



## ICJ's Ruling on Israel's Fence

(Published in *The Project for the New American Century*,  
<http://www.newamericancentury.org>, 12 July 2004)

Gary Schmitt

Colaboraciones n° 103

July 12, 2004

Last Friday, the International Court of Justice issued a highly critical advisory opinion on Israel's security fence. Peter Berkowitz, a GMU law professor and Hoover Institution fellow, argues in today's *New York Sun* that the ICJ had little business taking up the matter in the first place and, when it did, ignored Israel's legitimate right of self-defense - a right provided by both the UN Charter and standing international law. Indeed, as Thomas Buergenthal, the sole ICJ judge to dissent from the opinion noted: "To reach [a] conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of

self-defense, military necessity, and security needs, given the repeated deadly terrorist attacks in and upon Israel...cannot be justified as a matter of law."

"Destructive Decision"

Peter Berkowitz

*New York Sun*

July 12, 2004

On July 9 in The Hague, in the guise of a dispassionate legal judgment, the International Court of Justice issued a partisan political declaration condemning Israel's security fence in the West Bank as a violation of international law and instructing that Israel must tear it down and

compensate Palestinians for the hardships that it has caused.

The lengthy opinion, authored by Judge Shi Jiuyong of communist China and commanding a 14-1 majority of his colleagues on the court, barely so much as alluded to the almost four years of concerted Palestinian terrorism to which Israel's construction of the security fence is a response. And the court's judgment will aggravate the conflict.

Although it is an advisory opinion responding to a request from the United Nations General Assembly and, therefore, not legally binding, the court's decision blurs the crucial issues, reinforces the animus against Israel that poisons U.N. debate, and so will impede the achievement of a just and lasting peace between Israel and the Palestinians.

The U.N. General Assembly has been quick to act. It has scheduled a meeting for Thursday to discuss the ICJ's ruling, a discussion that is likely to issue in another round of ritualistic denunciations of Israel. And even as an Arab-drafted proposal to affirm the court's ruling and condemn Israel is being prepared to be brought to the General Assembly floor, the first suicide bombing attack in Israel since March took place in south Tel Aviv yesterday, responsibility for which was quickly claimed by the Al Aksa Martyr's Brigade, the armed branch of Yasser Arafat's Fatah organization.

Of course, courts cannot be held accountable for the abuse of their rulings. But they can be held ac-

countable for the quality of legal reasoning with which they support their conclusions. And here the International Court of Justice fails the test.

First, there is the court's dubious decision to hear the case when it did. Several factors counseled restraint. The International Court of Justice is not supposed to adjudicate a controversy unless the defendant state has agreed to its involvement or is bound by treaty to submit the controversy in question to the court. Although Israel did not agree to the court's involvement and was not bound by treaty to do so, the court contends that its decision properly responds to a request from the General Assembly for a non-binding clarification of a difficult legal question.

This is technically true. Yet by offering its judgment while the Security Council-backed road map for negotiations between the Israel and the Palestinians is underway, the court aggressively intervened in the controversy and thereby effectively circumvented and defeated the purpose of the consent requirement.

Moreover, because the statute constituting the International Court of Justice provides that its advisory rulings do not have superior authority to rulings on questions of international law by domestic courts, the ICJ at least should have waited to conduct its proceedings until after Israel's Supreme Court ruled on the same question, which it did just a few weeks ago. Indeed, in a carefully crafted opinion, Chief Justice Aharon Barak held that under inter-

national humanitarian law it was lawful for Israel to build a security fence in the West Bank to defend itself against infiltration by Palestinian terrorists, but that the hardships imposed by the fence on the Palestinian population must be proportional to the security benefits.

Applying this test, Justice Barak found that the purpose of the fence was indeed security and not, as alleged by the Palestinians who brought suit, the creation of a new political border, but that a section of the fence must be dismantled and rerouted in order to relieve the burden on the local Palestinian population. The military and the Sharon government promptly announced their acceptance of Israel's Supreme Court decision.

Second, there is the ICJ's inflammatory language. Following the General Assembly's usage, its opinion insists on referring to Israel's security fence as a "wall" even though more than 95% of the barrier is composed of an electronic fence (to detect intruders) surrounded on both sides by barbed-wire fencing. Designating the barrier a "wall" inescapably evokes menacing images of the Berlin Wall. But the moral and political associations are wrong. Whereas the purpose of the Berlin Wall was to prevent East German citizens who hated their government from escaping to freedom, the purpose of the security fence is to keep Palestinians devoted to their leader from blowing up Israeli civilians.

Third, there is the ICJ's grotesquely one-sided legal analysis of the cen-

tral issue. The court purports to "identify the existing principles and rules, interpret them and apply them...thus offering a reply to the question posed based on law." Most of the opinion, however, is devoted to quoting authorities in order to establish the full panoply of conventions and covenants governing international humanitarian law that apply to Israel's administration of the West Bank and to detailing the very considerable hardships that some sections of the security fence have caused the Palestinians. Most of this is unnecessary because Israel certainly agrees that it is bound to balance its security considerations against Palestinian human rights. Justice Barak's opinion for Israel's Supreme Court, which the army and the government accepted as the law of the land, could not have been clearer.

The only serious matter in dispute under international law was whether those parts of the security fence running through the West Bank imposed hardships on the Palestinian population disproportionate to the benefits Israel gained in its efforts to protect itself against the more than 780 terrorist attacks that have claimed more than 900 Israeli lives and left more than 6,000 wounded since September 2000, when the president of the Palestinian Authority, Mr. Arafat, launched the second intifada. In other words, the court was obliged by international law, just as Israel's Supreme Court argued it was obliged, to balance Israel's security needs against Palestinian human rights. Alas, the ICJ declined to discharge its duty.

Instead, the court simply dismissed Israel's security considerations, as the American Judge Thomas Buergenthal pointed out in a judicious and devastating dissent:

"The Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security...Lacking is an examination of the facts that might show why the alleged defenses of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it is 'not convinced' but

it fails to demonstrate why it is not convinced, and that is why these [the Court's] conclusions are not convincing."

The ICJ's conclusions are more than unconvincing. Because the judgment that Israel's security fence is unlawful rests on a grave misinterpretation and misapplication of the existing international law and a refusal to confront or indifference to the full range of relevant facts, the International Court of Justice discredits its standing as a fair and impartial arbiter.

*Peter Berkowitz teaches at George Mason University School of Law and is a fellow at Stanford's Hoover Institution.*



<http://www.newamericancentury.org/index.html>