⁷ in contradiction of article 17(2) of the Statute of the International Court of Justice.⁴⁸ Israel maintains that “it was inappropriate for a Member of the Court to participate in the decision of the Court in this case in circumstances in which he had previously played a leading role in the very Emergency Special Session from which the advisory opinion request has emerged, and had also acted in an official capacity as an advocate for a cause that was in contention in the proceedings.”⁴⁹

VI. Congressional Action

A bipartisan concurrent resolution, H. CON. RES. 371, was introduced on February 26, 2004, “[s]upporting the construction by Israel of a security fence to prevent Palestinian terrorist attacks and condemning the decision by the United Nations General Assembly to request the International Court of Justice to render an opinion on the legality of the security fence.”⁵⁰ H.CON.RES.371 was referred to the House Committee on International Relations.

⁴⁴ In a letter to Prime Minister Sharon, President George W. Bush reaffirms the temporary status of the armistice lines stating: “It is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949, and all previous efforts to negotiate a two-state solution have reached the same conclusion.” A letter from President Bush to PM Sharon, by White House Press Office, JERUSALEM POST ONLINE EDITION, *available at* <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1081913154123> (last visited Apr. 14, 2004).

⁴⁵ For information on the Roadmap, see Appendices 3 & 4, attached to this report.

⁴⁶ *Supra* note 22.

⁴⁷ *Id.* at 15-16.

⁴⁸ <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>.

⁴⁹ *Supra* note 22, at 16.

⁵⁰ Available on <http://thomas.loc.gov>, (last visited Mar. 3, 2004)); text of H.CON.RES.371 is provided in Appendix 6.

Another concurrent resolution, H.CON.RES. 390, was introduced on March 18, 2004. The resolution condemns “the adoption of United Nations General Assembly Resolution ES-10/14 (December 8, 2003) which requests the International Court of Justice (ICJ) to render an advisory opinion concerning the international legal consequences arising from Israel’s construction of a security fence in parts of the West Bank, and for other purposes.”⁵¹ H.CON.RES. 390 was also referred to the House Committee on International Relations.

Four days following the issuing of the advisory opinion by the ICJ, H.RES.713 was introduced, “[d]eploring the misuse of the International Court of Justice by a majority of the United Nations General Assembly for a narrow political purpose, the willingness of the International Court of Justice to acquiesce in an effort likely to undermine its reputation and interfere with a resolution of the Palestinian-Israeli conflict, and other purposes.”⁵²

S. RES. 408 was introduced on July 20, 2004, “[s]upporting the construction by Israel of a security fence to prevent Palestinian terrorist attacks, condemning the decision of the International Court of Justice on the legality of the security fence, and urging no further action by the United Nations to delay or prevent the construction of the security fence.”⁵³

VII. The Rule of Proportionality and the Controversy over the Barrier

Opponents of the barrier argue that its construction violates the basic rights of the Palestinians to property and to freedom of movement. Israel argues that its citizens have a right to life and that in building a temporary barrier it is exercising its right of self-defense. The construction of the barrier in the path chosen is designed to prevent infiltration of terrorists into heavily populated areas, while making efforts to minimize the ensuing hardship.

The right of self-defense is an inherent right of all nations under customary international law and is recognized by article 51 of the U.N. Charter.⁵⁴ In determining whether a State’s action qualifies as self-defense,

[m]uch will depend upon the characterization of the threat and the nature of the response, for this has to be proportionate... . Indeed, the concepts of necessity and proportionality are at the heart of self-defense in international law. The court in the *Nicaragua case* stated that there was a ‘specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law and in the Advisory Opinion it gave to the General Assembly on the *Legality of the Threat or Use of Nuclear Weapons* it was emphasized that ‘[t]he submission of the exercise of the right of self-defense]e to the conditions of necessity and proportionality is a rule of customary international law. Quite what will be necessary and proportionate will depend on the circumstances of the case. It also appears

⁵¹ *Id.* (last visited Mar. 22, 2004); text of H.CON.RES.390 is provided in Appendix 7.

⁵² *Id.* (last visited July 15, 2004); text of H.RES.713 is provided in Appendix 8.

⁵³ *Supra* note 50 (last visited July 29, 2004); text of S. RES. 408 is provided in Appendix 11.

⁵⁴ The decision of the International Court of Justice in the *Nicaragua case* as cited in M. N. Shaw, *International Law* 788 (4th ed. 1997).

inevitable that it will be the state contemplating such action that will first have to make that determination, although it will be subject to consideration by the international community as a whole, and more specifically by the Security Council, under the terms of article 51.

In order to be lawful, the ICJ stated, “a use of force that is proportionate under the law of self-defense, must ... also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.”⁵⁵

VIII. The ICJ Majority Advisory Opinion

On July 9, 2004, six months after the request for an advisory opinion was sent to the ICJ, the Court rendered its decision.⁵⁶ The following is a summary of the main determinations made by the majority of judges of the ICJ. While Judge Buergenthal from the United States objected to all parts of the decision, both he and Judge Kooijmans objected to the Court’s determination of legal consequences for other States.

A. Jurisdiction

The Court concluded that it has jurisdiction to give the advisory opinion as requested following an emergency session of the General Assembly even though the Security Council has been actively engaged with the situation. This is because of the Security Council’s failure to exercise its primary responsibility for the maintenance of international peace as evidenced by its failure to pass resolutions against “certain Israeli settlements in the Occupied Territory **due to the negative vote of a permanent member... (and) again as a result of the negative vote of a permanent member**, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory...”⁵⁷

The Court further held that the request raises legal questions and that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Additionally, the fact that the legal question has political aspects does not deprive it from being subject to judicial review.⁵⁸

B. Discretionary Power of the Court to Exercise Its Jurisdiction

The Court determines that lack of consent to the Court’s contentious jurisdiction by Israel has no bearing on the Court’s jurisdiction to give an advisory opinion. The Court rejects the claim that its decision may impact negotiations on the “Roadmap.” It similarly rejects the argument that the question

⁵⁵ *Id.* at 790, see also, K. Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98(1) AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (Jan. 2004).

⁵⁶ See Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory, Decision by the ICJ (hereinafter the “decision,” available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited July 14, 2004)); see also Summary of the Advisory Opinion of 9 July 2004 (hereinafter the “summary”), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited July 13, 2004). Text is provided in Appendix 9.

⁵⁷ The bold type was added by the author to reflect dissatisfaction of the ICJ with the exercise of veto power by the United States regarding decisions critical of Israeli actions. See the decision, p. 16-17; see also Summary at 3.

⁵⁸ Decision at 18-21; summary at 4.

of the construction of the barrier was only one aspect of the wider Israeli-Palestinian conflict and therefore cannot be properly addressed in the present proceedings.⁵⁹

C. Sufficient Information

Information available in the public domain and general observations made in Israel's Written Statement, although limited to issues of jurisdiction and juridical propriety, are sufficient basis for determination on the issue

The Court does not need any additional information regarding the nature, scope and effectiveness of the security threat to which the wall is intended to respond. The Court finds it has no need for additional information and that "it has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population."⁶⁰

D. Irrelevancy of the "Clean Hands" Rule

The Alleged Responsibility of Palestinians to the violence does not preclude the Court from rendering the advisory opinion.

The Court rejects Israel's argument that "Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing... . The Court does not consider this argument to be pertinent ... it was the General Assembly which requested the advisory opinion, and that the opinion is to be given to the General Assembly, and not to an individual State or entity."⁶¹

E. Terminology

The Court uses the term "wall" employed by the General Assembly, and not "barrier" as used by the Security Council, or "fence" by Israel because "the other terms ... are no more accurate if understood in the physical sense."⁶² Also, the ruling refers only to parts of the construction which are outside of the territory of Israel.

F. Status

The territories situated between the green line and the former eastern boundary of Palestine under the British Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. They thus remain occupied territories and Israel is the occupying Power.⁶³

⁵⁹ Decision at 22-25.

⁶⁰ Decision at 26; summary *at* 5.

⁶¹ Decision at 28; summary *at* 6.

⁶² Decision at 29; summary *at* 7.

⁶³ Decision at 32.

According to General Assembly Resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States: “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”⁶⁴

G. Applicability of International Humanitarian Law to the Palestinian Territories

The Fourth Hague Convention of 1907 on the Laws and Customs of War on Land and its annexed Regulations are applicable in the Palestinian territories.⁶⁵ Section III of those regulations, which concerns “Military Authority Over the Territory of the Hostile State” is particularly pertinent in this case.⁶⁶

H. Applicability of Human Rights Law to the Palestinian Territories

The Court determines that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are applicable to the occupied territories. The Court thereby rejects the Israeli claim that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.⁶⁷

I. Illegality of Israeli Settlements

Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.⁶⁸ These settlements negatively impact the right of Palestinian people to self-determination.⁶⁹

J. Annexation

The construction of the wall creates a “fait accompli” and “be tantamount to de facto annexation, thus severely impeding the Palestinian exercise of the right to self-determination.”⁷⁰

K. Deprivation of Rights

The construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under article 12 paragraph 1 of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health,

⁶⁴ Decision at 36.

⁶⁵ Decision at 40.

⁶⁶ Decision at 37.

⁶⁷ Decision at 43-44; summary *at* 9.

⁶⁸ Decision at 47.

⁶⁹ Decision at 46; summary *at* 10.

⁷⁰ Decision at 47; summary *at* 10-11.

to education and to an adequate standard of living as proclaimed in the international Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child.⁷¹

L. Military Exigencies Exception Does Not Apply

The Court recognizes that article 53 of the “Fourth Geneva Convention contains a relevant provision” regarding consideration of “military exigencies.” The Court concludes, however, on the material before it, that it “is not convinced that the destructions carried out contrary to the prohibition in article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations” so as to fall within the exception.⁷²

M. No Right to Self Defense Against Non-state Perpetrators of Terrorism

Article 51 of the Charter “recognizes the existence of an inherent right of self- defense in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.”⁷³

N. No Right to Self-defense Against Perpetrators in Occupied Territories

Israel cannot assert a right to self-defense in protecting itself from a threat originating from territories it occupies.⁷⁴

O. Proportionality

One of the conditions to establish necessity as a ground to preclusion of rights is “that the act being challenged be ‘the only way for the State to safeguard an essential interest against a grave and imminent peril’ In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.”⁷⁵

P. Legal Consequences for Israel

The following was supported by all judges with Judge Buergenthal (from the United States) objecting:

Israel is bound to respect the right of the Palestinian people to self-determination and comply with its obligations under international humanitarian law and international human rights law. It must also ensure freedom of access to the Holy Places.

⁷¹ Decision at 54.

⁷² Decision at 54, summary *at* 12-13.

⁷³ Decision at 56.

⁷⁴ *Id.*

⁷⁵ Decision at 57.

Israel should stop the construction of the wall and dismantle segments already built in the Occupied Palestinian Territory, including in and around East Jerusalem.

All related legislative and regulatory acts adopted by Israel should be repealed. Israel should make reparation for the damage it caused.⁷⁶

Q. Legal Consequences for other States

The following was supported by thirteen judges against two, Judge Kooijmans and Judge Buergenthal:

...[a]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁷⁷

IX. The Dissenting Declaration of Judge Buergenthal

Judge Buergenthal's opinion is that the Court should have exercised its discretion and declined to render the requested advisory opinion because "the Court did not have before it the requisite factual bases for its sweeping findings."⁷⁸

A. The Court's Opinion Lacks Credibility

While sharing the Court's conclusion that international humanitarian and human rights law are applicable to the Occupied Palestinian Territory, and that "the wall is causing deplorable suffering to many Palestinians living in that territory," Judge Buergenthal rejects the sweeping finding that "some or even all segments of the wall...violate international law."⁷⁹ He states:

But to reach that conclusion...without having before it or seeking to ascertain all relevant fact bearing directly on issues of Israel's legitimate right of self-defense, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which

⁷⁶ Decision at 59-60.

⁷⁷ Decision at 61; summary at 14-15.

⁷⁸ Declaration of Judge Buergenthal available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited July 14, 2004); text provided in appendix 9.

⁷⁹ *Id.* at 1.

Israel has been and continues to be subjected, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject.⁸⁰

B. Right to Self-Defense

Israel's right to self-defense, if applicable and legitimately invoked, would preclude wrongfulness.⁸¹ Whether Israel's right of self-defense is relevant depends on an examination of the nature and scope of the deadly terrorist attacks to which is exposed. Judge Buerghenthal states:

As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not. But to reach a conclusion either way, one has to examine the facts bearing on that issue with regard to the specific segments of the wall, their defensive needs and related topographical considerations.⁸²

Considering the lack of these facts before the Court, its conclusion that the right of self-defense is inapplicable is "legally dubious."⁸³

C. Self-Defense Against Non-State Actors

The Court's conclusion that Israel cannot claim self-defense against non-state actors is wrong:⁸⁴

- Article 51 of the Charter recognizes the right to self-defense "if an armed attack occurs against a Member of the United Nations," and does not require the armed attack to be perpetrated by a State actor.
- The Security Council has clarified that "international terrorism constitutes a threat to international peace and security."
- The Security Council reaffirmed the inherent right of individual or collective to self-defense in resolution 1368 (2001) adopted a day after September 11, 2001 attacks on the United States.
- The Security Council has not limited the application of self-defense to terrorist attacks by State actors only.

⁸⁰ *Id.*

⁸¹ *Id.* at 2.

⁸² *Id.* at 2.

⁸³ *Id.*

⁸⁴ *Id.* at 2-3.

D. Lack of Consideration of Pertinent Issues

The Court neglects to address the very issues that are at the heart of this case⁸⁵

Attacks on Israel coming from across the green line permit Israel to exercise its right of self-defense against such attacks, provided that the measures taken meet the tests of necessity and proportionality. “The Court’s formalistic approach to the right of self-defence enables it to avoid addressing the very issues that are at the heart of this case.”

E. Lack of Consideration of Facts and Evidence

The Court reached conclusions without addressing facts and evidence:

- “[T]he Court fails to address any facts or evidence specifically rebutting Israel’s claim of military exigencies or requirements of national security.”⁸⁶
- “[T]he Court barely address[es] the summaries of Israel’s position on this subject that are attached to the Secretary-General’s report and which contradict or cast doubt on the material the Court claims to rely on.”⁸⁷

F. The Court’s Conclusions Are Not Convincing

The Court says that it “is not convinced” that military exigencies, national security or public order are applicable to the wall or any segments of its route, “but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.”⁸⁸

G. Lack of Consideration of Israeli Positions

The Court failed to address Israel’s position that there was no change in ownership of the land; compensation is available for use of land, crop yield or damage to the land; residents can petition the Supreme Court to halt or alter construction and there is no change in resident status. “While these Israeli submissions are not necessarily determinative of the matter, they should have been dealt with by the Court and related to Israel’s further claim that the wall is a temporary structure....”⁸⁹

H. Illegality of Israeli Settlements

Israeli settlements in the West Bank are illegal. “It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law.”⁹⁰

⁸⁵ *Id.* at 3.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 3.

⁸⁹ *Id.* at 4.

⁹⁰ *Id.*

The construction of such segments would unlikely satisfy the requirement of proportionality to qualify as a legitimate measure of self-defense.⁹¹

I. No Adverse Evidentiary Conclusions from Lack of Consent for Adjudication

The Court may draw no adverse evidentiary conclusion from Israel’s refusal to participate in the proceedings, failure to supply evidence, or assume it has sufficient evidence without it.

Once the Court recognized that Israel’s consent to these proceedings was not necessary since the case was not brought against it and Israel was not a party to it, Israel had no legal obligation to participate in these proceedings or to adduce evidence and the Court may not draw any adverse evidentiary conclusions from its failure to supply it or assume that the information before it is sufficient to support each and every one of its sweeping legal conclusions.⁹²

X. The Landmark Ruling of the Israeli High Court of Justice (hereafter “the *Beit Surik* case”)⁹³

Nine days before the issuance of the advisory opinion by the ICJ, Israel’s High Court of Justice had issued its own landmark ruling on the subject of the barrier. The Israeli Court ordered the re-routing of an 18.6-mile stretch of the barrier northwest of Jerusalem. Although relating specifically to this stretch of land, the decision sets the ground rules for construction of any additional segments of the barrier. The June 30, 2004, forty-eight-page decision by Chief Justice Barak, with Deputy Chief Justice Matsa and Justice Cheshin consenting, analyzes the legality of decrees for seizure of land issued by the Israel Defense Force (IDF) Commander (hereinafter “Military Commander”) in Judea and Samaria (West Bank, hereinafter “the region”) for the purpose of construction of the barrier. The decision further analyzes the legality of the path selected for construction.

The following is a brief description of the Court’s holdings, to be followed by a comprehensive summary of the decision.

A. Main Points

1. The region is under belligerent occupation. Both sides agree that the humanitarian provisions of the Fourth Geneva Convention regarding Protection of Civilians at Time of War, 1949, apply. International law recognizes the humanitarian needs of the local population under belligerent occupation as well as the security needs from the perspective of the responsible military commander.
2. The decision of the military commander to build the barrier is based on military and not on political considerations. The location of the green line is not relevant in such considerations.
3. International law regarding belligerent occupation authorizes the military commander to seize land for military needs but subjects him to the duty to pay compensation for the land’s use.

⁹¹ *Id.*

⁹² *Id.* at 4.

⁹³ H.C. 2056/04 *Beit Surik Village Association et al. v. State of Israel and Chief IDF Commander in the West Bank*. Available at the website of the Israeli court system <http://62.90.71/Files/04/560/020/a28/04020560.a28.HTM>, (last visited June 30, 2004).

4. The harm caused to private ownership by seizure of the land does not negate the authority to construct a barrier for security reasons. However, the path selected for the barrier should take into consideration the needs of the local population. This relates to the path and not to the authority itself.
5. The legality of the path selected for the barrier depends on whether it is proportional.
6. Proportionality can be established by answering a three prong test:
 - I. Is there a rational nexus between the location of the barrier's path and achieving a security goal?
 - II. Among the different paths of the barrier capable of reaching the goal-was the path selected the least harmful?
 - III. Does the path-selected harm the local residents so badly that there is no appropriate relation between this harm and the security benefit arising from it?
7. The Court concluded that the harm caused to most petitioners is not proportional to the military benefit. Several military seizure decrees are held void. Respondents are ordered to re-examine the path of the barrier.

B. Comprehensive Summary

1. Background Information

In reviewing the facts of the case, the Court held that the region has been under Israeli belligerent occupation since 1967. A peace process between Israel and the Palestinians was underway from 1993 until July 2000, when negotiations on final status issues conducted in Camp David, Maryland, USA, failed. The Court held:

From the respondent's affidavit we learned that shortly after the failure of the Camp David talks the Palestinian-Israeli conflict has reached new records of violence. In September 2000 the Palestinian side moved to a fierce terror attack on Israel and on Israelis. Terrorist attacks take place in the region as well as in Israel. They are directed against citizens and soldiers, men and women, old people and infants, regular citizens and public figures. Terror attacks are conducted in any location including public transportation, shopping centers and markets, coffee houses and restaurants. The terror organizations use various different means, including shooting attacks, suicide attacks, launching of cannon shells and Katyushas as well as the use of car bombs. From September 2000 to the beginning of April 2004 more than 780 terrorist attacks have been carried out in Israel, and more than 8,200 such attacks in the region.

The armed conflict cost the lives of 900 Israeli citizens and residents. More than 6,000 were injured, some with serious injuries making them seriously handicapped.

The armed conflict resulted also in many deaths and injuries on the Palestinian side. Death and pain are overwhelming.⁹⁴

While describing the security situation, Chief Justice Barak cites the following extract from his decision in another case:

Israel's fighting is complex. The Palestinian side uses, among others, directed human bombs. These suicidal persons reach any place where there are Israelis (within the State of Israel as well as within the area of Jewish settlements in Judea and Samaria as well as the Gaza Strip). They plant death and blood in towns and in villages. Indeed, the forces fighting Israel are terrorists. They do not belong to a regular army; they do not wear uniform; they hide in the Palestinian population in the region, including in the holy places; they generally enjoy the support of part of the general civil population and specifically the support of family members and relatives.⁹⁵

Palestinian terror activities led Israel to resort to a variety of military operations, which did not succeed in bringing an end to terror. The government then approved the construction of a barrier that would prevent penetration of terrorist activity from the region into Israel. (The Court refers to the barrier as a "dividing fence.")

Petitioners oppose the path of the fence going through areas west of Jerusalem.

2. The Dividing Fence

Information admitted by the High Court indicated that the dividing fence is an obstacle composed of several components. At the center stands a "smart" fence. Its role is to warn Israeli forces spread along the fence of any attempt to cross it. On the exterior side of the fence there is an obstacle against vehicles, composed of a canal or another mean designed to prevent breaking the fence by striking vehicles. Close to the fence there is an additional service road. Blurry way (designed to disclose the footsteps of a person crossing the fence), way for patrols and a way for armed vehicles, as well as an additional fence. The average width of the obstacle is fifty to seventy meters (164 to 230 feet). In the area subject of this petition the width is not expected to exceed thirty-five meters (about 115 feet), except for areas where it is needed for topographic considerations. Also in the area subject of the petition the fence is not being replaced with a cement wall. During the course of work there was an effort to minimize the width of the area that will be actually seized. Various measures designed to contribute to prevention of penetration will be located along the obstacle. IDF and the Border Patrol forces will patrol along the dividing fence and will be called upon to infiltrate areas for prevention and pursuit of infiltrators.

3. Land Seizing Procedures

Parts of the dividing fence are situated on privately owned land and some are not. In this situation and in light of the security need the military commander in the region issued a seizure order. In accordance with accepted procedure, every landowner whose land is seized gets

⁹⁴ *Id.* at 2, translated by Ruth Levush.

⁹⁵ H.C. 7015/02 *Adjuri v. Chief IDF Commander in the West Bank*, 56(6) Piske Din (PD) 352, 358). Translation from Hebrew by Ruth Levush.

compensation for the use of his land. Following the signing of a seizure order, notification is made to the residents as well as to the relevant body in the Palestinian Authority. The notification is accompanied by an invitation to all interested persons to join a tour in the area subject of the seizure order for the purpose of displaying the planned path of the fence. Following the tour, landowners are provided with a seven-day period for submission of objections to the military commander. When possible, an attempt is made to reach an understanding with the landowners. If the objection is rejected, the landowners are provided with an additional period of seven days to petition to the High Court of Justice.

4. Petitioners' Claims

Petitioners are landowners who attacked the legality of the path of the barrier and of seizure orders for their lands in *Beit Surik, Bido, Al Kabeiba, Ktana, Beit Anan, Beit Likia, Beit Adjaza and Bit Dako*. These lands are adjacent to Israeli communities west and northwest of Jerusalem including *Mavo Horon, Har Adar, Mevaseret Tsion, Ramot* neighbourhood in Jerusalem and *Givat Zeev*.

According to the petitioners the decrees cause them undue hardship. The barrier goes through their lands and separates them from a large area of agricultural land they and their families have cultivated for many generations. Access will become complicated and even impossible under a complicated bureaucratic regime of permits. The lack of access to water wells in the area will make it impossible to raise sheep. In addition, thousands of olive and fruit trees will be uprooted. Petitioners point out that the barrier will prevent the villages to grow and develop, and the villagers to access the urban centers of Ramalla and Bir Naballa and the medical and other services in eastern Jerusalem and in other areas. The fence will make it difficult for ambulances to supply emergency services to the residents and make it difficult for village students to access schools in urban centers.

Petitioners further argue that the decrees are illegal under Israel's domestic administrative law as well as public international law which applies to the conflict in this case for the following reasons:

1. The military commander has no authority to issue seizure orders for land in the region. The dividing fence annexes areas to the State of Israel contrary to international law. The fence serves the need of the occupying power and not the needs of the local population in the occupied area. The purpose of the fence is to prevent harmful infiltration into Israel and therefore is not designed to service the interest of the local population or the needs of the occupying power in the occupied area. There is no military need to construct the dividing fence in the designated path, but it is rather a hidden agenda to annex land to Israel.
2. The process of determining the path of the dividing fence is illegal: decrees have not been published nor brought to the attention of the majority of landowners. Petitioners have not been properly provided with a right of objection.
3. The dividing fence harms many of the petitioners' basic rights. Their right to property is affected by the seizure of land and prevention of access. Their rights to free movement and to engage in an occupation are similarly harmed. The barrier harms educational opportunities for village children as well as access to the holy places.
4. Petitioners argue that the path of the dividing fence reflects collective punishment that is prohibited under international law. In spite of the language of the seizure, it is clear that the

fence is not temporary in its character, and the detrimental harm it inflicts on the population of the villages greatly exceeds its benefit.

5. Respondents' Arguments

The respondents argue that the seizure orders and the fence path have been legally issued. The dividing fence is a project of superior national importance. Israel is fighting a wave of terror, which enjoys the support of the Palestinian population and its leadership. The lives of Israeli citizens and residents are at stake. Several terrorist attacks against Jerusalem and Route 443 connecting Jerusalem and *Modiin* originated from the area of the petitioners' villages. Speedy construction of a dividing fence that will pass in that area is therefore crucial.

The central consideration in selecting the path of the fence was operational and military. The goal was to prevent uncontrolled passage of residents of the region into Israel and Israeli communities in the region. The fence is also designed to prevent the smuggling of weapons and the infiltration of Palestinians that may lead to the establishment or strengthening of terror cells in Israel. An additional goal is to protect forces operating along the fence and Israeli communities on both sides of the fence.

According to security considerations, the dividing fence should go through an area which controls its surrounding area and avoids curves as much as possible. Security considerations further dictate the need to have "a security space" to allow pursuit of infiltrators. Another security consideration, which needs to be taken into account, is that the construction of an obstacle may shift the focus of attacks to Israeli communities located near the fence, thus increasing their need for protection.

Respondents argue that in planning the path of the fence a lot of weight was given to the interests of the local residents in an effort to minimize harm to them as much as possible. For example, there was an effort to move the obstacle to lands that are not privately owned or not farmed, and to relocate plants instead of uprooting them. Similarly, it was planned to maintain open checkpoints twenty-four hours a day and pay compensation to landowners for use of their seized lands.

According to the respondents the seizure orders were properly issued. The authority to seize land for construction of an obstacle derives from Israel's natural right to defend itself from threats outside its borders. Based on the rules applying to belligerent occupation, the military commander may seize land for a military purpose. The respondents do not object to the need to consider the harm to the local population and preserve its proportionality, but argue that they are complying with their obligations. They disagree with the impact of the harm that petitioners claim had been caused. They claim that the scope of seized land, and the harm to trees and shrubbery is much lower than claimed. They further reject the claim that harm to water wells will prevent the supply of water for agriculture and other needs because the villages are connected to a water system that can provide for their needs. Finally, respondents state that there is at least one health station in every village, and that they will consider the educational needs of the local population and make any additional effort to minimize the harm to the local population.

6. The Hearing

The hearing lasted several sessions during which some changes in the path of the dividing fence have taken place. The Court ordered a halt to the construction in the relevant areas until the conclusion of the case.

Several residents of *Mevaseret Tsion*, an Israeli community adjacent to *Beit Surik* village, against the opposing view of another resident, joined the Palestinian petitioners in support of the claim that the

fence should pass adjacent to the green line in order to enable their neighbors to farm their lands, maintain their dignity and maintain their good neighborly relationship.

Additionally, an affidavit prepared by members of the Association for Peace and Security (hereinafter “the association”), a registered non-profit organization of Israelis with security experience, including retired high-ranking officers, was admitted in support of the petition with the consent of both sides. Defining itself as non-partisan, the association claims to have been one of the promoters of the idea to erect the dividing fence, as a response to Israel’s security needs. Having been permitted to join the hearing as friends of the court, members of the association argued that the dividing fence should meet three objectives:

1. It should serve as an obstacle that prevents or at least delays the entry of terror perpetrators into Israel.
2. It should provide a warning to the security forces in case of infiltration.
3. It should enable supervision, correction and control of mobile forces along the fence.

Based on the above the association members argue that the fence should be distant from the houses of Palestinian villages rather than adjacent to them to facilitate pursuit of forces moving along the fence. The path should be re-routed to avoid the need for passages and gates that will create frictions points and increase harm and anger; additionally, thickening the obstacle close to Israeli settlements can replace the need for constructing the fence further away from Israeli communities in order to prevent infiltration and facilitate pursuit.

Based on the above criteria, petitioners further argue that the path of the dividing fence is not proportional. It does not serve the security needs of Israel because by passing the path close to Palestinian homes, the State is endangering the lives of its soldiers who will patrol near the fence. Moreover, infiltration can be prevented by building the fence closer to Israel, thickening it, and adding additional obstacles instead of building it adjacent to the petitioners’ villages.

Respondents recognize the security and military experience of the signatories of the affidavit submitted by the association. They, however, emphasize that the responsibility to protect Israeli residents from security threats remains theirs. The disagreement is among security experts. In such a situation the view of the expert who is actually responsible for security is of a higher value.

Respondents accept that the borderline between Israel and the region should be taken into consideration in formulating the fence’s path for the purpose of minimizing the harm to the local population. That borderline, however, is a political and not a security line. The fence, respondents argue, should provide security space that permits pursuit of terrorist infiltrators, protect from direct shooting at soldiers guarding the fence and consider the area’s topographical conditions. Although location of the barrier near Palestinian homes may raise difficulties, it is only one of the considerations involved. Additionally, respondents argue, the thickening of the fence near Israeli settlements does not address the danger of shooting at them nor does it guarantee non-infiltration into them.

7. The Court’s Determination of the Normative Scope

Israel is holding the region in belligerent occupation. The areas subject to the petition are under military rule headed by a military commander. The authorities of the military commander are derived from the rules of public international law regarding belligerent occupation. These rules are based, on the most part, on regulations regarding laws and customs of war on land appended to the Fourth Hague

Convention of 1907 (hereinafter the Hague regulations). These regulations reflect the international customary law. The military commander's authority is also derived from the Geneva Convention relative to the Protection of Civilians in Time of War, 1949 (hereinafter the Geneva Convention). The respondents agree that the humanitarian provisions of the Geneva Convention apply in this case.

In addition to the provisions of international law, the military commander is also bound by the principles of Israeli administrative law regarding the use of administrative authority by a public official. Therefore he is subject to rules of substantive and procedural fairness including recognition of the right to a hearing before seizure, confiscation or any other administrative action; and the duty to act reasonably and apply the rules of proportionality.

The petition raises two questions:

1. Is the military commander in the region legally authorized to construct a dividing fence in the region?
2. If he is, is the location of the dividing fence legal?

8. The Authority of the Military Commander to Erect the Dividing Fence

The Court analyzed the petitioners' claims and concluded that, in accordance with the facts presented, the reason for constructing the fence is based on security and not on political considerations.

The Court held that the military commander of an area held under belligerent occupation must find a balance between the needs of the army on one side and the needs of the local residents on the other. Political considerations, annexation of land, or determination of permanent borders of the State have no place in these considerations. The authorities of the military commander are temporary by their nature because belligerent occupation is temporary by nature. Indeed, the belligerent occupation in the region has lasted for many years. The passage of time, however, does not result in broadening of the authorities of the military commander by allowing him to consider anything beyond the mere proper administration of the region subject to belligerent occupation.

The Court finds that the considerations of the military commander in determining the path of the fence in this case were typical security considerations. In his affidavit the military commander stated the goal of the fence was to prevent unsupervised passage of residents of the region into Israel and into some Israeli settlements in the region. He provided a detailed list of his considerations in selecting the path. He listed the need to have the fence pass in areas which control their surroundings; pass in a direct line as much as possible to facilitate surveillance; and establish "security space" to facilitate delay of infiltration into Israel. In his affidavit the commander also noted that the fence is constructed on a temporary basis and for a security purpose. The Court finds that "there is no basis not to recognize the full weight of these considerations and no basis to reject the sincerity of the commander's affidavit."⁹⁶

Based on the determination that the path of the fence was selected for military reasons, it follows that the green line, the line established by the armistice agreement between Israel and Jordan following the independence war, is not relevant. The Court held that it is the security approach and not the political one, which supports an evaluation of the path on its own merits without a necessary connection to the green line. Members of the association have not even raised the claim that the path should be adjacent to

⁹⁶ *Supra* note 92 at 16-17.

the green line. Nor did they claim that the considerations of the commander are political. Their dispute with him is regarding the appropriate path of the dividing fence from a security point of view and not from a political one.

The Court found no fault in the issuance of seizure orders and the appeal process provided to affected residents. It recognized the authority of the military commander, for military needs and subject to duty of compensation, to seize land based on articles 23(g) and 52 of the Hague regulations and section 53 of the Geneva Convention. The Court held that the obstacle is designed to replace military combat operations with physical blockage of terrorists from penetrating Israeli centers of populations. The harm it causes to individual property cannot void the authority to order it. Rather, the path of the obstacle must take into consideration the needs of the local population. This has to do with the issue of the path of the fence and not to whether there is authority to construct it.

9. The Path of the Dividing Fence

The laws of belligerent occupation recognize the power of the military commander to preserve the security in the region and in doing so protect the security of his country and its citizens. The exercise of this authority, however, must be properly balanced against the rights, needs, and interests of the local population. The Court's approach derives from the humanitarian laws of public international law; specifically article 46 of the Hague regulations and article 27 of the Geneva Convention.

Article 46 of the Hague regulations provides: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."⁹⁷

Article 27 of the Geneva Convention further provides:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.⁹⁸

According to the Court, the provisions cited above impose on the military commander a double duty: to refrain from actions that harm local residents and perform actions needed for their security. In addition to these basic rules there are additional rules dealing with specific aspects such as seizure of land (based on sections 23(g) and 52 of the Hague regulations; and section 53 of the Geneva Convention).

These provisions create a tapestry of provisions that on the one hand recognize the human rights and needs of the local population, and on the other recognize the security needs from the perspective of the military commander. Among these conflicting provisions there is a need to find a proper balance.

10. Proportionality

⁹⁷ *Id.* at 20.

⁹⁸ *Id.* at 21.

The problem of balancing between security and freedom is not limited to the exercise of authority of a military commander in an area subject to belligerent occupation. This is a general problem in both international and domestic law. The solution to the problem is found, among others, in general principles of law, including reasonableness and good faith. One of the basic principles that enable the balancing of a proper goal and the means for achieving it is the principle of proportionality. According to this principle, it is possible to limit the freedom of the individual (in this case the freedom of the local residents subject to belligerent occupation) in order to achieve appropriate goals (in this case, the security of the state and its citizens, as well as the security of the region) as long as the limitation is proportional.

Proportionality is recognized today as a general principle of international law. Proportionality has a central role in rules applying to armed conflicts where the need frequently arises to balance between military considerations and humanitarian ones.

Proportionality is a general principle not only of international law; it is also a principle of Israeli administrative law.

The principle of proportionality determines that a decision of an administrative authority is legal only if the measure taken in order to achieve the administrative goal is to the proper extent. The principle of proportionality therefore concentrates on the relationship between the goal and the means for its achievement.

Israeli law accepts a three-pronged test for application of the rule of proportionality:

1. There has to be compatibility between the goal and the means. The means used by the administrative agency must rationally lead to reaching the goal.
2. The means used by the administrative agency should harm the individual in the least possible way. Among the means that can be used for reaching the goal, the means with the least harmful impact are preferred.
3. The harm caused to the individual from the means used by the administrative agency need be proportional to the benefit it achieves.

11. Proportionality and the Path of the Dividing Fence

The Court recognizes that the dividing fence was designed to accomplish a security goal that the military commander is authorized to achieve. The question is whether the path is proportional.

The proportionality of the dividing fence should be determined in accordance with an answer to the three following questions

1. Is there a rational nexus between the locations of the fence's path and achieving the goal?
2. Among the different paths of the fence that could achieve the goal, was the path selected the least harmful?
3. Is the harm caused to the local residents by the elected path so severe that there is no appropriate balance between the harm and the security benefit arising from it?

Accordingly, the path selected will be found disproportional if an alternative path can be found to provide a lesser security advantage but cause significantly smaller harm.

12. Scope of Judicial Review

The Court recognized that a nexus exists between the military goal of the fence and its path. The Court further recognized that lacking military expertise, it cannot intervene in the dispute between the military commander and members of the association that the determined path offers less security than an alternative path.

The Court then examines the proportionality of the path and the balance between the military objective and the level of harm to the local residents. This is not about balancing between military considerations; rather, it is about balancing between the military considerations and the humanitarian ones. Determining that the path fulfills the military reasonableness test, the Court reviews every decree that is a subject of the petition on its own merits.

While rejecting a petition regarding one part of the path based on the respondent's actions to limit the harm, and the petitioners' neglect to raise any objection to the path itself, the Court accepts petitions regarding other segments, recognizing the severe harm caused to local residents by separating them from their farm lands. The Court finds that no attempt has been made in those cases to look for and provide the residents with alternative farming land. Although the separation from their land is not complete, the Court finds that a system of gates and licenses creates long cues and complicates passage of vehicles resulting in distancing the farmers from their land. This severely harms the farmers' rights to property and movement, thus impacting their livelihood and increasing the already existing unemployment in the region.

The Court determined that the harm described is not proportional to the benefit and that it can be minimized by a selection of an alternate route, either that proposed by the association's experts or another selected by the military commander.

The Court accepted the petition regarding the Beit Surik holding that “the original path of the decree leaves the Beit Surik village tightly surrounded by the obstacle in its western, southern, and eastern sides. It passes adjacent to the village homes. This is a real suffocating ring, which severely hurts the daily life. The fate of the Bido village is not much better. The obstacle surrounds the village from east and south and affects land located in the west.”⁹⁹

After balancing the security benefit with the harm caused to these villagers, the Court found that the latter is disproportional to the former. The Court voided the decree and ordered the military commander to find another route, even at the expense of somewhat lowering security considerations. The Court reaffirmed that the selection of the path is the authority of the military commander, but the path should liberate the *Beit Surik* (and to a smaller extent, the *Bidu* village) from the “suffocation ring” in which they find themselves and provide the villagers free access to the majority of their farmlands. Similar determinations are made regarding other segments of the path, which disconnect certain villages from the urban centers of Ramalla and east-Jerusalem.

13. The Court's Concluding Remarks and the Final Verdict

While concluding his decision Chief Justice Barak stated:

⁹⁹ *Id.* at 39.

Our job is difficult. We are members of the Israeli society. Even if we are sometimes located in the ivory tower, this tower is located inside Jerusalem, that many times was hurt by terror lacking any constraints. We are aware of the death and destruction that terror against the state and its citizens causes. Like any other Israeli, we also recognize the need to protect the state and its citizens against the hard impact of terror. We are aware of the fact that in the short run our decision does not facilitate the fight of the state against its enemies. This knowledge is hard on us. But we are judges. When we sit to judge, we are subject to judgment. We act according to the best of our conscience and understanding. Regarding the fight of the state with terror that is used against her, we are convinced, that at the end of the day its fight in accordance with law and while fulfilling its provisions strengthens its power and its spirit. There is no security without law. Implementation of the law is a component of national security...[o]nly a dividing fence which is built in accordance with law will provide security to the State and its citizens. Only a dividing path which is based on the path of law will lead the State to the aspired security.¹⁰⁰

As a result, most orders subject to the petition have been voided being found disproportional. Respondents were ordered to reconsider the path of the fence.

XI. The Aftermath

On July 20, 2004, the U.N. General Assembly passed a resolution demanding that Israel abide by the ICJ ruling to dismantle the barrier. The resolution passed by a vote of 150 to 6 (including the United States), with 10 abstaining. Israel's ambassador to the U.N. dismissed the ruling as "one-sided." He stated that the barrier had diminished the number of suicide bombings and that Israel will continue with the construction in accordance with the requirements imposed by the Israeli High Court of Justice.¹⁰¹

Following the decision of the Israeli High Court of Justice in the *Beit Surik* case, Israel's Ministry of Defense prepared new guidelines for construction of the barrier in an effort to comply with the Court's ruling. The Ministry of Defense spokesperson, Ms. Rachel Nidek- Ashkenazi, stated:

There is an ongoing project by central command that reviews the path of the defensive fence in accordance with the criterion determined by the High Court, requiring appropriate balancing between humanitarian considerations to security considerations.... Indeed we aspire to prevent creation of enclaves. We hope to distant the fence from the home of the Palestinian. We hope to prevent separation between Palestinians to their lands, and for this exact purpose the reevaluation is underway.¹⁰²

¹⁰⁰ *Id.* at 44-45, translated by Ruth Levush.

¹⁰¹ Colum Lynch, U.N. Demands That Israel Remove "Security Barrier," available at <http://www.washingtonpost.com/wp-dyn/articles/A108-2004Jul20.html> (last visited day of posting, 7/21/2004).

¹⁰² New Guidelines: The Fence will not "cage in" Palestinian Villages, available at <http://ynet.co.il/articles/0,7340,L-2946689,00.htm> by subscription, (last visited day of posting, July 13, 2004); see also Report: Fence Route to Approximate Green Line, Jerusalem Post Online edition, available at <http://www.jpost.com> (last visited day of posting July 13, 2004).

On February 20, 2005, the Israeli Ministry of Defense published the updated map of the path of the barrier.¹⁰³ The approved plan calls for locating large portions of the barrier immediately adjacent to the green line, and for the construction of local barriers around several settlements. The new path was generally approved by the Attorney General, except for the three enclaves of *Areil*, *Maale Adomim* and *Gush Etsion* located deep into the West Bank.¹⁰⁴ The new plan also calls for the building of walls along Route 45 (northeast of Jerusalem) and Route 60 (from Jerusalem to *Gush Etsion*), thereby eliminating the former plan of circling of Palestinian villages. Their residents, however, would be required to drive through tunnels passing under Israeli roads in order to get to neighboring towns.¹⁰⁵

On February 23, 2005, the Israeli government officially expressed its reaction to the ICJ's ruling, regarding it as biased and non-binding. The government position was detailed in a brief requested by the Israeli High Court of Justice in response to separate petitions against sections of the barrier near the Palestinian villages of *Shoqba* and *Burdus*. Attorneys for the State argued that the ICJ had based its decision on facts submitted by the UN secretary-general, which were "incomplete, general, inaccurate and imbalanced."¹⁰⁶ In addition, they argued the ICJ had considered the barrier in its entirety rather than examining each segment separately, and "therefore branded the entire project illegal on the basis of "inaccurate facts" regarding a small part of it."¹⁰⁷ The State further argued that the ICJ had also not considered the changes that took place in the barrier's route following the Israeli High Court landmark decision in the *Beit Surik* case.¹⁰⁸

In response to the petitions regarding *Shuqba* and *Burdus*, the State maintained that the route proposed by the government met the criteria established by the High Court in the *Beit Surik* case.¹⁰⁹ The State Attorney further stated that the final route of the barrier would include eight percent of the West Bank, and that the barrier was merely a temporary measure.

The petitions regarding *Shuqba* and *Burdus* are among several petitions submitted to the High Court involving other segments of the barrier. The Court has been reviewing the legality of the location of the barrier in various places based on the criteria it established in the *Beit Surik* case.¹¹⁰ For example, on February 3, 2005, the Court rejected a petition to change the route of the barrier in *Beit Lechem*.¹¹¹ On

¹⁰³ For the map and information on the design of what the government terms "obstacle" see Israel's Ministry of Defense, "Israel's Security Fence," <http://www.securityfence.mod.gov.il/Pages/Heb/mivne.htm> (last visited 02/24/05). The map and the design are provided in appendix 12.

¹⁰⁴ See Y. Yoaz, *The State to the High Court: Mazoz has not yet approved the parts of the fence surrounding Ariel and Maale Adumim*, <http://www.haaretz.co.il/hasite/spages/544097.html> (last visited 02/23/05).

¹⁰⁵ See A. Ben, *The Ministry of Defense Published the Updated Map of the Path of the Fence* (02/23/05) available at <http://www.haaretz.co.il/hasite/spages/543542.html> (last visited 02/23/05).

¹⁰⁶ See D. Izenberg et al., *State Condemns ICJ Fence Ruling as 'biased'* <http://www.jpost.com> (last visited 02/23/05).

¹⁰⁷ *Id.*

¹⁰⁸ *Supra* note 93.

¹⁰⁹ *Supra* note 106.

¹¹⁰ *Supra* note 88.

¹¹¹ See High Court of Justice Rejected a Petition to change the Route of the Fence near Rachel's Tomb (02/03/2005) <http://www.ynet.co.il/articles/0.7340.L-3040980.00.html> (last visited 02/03/05).

February 23, 2005, however, it ordered the Government to halt construction in the region of Kfar Safa, following complaints from local villagers.¹¹² A decision in the *Shuqba* and *Burdus* case is expected shortly.

XII. Conclusion

The Arab-Israeli conflict involves conflicting claims over issues of sovereignty, self-determination, and borders. The ongoing peace process was expected to bring about a resolution to these very complex issues. The peace process led to the signing of a peace treaty between Egypt and Israel, followed by the signing of a similar treaty between Israel and Jordan, and the initiation of the DOP and the Interim Agreement between Israel and the Palestinians. The Palestinian-Israeli track, however, faced serious obstacles. Terrorism against Israelis increased, while settlement activity by Israel continued. The construction of the barrier by Israel in the West Bank seems to reflect the multiplicity of conflicting positions and views of the parties and of the international community on the core issues of the conflict.¹¹³

It was opined that¹¹⁴ “[t]he idea of a fence separating Israelis and Palestinians is, on one level, an admission of failure. Yet it is also realistic Given the traumas both of these peoples have endured, especially over the last three years, keeping Israelis and Palestinians apart now is the only way to bring them together in the future.”¹¹⁵

Many believe that the ICJ should have refrained from entertaining the case, and that the question referred to it should have been redrafted in a balanced way that will include Palestinian terrorism as the cause for the barrier. Members of Congress have expressed their outrage at the United Nations General Assembly resolution to request an ICJ advisory opinion on the matter and at what they see as the willingness of that court “to acquiesce in an effort likely to undermine its reputation and interfere with a resolution of the Palestinian-Israeli conflict....”¹¹⁶

The majority opinion of the ICJ indeed raises many questions as to the appropriateness of the adjudication process. In the view of the dissenting ICJ American judge, Judge Buergenthal, the majority’s advisory opinion lacked credibility because “the Court did not have before it the requisite factual bases for its sweeping findings.” Judge Buergenthal further opines that the ICJ determination that a right to self-defense cannot be ascertained against non-state actors is wrong. Similarly to the Israeli High Court of Justice, Judge Buergenthal recognizes that military necessity and security needs, given the repeated deadly terrorist attacks on Israel and its people, can preclude wrongfulness if it is shown that the measures taken are proportional. According to Judge Buergenthal, the ICJ passed its judgment without examining any facts regarding the nature and scope of the deadly terrorist attacks to which Israel is exposed, or the factual situation regarding “specific segments of the wall, their defensive needs and

¹¹² *Supra* note 106.

¹¹³ See e.g., *Written Statements of the League of Arab States*, *supra* note 31, at 62-76, referring to the international status of the territory as mandated territory, Palestinians’ rights for self-determination and sovereignty over natural resources.

¹¹⁴ D. Makovsky, *How to Build a Fence*, FOREIGN AFFAIRS, 50 (Mar./Apr. 2004).

¹¹⁵ *Id.* at 64.

¹¹⁶ H.RES.713, available at <http://thomas.loc.gov>, (last visited July 15, 2004); text is provided in appendix 8.

related topographical considerations.”¹¹⁷ Unlike the ICJ, the Israeli High Court of Justice seems to have extensively examined all such considerations.

Palestinians and their supporters hailed the ICJ majority advisory opinion as a victory for justice. The reaction on the Israeli side has been very different. An Israeli journalist in the Haaretz left-leaning daily reflected:

Two substantial messages have been sent by the ruling of the International Court of Justice at The Hague. The first is that Israel has no right to determine how it should defend itself against terror. The second, representing a trend that has for long been gaining strength in Europe, is that the Israelis are never seen as victims.

The decision, from which we can understand that the ICJ will be the one to decide how Israel should defend itself in the war declared against it, is without precedent. To a great extent, it grants a kind of indirect support for the suicide bombers So far the story of the construction of the fence has left very hard feelings....¹¹⁸

Six months following the ICJ decision, the Israeli government issued a formal statement regarding the advisory opinion. Its response, discussed above, reflects its lack of trust of and respect for the ICJ advisory opinion that it finds biased and irrelevant to what it perceives as its right to defend its citizens.

The perceived lack of balance in the ICJ’s advisory opinion may weaken the stature of the ICJ as a judicial, rather than political, body. It is doubtful whether in such circumstances the advisory opinion will contribute to the furthering of world peace and progress in implementation of the Middle East Roadmap.

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¹¹⁷ Declaration at 2.

¹¹⁸ Ze’ev Schiff, Two messages from The Hague, Haaretz English edition online, 7/13/04, available at www.haaretz.com (last visited July 15, 2004).

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APPENDIX 2

THE MIDDLE EAST CONFLICT: HISTORICAL AND LEGAL BACKGROUND¹

The area including modern day Israel, the West Bank, and Gaza was under Ottoman control for four centuries since 1517. After the First World War, Palestine was carved out of the Ottoman Empire and was entrusted by the League of Nations to Great Britain as a mandated territory for implementation of the 1917 Balfour Declaration² on the establishment in Palestine of a national home for the Jewish people.³

On November 29, 1947, the U.N. General Assembly passed Resolution 181 (II), calling for the partition of Palestine into independent Arab and Jewish States and for a Special International Regime for the City of Jerusalem following the evacuation of the British mandatory armed forces.⁴ While representatives of the Jewish community in Palestine accepted the resolution,⁵ the Arab States and the Arab Higher Committee rejected it.⁶

On May 14, 1948, Israel declared its independence.⁷ The British left Palestine, and Egypt, Syria, Lebanon, Iraq, Trans Jordan, and Saudi Arabia declared war on the new State. The Egyptian, Syrian, Lebanese, and Trans Jordanian invasion began on May 15, 1948.

In 1949, Israel and the Arab states reached Armistice Agreements.⁸ The war created over 780,000 Palestinian refugees who fled or were evicted from Jewish held areas. The State of Israel absorbed a similar number of Jewish refugees who fled Arab countries during that period.⁹ As a consequence of the war Gaza fell under the control of Egypt. The West Bank was occupied by Jordan and later annexed.

¹ For detailed timeline, see *Timeline of Palestinian Israeli History and the Israel- Arab Conflict*, available at <http://www.mideastweb.org/timeline.htm> last visited Mar. 22, 2004.

² The Balfour Declaration (Nov. 2, 1917), see *The Arab-Israel Conflict and its Resolution: Selected Documents* 20 (R. Lapidoth & M. Hirsch, ed., 1992).

³ Terms of the British Mandate for Palestine confirmed by The Council of the League of Nations, July 24, 1922, entered into force on Sept. 29, 1923, see *id.* at 25.

⁴ U.N. General Assembly Resolution 181 (II) on the Future government of Palestine,[the "Partition Resolution"] Nov. 29, 1947, see *id.* at 33-54.

⁵ Statement to the Ad hoc Committee on the Palestine Question by the Representative of the Jewish Agency for Palestine, Oct. 2, 1947 (GAOR, 2nd session 1947 Ad hoc Committee on the Palestinian Question, 12-19), see *id.* at 55.

⁶ Statement to the Ad hoc Committee on the Palestine Question by the Representative of the Arab Higher Committee, 29 Sept. 1947 (GAOR, 2nd session 1947 Ad hoc Committee on the Palestinian Question, 5-11; GAOR, 2nd session 1947, Plenary Meetings, Vol. II. P. 1425, 1426,1427), see *id.* at 57-60.

⁷ Declaration of the Establishment of the State of Israel, 1 Laws of the State of Israel 3 (5708-1948).

⁸ For the text of the agreements see *The Arab-Israel Conflict and its Resolution: Selected Documents*, 74-102 (R. Lapidoth & M. Hirsch, ed., 1992).

⁹ See *The Forgotten Exodus: The Flight of Jews from Arab Lands*, 73 Policy Dispatches, WORLD JEWISH CONGRESS (Dec. 2001), available at http://www.wjc.org.il/publications/policy_dispatches/pub_dis73.html last visited Mar. 23, 2004.

In May 1964, the Palestine Liberation Organization (hereinafter the PLO) was founded with the aim of destroying Israel. The Palestinian National Charter (1968) officially called for the liquidation of Israel.¹⁰

June 5-10, 1967, in the Six Day War, Israel attacked Egypt, Jordan, and Syria following the massing of troops from these countries near its borders at the conclusion of a military pact among the three States. In response to the dismissal of U.N. peacekeeping force by Egyptian President Gamal Abdel Nasser, the closing of the straits of Tiran to Israeli shipping, and the failure of negotiations with the United States to reopen the Straits, Israel destroyed the Egyptian air force on the ground and conquered and occupied Sinai and Gaza from Egypt. After being fired on by Jordan and Syria, Israel attacked and conquered the West Bank from Jordan and the Golan Heights from Syria.¹¹

On November 22, 1967, the U.N. Security Council passed Resolution 242, which called for the withdrawal of Israel from “territories occupied in the recent conflict.”¹² There seems to be a controversy over the terminology used in the resolution. Whereas some states interpret resolution 242 as calling for full Israeli withdrawal, the United States position had been that the resolution calls for withdrawal in accordance with security, because “to seek withdrawal without secure and recognized boundaries, for example, would be just as fruitless as to seek secure and recognized boundaries without withdrawal.”¹³

On October 6, 1973, the Jewish Day of Atonement, Egypt and Syria attacked Israel by surprise. In the Yom Kippur- October War Egypt retook the Suez Canal and a narrow zone on the other side. Syria re-conquered the Golan Heights. Israel later succeeded in pushing back the Syrians and threatening Damascus. Ariel Sharon crossed the Suez Canal and cut off the Egyptian Third Army. Following the U.N. Security Council Resolution 338 of October 22, 1973, Israel withdrew from part of Sinai in stages and from a small part of the Golan Heights.

A peace treaty between the State of Israel and the Arab Republic of Egypt came into force on April 25, 1979.¹⁴ On October 6, 1981, Egyptian President Anwar Sadat was assassinated. On April 29, 1982, Israel completed the return of Sinai to Egypt under the peace agreement.

On September 13, 1993, Israel and the PLO, as a representative of the Palestinians, signed the Declaration of Principles on Interim Self- Government Arrangements (hereinafter the DOP) in which they agreed to mutual recognition.¹⁵ The agreement calls for a 5-year transitional period to begin upon the withdrawal of the Israeli army from the Gaza Strip and the Jericho area. Permanent status negotiations according to the agreement “will commence as soon as possible, but no later than the beginning of the third year of the interim period ... It is understood that these negotiations shall cover remaining issues,

¹⁰ See Palestine National Authority, The Official Website, available at http://www.pna.gov.ps/Government/gov/plo_Charter.asp, see also Information Regarding Israel’s Security (IRIS) available at <http://www.iris.org.il/plochart.htm>.

¹¹ The Middle East 22 (Congressional Quarterly, 7th edition Washington, DC, 1990).

¹² The Arab-Israel Conflict and its Resolution: Selected Documents 20 (R. Lapidot & M. Hirsch, ed., 1992) 134.

¹³ Statement by United States Representative Arthur Goldberg Before the United Nations Security Council, Nov. 15, 1967, see The Quest for Peace, Principal United States Public Statements and Related Documents on the Arab-Israeli Peace Process 1967-1983, 14 (United States Department of State, 1984).

¹⁴ UNTS, vol. 1138, no. 17855, 72-75, for text of the treaty and of accompanying documents, see *id.* at 218-246.

¹⁵ A comprehensive list and full text of all peace process documents see Israel’s Ministry of Foreign Affairs Website, at <http://www.mfa.gov.il/mfa/peace%20process/reference%20documents/>.

including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.”¹⁶

In accordance with the DOP and the subsequent Gaza- Jericho Accord (April 1994), Yasser Arafat and the PLO were allowed to return to Gaza from Jericho. The DOP called on the PLO and Palestinian leadership to renounce violence and use of terrorism and to revise the PLO charter by removing the chapters that refer to the destruction of Israel. After the signing of an Interim Agreement in September 1995, the 1998 Wye Agreement and the 1999 Sharm al Sheik Agreement, Israel withdrew from nearly twenty percent of the West Bank (area A) that was given to Palestinian security and civilian control; a slightly larger area (Area B) was given to Palestinian civil control only, while a third area (area C) of the West Bank and Gaza strip remained under total Israeli control. Implementation of obligations under the DOP on the removal of the PLO charter goals of destroying Israel, cessation of terrorism activities and support, as well as Israeli settlement activities, became subject of dispute.

On October 26, 1994, a peace treaty was signed between Jordan and Israel.¹⁷

Since the signing of the Oslo Declaration of Principles numerous suicide bombings have been carried out by Hamas, Islamic Jihad, and the Al- Aqsa Martyrs Brigades, an arm of Arafat’s Fatah faction of the PLO.¹⁸

Peace negotiations culminated in July 2000, when Israeli Prime Minister Barak, U.S. President Clinton, and Palestinian Chairman Yasser Arafat met at Camp David in a failed attempt to hammer out a final settlement. One last effort, at Taba, Egypt, in January 2001, failed as well. On September 28, 2000, Palestinians initiated riots after Israeli opposition leader Ariel Sharon visited the Temple Mount, considered the holiest site in Judaism and known as Al Haram al Sharif, Islam’s third holiest site. Violence escalated. In retaliation for a series of suicide bombings, Israel conducted operations in the West Bank. Heavy fighting followed resulting in additional casualties on both sides.

In an effort to break the deadlock, the Quartet, composed of the United States, the European Union, the United Nations Secretariat, and Russia designed a Performance-Based Roadmap to a Permanent Two- State Solution to the Israeli- Palestinian Conflict.¹⁹ On November 19, 2003, the U.N. Security Council passed resolution 1515 in support of the Roadmap for peace.²⁰

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¹⁶ *Id.*

¹⁷ For text of the treaty see Israel’s Ministry of Foreign Affairs, at <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Israel-Jordan%20Peace%20Treaty> .

¹⁸ Hamas, information posted on the website of the International Policy Institute for Counter-Terrorism, available at http://www.ict.org.il/inter_ter/orgdet.cfm?orgid=13 , for information on the Palestine Islamic Jihad see Terrorist Organizations, Palestine Islamic Jihad (PIJ) available at http://www.terrorismfiles.org/organisations/palestine_islamic_jihad.html last visited 4/12/04; for information on the Al- Aqsa Martiers Brigades see Terrorism: Questions & Answers, Council on Foreign Relations, available at <http://cfrterrorism.org/groups/alaqsa.html> last visited on 4/12/04.

¹⁹ See Performance-Based Roadmap to a Permanent Two- State Solution to the Israeli- Palestinian Conflict, U.S. Department of State, Press Statement, Office of the Spokesman, Washington DC (Apr. 30, 2003), available at <http://www.state.gov/r/pa/prs/ps/2003/20062.htm> .

²⁰ See <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/621/85/PDF/N0362185.pdf?OpenElement>, copy of the resolution is attached.

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APPENDIX 3

THE ROADMAP: SUMMARY

A press statement from the U.S. Department of State describes the Roadmap as¹

“a performance-based and goal-driven roadmap, with clear phases, timelines, target dates, and benchmarks aiming at progress through reciprocal steps by the two parties in the political, security, economic, humanitarian, and institution-building fields, under the auspices of the Quartet [the United States, European Union, United Nations, and Russia]. The destination is a final and comprehensive settlement of the Israel-Palestinian conflict by 2005, as presented in President Bush’s speech of 24 June, and welcomed by the EU, Russia and the UN in the 16 July and 17 September Quartet Ministerial statements.”²

The Roadmap sets three phases for implementation:

A. Phase I: Ending Terror And Violence, Normalizing Palestinian Life, and Building Palestinian Institutions – April 2003 - May 2003

In Phase I, the Palestinians are to immediately undertake an unconditional cessation of violence while Israel was to undertake supportive measures. Palestinians and Israelis resume security cooperation to end violence, terrorism, and incitement. Palestinians undertake comprehensive political reform in preparation for statehood, including drafting a Palestinian constitution and free, fair, and open elections. Israel withdraws from Palestinian areas occupied from September 28, 2000, and the two sides restore the status quo that existed at that time, as security performance and cooperation progress. Israel also freezes all settlement activity, consistent with the Mitchell report.

B. Phase II: Transition – June 2003 - December 2003

In the second phase, efforts are focused on the option of creating an independent Palestinian state with provisional borders and attributes of sovereignty, based on the new Constitution, as a way station to a permanent status settlement. According to the Roadmap, “this goal can be achieved when the Palestinian people have a leadership acting decisively against terror, willing and able to build a practicing democracy based on tolerance and liberty. With such a leadership, reformed civil institutions and security structures, the Palestinians will have the active support of the Quartet and the broader international community in establishing an independent, viable, state.”

The primary goals of Phase II are the continued comprehensive security performance and effective security cooperation, continued normalization of Palestinian life and institution-building, further building

¹ See Performance-Based Roadmap to a Permanent Two- State Solution to the Israeli-Palestinian Conflict, U.S. Department of State, Press Statement, Office of the Spokesman, Washington DC (Apr. 30, 2003), available at <http://www.state.gov/r/pa/irs/ps/2--3/20062.htm>.

² See *id.*

on and sustaining of the goals outlined in Phase I, ratification of a democratic Palestinian constitution, formal establishment of office of prime minister, consolidation of political reform, and the creation of a Palestinian state with provisional borders.

An international conference will be convened by the Quartet, in consultation with the parties, immediately after the successful conclusion of Palestinian elections, to support Palestinian economic recovery and launch a process, leading to establishment of an independent Palestinian state with provisional borders.

C. Phase III: Permanent Status Agreement and End of the Israeli-Palestinian Conflict 2004 – 2005

Phase III objectives are the consolidation of the reforms and stabilization of Palestinian institutions; sustained, effective Palestinian security performance; and Israeli-Palestinian negotiations aimed at a permanent status agreement in 2005.

A second international conference will be convened by Quartet, in consultation with the parties, at the beginning of 2004. The goals of the conference are to endorse an agreement reached on an independent Palestinian state with provisional borders; to formally launch a process with the active, sustained, and operational support of the Quartet, leading to a final, permanent status resolution in 2005, including on borders, Jerusalem, refugees, and settlements; and to support progress toward a comprehensive Middle East settlement between Israel and Lebanon and Israel and Syria, to be achieved as soon as possible.

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