



הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS

Human Rights Commission 61st Session
Statement by the International Association of Jewish Lawyers and Jurists
on Item 8 of the Agenda – Question of the Violation of
Human Rights in the Administered Territories

The current Report of the Special Rapporteur is likely to extinguish any expectation at this session of the Commission of the emerging dialogue between the Israel Government and the Palestinian Authority for progress towards peace negotiations. This report is far from objective in assessing the impact of the sustained campaign of mortar and rocket coupled with the suicide bomb attacks mounted from the Palestinian centers of population on Israeli civilian targets with which the Israeli Defence Forces have had to contend. This hopelessly one-sided litany of accusations exceeding in tone and content the unbalanced and distorted presentation of earlier reports, fails to grasp the essence of the problem to which the decision of the Israeli authorities to construct the security and separation fence responded.

The central issue which these comments will address, is the contested legitimacy under international law of the construction of the fence both in principle and in its execution, as modified by the decision of the Supreme Court of Israel in its Judgment of 30 June 2004.

It will be recalled that the decision of the Israeli Supreme Court was rendered prior to the issuance of the Advisory Opinion of the International Court of Justice (ICJ) on 9 July. Unlike the ICJ's Opinion, the Supreme Court of Israel tackled the crux of the entire issue. It unambiguously stated that the purpose of the fence is to prevent terrorist attacks against innocent civilians since September 2000, which have assumed the proportions of armed conflict, mounted across the so-called Green Line and targeted against Israeli population centers. These terrorist attacks claimed over 900 lives and more than 6,000 maimed and injured. Undoubtedly severe losses were also suffered on the Palestinian side in the military operations aimed at dismantling the terrorist infrastructure. These Israeli military operations were continuously under review by the Israeli judicial system in the light of applicable humanitarian law.



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The fence was thus erected as a non-violent means of self-defence precisely to minimize casualties on both sides. Results have confirmed these expectations by reducing the number of terrorist attacks by over 80% in vulnerable areas along the fence. The military authorities sought to reduce the hardships caused to the Palestinian population living adjacent to the fence to a minimum. In the recent Israel Supreme Court decision on those instances where the route taken for the fence was found to impose disproportionate hardship on the aggrieved inhabitants who petitioned the court, it ordered the re-routing of the fence with which the authorities are complying. Further the Israel Government has given a firm assurance that the fence would be dismantled in the context of a peace settlement.

Essentially political considerations induced the General Assembly in its 10th Emergency Session to request an advisory opinion of the ICJ on 8 December 2003. The request contained no mention of the word terror or any reference to terrorist attacks. Concerns that this request would have negative effects on the peace negotiations were in fact expressed by three members of the Quartet associated with the Roadmap for Peace, namely the U.S., European Union and Russian Federation.

It is clear that the terms of the Advisory Opinion may well compromise prospects for reaching a peace settlement outlined in the Roadmap notwithstanding the good intentions in the Opinion's final paragraph.

The Advisory Opinion has created the following adverse consequences:

- That it established an unfavourable precedent by which the role of the ICJ will become more politicized and less judicial.
- That it obscured the historical facts of the dispute causing a disturbing imbalance in understanding its origins. Judge Higgins in her separate opinion found paragraphs 71 to 76 of the conclusions as "neither balanced nor satisfactory". Judge Kooijmans in his separate opinion also expressed reservations about the presentation of the introductory history in paragraphs 70 to 78.
- That it cast doubt on the applicability to the Fence of Article 51 of the UN Charter notably by asserting that this inherent right of self defence only exists in the case of armed attack by one State against another. Nothing in the wording of Article

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51 supports this conclusion reached in paragraph 139 of the Opinion. It cannot be reconciled with Security Council Resolutions 1368 and 1373 of 2001, when it applied the concept of self-defence to combating international terrorism.

- That the Opinion failed as a result to examine such issues as military necessity, proportionality and other security issues, whether applicable to the whole or part of the Fence, in acting as non-violent barrier to terrorist attacks. It also ignored the detailed evidence of the nature and extent of the terrorist attacks sent by the Israeli authorities to the ICJ in the preliminary proceedings.
- That it contains a troubling finding, reflected in paragraphs 155 to 159 of the Opinion, purporting to find certain *erga omnes* obligations allegedly owed by one State creating third party obligations for all other States. Judge Kooijmans in his separate opinion felt constrained to distance himself as a result from a part of this conclusion.

The separate opinions of Judges Buergenthal, Higgins and Kooijmans all expressed reservations about significant aspects of the Advisory Opinion. Judge Buergenthal voted against all the findings of the Advisory Opinion in a separate Declaration, while accepting the unanimous view that the ICJ did in fact have jurisdiction to provide an Advisory Opinion. Judge Kooijmans disagreed with the alleged obligations arising for all States flowing from the ICJ's finding. However all three of these Judges had difficulties with regard to accepting the judicial propriety of the Advisory Opinion-

Many experts and scholars of international law and of the international legal community will share the considerable disquiet that this Advisory Opinion has created.

A serious concern that cannot be dispelled as a result of this Advisory Opinion is that parties to a dispute likely to endanger international peace and security, may be motivated not to pursue their first obligation of seeking a solution by negotiation, mediation, conciliation or similar means, as required by Article 33 of the Charter. Such parties may well now prefer to test their case directly in the General Assembly to seek a majority willing to request the ICJ for an Advisory Opinion.

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It is to be hoped that the members of this Commission will be aware of these dangers and encourage the parties to concentrate their efforts to pursue the path to a negotiated peace chartered by the Roadmap.