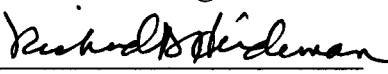


**BACKGROUND BRIEFING AND ANALYSIS OF
THE INTERNATIONAL COURT OF JUSTICE
ADVISORY OPINION ON ISRAEL'S TERRORISM
PREVENTION SECURITY FENCE**

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BACKGROUND BRIEFING AND ANALYSIS OF THE INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION ON ISRAEL'S TERRORISM PREVENTION SECURITY FENCE

Introduction

As a result of the ongoing terrorism and murder of Israeli citizens, the State of Israel is constructing a terrorism prevention security fence as a temporary, defensive measure designed to keep terrorists out of the State, which has endured an onslaught of violent terrorist attacks initiated by Palestinians, leaving Israel's citizens and visitors murdered and maimed. The route of the security fence is a topic of great dispute, but the fence has already succeeded in dramatically decreasing the number of terrorist attacks within Israel.

The Israel High Court of Justice ("the Israeli Court") considered the issues brought before it by aggrieved Palestinian residents, and in an extraordinary display of judicial independence, and in the spirit of a true democracy, on 30 June 2004 ordered that the fence be rerouted. Notwithstanding that opinion, and without giving judicial deference to that opinion, on July 9, 2004, the International Court of Justice, sitting at the Hague, rendered an advisory opinion, requested by resolution of the United Nations General Assembly ("the General Assembly"), regarding "the legal consequences arising from the construction of the wall being built by Israel"

The International Court of Justice ("ICJ") took it upon itself, in spite of the objections of Israel, the United States, and many other countries to the ICJ accepting jurisdiction over the referral from the UN General Assembly, and issued its Advisory Opinion wherein it stated that Israel must cease construction and pay reparations to affected Palestinians, deeming the fence in violation of international and humanitarian law.

The ICJ improperly exercised jurisdiction over the issue. In doing so, and although the Advisory Opinion is technically not binding, its future detrimental effect on the negotiations between Palestinians and Israelis, and its potential effects on all UN member states, set precedents unacceptable to any democratic nation. Furthermore, the General Assembly has no authority to attempt to convert the Advisory Opinion to law, or to seek its enforcement. Politicized attempts to do so fly in the face of due process and applicable international law.

The Issues

Since Israel emerged as an independent State in 1948, it has been engaged in a conflict with Arab Palestinians over territorial rights. Although the Arab-Israeli conflict has been marked by violence since its origin, in recent years the instances of violence have reached alarming proportions.

From 1992 to July 2000, Israel negotiated with the Palestinian Liberation Organization ("PLO") regarding Israel's administration of the areas which prior to 1967 were under Jordanian control. Jordan subsequently renounced its interest in the Palestinian

territories. As a result of direct negotiations between Israel and the PLO, subsequent to 1992, Israel agreed to transfer control of certain portions of the area to the Palestinian Authority ("PA"). The PA accepted obligations, which include, among other things, building schools, developing a stable economy, and providing health care facilities for the Palestinian people.

More than a decade of negotiations terminated unsuccessfully when Yasser Arafat, as then Chairman of the PLO and President of the PA, refused Israel's offer through United States President William Jefferson Clinton to designate more than 90 % of the disputed territories, including the West Bank, in addition to the entire Gaza Strip, as Palestinian land to be included in a new Palestinian state. An official border between the State of Israel and the Palestinian Authority has thus never been established. Shortly after Arafat refused Israel's offer at Camp David in July 2000, the Palestinians turned to terrorism as their negotiating tool and initiated a campaign of terror against Israel and all Israelis, thus commencing a period marked by intense violence and murder known as "the Second Intifada." Intifada means uprising, created to craft the impression that terrorism and murder, under the guise of freedom fighting, is somehow acceptable conduct.

Since September 2000, Israeli citizens have endured a steady yet unpredictable barrage of murderous terrorist attacks. The form of these attacks has varied in procedure, location, and target. Weapons have included guns, rocket fire, and suicide bombs. Victims have included all forms of innocent civilians, in addition to members of the military, government, police, and border patrol. The settings for the attacks have ranged from restaurants and public buses to religious events.

Since the Palestinian Intifada began, and as of April 2004, almost 10,000 attacks have been carried out in Israel and the surrounding territories. These attacks have claimed the lives of more than 1000 American and Israeli citizens, residents and visitors, and more than 6000 have been injured.¹

These deaths and injuries are not exclusive to Israelis. Palestinian citizens have suffered as well, yet Palestinian leaders encourage these terrorist attacks, which are committed by members of their population, including children. Despite calls by countries such as the United States for peace and constructive PA leadership, the Palestinian Authority sanctions this terrorism and provides a friendly base for terrorist organizations within Palestinian territories.

The Government of Israel has responded to this renewed terrorism with both defensive and offensive measures. Following a series of military operations that were insufficient as a means to end the terrorist siege, Israel's "Ministers' Committee on National Security considered a list of steps intended to prevent additional terror acts and to deter potential terrorists from participating in such acts."²

¹ *Beit Sourik Village Council v. Government of Israel*, HCJ 2056/04 at 2 (printed version) (June 30, 2004); see also Israeli Consulate, *Israel Line*, September 28, 2004.

² *Beit Sourik Village Council v. Government of Israel*, HCJ 2056/04 at 2 (June 30, 2004).

The Security Fence In Reality

When these measures also proved insufficient, in 2003, Israel decided to erect a temporary security fence to serve as an impediment to terrorists attempting to enter Israel. The fence as a whole consists mostly of (1) an electronic fence to detect infiltration attempts; (2) a trench-like obstacle surrounding the fence to prevent vehicles from breaking through; and (3) an internal delaying fence,³ including taller concrete walls and barriers to prevent gun attacks. The terrorism prevention security fence is a temporary defensive measure and Israel has pledged to remove the structure once the PA proves its willingness and ability to curb the campaign of terror.⁴

The sole purpose of the security fence is to combat terrorism; it has no effect on the political or legal status of the disputed land. Furthermore, in approving the fence, Israel vowed to make “every effort [to] minimize, to the extent possible the disturbances to the daily lives of the Palestinians due to the construction of the obstacle,”⁵ and with the increased security the fence provides, “the number of Israeli troops in Palestinian towns has [already] been significantly reduced.”⁶

Indeed, the fence has served its purpose thus far. Since it was put into operation, the number of attacks on Israel has decreased significantly. Although the fence is nowhere near completion, the number of attacks on Israel per month has already reportedly decreased from an average of 8.6 to an average of 3.2.⁷ “There has been a dramatic reduction of over 90% in successful terrorist attacks . . . which can be attributed directly to the security fence.”⁸ Additionally, there has been an 84% decrease in Israelis killed in terror attacks since the first portion of the security fence was completed between Salem and Elkana last year.⁹ By contrast, in the month of August 2004 in the unprotected city of Beer Sheva, sixteen Israelis were killed and more than 100 were wounded in twin suicide bombings that served as a “grim reminder” of the important purpose of the terrorism prevention security fence.¹⁰ “[The victims of the attacks] had the misfortune to be living in a part of the country that is not yet protected by this life-saving barrier.”¹¹

³ *Beit Sourik Village Council v. Government of Israel*, June 30, 2004, HCJ 2056/04 at 2, 3.

⁴ Israel’s Disengagement Plan, *available at* www.mfa.gov.il.

⁵ Meeting of Israel’s Ministers’ Committee on National Security (September 5, 2003).

⁶ Dubowitz, Mark, “Fenced In: Israel Draws A Red Line On The Green Line,” *National Review Online*, September 9, 2004, *available at* www.nationalreview.com/comment/dubowitz/200409090833.asp.

⁷ Dubowitz, Mark, “The UN’s Court Of ‘Justice’ Refuses To Draw A ‘Red Line’ Against Terrorism.”

⁸ Speech of Israeli Ambassador to the UN Dan Gillerman before the 10th Emergency Session of the 58th UN General Assembly on July 16, 2004.

⁹ Israeli Consulate, *Israel Line*, September 28, 2004.

¹⁰ Dubowitz, Mark, “Fenced In: Israel Draws A Red Line On The Green Line,” *National Review Online*, September 9, 2004, *available at* www.nationalreview.com/comment/dubowitz/200409090833.asp.

¹¹ Dubowitz, Mark, “Fenced In: Israel Draws A Red Line On The Green Line,” *National Review Online*, September 9, 2004, *available at* www.nationalreview.com/comment/dubowitz/200409090833.asp.

Proceedings Before the Israeli High Court of Justice

Despite the significant protection against terrorist attacks that the fence provides, and although Israel vowed to minimize the negative effects of its construction on Palestinians living in the area, the fence necessarily has disrupted the lives of those living in its path. To allow patrol officers to distinguish terrorists from Palestinian residents, the fence must be isolated from Palestinian communities, requiring the Government to relocate those residents and pay them for their land.

Accordingly, various petitions were filed in the Israeli justice system by people raising legal issues in relation to the fence. On 30 June 2004, the Israel High Court of Justice (“the High Court”) issued its first ruling on such petitions.

In spite of the fact that these petitions were pending review before the Court, however, the United Nations General Assembly requested, at the request of the Palestinian Authority and governments acting at the UN on its behalf, introduced a resolution before the General Assembly, which petitioned the International Court of Justice to render an advisory opinion on 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?¹²

It is worth noting that the measure to refer this Advisory Opinion to the ICJ failed to receive an absolute majority among the 189 member states, with a vote of 90 in favor, 8 against, with 74 abstentions, including most of Europe; numerous countries failed to even appear to vote on the issue.

The International Court of Justice, over the objection of 30 countries and the European Union collectively, determined that it had jurisdiction to render the Advisory Opinion. Scholars believe that the ICJ should have refrained from addressing the legality of the terrorism prevention security fence, and, moreover, should have deferred to the Israeli High Court of Justice on the issues presented in the petitions pending before the Israeli Supreme Court. Furthermore, the means by which the issue reached the Court, and the methodology employed to garner an Advisory Opinion from the ICJ, are in violation of the UN Charter.

¹² GA Res. ES 10/14, UN.

Procedures Within The United Nations

The bodies within the United Nations responsible for working toward and maintaining international peace are the General Assembly and the Security Council.

The General Assembly, comprised of representatives of all the UN member states, discusses and provides recommendations on international issues. By contrast, the Security Council has the power to make resolutions to enforce its decisions on international peace and security, and can take actions to ensure that affected States are in compliance.

The 10th Emergency Special Session of the General Assembly was convened in March 1997, under the “Uniting for Peace” procedure contained in Resolution 377. At the request of the Chairman of the Arab Group, the General Assembly adopted resolutions condemning Israel’s actions in constructing the proposed anti-terrorism fence.

As the General Assembly acted, however, so too did the UN Security Council, as the ultimate UN authority. The Council adopted Resolution 1515 on 19 November 2003, known as the Road Map for Peace in the Middle East (“Road Map”), which acknowledges that “a two state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism.”¹³ Indeed, Israel previously pledged its commitment to the Road Map, noting that only its “process – that sets out mutual rights and mutual obligations – can achieve real results.”¹⁴

In the resolution adopting the Road Map, the Security Council demanded “an immediate cessation of all acts of violence, including all acts of terrorism, provocation, incitement, and destruction,” and reiterated its “vision of two States, Israel and Palestine, living side by side within secure and recognized borders,” as originally outlined by United States President George W. Bush in his Rose Garden speech of 24 June 2002. The Road Map signaled a step toward achieving peace between the Palestinians and Israel by providing a means to govern their negotiations.

Israel’s Disengagement Plan

On 18 April 2004, Prime Minister Sharon formally announced a Disengagement Plan in response to the Palestinians’ failure to comply with their obligations under the Road Map. The Disengagement Plan is indicative of Israel’s dedication to peace, and includes its evacuation of the Gaza Strip and the Northern Samaria area, in order to “reduce friction with the Palestinian population” and to create a “potential for improvement in the Palestinian economy and living conditions.”¹⁵ The Plan anticipates complete evacuation from the disputed areas by 2005.¹⁶

¹³ SC Res. 1515, UN (2003).

¹⁴ Speech of Israeli Ambassador to the UN Dan Gillerman before the 10th Emergency Session of the 58th UN General Assembly on October 20, 2003.

¹⁵ Israel’s Disengagement Plan, *available at* www.mfa.gov.il.

¹⁶ *Id.*

The Disengagement Plan is based on the existence of the security fence, and emphasizes the fence's role as a temporary protective measure.¹⁷ Furthermore, Israel vows that "[w]hen there is evidence from the Palestinian side of its willingness, capability and implementation in practice of the fight against terrorism and the institution of reform as required by the Road Map, it will be possible to return to the track of negotiation and dialogue."¹⁸

The Plan received worldwide support, specifically from the Group of Eight summit members at their meeting in Sea Island, Georgia, USA on 10 June 2004.¹⁹ UN Secretary-General Kofi Annan pledged the UN's assistance in its implementation.²⁰ The Plan was overwhelmingly approved by Israel's Knesset on 26 October 2004.

The Relationship Of The General Assembly And The Security Council

Although the General Assembly has powers over issues of international peace and security, it may not infringe on the powers specifically delegated to the Security Council and denied to the General Assembly. Specifically, the Security Council has the power to enforce its decisions on international peace and security where the General Assembly does not.²¹

Article 11(2) of the UN Charter therefore directs the General Assembly to refer to the Security Council those issues of international peace and security that require that "action" be taken. Furthermore, Article 12(1) of the UN Charter prohibits the General Assembly from making "recommendations" on international security disputes where the issue is before the Security Council.

The Security Council on 14 October 2003, refused to adopt a draft resolution addressing the fence. The United States vetoed the resolution, "which failed to address both sides of the larger security context of the Middle East, including the devastating suicide attacks that Israelis have had to endure over the past three years."²² Thereafter, and notwithstanding said veto, the General Assembly voted to petition the ICJ to render its Advisory Opinion.

The Security Council subsequently adopted on 19 November 2003, the Road Map in Resolution 1515 to govern negotiations between Israel and the Palestinian Authority, and

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ "G8 Leaders Welcome Israeli Disengagement Plan," Embassy of the United States in Israel, June 10, 2004, available at <http://www.usembassy-israel.org.il/publish/press/2004/june/061001.html>.

²⁰ Jerusalem Post Staff, "Annan: UN Will Help Israel Implement Withdrawal Plan," June 11, 2004, Jerusalem Post Online, available at [staff.http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1086934151991](http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1086934151991)

²¹ See Articles 41 and 42, UN Charter.

²² Press Release #171 of the United States Mission to the United Nations, October 14, 2003, available at www.un.int/usa/03print_171.htm.

just three weeks prior to the General Assembly vote to request the Advisory Opinion declared itself “seized of the matter.”²³ By requesting the advisory opinion therefore, the General Assembly interfered with and effectively and illegally usurped the Security Council’s authority, as the General Assembly requested a form of action where only the Security Council had the authority to act.

The General Assembly bypassed the procedure prescribed by the UN Charter. Furthermore, as previously stated, the General Assembly did not have the legal or inherent right to make a request for action. Finally, the Advisory Opinion rendered by the Court will severely further frustrate negotiations between the Israelis and the Palestinians and interfere with the process envisioned by the Road Map.

Indeed, since the ICJ issued its opinion, during the 59th session of the UN General Assembly, the Palestinian Observers, through Farouk Kaddoumi and Nasir Al-Kidwa, confirmed their rejection of the peace process outlined in the Road Map. Both Kaddoumi and Al-Kidwa expressed their desire for a final determination of the status issues of the Israeli-Palestinian conflict, arguing that a negotiations process would chip away at the role of the UN and the international community, despite calls by Canadian Ambassador Allan Rock for the UN to take a more active role in encouraging resolution of the conflict through negotiations.²⁴ The Palestinians’ desire for UN involvement is not surprising, however, as during its 59th session, the General Assembly passed 19 anti-Israel resolutions.²⁵

During this session, Israeli Ambassador to the UN Daniel Gillerman addressed the rejection of the Road Map by the Palestinian Observers, calling for international support of the negotiations process and stating that peace could be attained “not in New York or Geneva, . . . but in Ramallah and Jerusalem.” In doing so, he highlighted Israel’s continued dedication to the peace process:

If the international community is serious about taking advantage of the opportunity before us, it is not enough to encourage and empower those committed to peace. We must also confront those opposed to it. We must show the same urgency and determination in combating these forces as they do in pursuing their hateful agenda. Without that, moderates in the region – be they in Iraq, the West Bank or elsewhere in the Middle East – have no chance to succeed. Without that we will record yet another missed opportunity on the road to peace. This is no time for complacency or false equivalencies. Treating those engaged in terror and those determined, under difficult conditions, to respond to it as though they were moral equals is not amoral – it is immoral. We remain hopeful that the

²³ S.C. Res. 1515, UN (2003).

²⁴ See Statement by Canada’s Permanent Representative at the UN, Ambassador Allan Rock, November 30, 2004, available at http://www.cicweb.ca/UN/rock_301104.cfm.

²⁵ Although the 59th session of the UNGA has not officially concluded, and will not conclude until September 13, 2005, the majority of the resolutions are generally passed from September to December of the period following the annual opening session, when the UNGA committee meetings take place.

circle of peace in the Middle East can be widened, and Israel is, as always, ready to reach a genuine and lasting peace with all its neighbors.²⁶

The UN Charter And The International Court of Justice

The UN Charter established the International Court of Justice as “the principal judicial organ of the United Nations.” The Court consists of fifteen judges who are elected by the UN General Assembly and the UN Security Council, and who are to be “independent” and “elected regardless of their nationality” The current composition of the Court includes judges from Brazil, China, Egypt, France, Germany, Japan, Jordan, Madagascar, the Netherlands, the Russian Federation, Sierra Leone, Slovakia, the United Kingdom, the United States of America, and Venezuela.

The ICJ has jurisdiction to hear cases in two specific circumstances. First, the Court may hear cases where two UN member states are in dispute over an issue of international law, so long as both states request hearing before the Court and agree to abide by its ruling. Article 36 of the Statute of the International Court of Justice instructs that contentious issues may only be brought before the Court with the consent of all parties. Second, the Court has jurisdiction to render an advisory opinion “on any legal question” when the United Nations requests that it does so.

Neither of these jurisdictional grants applies here. As a threshold matter, Article 34 of the UN Charter instructs that “[o]nly *states* may be parties in cases before the Court.” Indeed, the ICJ recently affirmed its inability to settle disputes by concluding unanimously on 15 December 2004 that it lacked jurisdiction to resolve whether Serbia and Montenegro have legal claims against NATO countries that participated in the 1999 intervention in Kosovo, because the former Socialist Federal Republic of Yugoslavia was not a member of the UN when it initiated the suit.²⁷

The state of Palestine, although represented by the PLO and the PA, is not and has never been recognized as a state under any definition of “state” applied by the United Nations. “It is inconceivable that the ICJ should be requested to give an Advisory Opinion on the issue of Israel’s security fence at the behest of the very terrorist organization which has been active in many of the murderous attacks which have made the fence necessary.”²⁸

Furthermore, Israel, a member state of the United Nations, did not consent to resolve it before the Court. The ICJ thus could not have considered the issue as an international dispute. The General Assembly therefore bypassed this obstacle by seeking a decision of the ICJ as an Advisory Opinion.

²⁶ Statement by Ambassador Dan Gillerman, Permanent Representative of Israel to the United Nations, before the 59th Session of the UN General Assembly on November 30, 2004, *available at* <http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches+-+statements/Statement+by+Amb+Gillerman+at+UN+General+Assembly+-+The+situation+in+the+Middle+East+30-Nov-2004.htm>.

²⁷ *Legality of the Use of Force (Serbia and Montenegro v. Belgium) Preliminary Objections* (December 14, 2004).

²⁸ Written Statement to the International Court of Justice by Israel, January 29, 2004.

Moreover, the question presented to the ICJ is not a legal question, but a political dispute. The General Assembly, in passing Resolution 10/14, has already condemned Israel's security fence. "Could there be a more obvious abuse of [the] Assembly and of the advisory opinion procedure, than for the Assembly to pretend to ask for guidance from the Court on an issue with respect to which it has already determined its response?"²⁹ This referral, however, was not an act of the Security Council. The ICJ thus did not possess jurisdiction to render an advisory opinion because the question presented is not one of law, but is a political controversy between parties who have not yet agreed to actual borders between their respective territories.

As United States Ambassador to the United Nations John Danforth states, "[i]f there is to be a solution to the tragedy of the Middle East, it must be political, entailing the agreement by both parties to a reasonable compromise. The judicial process is not the political process, and the International Court of Justice was not the appropriate forum to resolve this conflict."³⁰

The history of the International Court of Justice illustrates this point, as the Court's subject matter jurisdiction to render advisory opinions has been limited over time.

The International Court of Justice has roots in the Permanent Court of International Justice (PCIJ), which was established by the League of Nations in 1922.³¹ Article 14 of the Covenant of the League of Nations gave the Permanent Court of International Justice authority not only to resolve international disputes among parties, but also to render advisory opinions.

Although the Court successfully operated for a time, the outbreak of World War II in 1939 signaled the effective cessation of operations at the PCIJ, although its role was not forgotten.³²

In 1945, a judicial committee convened in San Francisco, California, to create the United Nations Charter and to plan for the future of the PCIJ. Although the San Francisco Conference officially created a new Court – the International Court of Justice – the committee drafted the ICJ's statute based on the pre-existing Statute of the PCIJ.³³

The Statute of the International Court of Justice has a much more limited scope of permissible subject matter for consideration of an advisory opinion than its predecessor. Where the PCIJ could render an advisory opinion on "any dispute or question," the new Statute, still in effect today, limits the permissible subject matter for ICJ advisory opinions to only questions of law.

²⁹ Speech of Israeli Ambassador to the UN Dan Gillerman before the 10th Emergency Session of the 58th UN General Assembly on October 20, 2003.

³⁰ Speech of US Ambassador to the UN John C. Danforth, before the 10th Emergency Session of the UN General Assembly on July 16, 2004.

³¹ See <http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm>.

³² See *id.*

³³ See *id.*

The ICJ Opinion

Ultimately, the question referred to the Court here is rife with political determinations that have no place in a request for a genuine legal opinion prior to completion of the direct negotiations between the parties establishing borders. The Court's exercise of jurisdiction was clearly improper, and as Judge Higgins of the United Kingdom explains in her separate opinion,

“[t]he request is not in order to secure advice on the Assembly's decolonization duties, but later, on the basis of [the Court's] opinion, to exercise powers over the dispute or controversy. Many participants in the oral phase of this case frankly emphasized this objective.”³⁴

The opinion itself is as important because of what it does not say as it is because of what it does say. First, the Court completely ignored the role of the Palestinian terrorist attacks that made the fence necessary in the first place. “The barrier between Israelis and Palestinians is not the security fence, but the terrorism that made it necessary.”³⁵ As Israel set forth in its Written Statement to the Court, the fence is for security purposes only and does not affect legal or political boundaries. Indeed, Judge Kooijmans of the Netherlands explains in his separate opinion:

[t]he construction of the wall is explained by Israel as a necessary protection against the latter category of acts which are generally considered to be international crimes. Deliberate and indiscriminate attacks against civilians with the intention to kill are the core element of terrorism which has been unconditionally condemned by the international community regardless of the motives which have inspired them.³⁶

The Court acknowledged Israel's argument that the “sole purpose [of the terrorism prevention fence] is to enable it to effectively combat terrorist attacks launched by the West Bank.” It recognized Israel's guarantee that the fence would have no impact whatsoever on legal or political boundaries within the territory. The Court recognized these facts, yet continued to ignore them. In a scathing dissent, Judge Buergenthal of the United States noted that:

to reach [the] conclusion [that the fence violates international law] . . . without having before [the Court] or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist

³⁴ *Legal Consequences of the Construction of A Wall In the Occupied Palestinian Territory*, General List No. 131, July 9, 2004 (Higgins, J.) at 3 (printed version).

³⁵ Speech of Israeli Ambassador to the UN Dan Gillerman before the 10th Emergency Session of the 58th UN General Assembly on July 16, 2004.

³⁶ *Legal Consequences of the Construction of A Wall In the Occupied Palestinian Territory*, General List No. 131, July 9, 2004 (Kooijmans, J.) at 2 (printed version).

attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which 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.³⁷

Indeed, the 600-page dossier UN Secretary General Kofi Annan submitted to the Court made no mention of UN Resolution 1373, which condemns terrorism, or the Road Map in UN Resolution 1515. Neither the question referred to the Court, nor the lengthy resolution which refers to it, make any reference whatsoever to Palestinian terrorism, suicide bombers, Israel's right of self-defense, the failure of the Palestinian leadership to take any measures to prevent terrorism, and indeed the institutionalized glorification of terrorists as heroes, nor any other of the factors leading to the necessity for this measure, which could enable the Court to address this issue adequately.

THE ICJ OPINION IGNORED THE DECISION OF THE ISRAEL HIGH COURT OF JUSTICE

Furthermore, Israel's High Court of Justice issued its decision in advance of the ICJ Advisory Opinion, affording ample time for consideration by the ICJ, yet the Justices failed to address it at any point. The Israel High Court on 30 June 2004 ordered that the anti-terrorism fence be rerouted in order to minimize the negative effects on Palestinians living adjacent to the fence's anticipated path. In doing so, however, the Court emphasized the security purpose of the fence and legitimized its construction under applicable law.

The Israel Supreme Court summarized the record of the government of Israel's decision making process in deciding to construct the fence, noting that "the government has emphasized, numerous times, that 'the fence . . . is a security measure. Its construction does not express a political border, or any other border.' 'The obstacle that will be erected pursuant to this decision [to construct the fence] . . . is a security measure for the prevention of terror attacks and does not mark a national border or any other border.'"³⁸

Even though the Israel High Court was "aware that in the short term, [its] judgment will not make the state's struggle against those rising up against it easier," it acted independent of political concerns to recognize the rights of affected Palestinians. The Israel High Court used the principle of proportionality as a standard to balance Palestinian human considerations against military necessities. The terrorism prevention fence is in accordance with Israeli and international law, the Court held, but the negative impact it has on the lives of those Palestinians living in the planned route of the fence justifies changing its location, despite the decreased protection it would afford Israelis.

³⁷ *Legal Consequences of the Construction of A Wall In the Occupied Palestinian Territory*, General List No. 131, July 9, 2004 (Buerghenthal, J.) at 1 (printed version).

³⁸ *Beit Sourik Village Council v. Government of Israel*, HCJ 2056/04 at 10 (June 30, 2004).

This display of judicial independence emphasizes the propriety of the Israeli judicial system as sole adjudicator of the ongoing disputed issues related to the security fence. Although such independence in the face of the turmoil suffered by all Israelis, including the Justices of the Israeli High Court of Justice, is remarkable, this showing is not unusual for this Court. Indeed, as United States Supreme Court Justice William Brennan observed in “The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis” (see www.brennancenter.org):

It may well be Israel...that provides the best hope for building a jurisprudence that can protect civil liberties against the demands of national security...The nations of the world, faced with sudden threats to their own security, will look to Israel's experience in handling its continuing security crisis and may well find in that experience that expertise to reject security claims that Israel has exposed as baseless and the courage to preserve the civil liberties that Israel has preserved without detriment to its security.”

Moreover, even though the opinion makes defending Israel more difficult and expensive, Israel's Prime Minister Ariel Sharon has expressed his intent to comply with the Court's ruling, rejecting the idea of enacting a special law to contradict the ruling. In fact, Israel's Ministry of Defense has already begun to implement the High Court of Justice's decision in planning a modified route of the fence, which Prime Minister Sharon has approved.³⁹ The new route was expected to be presented to US National Security Advisor Condoleezza Rice for review.⁴⁰

Even so, nowhere in its Opinion does the International Court mention the High Court's ruling, except for one collateral reference in a separate opinion. The Court's condemnation of Israel's actions in light of the humanitarian considerations of the Palestinian people is thus based on false and outdated information. The ICJ was advised of the High Court of Justice opinion prior to issuing its Advisory Opinion, but chose to ignore the decision of the Israeli High Court of Justice decision.

As Judge Kooijmans states, “the Court could and should have given more explicit attention to the general context of the request in its Opinion.”⁴¹ The Court's refusal to acknowledge the terrorist attacks the Israelis have endured, making self-defense necessary for survival, and the opinion issued by Israel's High Court of Justice, both matters which were brought to the Court's attention, is indicative of its biased judgment.

³⁹ Consulate General of Israel in New York, *Israel Line*, September 8, 2004.

⁴⁰ Consulate General of Israel in New York, *Israel Line*, September 7, 2004.

⁴¹ *Legal Consequences of the Construction of A Wall In the Occupied Palestinian Territory*, General List No. 131, July 9, 2004 (Kooijmans, J.) at 2 (printed version).

The Inherent Right To Self-Defense

The Advisory Opinion serves to redefine the ways in which countries under attack from terrorists are able to defend themselves. The Court held that “Israel cannot rely on the right of self-defence or on a state of necessity”⁴² to justify constructing the fence as a security measure. The Court’s interpretation of “self-defence” in this context is alarming and unprecedented.

Article 51 of the UN Charter acknowledges that member states possess the inherent right to self-defend “if an armed attack occurs.” The ICJ interprets this right, however, to be limited to instances where the attack is “by one state against another state.” The ICJ essentially ignores the violent murderous armed attacks upon the Israeli people by Palestinian terrorists.

The language of Article 51 does not contain the qualification asserted by the Court, yet the Court offers no other justification for determining Article 51 to be inapplicable. “This distinction is critical in the on-going struggle against international terrorism. Although every act of terrorism necessarily originates in territory (or aboard a ship or aircraft) that is owned or occupied by a sovereign state, it does not follow that every such act of terrorism is supported by that state, and attributable to it in a legal sense.”⁴³

The Court’s disturbing logic would instruct that “the United States (and other countries) could not fully exercise the right to self-defense against Al-Qaeda terrorists, since they do not represent a state any more than Hamas does.”⁴⁴

Other Fences

“Ironically, three countries -- India, Saudi Arabia, and Turkey -- condemned Israel at the UN General Assembly and voted to refer the Israeli fence to the ICJ for an advisory opinion even though they had themselves built barriers in areas contested by their neighbors. India is just completing a 460-mile barrier in the contested Kashmir to halt infiltrations supported by Pakistan; within the last two years, Saudi Arabia built a sixty-mile barrier along an undefined border zone with Yemen to halt smuggling of weaponry; and Turkey built a barrier in an area that Syria claims as its own.”⁴⁵ Even in the United States, a fence has been built to separate Prince George’s County, MD from Washington, DC in order to combat problems of drug dealing.⁴⁶ And, the US is expanding its fence

⁴² *Legal Consequences of the Construction of A Wall In the Occupied Palestinian Territory*, General List No. 131, July 9, 2004.

⁴³ Piggott, Leanne, “Leanne Piggott: Justices’ Ruling Rewrites UN Charter On Self-Defence,” *The Australian*, July 12, 2004, available at www.theaustralian.news.com/au

⁴⁴ Lubet, Steven, “Lack of Regard Shown For Israel’s Security Concerns,” *The Chicago Tribune*, July 13, 2004.

⁴⁵ Makovsky, David, “Unilaterally Constructed Barriers in Contested Areas,” July 8, 2004, available at <http://www.washingtoninstitute.org/distribution/PCE465.doc>.

⁴⁶ Stockwell, Jamie, *The Washington Post*, “Criminals To Face New Hurdle On D.C.-Prince George’s Line” January 4, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A45674-2005Jan3.html>

between the US and Mexico for border control and homeland security purposes.⁴⁷ Yet, the ICJ is silent on those security fences, and fails or refuses to reference other unilaterally constructed security fences in its consideration of the Israeli fence.

Use of Force

Security Council Resolutions 1368 and 1373, adopted shortly after the September 11, 2001, terrorist attacks against the United States, permit a State to use force to defend against non-state terror organizations.⁴⁸ Nevertheless, the Court relies on Israel's failure to "claim that the attacks against it are imputable to a foreign State" in order to deny Israel the inherent right prescribed by Article 51. In subsequently passing Resolution 1566, however, the UN Security Council defined and condemned terrorism and reaffirmed a country's right to defend against terror. This resolution may accordingly repudiate the Advisory Opinion's interpretation of the general right to self-defense, however its definition of terrorism requires that to qualify as terrorism the offense must be previously outlawed.⁴⁹ Accordingly, the suicide bombings and other tactics used by Palestinian terrorists remain a permissible means of resistance according to the UN. Nevertheless, this fatally defective ruling by the ICJ has widespread implications for all states that wish to preserve the right to self-defense, mandating rejection of the Advisory Opinion as severely biased and prejudiced against Israel.

The Advisory Opinion Is Violative Of Israel's Rights

Although an ICJ advisory opinion is technically non-binding, the Court's role as the "principal judicial organ" established by the UN dictates that it may well have a strong effect on international disputes. As Dutch Judge Kooijmans stated in his separate opinion, "[a]n advisory opinion is brought to the attention of a political organ of the United Nations and is destined to have an effect on a political process."

In a report to Prime Minister Ariel Sharon assessing the potential impact of the ICJ Opinion, Israeli Attorney General Menachem Mazuz states that "[i]t is hard to exaggerate the negative ramifications the International Court ruling will have on Israel on many levels, even on matters that lie beyond the separation fence. The decision creates a political reality for Israel on the international level, that may be used to expedite actions against Israel in international forums, to the point that they may result in sanctions."⁵⁰

Furthermore, even the International Court of Justice declares that "the authority and prestige of the Court attach to its advisory opinions and [] where the organ or agency concerned endorses that opinion, that decision is as it were sanctioned by international

⁴⁷ See *Fox News*, "Battle Over U.S.-Mexico Border Fence Heats Up", March 15, 2004, available at www.foxnews.com/printer_friendly_story/0,3566,114090,00.html

⁴⁸ Written Statement to the International Court of Justice by Israel, January 29, 2004.

⁴⁹ See UNSC Res. 1566 (2004).

⁵⁰ Yoaz, Yoam, "AG: Hague Fence Ruling May Lead To Sanctions Against Israel," *Haaretz Daily*, August 19, 2004, available at www.haaretz.com.

law.”⁵¹ Accordingly, the inappropriately decided and issued Opinion will serve as fodder for those who seek to bash Israel on a daily basis.

The ICJ further goes beyond its authority and interferes with Israel’s rights as a sovereign nation State in calling for action by other States by expressing its “view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction” of the terrorism prevention fence. The Court went further to also warn that all countries “are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction.”⁵² Anyone who considers this a legal, and not a political, opinion is blind to justice.

The opinion not only ignores the Palestinians’ role and responsibility in the need for the fence in the first place, but it also clears them of their responsibilities in the future, placing the burden only on the Israelis to cease construction and make reparations. As Israel’s Ambassador to the UN, Dan Gillerman, makes clear, the ICJ has “put the people who are trying to prevent terror and the victims of terror in the dock, rather than the terrorists themselves.”⁵³ What about requiring the Palestinian Authority to stop the terrorist infiltration into Israel?

There is after all, one straightforward measure that would lead to the removal of the fence – and it is not more resolutions adopted in UN halls. It is, simply put, for the Palestinian side to abandon terror as a strategic choice and comply once and for all with its obligations to fight terrorism and incitement. As controversial as the fence may be, one issue is beyond controversy: the terrorism that made the fence necessary is not only a grave violation of international law, it is the enemy of the Israeli and Palestinian peoples, and its eradication is an indispensable step to lasting peace.⁵⁴

⁵¹ See www.icj-cij.org.

⁵² *Legal Consequences of the Construction of A Wall In The Occupied Palestinian Territory*, ICJ General List No. 31, July 9, 2004.

⁵³ Lazaroff, Tovah and Radler, Melissa, “Gillerman: Dark Day For The United Nations,” *Jerusalem Post*, July 15, 2004, available at www.jpost.com.

⁵⁴ Speech of Israeli Ambassador to the UN Dan Gillerman before the 10th Emergency Session of the 58th UN General Assembly on October 20, 2003.

Politicization Of The Advisory Opinion

The ICJ Advisory Opinion was rendered at approximately 3:00 p.m. (at the Hague) on 9 July 2004. The PA leadership immediately took steps to politicize the Advisory Opinion through the Arab Group at the United Nations.

On Monday, 12 July 2004, the Arab states called for the 10th Emergency Special Session of the UN General Assembly to convene to consider its draft resolution, which would require mandatory application of the ICJ Advisory Opinion, and demand that Israel comply with the Advisory Opinion.⁵⁵ The draft resolution also called for Switzerland, keeper of the Fourth Geneva Convention, to hold a meeting of all parties to the Convention to assure that the Convention's mandate, which in part prohibits participants from "building settlements on land they acquire through the use of force" in times of war, is followed.⁵⁶

By Tuesday, 13 July 2004, the UN General Assembly announced its intention to resume a meeting of its 10th Emergency Special Session to consider the Arab Group's resolution,⁵⁷ and on Friday, 16 July 2004, the Emergency Session reconvened. Nasser Al-Kidwa, the Palestinian UN observer, expressed the Arab Group's intention to focus its efforts on the 25 nation European Union (EU), in order to obtain widespread support for the draft resolution.⁵⁸

United States Ambassador to the United Nations John Danforth condemned the resolution, emphasizing that "[t]he claims of each side must be accommodated, or there can be no agreement."⁵⁹ Calling the resolution "not balanced" and "wholly one-sided," Ambassador Danforth emphasized that the resolution did not "mention the threat terrorists pose to Israel. It follows a long line of one-sided resolutions adopted by the General Assembly, none of which has made any contribution to peace in the Middle East."⁶⁰

On Tuesday evening, 20 July 2004, the General Assembly, after debate and much inter-governmental negotiation, passed a modified resolution by a majority of 150 to 6, with 10 abstentions and 25 member states absent.

The General Assembly Resolution ES 10/15 calls upon Israel to comply with the Advisory Opinion issued by the International Court of Justice.⁶¹ Although the General Assembly's resolution, like the ICJ Advisory Opinion, is not binding, it is nevertheless an

⁵⁵ Arieff, Irwin, "Arab Nations Want UN To Pressure Israel On Barrier," Reuters News Service, July 12, 2004, available at <http://www.reuters.com/newsArticle.jhtml?type=worldNews&storyID=5633722>.

⁵⁶ *Id.*

⁵⁷ "UN Assembly To Meet Friday In Emergency Session On ICJ Ruling," UN News Service, 13 July 2004, available at <http://www.un.org/apps/news/story.asp?NewsID=11328&Cr=palestin&Cr1=>.

⁵⁸ Lederer, Edith M., "Palestinians Seek Support On Wall Issue," *The Washington Post*, 16 July 2004.

⁵⁹ Speech of US Ambassador to the UN John C. Danforth, before the 10th Emergency Session of the UN General Assembly on July 16, 2004.

⁶⁰ *Id.*

⁶¹ See GA ES 10/15, UN (2004).

additional and inappropriate politicized effort to force Israel to dismantle the security fence. It is yet another bitter example of what Ambassador Gillerman terms a “virtual reality. An alternate world in which there is but one victim and one villain, in which there are Palestinian rights but no Palestinian responsibilities, in which there are Israeli responsibilities but no Israeli rights.”⁶² Israel has made clear that the terrorism prevention security fence is (a) saving lives, and (b) stopping terrorists, and that it will not dismantle the fence in spite of the ICJ Advisory Opinion.⁶³ It has stated, however, that it will relocate the fence as ordered by its own court, the Israeli High Court of Justice.⁶⁴

One of the ten states to abstain from voting for the General Assembly resolution was, ironically, Uganda, which in 1975 sponsored the Zionism is Racism resolution at the United Nations, attempting to deny Israel the right to exist. This week’s resolution, while stopping short of making this straightforward assertion, is essentially different only in “degrees of baldness. The 1975 resolution said Israel has no right to exist. The 2004 resolution says Israel has no right to defend itself, *except* on terms agreeable to the international community generally and the Palestinians particularly, which is tantamount to no defense at all.”⁶⁵

New language was added to the Arab Group’s resolution during the course of debate and negotiation, calling for both the Palestinians and Israelis to comply with their obligations under the Road Map, and recognizing Israel’s right to self-defense.⁶⁶

The PA, which has observer status at the UN, through its representative, Nasser Al-Kidwa, has expressed its literal delight at the passing of the resolution, stating that its next step is to take the measure to the UN Security Council. Mr. Kidwa stated that “[t]he debate is completed. It is now time for implementation and compliance, and at a later stage for additional measures.”⁶⁷

The passing of this resolution is a clear accomplishment of the Palestinian and Arab leadership in its continued attempts to ostracize, criticize and delegitimize Israel. As Ambassador Gillerman’s reaction indicates, “[i]t is simply outrageous to respond with such vigor to a measure that saves lives and respond with such casual indifference and apathy to the ongoing campaign of Palestinian terrorism that takes lives. This is not justice but a perversion of justice.”⁶⁸

⁶² Speech of Israeli Ambassador to the UN Dan Gillerman before the 10th Emergency Session of the 58th UN General Assembly on July 16, 2004.

⁶³ Susser, Leslie, “World Court Says Security Fence Illegal, But Israel Rejects Opinion,” *JTA News*, available at

www.jta.org/page_view_story.asp?strwebhead=Israel+rejects+world+court+ruling&intcategoryid=5.

⁶⁴ Shahr, Ilil, “Officials Applaud High Court Decision On Barrier,” July 1, 2003, *Maariv International*, available at <http://www.maarivintl.com/index.cfm?fuseaction=article&articleID=9257>.

⁶⁵ “This Infamous Act,” *Jerusalem Post Online Edition*, July 21, 2004, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull%26cid=1090380222208>.

⁶⁶ Hoge, Warren, “Remove Wall, Israel Is Told By The U.N.,” July 21, 2004, *The New York Times*, available at www.nytimes.com/2001/07/21/international/middleeast/21nati.html?pagewanted=printed.

⁶⁷ *Id.*

⁶⁸ “The Media Line Daily News Focus,” July 21, 2004, available at www.themedialine.org.

Following the passing of the General Assembly Resolution, the foreign ministers of the Non-Aligned Movement (“NAM”), a group of more than 100 nations representing approximately two-thirds of the UN, adopted during the 2004 NAM Summit held in Durban, South Africa on August 17 through August 19 a “Declaration on Palestine.”⁶⁹ Although like the GA Resolution and the ICJ Advisory Opinion the Declaration is not binding, it further politicizes the Advisory Opinion by calling for sanctions against Israel and advising UN member states to “undertake measures, including by means of legislation, collectively, regionally and individually, to prevent any products of the illegal Israeli settlements from entering their markets consistent with the obligations under International Treaties, to decline entry to Israeli settlers and to impose sanctions against companies and entities involved in the construction of the wall and other illegal activities in the Occupied Palestinian Territory, including East Jerusalem.”⁷⁰

Among other things, the Declaration condemns Israel’s construction of the security fence and Israel’s right to self-defense.⁷¹ The Declaration refers to the findings in the ICJ Opinion as “authoritative” and demands that Israel stop construction on its terrorism prevention security fence, adhering to the ICJ view that the fence “violate[s] the Palestinian people’s freedom of movement and the right to work, to health, to education and to an adequate standard of living.”⁷² The Declaration again imposes required acts as envisioned under the Declaration only upon the State of Israel and ignores the obligations of the Palestinians under the Road Map in yet another one-sided attempt within the UN to impose unjust and undeserved sanctions on Israel.

Meanwhile, Israel formulated an Action Plan to present to the 59th General Assembly, which outlined its priorities for then upcoming session and emphasized its dedication to the Road Map. In the Action Plan, Israel declared that it “hopes that [UN] member states will reject further escalation and resolutions on the issue. Our hope is that the Middle East agenda of the UNGA will stop the biased anti-Israel activity and will reemphasize the essential immediate steps the two sides have to take: ending terror and violence, and encouraging the Disengagement Plan and the Road Map process. It is our hope that these steps will lead to the renewal of the dialogue toward a solution between the parties.”⁷³ Despite this expression of hope, the 59th session of the UN General Assembly passed 19 anti-Israel resolutions, some of which reference the ICJ Advisory Opinion.⁷⁴

⁶⁹ B’nai B’rith Leadership Briefing, August 27, 2004, *available at* bnaibrith.org/ppolicy/chrpp/040827_lbriefing.cfm#nam.

⁷⁰ “Declaration on Palestine” adopted at NAM conference in Durban, South Africa on August 17, 2004 to August 19, 2004; *see also* B’nai B’rith Leadership Briefing, August 27, 2004, *available at* bnaibrith.org/ppolicy/chrpp/040827_lbriefing.cfm#nam.

⁷¹ *Id.*

⁷² *Id.*

⁷³ “59th United Nations General Assembly Israel Priorities and Action Plan,” September 20, 2004, *available at* www.embassyofisrael.org/articles/2004/September/2004092000.htm.

⁷⁴ Although the 59th session of the UNGA has not officially concluded, and will not conclude until September 13, 2005, the majority of the resolutions are passed from September to December, when the UNGA committee meetings take place.

The possible worldwide impact of this hijacking of justice is most disturbing and must be rejected by all governments who respect law and justice, notwithstanding the overwhelming vote in favor of the United Nations General Assembly resolution and the further embracing and adoption of the findings of the Advisory Opinion at the NAM Summit. As the issue moves to the Security Council, it is noted that the United States has indicated that it will use its veto power, as it previously did in vetoing the resolution to request the ICJ Advisory Opinion on 14 October 2003, to again veto a Security Council resolution designed to make the Advisory Opinion binding and to thwart Israel in her defense against terrorism.⁷⁵

Continuing Efforts Of The United States

President Bush in a speech before more than 100 heads of state, heads of government and foreign ministers at the opening of the UN General Assembly on 21 September 2004 called on Arab states to “end incitement in their own media, cut off public and private funding for terrorism, and establish normal relations with Israel.”⁷⁶ Moreover, US Ambassador to the UN John C. Danforth sent a letter to all Permanent Representatives of Missions to the United Nations which outlined the United States’ principal objectives for the 59th General Assembly.⁷⁷ Amb. Danforth listed “Reducing Middle East Resolutions” as one of the five US aims, calling the resolutions “unbalanced” and advocating for the abolition of four UN bodies which the US considers “biased against Israel.”⁷⁸

Ambassador Danforth has condemned the UN Security Council’s latest anti-Israel activities vetoing, on behalf of the United States, Algeria’s attempt to pass a resolution within the Security Council to condemn Israel’s defensive operations in Gaza. Ambassador Danforth stated that the Security Council “acts as the adversary of the Israelis and cheerleader to the Palestinians.”⁷⁹ In vetoing the resolution, Amb. Danforth highlighted Israel’s inherent right to self defense, which the ICJ opinion ignored, noting that “until the Palestinians and those claiming to act in their name stop their use of indiscriminate acts of terror, Israel will likely continue to track down the terrorists wherever they may hide”⁸⁰

⁷⁵ Pomerance, Rachel, “Europeans Held The Key As Palestinians Succeeded In Pressing Barrier Case At U.N.” *JTA*, July 21, 2004, *available at*

http://www.jta.org/page_view_story.asp?intarticleid=14299&intcategoryid=2.

⁷⁶ Speech of President George W. Bush at the UN General Assembly on September 21, 2004, *available at* <http://www.whitehouse.gov/news/releases/2004/09/20040921-3.html>.

⁷⁷ Letter dated July 20, 2004 from US Ambassador to the UN John C. Danforth to Permanent Representatives of Missions to the UN outlining principal objectives for the 59th General Assembly, *available at* www.un.int/usa/ga59obj.htm.

⁷⁸ *Id.*

⁷⁹ Report of the American Israel Public Affairs Committee, October 5, 2004, *available at* www.aipac.org.

⁸⁰ Explanation of vote by John C. Danforth, US Ambassador to the UN, on the resolution addressing the situation in the Middle East, in the Security Council, October 5, 2004, *available at* http://www.un.int/usa/04_180.htm.

Action Of The US Congress

The United States House of Representatives has approved a resolution issued in response to the “unjust decision at the Hague,” whereby the ICJ “violated many of its own rules of jurisdiction where it ordinarily would have recognized the authority of the Supreme Court of Israel to decide such matters.”⁸¹ The resolution, “[d]eploring the misuse of the International Court of Justice by a majority of the United Nations General Assembly for a narrow political purpose,”⁸² is designed to show America’s support for Israel’s right of self-defense, and its dedication to the Road Map, but also to place the ICJ Advisory Opinion in proper perspective as an opinion which must be rejected as biased, prejudiced and ignorant of the truthful situation in which Israel finds herself.

Unlike the ICJ Advisory Opinion and the aforementioned one-sided resolutions adopted in the United Nations, the House Resolution acknowledges (1) the “three-year campaign of terror [endured by the Israeli people] that has included suicide bombings, snipers, and other attacks on homes, businesses, and places of worship and has resulted in the murder of more than 1,000 innocent people since September 2000;” (2) Israel’s right to self-defense against not only other nations but also that, as acknowledged by “United Nations Security Council Resolution 1373 (2001), relating to international cooperation to combat threats to international peace and security caused by terrorist acts, and statements by representatives of other countries at that time, make clear that Article 51 of the United Nations Charter applies to self-defense against actions by terrorist groups against the civilian population of any country;” and (4) the true defensive purpose, temporary nature, and the legitimate and proven results of the security fence.⁸³

Moreover, the Resolution also recognizes the procedural defects in the referral of the ICJ opinion, and the impropriety of the ICJ’s exercise of jurisdiction, including (1) the failure by the General Assembly to obtain a majority vote of member nations for its referral of the request for an advisory opinion to the ICJ; (2) the objection of numerous member States to the ICJ’s exercise of jurisdiction; and (3) the decision of Israel’s High Court of Justice on 30 June 2004 and the Government of Israel’s expressed intention to adhere to the High Court’s ruling.⁸⁴

The House also forecasted the attempts by the Palestinians and other anti-Israel groups to “use the ICJ’s advisory judgment to advance their positions on issues committed to negotiations between the Israelis and Palestinians by advancing resolutions in the United Nations General Assembly, the Security Council, or elsewhere calling for the removal of the barrier and for the imposition of sanctions to force Israel to comply with the advisory judgment”⁸⁵

⁸¹ Speech of Rep. Michael Pence on July 14, 2004 before the House of Representatives on the H. Res. 713, 2d Session, 108th Cong., introduced by Rep. Pence, Berkley, and Ros-Lehtinen.

⁸² H. Res. 713, 2d Session, 108th Cong. (July 15, 2004).

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

In addition, the United States Senate has unanimously approved a Foreign Operations Appropriations bill which appropriates funds to Israel for use in military and economic assistance. The bill also expresses the United States' continued support for Israel in its struggle to defend herself against the Palestinian acts of terror and the anti-Israel efforts within the United Nations by, among other things, calling on American officials to block the one-sided resolutions within the UN condemning Israel's defensive actions.⁸⁶

Hopeful Signs That The Law Abiding World Will Recognize Israel's Right And Obligation To Defend Her Citizens

However, a small positive sign has appeared in that plans by PLO representative Nasser Al Kidwa to propose a further resolution threatening Israel with sanctions if it does not comply with the ICJ opinion have reportedly been met with disdain by senior diplomats of major European Union countries, who argued to Al Kidwa that "the issue of the separation fence in the UN forum has been exhausted, and must now move on to the political level in discussions between Israel and the Palestinian Authority."⁸⁷

Moreover, German Interior Minister Otto Schily expressed support for the terrorism prevention security fence, denouncing comparisons drawn between Israel's fence and the Berlin Wall. He states "[t]hose who draw comparisons with the Berlin Wall are wrong, because [the terrorism prevention security fence] does not shut people in and deprive them of their freedom. Its purpose is to protect Israel from the terrorists."⁸⁸ Minister Schily justified the security nature of the fence, noting that its construction was a reaction to previous failed attempts to prevent Palestinian suicide bombers from entering Israel.⁸⁹ "All the efforts undertaken over many years, even decades, have unfortunately failed to bear fruit," he said.⁹⁰ "So it is understandable that Israel should erect a protective barrier, which furthermore has shown it works, and I think that the criticism is far from reality."⁹¹ Minister Schily also declared that the terrorism prevention security fence should be referred to as what it is – a "fence" – and not a "wall" as it is often called in Germany and other nations.⁹²

European Union diplomats also have reportedly expressed "growing dissatisfaction . . . over what they regard as the almost automatic opposition to Israel that is evident in the General Assembly and in many of its resolutions."⁹³

⁸⁶ The American Israel Public Affairs Committee, *Near East Report*, available at <http://www.aipac.org/Vital%20Aid101104.htm>.

⁸⁷ Shamir, Shlomo, "EU Opposed To More Talks On Fence At UN," *Haaretz*, September 15, 2004, available at www.haaretz.com.

⁸⁸ "German Minister Justifies Israeli Barrier," Deutsche Welle (Germany), September 14, 2004, available at http://www.dw-world.de/english/0,1594,1432_A_1327916_1_A,00.html?mpb=en.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Shamir, Shlomo, "EU Opposed To More Talks On Fence At UN," *Haaretz*, September 15, 2004, available at www.haaretz.com.

Moreover, the UN General Assembly held a Special Session on 24 January 2005 to commemorate the 60th anniversary of the liberation of the Nazi concentration camps at Auschwitz. This meeting was especially historic. Not only did it mark the first commemoration by the General Assembly of the Holocaust, but it also was the first time the General Assembly convened a Special Session, which requires a majority vote by UN member states, at Israel's initiative.⁹⁴ The PLO was granted official observer status for the Session and a number of Arab countries, for the first time, supported the calling of the General Assembly despite its relation to Israel, the Jewish people and the commemoration of the liberation of Auschwitz.⁹⁵ A number of Ambassadors from Arab countries, including the Libyan Ambassador, participated in the Session, which was addressed by Foreign Ministers from such countries as Germany and France.

Israeli Foreign Minister Silvan Shalom addressed the General Assembly and highlighted the continuing need to recognize and delegitimize attempts to further anti-Semitism:

The lessons of the Holocaust are crucial today for [several reasons, one being] because today once again we are witnessing, against Jews and other minorities, that the same process of deligitimization and dehumanization, that paved the way to destruction. Let us not forget. The brutal extermination of a people began, not with guns or tanks, but with words, systematically portraying the Jew – the other – as less than legitimate, less than human. Let us not forget this, when we find current newspapers and schoolbooks borrowing caricatures and themes from the Nazi paper *Der Sturmer*, to portray Jews and Israelis.

And finally these lessons are crucial today, because once again, we are witnessing a violent assault on the fundamental principle of the sanctity of human life For the Nazis, the destruction of one human being, or of a hundred, a thousand, six million, was of no consequence. It was just a means to an evil end.

Today, again, we are pitted against the forces of evil, those for whom human life – whether the civilians they target, or their own youth who they use as weapons – are of no value, nothing but a means to their goals. Our sages teach us that “He who takes a single life, it is as if he has taken an entire world”. No human life is less than a world. No ideology, no political agenda, can justify or excuse the deliberate taking of an innocent life.⁹⁶

⁹⁴ See Israel Ministry of Foreign Affairs, “Special Session of UN General Assembly to Mark the 60th Anniversary of the Liberation of the Death Camps”, January 16, 2004, *available at* <http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Issues/Special+UN+Session+-+60+years+liberation+of+death+camps+-+Jan+2005.htm>.

⁹⁵ See UN Press Release Note No. 5913/Rev. 1 “General Assembly to Convene Special Session Commemorating Sixtieth Anniversary of Liberation of Nazi Death Camps, Monday, 24 January”, *available at* <http://www.un.org/News/Press/docs/2005/note5913.doc.htm>.

⁹⁶ Address of Israeli Foreign Minister Silvan Shalom before the UN General Assembly, January 24, 2005, *available at* <http://www.mfa.gov.il/MFA/Anti->

At the main entrance hall of the United Nations, the Israeli Foreign Ministry sponsored an exhibit on the concentration camps at Auschwitz entitled “Auschwitz – the Depth of the Abyss”. The exhibit features the Auschwitz Album, the sole remaining visual evidence of the death camps, which consists of identification photographs of Hungarian Jews upon their arrival.⁹⁷

The Failure of Leadership by Yasser Arafat

The world has generally acknowledged that the death of Yasser Arafat has presented an opportunity to revive the peace process, depending upon the cause established by new Palestinian leadership under Former Palestinian Prime Minister Abu Mazen (a.k.a. Mohammad Abbas). Since Arafat’s passing Israel has continued to adhere to the Disengagement Plan, despite the overwhelming belief by Israelis that they still lack a Palestinian partner in their quest for peace.⁹⁸ It remains to be seen whether Arafat, who made the legitimization of terrorism the hallmark of his regime under the guise of freedom-fighting, was merely a symbol of the larger problem of the method by which Palestinians who, for example, even after signing the Oslo Agreement continued to publish school textbooks with maps that omitted Israel and mentioned Israel only as an occupying power, conduct negotiations in general.⁹⁹

Notwithstanding this history, immediately upon Arafat’s death Israel seized the opportunity to express its willingness to facilitate negotiations. Israel refrained from initiating new military action in the disputed territories, reduced roadblocks, made outreach efforts to begin discussions and expressed its readiness to coordinate with Palestinian leadership its withdrawal from Gaza.¹⁰⁰ Israeli Ambassador to the UN Dan Gillerman emphasized the historic opportunity for a change in leadership that could lead to peace with Israel. Terje Roed-Larsen, the former Secretary General’s Special Coordinator for the Middle East Peace Process, echoed this sentiment in his final briefing to the UN Security Council stating “[t]he extent and success of coordination in [the] recent days [since Arafat’s death] is reminiscent of earlier, happier days, and might herald a new beginning – a new beginning that would come not because of President Arafat’s passing, but in spite of the very difficult situation.”¹⁰¹

Semitism+and+the+Holocaust/Documents+and+communiques/Address+by+FM+Shalom+to+the+UN+General+Assembly+Special+Session+24-Jan-2005.htm.

⁹⁷ See UN Press Release Note No. 5914/Rev. 1, “‘Auschwitz – the Depth of the Abyss’ Exhibit Opens at Headquarters on 24 January”, available at <http://www.un.org/News/Press/docs/2005/note5914.doc.htm>.

⁹⁸ See Hurewitz, Jeremy, *World Security Network Newsletter*, “Viewpoints on a Post-Arafat Middle East” (December 19, 2004) (interviewing Barry Rubin, director of the Global Research in International Affairs (GLORIA) Center, co-author of *Yasir Arafat: A Political Biography* and columnist for *The Jerusalem Post* who states that “70 to 80 %” of the Israeli population believes they have no Palestinian partner).

⁹⁹ See *id* (interviewing Shlomo Avineri, a professor of Political Science at the Hebrew University of Jerusalem, author of works on Middle Eastern affairs and political theory, and former Director-General of Israel’s Ministry of Foreign Affairs).

¹⁰⁰ See *id* (interviewing Barry Rubin).

¹⁰¹ Briefing to the United Nations Security Council by Terje Roed-Larsen, then Special Coordinator for the Middle East Peace Process on 15 November 2004.

Implementation of the Road Map, in addition to the Disengagement Plan and the Palestinian presidential election held on 9 January 2005 can ultimately lead to dismantling the terrorist infrastructure and a peaceful resolution to this longstanding and violent conflict, but it will require more than Israel's unilateral disengagement. It will require firm positive action by the new PA leadership under Mr. Abbas. Achieving peace will require the affirmative Palestinian participation with a true commitment to achieving a peaceful resolution that was lacking during Arafat's tenure, and an affirmative commitment to ending corruption within the Palestinian Authority and delegitimizing terrorism, investigating terrorist attacks and prosecuting the terrorists.

During his campaign, Mr. Abbas, while purporting to make ending the intifada and terrorism a political goal, still referred to Israel as "the Zionist enemy."¹⁰² Since Arafat's death, however, there has been a decrease in public support for Hamas and a 50 to 70 percent reduction in Palestinian terrorist attacks.¹⁰³ Then US Secretary of State Colin Powell expressed the United States' continued dedication to resolving the conflict and its confidence in Israel in stating that if the new Palestinian president "shows a real commitment to end terror, I think he will find an Israeli partner ready to work with him and he will certainly find the international community and especially the United States ready to play an important role."¹⁰⁴

Signaling an important change in the direction of peace, as of 25 January 2005 militant Palestinian groups agreed to assist the newly elected President Abbas in working toward a cease-fire with Israel by temporarily refraining from initiating attacks against Israel.¹⁰⁵ Soon thereafter, on 8 February 2005, Prime Minister Sharon and President Abbas pledged "that all Palestinians will stop all acts of violence against all Israelis everywhere . . . [and] Israel will cease all its military activity against all Palestinians anywhere."¹⁰⁶ Although the agreement does not have the force of a formal cease-fire, it is a hopeful sign that Israelis and Palestinians will one day achieve the peaceful coexistence envisioned by the Road Map. As Prime Minister Sharon stated at the summit:

We do hope we will have a new era, which will make a real change that will be a proper, solid basis for new relations between us. I am absolutely determined to implement the disengagement plan, which I have initiated. This was initiated as a unilateral step by ourselves, but if a real change actually comes about from the Palestinian side, then disengagement can

¹⁰² See Toameh, Khaled Abu, *Jerusalem Post* "Abbas Denounces 'Zionist Enemy'" (January 4, 2005), available at

<http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1104808687135>.

¹⁰³ See *JCPA Middle East Briefing*, Vol. 8, No. 11, "Beyond Arafat: Palestinian Politics in the New Era" (December 15, 2004).

¹⁰⁴ Statement of Colin Powell on NBC's Meet the Press (January 2, 2005).

¹⁰⁵ See *The Washington Post*, "Palestinian Groups Agree To Suspend Attacks On Israel" (January 25, 2005).

¹⁰⁶ Speech of Israeli Prime Minister Ariel Sharon at a summit at the Red Sea Resort in Sharm el-Sheikh, Egypt on 8 February 2005; available at

<http://www.cnn.com/2005/WORLD/meast/02/08/transcript.sharon/index.html>.

bring about peace and act as a new launching point for coordinated and successful plan.¹⁰⁷

Prime Minister Sharon further called on the leaders of all Arab countries to work together in this effort:

Let us hold hands, let us get together and bring about a new atmosphere of openness and tolerance. Today, we can stem the flood of radicals who could otherwise allow us all to be swept away in a whirlpool of bloodletting and violence. I do hope that we are able to say to the peoples of the Middle East there are the initial, the first glows of light of hope here. I hope for all of us that we will be able to live in liberty, in hope, prosperity and peace.

May we all be worthy of this great opportunity which has presented itself to us.¹⁰⁸

President Abbas echoed the desire for a peaceful resolution of the Israeli/Palestinian conflict, but also regarding the appeal for international collaboration to work toward this end:

And also I assert our interest in respecting all our obligations and implementing all our commitments. And will save no effort whatever to protect this newborn opportunity of peace, that is provided through what we have already declared here today. We hope that our brothers in the Arab Republic of Egypt and the Hashemite Kingdom of Jordan, we hope that they will continue their good efforts as well as we hope that the quartet, the international quartet, will resume its responsibilities to achieve acceleration of progress on the Palestinian/Israeli with reviving a peace process, as well, on the Syrian and Lebanese track as -- tracks as one

We look forward to that day and hoping it will come as soon as possible in order that the language of negotiations will replace the language of bullets and cannons and in which neighborhood and livelihood will prevail instead of the war; and in order to provide our grandsons and our future generations, Palestinian and Israelis, a different tomorrow, a promising tomorrow.

This is a new opportunity. A new opportunity of peace is won today in the city of peace. Let us all pledge to protect this opportunity in order to see that the wish of peace becomes a true and daily fact in this region.¹⁰⁹

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

United States Secretary of State Condoleezza Rice called the meeting “the most promising moment for progress between Palestinians and Israelis in recent years.”¹¹⁰

The Victims

What the International Court of Justice and even the United Nations have failed to recognize is that all of this is, or at least should be, about protecting people so that they may be safe and secure in their homes, on buses, in restaurants, that they be free to walk in shopping areas, that children will be safe and that citizens can enjoy the freedom to which they are entitled as a matter of right.

Hearings on behalf of Israeli Victims of Terrorism were held at the Hague in the Old City Hall on 23 February 2004 sponsored by the Dutch Center for Information and Documentation on Israel. In the presence of members of the European Parliament, an important resolution was unanimously adopted by those assembled. A copy is attached for your reference.

Israel’s terrorism prevention security fence must, as a matter of law, be viewed in the context of protecting people from becoming victims of terrorism.

CONCLUSION

It is essential for the Security Council to reject efforts of the Palestinian leadership to approve a sanctions resolution against Israel and, if necessary, for the United States to veto the Security Council resolution as an affirmative stand against the attempted denial of Israel’s right to defend against terrorist attacks.

The State of Israel, as any other nation-State which is a member of the United Nations and the family of nations, is entitled to, and has an obligation to, protect and defend her people.

No ruling, resolution, or even an advisory opinion of the International Court of Justice can interfere with a nation’s rights and obligations to defend her citizens; nor any citizen’s right and entitlement to be defended by her country.

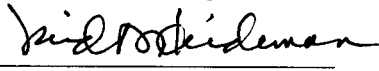
¹⁰⁹ Speech of Palestinian Authority President Mahmoud Abbas at a summit at the Red Sea Resort in Sharm el-Sheikh, Egypt on 8 February 2005; *available at*

<http://www.cnn.com/2005/WORLD/meast/02/08/transcript.abbas/index.html>.

¹¹⁰ See <http://www.cnn.com/2005/WORLD/meast/02/08/mideast/index.html>.

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