

**BEFORE THE
INTERNATIONAL COURT OF JUSTICE
THE HAGUE**

**IN RE: REFERRAL BY THE UNITED NATIONS GENERAL ASSEMBLY OF
THE MATTER RELATING TO THE ISRAELI TERRORISM PREVENTION
SECURITY BARRIER UNDER CONSTRUCTION, PURSUANT TO
RESOLUTION, SEEKING ADVISORY OPINION**

**WRITTEN STATEMENT
FRIEND OF THE COURT BRIEF**

**SUBMITTED BY
THE FOUNDATION FOR THE DEFENSE OF DEMOCRACIES**

30 JANUARY 2004

RESPECTFULLY SUBMITTED,

**HEIDEMAN LEZELL NUDELMAN & KALIK, P.C.
1146 Nineteenth Street NW, Fifth Floor
Washington, DC 20036
Telephone 202. 463-1818/Telefax 202. 463-2999
Email: rdheideman@HLNKlaw.com**

By: */s/Richard D. Heideman*

**Richard D. Heideman, Esq.
Mark L. Lezell, Esq.
Noel J. Nudelman, Esq.
Tracy R. Kalik, Esq.**

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PREAMBLE

Comes now, The Foundation For The Defense of Democracies “FDD” or “the Foundation”, a non-profit non-governmental organization (“NGO”), established under the laws of the State of Delaware in the United States of America and approved as a tax exempt organization, being committed to the expansion and development of emerging democracies, and the protection of the principles and processes of democracy, and as a Friend of the Court does hereby submit its Amicus Curaie brief in relation to the referral by the United Nations General Assembly of the matter relating to the Israeli Terrorism Prevention Security Barrier “Fence” under construction, wherein an Advisory Opinion is sought from this Court pursuant to Article 65 of the Statute of the International Court of Justice.

The Foundation is a non-partisan and non-religious organization that was founded shortly after the attacks of September 11, 2001 to conduct research and ad education on global terrorism – the most serious security threat to democracy. As an organization that researches and advocates policies to defend democracies against terrorism and promote the values of freedom against anti-democratic ideologies, FDD is uniquely able to furnish this Court with information on the issue submitted to the Court for an Advisory Opinion.

**PART I – STATEMENT OF FACTS AND CONTEXT OF THE REFERRAL BY
THE UNITED NATIONS OF A QUESTION FOR ADVISORY OPINION**

A. The Conflict

In 1947, General Assembly Resolution 181, dated 29 November 1947 (A/RES/181(II)(A+B)) set the stage for the emergence of two nations, one Jewish and one Arab, in the territory formerly subject to the British Mandate over Palestine. Israel accepted Resolution 181 while the Arab world rejected it. Seven months later, on 14 May 1948, the British Mandate ended and the State of Israel declared its independence. The Arab countries launched a war of aggression against the newly-created Jewish state but were defeated in what became Israel's War of Independence. Israel was admitted to the body of the United Nations in 1949.

Despite its being called for in Resolution 181, no corresponding Arab nation arose at that time. Instead, those portions of Palestine in Judea and Samaria which did not become part of Israel, including the West Bank and Gaza (hereinafter collectively referred to as the "West Bank") in the War of Independence were occupied first by Iraq and then Jordan, which annexed the West Bank from 1949 until 1967, and then from 1967 until the present have been administered by Israel, following its victory in the Six-Day War, a war of aggression launched by the Arab world against Israel. No other single international issue has preoccupied the United Nations more than the Arab-Israeli conflict. The conflict has been the subject of innumerable resolutions in both the Security Council and the General Assembly. At last count, since 1964, the UN Security Council has passed 88 resolutions against Israel, the only democracy in the region, while the UN General Assembly has passed more than 400 such resolutions. Through this time, the UN has been used to publicly ridicule the democratic State of Israel while excusing the violence and terrorism of its authoritarian neighbors. This double standard has made it more difficult to resolve the issue of finding a lasting peace between the Arab Palestinians and the State of Israel.

B. The Reality of Violence

Despite the general desire among both the Arab Palestinians and the Israelis for peaceful coexistence, violence between Israel and Arab Palestinians has been a fixture of the relationship since 1948. In more recent years, terrorist violence has captured the region. Groups such as Hamas, Hezbollah, Palestinian Islamic Jihad, Fatah and the Al-Aksa Martyrs Brigades, operating out of the West Bank commit acts of violence either within or from the West Bank or in Israel. The Government of Israel ("Israel") views these groups and their operations as a threat to the safety of its citizens and the security of the whole nation. In response to that threat Israel's military has taken actions within the West Bank to direct lethal force against members of these groups. The violence committed by these terrorist organizations, and the Israeli attempts to stop terrorism have resulted in the death and grave injury to Arab and Israeli civilians alike. It must be noted that almost 80% of Israelis killed since September 27, 2000, have been non-combatants while almost 50% of Palestinian fatalities have been combatants or non-combatants killed by Palestinians.

Terrorism, as a means of achieving political ends, particularly when directed against civilians, has been categorically rejected by the United Nations. In Resolution 57/27 of 15 January 2003, the General Assembly reaffirmed its commitment to the Declaration on Measures to Eliminate International Terrorism and in paragraphs 1 and 2 stated that it:

- 1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;*
- 2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them;*

C. The Role of the UN in the Middle East Peace Process

The United Nations (“UN”) convenes in (1) a General Assembly forum where each member state, along with invited observers, participates in debating and addressing issues of public policy as it relates to international peace and security; and (2) a Security Council where permanent and selected member states address these issues of policy and other resolutions of significance as it deems appropriate.

The State of Israel is a member of the United Nations, being a nation state with full credentials and accreditation as a part of the General Assembly, which pursuant to the Partition Resolution adopted by the UN in November 1947, declared its independence in May 1948. The Partition Resolution also envisioned the creation of a second state in the territory known as Palestine, the second state being an independent State of (Arab) Palestine, as distinguished from the State of Israel which was created primarily as a Jewish state and homeland for the Jewish people either living in Israel or forced to relocate there as a result of anti-Semitism, oppression, or mass murder (the “Holocaust”) that took place throughout Eastern and Western Europe and subsequently in other parts of the world. Notwithstanding the rejection of the Partition Resolution by the Arab states, subsequent wars against the State of Israel, and a massive diplomatic and political offensive upon the legitimacy of the State of Israel the subject of Palestine remains a large and integral part of the agenda of the United Nations. The contemplated State of Arab Palestine, envisioned under the Partition Resolution, has not yet come into existence, although the Palestinian people have been represented by the Palestine Liberation Organization (“PLO”) and more recently by the Palestinian Authority (“PA”).

In his June 24, 2002 rose garden speech, U.S. President George W. Bush outlined a vision of two states, Israel and Palestine, living side by side, in security and in peace. Drawing on the long standing commitment and efforts of the international community to effect a just and comprehensive resolution to the lingering conflict, the President’s vision has become embodied in a Road Map for Peace in the Middle East, an internationally sanctioned and monitored agreement and process for the creation of a viable Palestinian state living alongside a secure state of Israel.

The United States, Russia, the European Union and the United Nations, acting as a “Quartet,” have adopted the Road Map for Peace in the Middle East. The Road Map has been formally ratified and adopted by a binding resolution of the UN Security Council, which is the organ of the United Nations that remains principally seized of this matter. No final borders between Israel and Palestine have been, nor could they yet be determined except in accordance with the steps outlined in the Road Map.

Pending completion of a directly negotiated settlement between the parties in accordance with the Road Map, the status of the territory known as “The West Bank” remains disputed, as a matter of fact and law, as recognized by the UN Security Council (Resolution 242(1967)).

D. The Long Road to Peace

The inability of the parties to resolve the dispute and thus the status of this disputed territory has been costly for all concerned. Thousands of innocent people have been killed and injured. Endless war has drained Israel’s resources and crippled Palestinian society.

While the State of Israel has entered into official peace agreements with Egypt (1978) (signed at Camp David by the then President of Egypt, Anwar Sadat, and Israeli Prime Minister Menahem Begin), and Jordan (1994), (signed in Washington by the then King of Jordan, Hussein, and Israeli Prime Minister Yitzhak Rabin), there exists today a continuing state of war with Syria and Lebanon. Arab governments throughout the region have largely treated Israel as a pariah, refusing her proper admission or participation in the United Nations’ regional group to which Israel geographically belongs, and refusing, for the most part, to have diplomatic relations with Israel.

Despite the intervention of other countries and of the United Nations, no official peace has been established between the State of Israel and the Palestinian Authority, although the various agreements entered into between the governments have envisioned peace through a process leading to what is referred to as final status negotiations, with an end result including resolution of the major open issues concerning borders, refugees and Jerusalem, and the planned creation of the independent State of (Arab) Palestine.

Direct negotiations between the Israelis and the Palestinians during the past decade have produced some agreements. In 1992, then Israeli Prime Minister Yitzhak Rabin and Yasser Arafat signed the Oslo Accords. In 1998, then Israeli Prime Minister Benjamin Netanyahu and Yasser Arafat signed the Wye River Accords. In 2000, Israeli Prime Minister Ehud Barak and Yasser Arafat, at the invitation of then President Bill Clinton, convened at Camp David in an attempt to resolve most of the major open issues between the Israelis and the Palestinians. Arafat rejected the offer of the creation of a Palestinian state on over 90% of the West Bank and the whole of the Gaza Strip, with its capital in East Jerusalem. His demand for millions of Palestinian refugees to be given the right to return to Israel destroyed the possibility of this historic peace treaty between the Israelis and the Palestinians.

The failure of that process to reach a conclusion has been followed by a tumultuous period referred to as “The Second Intifada,” a period marred by numerous terrorist acts targeting Israeli civilians. These acts include: bombings of busses, restaurants, shopping centers, hotels, synagogues and other public and private places through Israel. All of the acts were committed by Palestinian terrorists claiming to be pursuing the establishment of an independent state. Thousands of Israelis, mainly civilians, have been murdered and maimed by these bombings, largely committed by people wearing bombs strapped to their bodies, and causing the terrorists themselves to be killed when the bombs have been detonated. These bombings have come to be known as “suicide bombings” and perhaps more aptly “homicide bombings,” designed to murder and maim civilians.

The Palestinian terrorist organizations which have long promoted terrorism as a negotiating tool against Israel have escalated their activities during this latest chapter in the Arab-Israeli war, the so-called Second Intifada. Under the guise of “freedom fighting,” they expressly seek to destroy Israel while posturing behind slogans like “end the occupation.” That the terrorists plead their case and cause, by violence and murder, and before the United Nations, is not only ironic, but it is also an affront to the fundamental principles and values upon which democracy and the United Nations itself are grounded.

As a result of the agreements reached over the past decade between Israel and the Palestinian Authority, certain lands, governing and judicial functions, and police responsibilities were transferred from the Israelis to the Palestinian Authority. The security services of the Palestinian Authority, after the Oslo Accords, were established for the purposes of providing routine police functions for the Palestinian people, as well as serving as Palestinian border guards in areas where both Israeli and Palestinian guards were working, even though official borders have not yet been established between the State of Israel and the Palestinian Authority. The Palestinian Authority has largely failed in meeting its obligation to build democracy, to construct schools, health care facilities, town halls, to develop a stable economy or to cause the establishment of democratic law abiding institutions. Elections have not been held in the Palestinian territories since 1996. Equally, no genuine opposition has been permitted, so that any elections that might take place today would be essentially controlled as to the result.

The Palestinian Authority has either been unwilling, or unable, to curb these terrorist acts, and has largely failed, or refused, to put a stop to the suicide bombings and other acts of terror and murder that have been committed upon Israeli citizens, a government minister, the military, police and members of the border patrol. Palestinian textbooks are full of hatred; leaders encourage and fail to stop suicide bombings by children; terrorism as a means of expression is sanctioned and sponsored by the Palestinian Authority and various terrorist organizations are permitted to operate freely within the Palestinian territories. Lawlessness exists and democracy in all meaningful forms is repressed.

The Israeli government has responded in numerous ways to these acts of violence: (a) it re-took control of most of the Palestinian territories and asserted military presence in place of the Palestinian Authority police; (b) it targeted terrorist leaders and either

arrested, deported, or even killed them; (c) it weakened the terrorist infrastructure, physically and financially; and (d) it largely sealed off Israel from the Palestinian territories.

Since 2000, most of the cooperative progress that had been made between the State of Israel and the Palestinian Authority has been lost. Joint efforts at regional economic development, education, health care, democracy building, society building, and integration of infrastructure have come to a grinding halt. The Palestinian people, and the Israeli people, and their businesses, have suffered greatly as a result of the ongoing state of siege which both “sides” have experienced.

In spite of efforts by the United States, Russia, the European Union, the United Nations, and many other governments, there has not been any recent significant progress in economy building, democracy building, society building, or in resolving the serious open issues between the parties, although there remains hope that if acts of terrorism would cease, the parties could return to direct negotiations and a meaningful peace process.

However, the Palestinian Authority has not held general elections since 1996, and Israel, and other countries including the United States, firmly believe that they do not have a negotiating partner in Yasser Arafat, who has failed to provide the necessary leadership in building the economy, civil or governmental institutions and democracy for the Palestinian people. Palestinian textbooks, media, religious clergy and social discourse are full of hatred toward Israel. Despite billions of dollars in foreign aid given to the Palestinian Authority, many Palestinians continue to live in squalor and have no hope for the future. Allegations abound about the misappropriation of foreign aid money by Yasser Arafat and other leaders of the Palestinian Authority. Evidence continues to accumulate about the improper use of foreign aid money and the funneling of foreign aid dollars to those who support and conduct terrorist acts.

The War on Terrorism, designed to remove murderous regimes in Afghanistan, Iraq and against Al Qaeda and other terrorist organizations, in which the President of the United States, George W. Bush, has provided leadership for the world, has of late had some impact on the terrorist organizations in the Palestinian territories. The United States, the European Union and other governments have branded terrorist organizations such as Hamas, Palestinian Islamic Jihad and others, as outlaws. Steps have been taken to stop the funding of terrorist organizations in order to put the terrorists out of business.

The State of Israel, the United States, and others have called upon the leadership of the Palestinian Authority to stop terrorism against the Israeli people as a precondition to the resumption of direct negotiations between the State of Israel and the Palestinian Authority.

However, the Palestinian Authority has not made the necessary efforts to dismantle terrorist organizations and to stop murderous acts against the Israeli people, either because it is incapable of getting terrorist organizations such as Hamas, Palestinian Islamic Jihad, and others to stop encouraging suicide bombings and other acts of

terrorism, or because the Palestinian Authority has simply refused to do so. Through its affiliate, the Al-Aksa Martyrs Brigades, which is responsible for numerous suicide bombings and other acts of terrorism, the Palestinian Authority has embraced the use of terrorism as a matter of strategic choice designed to prevent a lasting peace between Arab Palestinians, the Arab world, and Israel.

Some claim that the Palestinian Authority cannot stop the terrorism without rebuilding and rearming its own police and security services. The Israelis have been loathe to permit the rearming of the Palestinian police and security services because of the proliferation of weapons throughout the Palestinian territories and the use of those weapons against the citizens of Israel, rather than for internal Palestinian Authority security purposes.

The world has encouraged the Palestinian Authority to undertake major democracy-building and to change the way it has done business. The position of a Prime Minister was established in 2002, and the first Palestinian Prime Minister, Abu Mazen, was installed and subsequently received by President George W. Bush and other world leaders, in the hopes that direct negotiations could resume. Unfortunately, the Prime Minister resigned during 2003. A new Palestinian Prime Minister, Ahmed Queria, has been installed and it is hoped that he will provide the needed leadership to ensure that terrorism stops and negotiations can resume.

E. Moving the Peace Process Forward

Both Israel and Arab Palestinians, represented by the Palestine Liberation Organization (“PLO”) and the Palestinian Authority (“PA”), have attempted over the years to achieve peace; to date, these efforts have not resulted in a lasting peace, although various agreements have been entered into, and negotiations have started and stopped on numerous occasions, most recently because of the terrorist violence committed against the Israeli citizens. The parties, and the Security Council in resolution 1515 of 19 November 2003, adopted the Road Map as the mechanism whereby they could formulate a lasting peaceful co-existence.

i. The Road Map

The Road Map states that:

a two state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism.

Further, Phase I of the Road Map requires:

the Palestinians to immediately undertake an unconditional cessation of violence. Such actions should be accompanied by supportive measures undertaken by Israel [in part by making] efforts on [the] ground to disrupt and restrain individuals and groups conducting and planning violent attacks on Israelis anywhere.

The Mitchell Report recognized the central obstacle which violence serves to any peaceful coexistence between Israel and Arab Palestinians:

[the] . . . overriding concern of those in the region with whom we spoke is to end the violence and to return to the process of shaping a sustainable peace

. . .

With widespread violence, both sides have resorted to portrayals of each other in hostile stereotypes. This cycle cannot be easily broken. Without considerable determination and readiness to compromise, the rebuilding of trust will be impossible.

Cessation of Violence: Since 1991, the parties have consistently committed themselves, in all their agreements, to the path of nonviolence. To stop the violence now, the PA and GOI need not "reinvent the wheel." Rather they should take immediate steps to end the violence, reaffirm their mutual commitments, and resume negotiations.

ii. Attempts to End Violence

The Mitchell Report found that:

Despite their long history and close proximity, some Israelis and Palestinians seem not to fully appreciate each other's concerns. Some Israelis appear not to comprehend the humiliation and frustration that Palestinians must endure every day as a result of living with the continuing effects of occupation, sustained by the presence of Israeli military forces and settlements in their midst, or the determination of the Palestinians to achieve independence and genuine self-determination. Some Palestinians appear not to comprehend the extent to which terrorism creates fear among the Israeli people and undermines their belief in the possibility of co-existence, or the determination of the GOI to do whatever is necessary to protect its people.

. . .

Fear, hate, anger, and frustration have risen on both sides. The greatest danger of all is that the culture of peace, nurtured over the past decade is being shattered. In its place there is a growing sense of futility and despair, and a growing resort to violence.

Efforts by the PA, on the one hand, and Israel on the other have made little progress in ending the violence.

As a factual matter, between September 27, 2000 and January 29, 2004, 890 Israelis have been killed in the course of terrorist attacks of which 693 or 78% were non-combatants killed by terrorist attacks committed by the Palestinians and 20 killed by actions of the Israelis. During the same period, 2,573 Palestinians have died as a result of Israeli incursions of which 932 or 36% were non-combatants killed by actions of the other side and 324 or 13% were killed by actions of the Palestinians. Therefore, almost 50% of Palestinians have been combatants or have been killed by their own side while almost 80% of Israeli fatalities have been civilians.¹

With the exception of the terrorists seeking to disrupt the pursuit of peace between Israel and the Palestinians, the parties, and the world, seem to be in unanimous agreement that a

¹ See International Policy Institute for Counter-Terrorism, Interdisciplinary Center Herzliyah: *available at* www.ict.org.il.

peaceful resolution, achieved through direct negotiations, is desirable and possible in the foreseeable future.

Israel, in accordance with Resolutions of the Security Council, has put forth clear conditions to the resumption of negotiations focused on one central issue: the cessation of terrorist acts against the Israeli people; the PA, on its side has similarly set forth clear conditions to the resumption of negotiations, also focused on one central issue: the withdrawal by Israel from the West Bank and Gaza (“the Palestinian territories”). Israel says it cannot and will not withdraw until the violence and terrorism stop. The PA says it cannot or will not reign in the terrorists, and the organizations that sponsor the suicide bombers until Israel withdraws and a Palestinian police force can take control of the territories. This situation has been referred to as a cycle of violence, and remains a serious threat to the safety and security of all people in the region. Everyone agrees that this untenable situation cannot continue, and the world has pledged its support in an effort to improve the situation on the ground so negotiations can resume and lead to a satisfactory conclusion.

Israel, however, has a clear obligation, and a right, as a nation state to protect the citizens living and working in Israel. It is a basic human right to live in a safe and secure environment that is based on law and order, and is safe and free from terrorist acts.

Since her founding, Israel has refrained from establishing a fixed border line, or fences or barriers between herself and her neighbors, except for security purposes. The recent volume of attacks, and attempted attacks, by suicide bombers resulting in the killing and maiming of Israelis, has led to Israel’s recent construction of a defensive terrorism prevention barrier (“the security fence”), running along a line (“The Seam Line”) between Israel and the Palestinian territories. At no time has the State of Israel annexed any of this disputed territory nor has it declared any intention to do so. Israel remains fully committed to a final determination of its borders through a process of bilateral negotiations, in accordance with the Road Map, about which it has expressed its concerns and reservations, but to which it has announced its commitment.

Israel, in an attempt to protect its residents and citizens from the continuing acts of terrorism, determined through its democratic, legislative process to establish a terrorism prevention barrier between The State of Israel and the Palestinian territories, publicly stating that it was building the barrier solely for security purposes, in keeping with its obligation to protect its people, and its right to defend itself.

Criticism of Israel’s efforts to protect its citizens from brazen and bloody acts of terror continues to stun Israel. Regrettably, some in the international community have used the image of the security barrier to promote the misconception that Israel is unilaterally establishing permanent border lines between Israel and the Palestinian state to be created. Israel has publicly denied that allegation, making it clear that the terrorism prevention barrier is just that: a protective defensive terrorism prevention barrier, and not a border. Israel has further made it clear that upon the completion of final status negotiations with the Palestinian Authority, in accordance with the Road Map, Israel will relocate the

security barrier to be on or within the agreed upon borders between the State of Israel and the State of (Arab) Palestine to be created as envisioned under the Road Map. Israel's willingness to relocate a security barrier if and when a final settlement is reached is evidenced by its prior acts in relation to its other neighbors: withdrawal from Sinai; relocation of a security barrier with Jordan; relocation of a terrorism prevention barrier with Lebanon; and the extension of a comprehensive peace offer to the to the Palestinian Authority at Camp David in August 2000.

F. The Terrorism Prevention Barrier Saves and Protects Lives

The terrorism prevention barrier is already proving itself successful in helping Israel protect itself from terrorism. Since Israel began constructing the terrorism prevention barrier, deaths from terrorist attacks have fallen considerably, as have deaths from Israeli military action in the West Bank ("WB"). The terrorism prevention barrier has been an effective method of containing the violence against Arabs and Israelis alike. The terrorists target their victims for death. Death is irreversible. Inconveniences caused by the barrier are reversible. As a legitimate temporary security measure, the barrier will help to end terror and restore calm - steps that are necessary for renewing the peace process.

The barrier is also an alternative to other counter-terrorism measures that Israel currently is forced to use to protect its citizens from Palestinian terrorism, such as Israeli military re-occupation of areas that it had handed over to the Palestinian Authority during or pursuant to the Oslo accords, and the imposition of curfews, checkpoints and roadblocks that impede the free movement of Palestinian civilians.

The Quartet and various independent governments continue to encourage the Israelis and the Palestinians to restart negotiations in the hopes that a renewed path to peace can be found. This is a political process that includes the interaction between Israel, a democracy with a full executive, legislative and judicial infrastructure; and the Palestinian Authority, which has shown no desire to build a democracy or commit itself to the establishment of a full executive, legislative and judicial infrastructure.

In public statements, the Israeli government and the Palestinian Authority each proclaim their willingness to pursue peace. This goal will only be achieved when terrorist acts stop, democracy building continues, and the political process and direct negotiations between the State of Israel and the Palestinian Authority resume. Until that time, Israel has no choice but to exercise its right to protect itself in meeting its obligation to protect its people.

G. Terrorism Must Not Be Allowed To Succeed

Palestinian terrorist organizations pursue goals that are incompatible with the Road Maps' vision of a democratic Palestinian State (not to mention the UN charter). Radical Islamic Palestinian terrorist groups (and radical Islamic terrorists worldwide) are strengthened when terrorism is viewed as a successful tactic. For those genuinely committed to freedom for the Palestinians to live in a peaceful and independent state, to freedom for

the Israelis to live free from violence and terror, and to freedom as a universal value, Palestinian terrorism must not be allowed to succeed. By reducing Palestinian terrorism against Israeli citizens, the terrorism prevention security barrier represents a non-violent and effective way to ensure that terrorists will fail to achieve their objectives. Such a result is good for Israelis, good for Palestinians, and in a world of escalating global terrorism, good for the world.

The question referred by the United Nations, and now before the Court, is a political question and is not ripe for decision by this Court. Any consideration given to the question by the Court must necessarily be considered in the historical and factual context outlined above. The Court, in even considering the referred question, will improperly inject itself into a process that has already been agreed upon: the Road Map. The Court should refrain from doing so.

PART II- SUMMARY OF ISSUES AND ARGUMENTS

1. The resolution of the UN General Assembly referring this matter to the Court requests an Advisory Opinion, which the Court should decline to render for numerous substantive and procedural reasons, including:
 - (a) No Jurisdiction
 - (b) No Justiciable Issue before the Court
 - (c) The Advisory Opinion being sought is a political opinion which the proponents of the resolution would surely utilize to impact the negotiating process between the Israelis and the Palestinians, attempting to control the result of such direct negotiations between the affected parties, and being violative of the intent and purposes of the enabling statute creating the International Court of Justice.
 - (d) The Advisory Opinion sought was improperly referred by the United Nations and undermines the legitimacy of the United Nations as a neutral mediator and monitor under the Road Map, and if rendered by this Court will undermine the legitimacy of the Court itself.
2. The erection of the terrorism prevention barrier along the current/planned route is a legitimate and legal manifestation of a nation state's inherent right (and obligation) to protect itself and its citizens and residents, based on international law, custom, and the values and principles upon which the UN system is premised.
3. With the Security Council having adopted the Road Map, which envisions a political process, it is inappropriate for the Court to review, at this time, disputes between the Israelis and the Palestinians.
4. The Israeli government having stated in clear terms its willingness to, and expectation of returning to the negotiating table with the Palestinians at such time as the

Palestinian Authority stops terrorist acts committed from the Palestinian territories, or by residents of the Palestinian territories, against Israel; and the Palestinian Authority having failed or refused to stop those terrorist acts, but having stated its willingness to return to the negotiating table with the Israelis, it is inappropriate for the Court to review, at this time, disputes between the Israelis and the Palestinians.

5. The Security Council Resolutions cited in the General Assembly's request to the ICJ do not address the security issues faced by Israel and therefore are extraneous to the issue of a construction of a protective barrier by the government of Israel.
6. The Israeli government having stated in clear terms that the security fence it is constructing is for security purposes, and not intended as a border, it is inappropriate for the Court to review, at this time, disputes between the Israelis and the Palestinians.
7. Israel's High Court of Justice presently having before it, and considering in due process, claims by Palestinians and Israelis allegedly aggrieved by the existence or route of the terrorism prevention barrier, and Israel's High Court of Justice not having yet issued its opinion on such cases, it is inappropriate for this Court to review, at this time, the same or similar disputes, even if pleaded in the form of a request for an advisory opinion.
8. In issuing an Advisory Opinion, there is a significant risk that the ICJ will diminish its standing and the strength of its other opinions on proper cases.

Jurisdiction

The authority of the International Court of Justice to give an advisory opinion is derived from Article 96, paragraph 1, of the *Charter of the United Nations* and from Article 65 of the *Statute of the International Court of Justice*. Both provisions require that the question forming the subject matter of the request be a "legal question." In our opinion, the question submitted to the Court by the General Assembly is a political question, and not a legal one, and accordingly, the Court is not empowered to answer it.

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.

While the EU observed that the ICJ is not the appropriate forum to resolve political disputes relating to the conflict between Israel, Palestinians and other Arab states, the UN ambassador from Singapore pointed out that, while he had voted for the Palestinian position on all 17 anti-Israel resolutions that had passed in the last U.N. session, he observed that "as a small state, we rely upon the integrity of international law, of which the ICJ is one of the most important pillars... This should be settled by negotiation among the parties concerned."

Similarly, the Ugandan ambassador noted that rather than going to the court, the road map "should be given a chance." Resolutions that "condemn one side would only harden attitudes" and "would not serve the cause of peace." Finally, he cautioned against "politicizing the court" and charged resolution proponents with "forum shopping when a mechanism already existed to address the issue." The more relevant question is not legal consequences of the fence, but whether the Arab bloc, having transformed well-intentioned international organizations and activities - from the UN Human Rights Commission to the Durban anti-racism conference - into anti-Israel vehicles, would be able to do the same to this court.²

Standing

Moreover, this Court is empowered to hold oral and written proceedings and to receive written statements from any state entitled to appear before the Court or international organization considered by the Court "as likely to be able to furnish information on the question." [Article 65, *Statute of the International Court of Justice*]. The Palestinian Authority is not a member state, nor a government, but is by definition an "Entity or Intergovernmental Organization" having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent offices at Headquarters."³ This Court has issued an Order allowing the submission of a brief from the Palestinian Authority, a non-state entity, and has allowed filings by certain international organizations. This court is respectfully requested by the Foundation for the Defense of Democracies to exercise its discretion to also accept a brief from this non governmental organization, the Foundation for the Defense of Democracies which as a non governmental organization emphasizes its expressed desire to submit a written statement, to make oral argument, and to be granted party status in light of its commitment to shed light on the question presented by the referral resolution adopted by the UN General Assembly. This Court should grant the formal request of the Foundation for the Defense of Democracies to submit and have filed in the record this brief, and to make written and oral statements, and to be granted party status as a non profit, non partisan, non religious governmental organization, as justice will be served by the Court's consideration of the issues and arguments presented by the Foundation for the Defense of Democracies, even though it is neither a UN Member State nor an Arab or Islamic organization.

PART III- ARGUMENT

1. THE RESOLUTION OF THE UN GENERAL ASSEMBLY REFERRING THIS MATTER TO THE COURT REQUESTS AN ADVISORY OPINION, WHICH THE COURT SHOULD DECLINE TO RENDER.

a. No Jurisdiction

² See Saul Singer, *Delegitimizing Israel: What the Mideast conflict has wrought*, (Jan. 23, 2004) available at <http://nationalreview.com/comment/singer200401230908.asp>

³ See List of UN Member States, available at <http://www.un.org/Overview/missions.htm#iga>.

The use of the advisory opinion procedure of the ICJ to refer this issue to the Court is a transparent attempt to bypass the fundamental principle, enshrined in Article 36 of the Court's Statute, that contentious issues can only be brought before the Court with the consent of all sides, which is clearly absent in this case. Not only is the issue at hand clearly contentious, but the parties have already agreed on appropriate alternative mechanisms for resolving such issues between them.

Article 10 of the *Charter of the United Nations* has conferred on the General Assembly a competence relating to any question or matter within the scope of the *Charter*. Article 11 of the *Charter* gives the General Assembly a competence to consider the general principles in the maintenance of international peace and security. Article 13 of the *Charter* provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.

Nonetheless, this general power is constrained by the obligation to avoid circumventing the powers given exclusively to the Security Council and denied to the General Assembly. In particular, the Security Council has exclusive powers to decide what measures are to be employed to maintain or restore international peace and security.⁴

The General Assembly, either on its own or in combination with the International Court of Justice, cannot decide what measures are to be employed to maintain or restore international peace and security. Any attempt to do so would be a perversion of the United Nations system.

In order to determine the legitimacy of the request for an advisory opinion, one has to consider what the answer might be to the question that was asked. The *South West Africa* advisory opinion of 1971 serves as a guide. In the 1971 *South West Africa* advisory opinion, the Court was asked "What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276(1970)?" In form, the question asked there and here is similar. It is a question of legal consequences.

There, the Court gave the following answers:

- 1) The continued presence of South Africa in Namibia being illegal, South Africa is under an obligation to withdraw its administration.

- 2) State Members of the United Nations are under an obligation to recognize this illegality and to refrain from any acts or dealing with South Africa implying recognition of the legality of, or lending support or assistance to the South African presence in Namibia.

⁴ Chapter VII, *Charter of the United Nations*.

There is little doubt that the Palestinian Authority and anti-Israel States would like a similar answer. Such bodies would want the Court to deem the terrorism prevention barrier illegal and to state that Israel is under an obligation to demolish it. Moreover, they also present this to the Court as a political opportunity to ask member States of the United Nations to recognize such illegality and to refrain from any acts or dealings with Israel that might imply recognition or support of the construction or maintenance of the barrier.

One can see that such an answer would be a determination very much like what the Security Council might make under Chapter VII of the *Charter of the United Nations*. It is an answer only the Security Council can give. It would corrupt and defy the UN system for the Court to be able to say, on the request of the General Assembly alone, that States are under an obligation to do anything on matters of peace and security, without any involvement by the Security Council.

Put another way, the question asked by the General Assembly can be answered, but only in a procedural way. The procedural legal consequence arising from the construction of the terrorism prevention barrier and the General Assembly's request is that the substantive legal consequences must be decided by the Security Council. The Court could provide substantive advice on legal consequences to the Security Council, if requested to do so, but otherwise cannot and should not respond.

Article 11(2) of the *Charter* provides that any question relating to the maintenance of international peace and security on which action is necessary shall be referred by the General Assembly to the Security Council. The request to the Court for an Advisory Opinion is a form of action. However, since in this case, the General Assembly did not refer the request for an advisory opinion to the Security Council, the request is invalid.

In this case, there is no comparable Security Council resolution. The only Security Council resolution passed subsequent to the commencement of the construction of the terrorism prevention barrier to which the present General Assembly request refers to is Resolution 1515 of November 19, 2003. That resolution simply endorses the Road Map and calls on all parties to fulfil their obligations under it. There is no mention of the terrorism prevention barrier. The West Bank is not called "Occupied Palestinian Territory." Israel is not called "an occupying Power." There is no obvious connection between what the General Assembly is doing through its Advisory Opinion request resolution, and what the Security Council has done.

There is little doubt that enforcement of a decision of the Court on matters of international peace and security rests with the Security Council. But, when the Security Council has not asked the question, has no apparent interest in the answer, and has made no prior determination of illegality or opposition to the construction of the terrorism prevention barrier, any determination by the Court becomes little more than an empty and improper exercise. It is an affront to the Security Council and its exclusive powers over matters of international peace and security.

The permissive character of Article 65 of the *Statute of the Court* on advisory opinions gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request for an Advisory Opinion. Even if the question asked is a legal question that the Court is competent to answer, it may nonetheless decline to do so.

In this case, there are compelling reasons why this question should not be answered.

b. No Justiciable Issue before the Court

The question referred to the ICJ is not a legal question. It raises a predominantly political issue. It would thus be inappropriate for the ICJ to consider such a political issue in the guise of a legal question. [*Statute of ICJ*, Article 65]

The unsuitability of the question for judicial determination by the ICJ derives from the presence of the following factors which render it unjusticiable: (1) the question, and the circumstances from which it arises, are in the jurisdiction of another branch of the United Nations, namely the Security Council, which remains seized of the matter (S/RES/1515, 19 November, 2003); (2) the absence of a particular concrete dispute underlying the question; and (3) the predominantly political nature of the question.

The stated question amounts to and invites a declaration of policy in the face of an existing policy and framework already in place and under the aegis of the Security Council, namely the Road Map.

On its face, the Resolution of the Tenth Emergency Special Session filed with the ICJ in support of the ICJ's Order of December 19, 2003, amounts to a general assault on the right and obligation of a member State of the United Nations (Israel) to defend its citizens against terrorism, in accordance with Article 51 of the UN Charter and its inherent right to self defense. This assault does not arise from any concrete and particular evidence, and does not relate to a particular, concrete incident or grievance. Rather, it is an abstract manifestation of political argument and rhetoric, the sole purpose of which is to exert international pressure on the State of Israel to abandon its policy of counter-terrorism. It thus violates the well established principle of law that the judiciary ought not to consider abstract matters of public significance which are within the jurisdiction of the legislative or executive branches of government, in this case, the Security Council. [*Warth v. Seldin* 95 S.Ct. 2197 (1975)]

It is reasonable for the ICJ to provide an advisory opinion in relation to a *particular* dispute, on the basis of evidence. However, it is unreasonable for the ICJ to allow itself to be used as a policy making body that determines matters of a general nature arising from a political and military conflict. As put by the Supreme Court of the United States in *Valley Forge College v. Americans United*, 454 U.S. 464 (1981), the court must not deal with "generalized grievances, pervasively shared and most appropriately addressed to the representative branches." This is especially so in the instant case where the Security Council has established a detailed and clear process for the resolution of "generalized

grievances” (i.e., the Road Map) and has declared itself seized of the matter pending completion of this process.

The ICJ should exercise its discretion under Article 65 of its enabling statute (“The Court *may* give an advisory opinion...”) and refrain from considering the question now before it. As Israel’s High Court of Justice, which regularly considers and adjudicates petitions brought by or on behalf of Palestinians living in the disputed territories, has wisely observed with respect to the role of the judiciary in the peace process: “A judicial determination, which does not concern individual rights, should defer to a political process of great importance and great significance. Such is the issue before us: it stands at the centre of the peace process; it is of unrivalled importance; and any determination by the court is likely to be interpreted as a direct intervention therein...The petitioners have the right to place a ‘legal mine’ on the court’s threshold, but the court should not step on a mine that will shake its foundations, which are the public’s confidence in it.” [*Bargil et al v. Government of Israel, et al*, Court File No. HCJ 4481/91, Reasons released 25 August, 1993].

Accordingly, the ICJ must not allow itself to be used, to quote the Supreme Court of the United States, as a “vehicle for the vindication of the value interests of concerned bystanders.” [see *Valley Forge College v. Americans United*, *supra*]

Furthermore, and in the alternative, the ICJ ought to be guided by the approach adopted by the Supreme Court of Canada in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (*Patriation Reference*) at pp. 875-876: “If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. *Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is either free to interpret the question...or it may qualify both the question and the answer...*” [emphasis added].

Therefore, if the ICJ determines that the question which has been referred to it for an advisory opinion raises justiciable issues, then the Court should consider those issues in a historical and political context (see Part I, above), and specifically with reference to the Road Map and the various Resolutions of the Security Council that call upon the international community to take sustained and comprehensive action against terrorism and those who facilitate the commission of acts of terror [see, for example, S/RES/1515 (2003); S/RES/1377 (2001); S/RES/1373 (2001); S/RES/1368 (2001)]. In this regard, the Court should take judicial notice of the now well established fact that the disputed territory in question – “The West Bank” – is home to numerous terrorist groups and cells and is a repository of violent activity directed against, *inter alia*, the State and people of Israel. This fact has been acknowledged by the President of the United States [Speech of President George W. Bush, June 24, 2002].

In providing an advisory opinion in relation to the “legal consequences” of the terrorism prevention barrier being constructed by the State of Israel in the disputed territory over which it has administrative control and jurisdiction, it is incumbent upon this Court to

maintain vigilant regard for the fundamental principles of international law and justice upon which the United Nations is rooted, and to affirm the rights of the people of Israel to be secure and free from terror. As resolved by the Security Council itself [S/RES/1377]: “acts of terrorism endanger innocent lives and the dignity and security of human beings everywhere, threaten the social and economic development of all States, and undermine global stability and prosperity.” In this regard, and others, the prescient words of U.S. President Bush are apt and worthy of careful deliberation: “I can understand the deep anger and anguish of the Israeli people. You’ve lived too long with fear and funerals, having to avoid markets and public transportation, and forced to put armed guards in kindergarten classrooms. The Palestinian Authority has rejected your offered hand and trafficked with terrorists. You have a right to a normal life. You have a right to security...” [Speech of President George W. Bush, June 24, 2002]

In determining the justiciability of the issues raised by the referring Resolution of the General Assembly, the ICJ should also consider that the Security Council has already refused to declare Israel’s building of a terrorism prevention barrier in the disputed territory, and in departure from the armistice line of 1949, illegal (October 14, 2003). Among other reasons, this refusal was premised on the imbalance in the language and the content of the proposed resolution, which failed to address (or even mention) the terrorism and security threats that have necessitated the construction of the terrorism prevention barrier. Moreover, the sponsors of the draft resolution (which included Malaysia, and Syria) could have resubmitted a more balanced and judiciously worded resolution to the Security Council, especially considering that the Security Council has seized itself of the Road Map and the issues related thereto. They did not. Instead, they opted to submit the resolution to the General Assembly, in a cynical attempt to circumvent the Security Council and its concerns. In furtherance of this attempt, the General Assembly referred the matter to this Court under the guise of a request for an “advisory opinion.”

Ultimately, the question referred to the Court 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. It calls Israel’s terrorism prevention barrier a *wall* (true for less than 5% of its length) and uses terminology such as *occupying power* and *occupied Palestinian territory* that prejudice contested issues of international law.

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 the issue adequately.

That those behind the General Assembly resolution had no interest in a genuine legal opinion is clear from the fact that the General Assembly has already passed resolutions

determining its response on the same issues on which guidance is supposedly being sought from the Court.

Given the question that is asked, should the Court undertake the task of addressing the substance of the referred question notwithstanding all of the reasons why the Court should refrain from doing so, is it open to the Court to hold that there is no wall, but only a terrorism prevention barrier, that Israel is not "the occupying Power", that the West Bank is not "Occupied Palestinian Territory," that, even if there is such a thing as "Occupied Palestinian Territory," it does not include East Jerusalem? If these holdings are not open to the Court, then the Court is being asked to consider questions that assume certain propositions of international law that may indeed be wrong. The Court should reject any invitation to assume legal positions that may be incorrect.

If it is open to the Court to examine the legal assumptions on which the question is based, and the Court answers all of these questions the way Israel would propose, then the stated question can be unmasked for what it truly is: political rhetoric designed to undermine the basic tenets of the Road Map. The question exists only because it is posed based on certain assumptions of international law which may or may not be true.

Given that the question asked cannot be answered without addressing these other issues, and given also that the General Assembly has not asked the Court to answer these other questions, either expressly or by implication, the question asked becomes unanswerable without the Court making ill-advised political determinations.

- c. The Advisory Opinion being sought is a political opinion which the proponents of the resolution would surely utilize to impact the negotiating process between the Israelis and the Palestinians, attempting to control the result of such direct negotiations between the affected parties, and being violative of the intent and purposes of the enabling statute creating the International Court of Justice.***

Article 102 limits ICJ's authority to issue advisory opinions to legal issues. The issue of construction of a protective barrier by the government of Israel is political and not legal in nature. The International Court of Justice has a specific mandate – resolving legal disputes between two states that voluntarily submitted to its jurisdiction. Its authority to give advisory opinions upon request by a General Assembly, or another international organization so authorized, is limited to advisory opinions "on legal questions actually pending between two or more States." [See Article 102 (2) of Court's Rules]

Contrary to the requirements of Article 102 (2), the issue of the terrorism prevention barrier built by Israel involves only one state – Israel. General Assembly's Resolution A/RES/ES-10/14 (A/ES-10/L.16) requesting the International Court of Justice to "urgently render an advisory opinion" "on the legal consequences arising from the construction of the wall being built by Israel" further fails to meet the requirements of the Article 102 (2) as it presents to ICJ an issue that is clearly political and not legal in nature. The purpose of the General Assembly's Request is to put political pressure on the

government of Israel and not to resolve an issue of international law. Israel is not engaged in a legal dispute with any of the states that instigated this resolution. It does, however, have a terrorism problem that emanates from neighboring territory with no regular governmental control mechanism. It is this security problem that prompted the government of Israel, along with its attempts to resolve the problem through diplomatic channels, to take specific steps to protect its population while diplomatic and legal solutions are being explored.

d. The Advisory Opinion sought was improperly referred by the United Nations and undermines the legitimacy of the United Nations as a neutral mediator and monitor under the Road Map.

The Security Council of the United Nations had reviewed and rejected a proposed resolution pronouncing the construction of the terrorism prevention barrier by the government of Israel illegal under international law. [See S/PV 4842] In his statement, the President of the Security Council meeting, in his capacity as the representative of the United States, stated that the resolution was “unbalanced” and that it “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.” See S/PV 4842. The President further stated, “A Security Council resolution focused on the terrorism prevention barrier does not further the goals of peace and security in the region. We believe that all resolutions on Israeli-Palestinian peace should reflect the kind of balance of mutual responsibilities embodied by the Quartet’s road map. That draft resolution did not do so.” *Id.*

The General Assembly Resolution requesting this Court’s advisory opinion on the same issue is an attempt by the forces behind the above-mentioned Security Council draft resolution to circumvent the United Nations procedure and to obtain from this Court a political declaration that was refused to be given by the Security Council. This declaration would be used by the Palestinian leadership to shield itself from any responsibility for terrorist acts against Israeli citizens and to justify its failure to implement the steps required by the Road Map, the peace plan adopted by the United Nations and agreed to by both sides to the conflict. The ICJ should not issue an advisory opinion that would be in contradiction to the Security Council’s refusal to pass a resolution that would single out Israel by scrutinizing its security measures, while ignoring Palestine’s failure to address the problem of terrorism, which necessitated such security measures.

While the political orientation of activity within the General Assembly of the United Nations, especially on Middle East issues, is widely recognized, abuse of the ICJ in such political campaigns crosses a new threshold. Indeed all previous Arab Group attempts to involve the Court in its campaign have been prevented by other states. Even in this case, and notwithstanding the automatic majority at the behest of the Arab group, the initiative failed to garner the affirmative votes of even a majority of UN members.

The initiative also trampled on many important procedural requirements. Among many notable violations was the holding of an Emergency Special Session while the General Assembly was actually in session, and the fact that this session was, without any legal basis, called on to address issues, including the request for an advisory opinion, which had not been raised before the Security Council. The action by the 10th Emergency Special Session of the General Assembly was ultra vires and a dangerous breach of the balance of powers between the Security Council and the General Assembly as envisaged by the UN Charter and may serve as a precedent for similar actions in other conflicts.

This partisan initiative is also likely to threaten the role of the UN in the Middle East peace process. In particular, it directly challenges the Road Map to which the UN is a co-sponsor and which the Security Council has unanimously supported in Resolution 1515 (2003).

The UN Charter, and the Court's charter, states that it can take up issues that the UN General Assembly considers to be of "overwhelming importance" to the UN. However, in this case, UNGA Resolution ES -10/114 was passed by a minority of UN Member States. A total of 101 countries did not support the resolution calling for an advisory opinion (the vote was 90-8-74 abstentions, with 19 countries not present).⁵ This does not meet the standard of "overwhelming interest to the UN."

Finally, there are adequate safeguards in place to provide aggrieved residents on either side of the terrorism prevention barrier with access to justice without resort to the ICJ, and which can, and should, be pursued prior to this Court's intervention.

2. THE ERECTION OF THE TERRORISM PREVENTION BARRIER ALONG THE CURRENT/PLANNED ROUTE IS A LEGITIMATE AND LEGAL MANIFESTATION OF A NATION STATE'S INHERENT RIGHT (AND OBLIGATION) TO PROTECT ITSELF AND ITS CITIZENS AND RESIDENTS, BASED ON INTERNATIONAL LAW, CUSTOM, AND THE VALUES AND PRINCIPLES UPON WHICH THE UN SYSTEM IS PREMISED.

The right to defend oneself from terrorists is a fundamental human right. As this Court so aptly noted in *The Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion of 8 July 1995, "the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake." Because the Road Map is stuck (and in erecting the terrorism prevention barrier, the process may become unstuck), due to the

⁵ See Saul Singer, *Delegitimizing Israel: What the Mideast conflict has wrought*, Jan. 23, 2004, available at <http://nationalreview.com/comment/singer200401230908.asp>, noting that during the Security Council proceedings, "the Singaporean ambassador began by pointing out that he had voted for the Palestinian position on all 17 anti-Israel resolutions that had passed in the last U.N. session. But 'as a small state,' the ambassador explained impudently, 'we rely upon the integrity of international law, of which the ICJ is one of the most important pillars . . . This should be settled by negotiation among the parties concerned.' Similarly, the Ugandan ambassador said that rather than going to the court, the road map 'should be given a chance.' Resolutions that 'condemn one side would only harden attitudes and 'would not serve the cause of peace.' . . . he warned against 'politicizing the court' and accused resolution proponents of 'forum shopping when there is already a mechanism to address the issue.'"

failure of the PA to variously perform thereunder, Israel, as a sovereign nation state has the right and authority under international law to take proportional measures to defend and secure itself and its citizens. Precisely because the territory in question does not belong to another sovereign nation state, Israel is not precluded from erecting a terrorism prevention barrier on it in order to effect its legitimate right to self-defense.

The terrorism prevention barrier is a temporary, proven,⁶ necessary and non-violent measure adopted, in accordance with international and local law, to defend the people of Israel from a continuing campaign of terrorism that has killed hundreds of innocent civilians. As long as the Palestinian leadership continues to flout its most basic obligations to fight terrorism, there is simply no alternative. Indeed, the only reason for the construction of the barrier is the Palestinian strategy of terrorism - as soon as the terror ends, the barrier will no longer be necessary.⁷ Using a terrorism prevention barrier for defense is a non-violent way to protect one's children; no one should demand the Israelis or Palestinians leave their children vulnerable.

The building of a terrorism prevention barrier does not, as such, raise any wider legal issues. However, a terrorism prevention barrier must be put somewhere, and barriers by their very nature restrict movement. Accordingly, barriers do implicate the following legal issues:

1. Does the builder have the right to make any use of the land on which the terrorism prevention barrier rests?
2. Does the builder have the right to limit movement?
3. Will the restriction of access, through the effluxion of time, give the builder greater rights to its side of the terrorism prevention barrier than those which the builder had immediately prior to the erection of the barrier?

Legal Consequences of the Terrorism Prevention Barrier

The terrorism prevention barrier faces criticism in respect of all three of these issues.

1. Does Israel have the right to make any use of the land on which the terrorism prevention barrier rests?

Unlike land in Israel or on the green line, land within the West Bank is not directly subject to Israeli law and has been characterized as occupied territory. In connection

⁶ See Barry Rubin, *Fencing Out the Terrorists*, National Post Op-ed, Jan. 26, 2004, A12, noting that "This [the security fence] is a method that has worked on the perimeter of the Gaza Strip and on the Lebanon border. The technology is so good that other countries, like India, are eager to buy it for their own border defenses."

⁷ Tenth Emergency Special Session - Illegal Israeli actions in occupied East Jerusalem and the rest of the occupied territories; Statement by Ambassador Dan Gillerman (8 December 2003 58th UN General Assembly.)

with this advisory opinion, the authority of Israel should be sought in international law and construed in accordance with the Road Map.

Geneva Convention

The General Assembly's Resolution A/RES/ES-10/14 (A/ES-10/L.16) lists the Fourth Geneva Convention of 1949 (Convention) as one of the grounds for the Court's advisory opinion. Since Palestine has not been recognized as a sovereign state⁸ it is questionable whether any of the measures taken by the Israeli government with regards to Palestine fall under the Convention. Assuming, *arguendo*, that the Convention applies, then its provisions require a balancing on the part of the GOI. The provisions of the Convention most directly implicated in the building of the terrorism prevention barrier are:

Article 3, which prohibits "violence to life and person" of civilians,

Article 27 which provides that

Protected persons . . . shall be protected especially against all acts of violence or threats thereof

Article 53 which provides that

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Article 64, which provides that:

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration. . .

The Convention imposes upon the GOI, as an occupying power in the West Bank, both the obligation and the right to take steps necessary to prevent such violence and to ensure its security in both the West Bank and, *a fortiori*, within Israel itself.

⁸ Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto." On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine."

In the Report of the Secretary-General dated 24 November 2003 (A/ES-10/248) (the “SG Report”), the legal position of the Palestine Liberation Organization, provides that

Israel has a right to undertake certain limited measures in cases of strict military necessity and to protect its legitimate security interests . . . [but that such necessity and interests] can more likely be met by building the Barrier within Israeli territory or even on the Green Line

However, there are a number of Israeli citizens who live both near and in the West Bank. To be sure, Israeli citizens living in the West Bank are cited by the PA as a significant obstacle to long-term peace. However, the status of these citizens, and their ultimate disposition are precisely issues which are to be addressed as part of the Road Map, and are therefore issues which cannot be reached without the preliminary step of ending violence.

If the terrorism prevention barrier is to serve its primary goal, it must separate Israeli citizens from Arab Palestinians living in the West Bank, and as such, it must necessarily run through territory which is in the West Bank. The specific path chosen by the GOI for this protective defensive terrorism prevention barrier being established for exclusively security purposes, and which can and will be modified and, as necessary, relocated to a permanent border line after conclusion of a written agreement between Israel and the PA seeks to balance two current aims: maximize the effectiveness of the terrorism prevention barrier, while minimizing its environmental, social and economic costs.⁹ Whether the GOI has succeeded in balancing these goals is a determination which Israel’s High Court of Justice is currently considering. It is therefore inappropriate for this Court to review this issue at this time (see Argument 7).

2. Does Israel have the right to so restrict access?

The barrier arises out of the judgment that in the circumstances, the most effective way of limiting violence is to physically separate the two populations, and as such its *raison d’etre* is the restriction of access from one side to another.

Because Israelis reside, in part, within the West Bank and immediately adjacent to it, for the terrorism prevention barrier to be effective it must necessarily restrict access between parts of the West Bank itself, and in particular, between the Seam Zone and those portions of the West Bank to the East of the terrorism prevention barrier (the “West Bank Proper”). There have been limitations, sometimes severe, to residents on both sides of the terrorism prevention barrier. Residents in the seam zone have been cut off from services which they need in the West Bank. Residents in the West Bank have been cut off from their land and livelihood in the Seam Zone. See generally, UNRWA reports.

Without minimizing the suffering that such limitations impose on Arab Palestinians living in both the Seam Zone and the West Bank Proper, such suffering is a foreseeable consequence and cost of the PA’s failure to combat terror and end violence. If the

⁹ See <http://www.securityfence.mod.gov.il/Pages/ENG/route.htm>

terrorism prevention barrier is necessary, then the focus must be not on whether any restrictions, as such, are permitted as a matter of law; rather, given that restrictions are a necessary consequence of the terrorism prevention barrier, what are the restrictions and are they reasonable and proportional in the circumstances.

The Convention does not speak directly on the issue of limiting movement within an occupied territory, but Article 49 does prohibit, as a general matter, the forced relocation of persons in the territory; however, that article does provide that an

Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand . . . The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

Assuming that the limitations constitute a partial evacuation, then the onus is on Israel to ensure that such restrictions are diminished to the extent possible while still serving the primary purpose.

Israel has in fact taken significant steps to minimize such restrictions and limitations as set out in Appendix A. Again, whether Israel has succeeded in minimizing these restrictions and limitations are determinations which Israel's High Court of Justice is currently considering. It is therefore inappropriate for this Court to review this issue at this time (see Argument 7).

3. Will the restriction of access, as such or through the effluxion of time, give Israel greater right to the SL than the right which it had immediately prior to the erection of the terrorism prevention barrier?

Security Council Resolution 242 (S/RES/242 (1967)) emphasizes a basic feature of modern international law; namely, the "inadmissibility of the acquisition of territory by war."

Where there has been no agreement between the parties regarding a boundary, where both parties reject a particular boundary, and where neither party acts to treat the boundary as a *de facto* frontier, there can be no suggestion that such boundary can acquire a permanent legal character by the effluxion of time. No "fact on the ground" can change this basic reality.

Obviously, PA has rejected any implication that the terrorism prevention barrier defines or ought to define a future border between Israel and a Palestinian nation which may arise on the West Bank. Israel has similarly rejected any such conclusion. Therefore, the terrorism prevention barrier cannot form the basis of any future frontier between nations unless the nations themselves agree to make it so.

3. WITH THE SECURITY COUNCIL HAVING ADOPTED THE ROAD MAP, WHICH ENVISIONS A POLITICAL PROCESS, IT IS INAPPROPRIATE FOR THE COURT TO REVIEW, AT THIS TIME, DISPUTES BETWEEN THE ISRAELIS AND THE PALESTINIANS.

The political issues now raised before this Court should ultimately be addressed by the Quartet and the parties themselves, in accordance with the Road Map.

The Road Map was created and accepted by the disputing parties, in coordination with the Security Council (among others), as a response to the underlying political realities that developed in the aftermath to the Camp David negotiations of August, 2000, and the disintegration of the Oslo Accords thereafter. Based in part on lessons learned from the collapse of the Oslo process and the recommendations of the Mitchell Report (2001), the United States ultimately sponsored the Road Map, which provides for a comprehensive performance-based process for the resolution of the Israeli-Palestinian conflict under the auspices of the Quartet. The fundamental principles underlying the Road Map and its implementation, already accepted by the parties to the conflict, include: (1) an immediate end to violence and terrorism; (2) democratic reform of the PA; (3) progressive Israeli withdrawal from areas occupied since September 28, 2000; and (4) negotiation as the basis upon which an independent and viable Palestinian state can be established [see A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, April 30, 2003].

Notwithstanding the parties' agreement to be bound by the terms and governing principles of the Road Map, the Palestinian Authority has refused and/or failed to perform thereunder. In particular, the PA has refused and/or failed to undertake "visible efforts on the ground to arrest, disrupt, and restrain individuals and groups planning violent attacks on Israelis anywhere" and "sustained, targeted, and effective operations aimed at confronting all those engaged in terror and the dismantlement of terrorist capabilities and infrastructure." It is in the context of these grave refusals and/or failures to act on the part of the PA that Israel continues to construct the terrorism prevention barrier. Israel must complete the terrorism prevention barrier as an unfortunate result of the PA's abdication of its responsibility under the Road Map and its strategic decision to use terror as a means to achieve its political objectives.

The State of Israel has stated, for the record, that the terrorism prevention barrier is a temporary measure and does not create a final border. Israel has clearly stated at the Security Council that it hopes that by building the terrorism prevention barrier, its very function would become redundant. Based on the "success" of a similar barrier constructed by Israel to secure itself from terrorists based in Gaza (no suicide bomber has penetrated the barrier there and emanated from that territory since the completion of a terrorism prevention barrier in that region in 1994), it is anticipated that the cessation of terrorist activity can be sharply reduced, resulting in relative calm and the opportunity for a resumption of meaningful negotiations.

The purpose of the terrorism prevention barrier is thus fully consistent with a fundamental principle of the Road Map: putting an end to terror and violence. Rather than accept the PA's *de facto* repudiation of the Road Map, Israel has (to borrow a term from Anglo common law) mitigated its loss and secured an alternative means of performance. Moreover, Israel remains committed in word and deed to the Road Map. Prime Minister Sharon has recently appealed to the Palestinian people and its leadership: "It is not in our interest to govern you. We would like you to govern yourselves in your own country; a democratic Palestinian state with territorial contiguity in Judea and Samaria...The Road Map is the only political plan accepted by Israel, the Palestinians, the Americans and a majority of the international community. We are willing to proceed towards its implementation: two states – Israel and a Palestinian state – living side by side in tranquility, security, and peace." [Annual Conference of the Herzliya Interdisciplinary Institute, December 18, 2003]

Contrary to what is alleged by the PA and its supporters, the construction of the terrorism prevention barrier does not create new 'facts on the ground'. To adopt another analogy from Anglo common law, Israel – by its own accord – lacks the *animus possidendi* required to successfully assert a proprietary right by way of 'adverse possession' to any part of the disputed territory as a result of the placement of the terrorism prevention barrier. Furthermore, Israel has repeatedly demonstrated the will to relocate terrorism prevention barriers in the context of negotiated settlements with Egypt (Sinai), Jordan (the Jordan Valley), and most recently, Lebanon. (see, e.g., Resolution of the United States Senate, May 23, 2000, S. Con. Res. 116).

The principle of negotiation, which underpins the Road Map, obliges the PA to negotiate changes to the Road Map according to the process and precedent established by that agreement. The PA cannot, unilaterally, determine that the cessation of terror and violence is no longer an integral part of the Road Map. In refusing and/or failing to take sustained and decisive action against terror, however, that is exactly what the PA has done and continues to do. Rather than take the difficult but necessary steps required of it under the Road Map, the PA has abdicated its responsibility. In the context of the security vacuum created as a result of this abdication, Israel has taken reasonable measures to obtain that which it bargained for and is entitled under the Road Map agreement. Bound by the terms and process established in the Road Map, the PA cannot unilaterally amend the terms of that agreement. It is bound, as a matter of law, to return to the negotiating table in such circumstances.

As concluded by the Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 in relation to agreements concerning the governance of fundamental relationships between members of a federation formed through negotiation: "refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to

contribute to the maintenance and promotion of an environment in which the rule of law may flourish.”

The Security Council continues to endorse the Road Map as the solution to the Israeli-Palestinian conflict and calls on the parties “to fulfill their obligations under the Road Map in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and tranquility.” [Resolution 1515, 19 November, 2003]. The PA, along with Israel, must heed this call. It cannot unilaterally decide that it is not bound by the terms and guiding principles underlying the Road Map, to which it is clearly bound. This Court, in providing an advisory opinion in relation to the terrorism prevention barrier and thus the issue of security in general, must advise the United Nations accordingly.

A significant group of states including the United States, Switzerland, Uganda and Italy (on behalf of the European Union and newly acceding EU states) stated in the General Assembly that they oppose the request for an advisory opinion because it goes directly against the Road Map and wishes of the Security Council, which unanimously endorsed the Road Map in Resolution 1515 of 19 November 2003, and which has repeatedly called for resolution of the conflict via direct negotiations in accordance with Resolutions 242 (1967) and 338 (1973).

Following the ICJ's reported decision [ruling that fifty-six countries, including Afghanistan and Cameroon, are allowed to testify against the Israeli terrorism prevention barrier via the Organization of the Islamic Conference], Israeli Foreign Minister Silvan Shalom and US Secretary of State Colin Powell concluded that if the Palestinians can win in the court of world opinion, they would not have any incentives to pursue the Road Map peace plan. Although the US has not decided if it will participate, it does oppose the trial, according to an official at the Department of State, "We stated at the General Assembly that, while our policy on the fence is clear and President [George W.] Bush said that 'Israel... should not prejudice final negotiations with the placement of walls and fences,' the resolution requesting an ICJ opinion would undermine rather than encourage direct negotiations between the parties to resolve those differences. This is the wrong way and the wrong time to proceed on this issue." (See, Jerusalem Post, *ICJ says fifty-six Arab states can testify against Israeli fence*, Jan 22, 2004)

The Government of Israel (“GOI”) has recently reiterated its commitment to the Road Map. It believes that those who support the efforts of the Quartet and the international community to bring the sides together should stress to the ICJ the importance of not prejudicing that process and emphasize that the Court should refuse to respond to the question posed.

It should also be stressed that if those behind this initiative succeed in getting the ICJ to issue an opinion on a single issue in contention, outside the context of the entire complex of issues to be negotiated between the two sides, this will only encourage further attempts to extract isolated issues and refer them to the Court, thus undermining any prospect of meaningful comprehensive negotiations.

4. THE ISRAELI GOVERNMENT HAVING STATED IN CLEAR TERMS ITS WILLINGNESS TO, AND EXPECTATION OF, RETURNING TO THE NEGOTIATING TABLE WITH THE PALESTINIANS AT SUCH TIME AS THE PALESTINIAN AUTHORITY STOPS TERRORIST ACTS COMMITTED FROM THE PALESTINIAN TERRITORIES, OR BY RESIDENTS OF THE PALESTINIAN TERRITORIES, AGAINST ISRAEL; AND THE PALESTINIAN AUTHORITY HAVING FAILED OR REFUSED TO STOP THOSE TERRORIST ACTS, BUT HAVING STATED ITS WILLINGNESS TO RETURN TO THE NEGOTIATING TABLE WITH THE ISRAELIS, IT IS INAPPROPRIATE FOR THE COURT TO REVIEW, AT THIS TIME, DISPUTES BETWEEN THE ISRAELIS AND THE PALESTINIANS.

The UN *Charter* calls on all States to pursue in good faith the peaceful settlement of disputes. The dispute between Israel and her neighbours, including the Palestinian Authority, about which the question asked by the General Assembly forms part, is best resolved by negotiations.

Legal wrangling over rights and wrongs in the International Court of Justice does nothing to move the parties towards negotiations. By casting the issues as matters of right and wrong, each side becomes entrenched in its own position. Attitudes become hardened, even envenomed. The litigation moves the parties away from a negotiated settlement to their disputes. The likelihood that the dispute between the parties will only be further embittered as a result of the Court having considered and answered the question is itself a compelling reason why it should not be answered in this venue.

The Palestinian Authority is not a State Party to the *Statute of the International Court of Justice*. Israel, which is a State party to that *Statute* by virtue of being a member of the United Nations, has opposed the request for an advisory opinion. Israel has not accepted the compulsory jurisdiction of the Court. The question asks the Court to give an opinion on a matter in dispute between the Palestinian Authority and Israel, which legally could not be brought before the Court under its compulsory jurisdiction.

In 1923, in the *Eastern Carelia* case, the Permanent Court of International Justice declined to render an advisory opinion requested by the League of Nations. The request concerned a dispute between Finland and Russia where Russia was not a member of the League of Nations. The Court applied the principle that no State can, without its consent, be compelled to submit its disputes with other States to any kind of judgment or opinion by the Court.

In the 1950 advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the International Court of Justice agreed to comply with the request of the General Assembly for an advisory opinion despite the opposition of all three concerned States - Bulgaria, Hungary and Romania. In doing so, the Court noted that it was considering only the applicability of a procedure for the settlement of disputes and was not pronouncing on the merits of these disputes. The implication of this reasoning is that the Court may well have refused to answer the request for an advisory opinion if it had been asked to pronounce on the merits of a dispute amongst the States concerned.

However, in the case of the request for an advisory opinion on the fence, there is no doubt that the Court is being asked to pronounce on the merits of a dispute between Israel, the Palestinian Authority and other States. The reasoning in the 1950 opinion militates against answering the question in this case.

The International Court of Justice in the 1975 *Western Sahara* case also agreed to comply with a request of the General Assembly for an advisory opinion, this time on the legal status of the Western Sahara, despite the objections of Spain. At the time there was a dispute between Spain and Morocco on the attribution of the territorial sovereignty of the Western Sahara.

In agreeing to comply with that request, the Court observed that the purpose of the reference was to assist the General Assembly in its own functions of decolonization, not to bring before the Court a dispute between States, and that the legal position of Spain could not be compromised by the Court's answer to the questions submitted. The Court, it is apparent, would have declined to answer the question asked if the answer could have compromised the legal position of Spain.

That is certainly not true with this reference. The legal position of Israel could be compromised by the answer the Court gives such that the question as submitted should not be answered.

5. THE SECURITY COUNCIL RESOLUTIONS CITED IN THE GENERAL ASSEMBLY'S REQUEST TO THE ICJ DO NOT ADDRESS THE SECURITY ISSUES FACED BY ISRAEL AND THEREFORE ARE EXTRANEOUS TO THE ISSUE OF A CONSTRUCTION OF A PROTECTIVE BARRIER BY THE GOVERNMENT OF ISRAEL.

The Security Council and General Assembly Resolutions cited in the General Assembly's request to the ICJ are irrelevant to the security procedures that are being implemented by the Israeli government. For the obvious reasons, neither the General Assembly nor the Security Council has the power to stop terrorist attacks and guarantee the safety of Israeli citizens. The United Nations is an organization regulating relationships between states. The necessity for a physical barrier protecting Israeli citizens stemmed not from Israel's conflict with another state, but rather from terrorist acts of illegal groups, acts that do not comply with any rule of law.

Furthermore, General Assembly Resolutions are not normative in nature, and therefore could not support allegations of international law violations by Israel. The Security Council Resolutions cited do not address the issue of a protective barrier. Neither do they address the measures that need to be taken to protect citizens of Israel from attacks by terrorists, and therefore are extraneous to the issue of Israel's right to build a protective barrier.

6. THE ISRAELI GOVERNMENT HAVING STATED IN CLEAR TERMS THAT THE SECURITY FENCE IT IS CONSTRUCTING IS FOR SECURITY PURPOSES, AND NOT INTENDED AS A BORDER, IT IS INAPPROPRIATE FOR THE COURT TO REVIEW, AT THIS TIME, DISPUTES BETWEEN THE ISRAELIS AND THE PALESTINIANS.

Ambassador Dan Gillerman, Permanent Representative of Israel to the United Nations, summarized the Israeli perspective in his statements before the Tenth Emergency Special Session of the General Assembly:¹⁰

A security fence has proven itself to be one of the most effective non-violent methods for preventing terrorism in the heart of civilian areas. The fence is a measure wholly consistent with the right of states to self defense enshrined in Article 51 of the Charter. International law and Security Council resolutions, including resolutions 1368 and 1373, have clearly recognized the right of states to use force in self-defense against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end.

In building the fence, Israel has sought to achieve a balance between the rights and interests of local populations and the rights of civilians to life and not to be blown to pieces in a suicide attack. A similar fence in Gaza, agreed as part of the Israeli-Palestinian Agreements, which garnered no dissent from the UN, has successfully prevented the infiltration of terrorists into Israel. By building a fence along a stretch of land that until now has been open to infiltration, there is a real chance to take terrorism out of the equation, and ensure that it is far less available as a weapon to scuttle efforts for peace. The fence is not a border, and has no political significance. It does not change the legal status of the territory in any way. Israel remains committed to determining the final status of the West Bank and Gaza Strip, including the issue of borders, through negotiations as has been agreed by the parties. As we have proven before, we will be ready to dismantle or alter the route of the fence in accordance with any political settlement reached.¹¹

Additionally, the Security Fence will increase the safety and security of the Palestinian people:

Israel is working to ensure that the fence does not cause undue hardship to local Palestinian residents, both through extensive consultations with the local population over the route of the fence, and through an active process of appeals and judicial review. And we will continue to engage in this process and to seek individual solutions to problems that arise. At the same time, we reiterate that the fence will allow a significant reduction in the presence of Israeli forces in the West Bank, thus improving overall humanitarian conditions for the majority of Palestinian residents. And we stress that while the rights of local residents are legitimate and important, we should not forget that the right not to be murdered

¹⁰ Tenth Emergency Special Session of the General Assembly Illegal Israeli actions in occupied East Jerusalem and the rest of the occupied territories; Statement by H.E. Ambassador Dan Gillerman Permanent Representative of Israel to the United Nations (20 October 2003) The United Nations New York.

¹¹ Tenth Emergency Special Session - Illegal Israeli actions in occupied East Jerusalem and the rest of the occupied territories; Statement by Ambassador Dan Gillerman (8 December 2003 58th UN General Assembly.)

by terrorists is a right which is certainly no less important and, if violated, is impossible to redress.

The use of public and unused land has been the highest priority, and in the cases where property has been requisitioned, this has been done in full conformity with specific provisions of international humanitarian and local law, for which requisitions by other states for security purposes have served as a precedent. There is no change in the ownership of the territory. Compensation is provided for use of the land, crop yield and any damage caused. Individual solutions have been found, including the provision of dozens of agricultural gates and crossing points along the fence. And residents have the unprecedented opportunity not only to be consulted throughout the process, but also to file a petition directly with the Israeli Supreme Court.

Far from reducing the freedom of movement or territorial contiguity in the West Bank, the net effect of the fence will be to improve the overall humanitarian situation by allowing for a reduction in the presence of Israeli forces in Palestinian areas. In fact, the presence of the fence will actually allow for roadblocks and checkpoints to be removed, without increasing the vulnerability to terrorism.¹²

7. ISRAEL'S HIGH COURT OF JUSTICE PRESENTLY HAVING BEFORE IT, AND CONSIDERING IN DUE PROCESS, CLAIMS BY PALESTINIANS AND ISRAELIS ALLEGEDLY AGGRIEVED BY THE EXISTENCE OF, OR ROUTE OF, THE TERRORISM PREVENTION BARRIER, AND ISRAEL'S HIGH COURT OF JUSTICE NOT HAVING YET ISSUED ITS OPINION(S) ON SUCH CASES, IT IS INAPPROPRIATE FOR THIS COURT TO REVIEW, AT THIS TIME, THE SAME OR SIMILAR DISPUTES, EVEN IF PLEADED IN THE FORM OF A REQUEST FOR AN ADVISORY OPINION.

To the extent there are legal issues associated with the current route of the fence, an issuance of an Advisory Opinion by the ICJ is premature as this issue has been submitted to a review by the High Court of Justice of Israel.¹³ On January 21, 2004 Association for Civil Rights in Israel ("ACRI") filed a petition to Israel's High Court of Justice seeking a declaration that the permit system regulating residency in the seam line area infringes the rights of Palestinian residents. Previously, on January 19, 2004 ACRI filed a petition to Israel's High Court of Justice seeking injunctive relief against the IDF to keep the barrier's access points continuously open to Palestinian residents, vehicles, and agricultural equipment. The High Court issued an order *nisi*, obligating IDF to justify the limited access and explain the lack of more reasonable hours of access. The IDF was ordered to provide the High Court with justification and explanation for its actions within 20 days.

¹² Tenth Emergency Special Session of the General Assembly Illegal Israeli actions in occupied East Jerusalem and the rest of the occupied territories; Statement by H.E. Ambassador Dan Gillerman Permanent Representative of Israel to the United Nations (20 October 2003) The United Nations New York.

¹³ See Yuval Yoaz, *Terror victims want to attend fence hearing at Int'l Court*, by Yuval Yoaz, Haaretz Service and Agencies, Jan. 26, 2004 Shvat 3, 5764.

Israel's High Court of Justice has frequently determined the legality of actions taken by the Government of Israel and the IDF in the disputed territory. See for example: *Public Committee Against Torture in Israel v. The State of Israel and related cases* September 6, 1999, HCJ 5100/94; *Physicians for Human Rights v. The Commander of IDF Forces in the West Bank* April 8, 2002 HCJ 2936/02; *Center for Defense of the Individual et al v. Commander of IDF Forces in West Bank* December 18, 2002 HCJ 3278/02; *Yassin v. Ben David et al* December 18, 2002 HCJ 5591/02; *Ajuri et al v. IDF Commander in west Bank et al* September 3, 2002 HCJ 7015/02.

Israel's High Court of Justice has routinely taken bold measures to uphold the human rights and civil liberties of Palestinians residing in the disputed territory, even in times of major combat. Indeed, as Justice William Brennan of the United States Supreme Court has 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."

Palestinian, Israeli, and international human rights groups have been concerned with hardships suffered by the Palestinian civilians as a result of the construction of the fence and the High Court of Justice of Israel has agreed to review this issue. The Government of Israel has declared that it would review the route of the terrorism prevention barrier to ensure that the lives of the Palestinian civilians are not disrupted unless such disruption is absolutely necessary for security reasons. Given that this type of issue is routinely and rigorously reviewed by Israel's Supreme Court, the ICJ should refrain from issuing an advisory opinion at least until High Court of Justice of Israel has an opportunity to address the issue.

It should also be noted that the General Assembly's Resolution A/RES/ES-10/14 (A/ES-10/L.16) lists the Fourth Geneva Convention of 1949 (Convention) as one of the grounds for the Court's advisory opinion. Since Palestine has not been recognized as a sovereign state¹⁴ it is questionable whether any of the measures taken by the Israeli government

¹⁴ Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto." On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine."

with regards to Palestine fall under the Convention. However, assuming that the Convention is applicable, it does not prohibit construction of a security fence. Article 27 of the Convention states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour [sic], 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 and against insults and public curiosity...

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. [emphasis added]

The Fourth Geneva Convention, (August 12, 1949), U.N.T.S. No. 973, vol. 75, p. 287.

Moreover, the Convention does not prohibit relocation of civilian population, as long as such relocation is necessitated by security concerns and civilians are not forced to relocate outside the boundaries of the state in which they reside. According to the Article 49 of the Convention:

...the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

Id., (emphasis added).

The Convention also states in Article 53:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Id., (emphasis added).

As previously stated, construction of the security barrier was necessitated by an increasing number of deadly terrorist attacks on the Israeli soil. The government of Israel

has stated time and again, that security barrier is temporary security measure that will be reversed once the threat of terrorist attacks is lifted.¹⁵

8. IN ISSUING AN ADVISORY OPINION, THERE IS A SIGNIFICANT RISK THAT THE ICJ WILL DIMINISH ITS STANDING AND THE STRENGTH OF ITS OTHER OPINIONS ON PROPER CASES.

If the Court is prepared to answer a question on the rights and wrongs of armed conflict posed by the side in the conflict which has the most votes at the General Assembly, there are potentially many more such questions that can be asked, not just about Israel, but about every armed conflict. The Court could end up being dragged into many armed conflicts, not in a neutral way, not in a way to help resolve the conflict, but, as here, by being asked to answer a biased one-sided question, where the Court is asked to judge the legality of the behaviour of one side only to the conflict.

International justice can be harmed by doing either too little or too much. We have seen the problems created by overreaching both in Belgium and in Spain. Attempts to extend the doctrine of universal jurisdiction for criminal prosecution beyond all recognition have led to backlash and retrenchment. For Spain, see the *Guatemala Genocide case*, Spanish Supreme Court decision of February 25, 2003, 42 International Legal Materials 686 (2003) and the *Peruvian Genocide case*, 42 International Legal Materials 1200 (2003). For Belgium, see Amendment to the *Law of June 15, 1993* (as amended by the Law of February 10, 1999 and April 23, 2003) *concerning the Punishment of Grave Breaches of Humanitarian Law*, 42 International Legal Materials 1200 1258 (2003). The Spanish and Belgian efforts to extend the reach of international criminal justice have fuelled opposition to the International Criminal Court and hampered its development.

This reference poses a similar danger for the International Court of Justice. It is in the very nature of any political dispute that one side in the dispute is more popular than another. There is no doubt that right now, at the United Nations, the Palestinian cause can muster many votes while the Israeli cause can muster only a few. However, the political unpopularity of Israel is no reason for Court involvement in the disputes Israel has with the Palestinian Authority or with neighbouring States. If the Court accepts to answer the question asked and become involved in a political dispute at the invitation of one side only to that dispute, it risks undermining both the Court and the cause of international justice.

One must consider the question in context, the context of the wars in the Middle East and the struggle for the survival of Israel in the face of opposing armies and the terrorist threat. The construction of the fence is a direct response to the war of terror being perpetrated against the State of Israel by the PA and other Palestinian terrorist organizations.

¹⁵ Aluf Benn & Nathan Guttman *Shalom says fence 'is moveable,' if deal reached with PA*, Haaretz Service and Agencies.

The Court must insist that any request for an advisory opinion not be used to answer contested questions of international law. Questions posed to the Court that attempt to answer questions of international law are not truly requests for advisory legal opinions but just statements of political opinion for which the General Assembly is seeking outside support. The Court would undermine its own existence if it consented to being used for that purpose.

The Court must decline to answer a question posed in the context of armed conflict which raises the culpability of only one side only in that conflict. Otherwise, the Court itself will be seen to be taking sides, not because of the answer it might give, but because, by its very willingness to attempt to answer the question, it will have legitimised such a one-sided debate.

Peace is, of necessity, a reciprocal affair. It is impossible to have peace if only one side wants peace, if only one side is prepared to lay down its arms and accept a settlement. For the General Assembly to ask, and the Court to answer, questions about the culpability of only one side in the Middle East conflict ignores the need for reciprocity for peace to occur.

Setting out the legal obligations of only one side de-contextualizes the acts of the side under legal scrutiny from the armed conflict of which the acts form part. Although setting out the legal obligations of both sides is not necessarily the best way to achieve peace, at least it is a positive contribution to peace. It might make sense to hold that, legally, each side should engage in certain behaviour. Resolutions of the Security Council, or of the General Assembly, have called on Israel to engage in certain acts, provided Palestinians and neighbouring Arab States are willing to live at peace with Israel. However, it makes no sense to even consider what one side should do in isolation, without considering any legal constraints on the other side at all.

Any decision or action by an international organization, including the International Court of Justice, that would seek to impose a solution or a condition on Israel will undermine the diplomatic process between Israel and the Palestinians. Moreover, through action on this specific case, by rendering such a decision, the Court will create precedent that will encourage future negotiators to seek an opinion from the ICJ in lieu of direct negotiations.¹⁶

In seeking so shamelessly to politicize the Court and to bring an issue that is the subject of dispute before the Court in its advisory capacity, the sponsors of this resolution risk serious harm to the reputation, independence and authority of the principal judicial organ of the United Nations. Such cynical abuse of the Advisory Opinion procedure, in violation of its basic preconditions and its intended purpose, would be an extremely

¹⁶ See Case of Slovakia and Hungary regarding a dam, in which the Court refused to render a decision because the two countries had engaged in a diplomatic process, which the Court did not want to undermine.

dangerous precedent, and would only encourage further abuse of the ICJ as a political weapon by any party to a political conflict.¹⁷

Should the prestige of this Court be damaged, there would be nothing to stop the uncontrolled referral of sensitive political issues to the ICJ without the agreement of both sides to the conflict, as is required by the Court's Statute and rules of procedure in contentious cases. On previous occasions, the Assembly has recognized the danger of such attempts to raise disputed issues in this way and has refused to allow the Court to be so manipulated. We urge the Court to continue to preserve the legitimacy of the Court's Statute and Mission.

PART IV – SUMMARY OF REASONING; RELIEF REQUESTED

For the reasons set forth above, The Foundation for the Defense of Democracies asks this International Court of Justice, in the exercise of its wisdom, to refrain from engaging in political dialogue, from succumbing to political pressure, and to decline to proceed further on the request for the issuance of the Advisory Opinion sought.

In this case, the Court should decline to render an Advisory Opinion because: (a) this Court lacks jurisdiction; (b) there is no justiciable issue before the Court; (c) the Advisory Opinion being sought is a political opinion that would impact the negotiating process between the Israelis and the Palestinians and violates the intent and purposes of the ICJ's enabling statute; and (d) the Advisory Opinion sought was improperly referred by the United Nations and undermines the legitimacy of the United Nations as a neutral mediator and monitor under the Road Map.

In Addition, the erection of the terrorism prevention barrier is a legitimate and legal manifestation of a nation state's inherent obligation and right to protect itself and its inhabitants. It is inappropriate for the Court to review disputes between the Israelis and the Palestinians at this time because the Security Council has envisioned a *political* process embodied in the Road Map and because the Israeli government and Palestinian Authority have stated a mutual willingness to return to the negotiating table once the terrorist acts cease.

The Security Council Resolutions cited in the General Assembly's request to the ICJ do not address the security issues faced by Israel and are extraneous to the issue of a construction of a protective barrier. It is inappropriate for this Court to review disputes regarding the terrorism prevention barrier that are the same, or similar to those currently under consideration by Israel's High Court of Justice.

¹⁷ Tenth Emergency Special Session of the General Assembly Illegal Israeli actions in occupied East Jerusalem and the rest of the occupied territories; Statement by H.E. Ambassador Dan Gillerman Permanent Representative of Israel to the United Nations (20 October 2003) The United Nations New York.

Finally, in issuing an Advisory Opinion, there is a significant risk that the ICJ will diminish its standing and the strength of its other opinions on proper cases.

The parties to the conflict need to take all appropriate steps to stop terrorism and murder, to establish security, and to return to direct negotiations on the issues between them. The goal must be peace and the building of a democracy for the Palestinian people which will become a nation state, The State of Palestine, and which will stand side by side with The State of Israel in building a future for all peoples in the region. For this Honorable Court to intervene in that process by imposing premature decisions relating to the establishment of a terrorism prevention barrier by the State of Israel, would constitute a grave and perhaps irreparable error, and may very well undermine the peace process itself.

However, should this Court determine to hold arguments, and consider, substantive issues regarding the question of Israel's terrorism prevention security barrier, notwithstanding all of the compelling and controlling reasons for the court to refrain from doing so, the court must consider the overwhelming weight of evidence that the terrorist murderous acts committed upon the israeli people clearly entitle the israeli government to construct a terrorist prevention security barrier between israel and the palestinian territories in the exercise of israel's right to defend its people, and it's peoples rights to safety and security in their homes, places of worship, on busses, in shopping centers? and in their lives.

Respectfully submitted,

THE FOUNDATION FOR THE DEFENSE OF DEMOCRACIES

Clifford May, President
Washington, DC

HEIDEMAN LEZELL NUDELMAN & KALIK, P.C.
1146 Nineteenth Street NW, Fifth Floor
Washington, DC 20036
Telephone 202. 463-1818/Telefax 202. 463-2999
Email: rdheideman@HLNKlaw.com

Counsel to The Foundation for the Defense of Democracies

By: /s/Richard D. Heideman
Richard D. Heideman, Esq.
Mark L. Lezell, Esq.
Noel J. Nudelman, Esq.
Tracy R. Kalik, Esq.

Of counsel:

David S. Steinberg, Esq.
Jonathan L. Rosenstein, Esq.
Toronto, Ontario Canada

Steven R. Perles, Esq.
Narguiz Abbaszade, Esq
Washington, DC

**BEFORE THE
INTERNATIONAL COURT OF JUSTICE
THE HAGUE**

**IN RE: REFERRAL BY THE UNITED NATIONS GENERAL ASSEMBLY OF
THE MATTER RELATING TO THE ISRAELI TERRORISM PREVENTION
SECURITY BARRIER UNDER CONSTRUCTION, PURSUANT TO
RESOLUTION, SEEKING ADVISORY OPINION**

**WRITTEN STATEMENT
FRIEND OF THE COURT BRIEF**

**SUBMITTED BY
THE FOUNDATION FOR THE DEFENSE OF DEMOCRACIES**

30 JANUARY 2004

RESPECTFULLY SUBMITTED,

**HEIDEMAN LEZELL NUDELMAN & KALIK, P.C.
1146 Nineteenth Street NW, Fifth Floor
Washington, DC 20036
Telephone 202. 463-1818/Telefax 202. 463-2999
Email: rdheideman@HLNKlaw.com**

**By:
Richard D. Heideman, Esq.
Mark L. Lezell, Esq.
Noel J. Nudelman, Esq.
Tracy R. Kalik, Esq.**

CERTIFICATION

***THE UNDERSIGNED HEREBY CERTIFIES THAT ATTACHED HERETO IS A CERTIFIED COPY OF
THE FOREGOING PLEADING FILED THIS 30 DAY OF JANUARY 2004 WITH THE REGISTRAR
OF THE INTERNATIONAL COURT OF JUSTICE SITTING AT THE HAGUE.***

By: _____/s/Richard D. Heideman