

## **INTERNATIONAL COURT OF JUSTICE TO GIVE ADVISORY OPINION CONCERNING ISRAEL'S BARRIER**

AT THE 10TH EMERGENCY SPECIAL Session on December 8, 2003, the 191-member United Nations General Assembly (Assembly) adopted a resolution requesting an "urgent" advisory opinion from the International Court of Justice (Court) on the legal consequences of Israel's construction of a "Barrier" between itself and the West Bank and East Jerusalem. Secretary General of the United Nations (UN) Kofi Annan transmitted the request for the advisory opinion to the Court in a letter dated December 8, 2003. The term "Barrier" is used by the UN to describe and refer to Israel's system of ditches, fences, and walls constructed in the West Bank and East Jerusalem. Israelis refer to it as the "Security Fence," while Palestinians refer to it as the "Separation Wall."

The Assembly has requested advisory opinions from the Court fourteen times since the Court's inception in 1946, with the majority requested immediately following World War II. While the Court's opinion will not be legally binding, the opinion will address whether Israel may build a Barrier on Palestinian Occupied Territory and will provide guidance to both parties, as well as the international community, on how to treat the current situation and how to proceed with negotiations.

### **HISTORICAL BACKGROUND**

Recognizing its urgent task to bring lasting peace to the Middle East, the Assembly created the 10th Emergency Special Session (Session) on the "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory" in 1997, and resumed the ongoing Session on October 20, 2003. At the October session, the Assembly passed a resolution "demand[ing] that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law."

The Armistice Line of 1949 (Line), otherwise known as the Green Line, was drawn

as a result of the Armistice Agreements of 1949 between Israel, Egypt, Lebanon, Jordan, and Syria. The Line effectively separated the West Bank and Gaza from what the international community came to recognize as Israel's borders.

During the spring of 2002, the increased number of attacks by Palestinian terrorists led to Israel's approval of the construction of 80 kilometers of the Barrier in three portions of the West Bank as a "security measure" that did not "represent a political or other border." By August 2002, Israel approved the first phase of a continuous Barrier extending 123 kilometers in the northern West Bank and 19.5 kilometers around Jerusalem, almost entirely on land that Israel occupied in 1967 as a result of the Six Day War.

Construction of the Barrier continues, and on October 23, 2003, Israel approved a continuous route along the West Bank significantly deviating from the Line. According to official maps of the approved Barrier route and an official report issued by the UN Secretary General, about 975 kilometers, or "16.6 percent of the entire West Bank will lie between the Barrier and the Green Line."

Just before Israel passed the final plans of its continuous Barrier, the Assembly convened and passed Resolution ES 10/13 (Resolution) on October 21, 2003, condemning the Barrier's construction. The Resolution demanded that Israel cease construction of the Barrier and that it remove the completed portions from Occupied Palestinian Territory. Additionally, the Resolution required the Secretary General to submit a report on Israel's compliance with the Resolution (the Report). Finding that Israel had not complied with the demand to stop construction of the Barrier, the General Assembly adopted Resolution ES 10/14, submitting the question of the legality of Israel's construction of a separation barrier on Occupied Palestinian Territory to the Court for an advisory opinion.

### **HUMANITARIAN IMPACT OF THE BARRIER**

According to the Report, the route of the Barrier has significant humanitarian and socio-economic consequences for Palestinians in the West Bank. The Barrier consists of con-

crete walls, razor wire fences, or ditches with intermittent gates acting as checkpoints. The Barrier is causing serious socio-economic harm by restricting the movement of Palestinian goods in addition to the movement of people across the border. The future construction route will also likely deepen socio-economic harm to the region by limiting access to jobs, markets, health services, hospitals, schools, water resources, and electricity networks.

The Report further cites the agricultural consequences of the Barrier, because its route cuts through what is considered the "breadbasket" of the West Bank. The Government of Israel requisitioned and destroyed farmland lying in the Barrier's route. Farmers separated from their land by the Barrier must cross through controlled gates that are not opened regularly. Recent harvests from many villages perished due to irregular opening times and the arbitrary granting of passage across the Barrier, drastically increasing food insecurity in the area.

### **ISRAEL'S LEGAL POSITION**

Israel ardently maintains that the "Security Fence" is a temporary measure employed to combat terrorism and does not represent a political border. Israel also claims that the Barrier will not change the legal status of any Palestinians or annex any Palestinian land to Israel. Rather, Israel maintains that the route was determined by security needs and topographical conditions to place a barrier in the path of the terrorist organizations that the Palestinian leadership refuses to dismantle. Israel also states that the final border will be determined by negotiations because it does not recognize the Armistice Line of 1949 as a confirmed international boundary and disputes the legal status of the Occupied Palestinian Territory.

Israel claims it is asserting its inherent right to self-defense against the terrorism that has placed the country in a conflict situation. Considering itself to be in a state of war, Israel cites the Hague Regulations permitting the seizure of property if demanded by the necessities of war as justification for the Barrier. Further, Israel asserts that Palestinian land used to enable the building of the Barrier is proportionate to the number of deaths and injuries sustained by Israeli citizens.

*continued on page 37*

the Faculty of Letters at the National University of Rwanda, co-founded a radio station called RTLM, which thereafter became very popular with the Hutu population. Nahimana was responsible for allowing the highly inflammatory broadcasts of RTLM and admitted that he was happy that RTLM had been instrumental in awakening the Hutu majority against the “enemy” Tutsi population. He considered RTLM an important part of the “war of media, words, newspapers and radio stations” that accompanied the bullets. The Trial Chamber considered these statements conclusive evidence of intent to destroy, in whole or in part, the Tutsi ethnic group. RTLM also broadcasted the names of Tutsi individuals and their families. In some cases, these persons were subsequently killed. The Trial Chamber found that this established a specific causal connection between the RTLM broadcasts and the killings and that Nahimana’s role in the creation and control of RTLM established his individual criminal

responsibility under article 6(1) of the ICTR Statute.

Jean-Bosco Barayagwiza, a lawyer and Director of Political Affairs in the Rwandan Ministry of Foreign Affairs, founded the political group CDR, which spearheaded the Hutu power movement. He also co-founded RTLM and was a member of its steering committee. The Trial Chamber found that CDR created a political framework for the killing of Tutsi and Hutu political opponents by convening meetings, holding demonstrations, establishing roadblocks, distributing weapons, and organizing and carrying out the killing of Tutsi civilians. The Trial Chamber found that Barayagwiza played a critical role in planning and orchestrating the delivery of weapons used in planning attacks on April 7, 1994. In addition, the Trial Chamber noted that Barayagwiza said publicly, “Let’s exterminate them,” meaning the Tutsis, and threatened to kill them, saying it would not be hard. The

chamber found that these words and deeds made clear Barayagwiza’s “ruthless commitment” to the destruction of the Tutsi population. The Trial Chamber also found Barayagwiza individually criminally responsible for his role in the creation and control of RTLM and individual and superior responsibility for instigating the acts of genocide by CDR members.

## Conclusion

The Trial Chamber stated that although the downing of the plane of the president on April 6, 1994, may have triggered the genocide that followed in Rwanda, the RTLM, *Kangura*, and CDR were the “bullets in the gun.” The Trial Chamber notes that “the gun had such a deadly impact because it was loaded.” *HRB*

*Tejal Jesrani, a J.D. candidate at the Washington College of Law, covers the ICTY and the ICTR for the Human Rights Brief.*

---

United Nations Update *continued from page 34*

## THE PALESTINIAN AUTHORITY’S LEGAL POSITION

The Palestinian Authority recognizes Israel’s right to “undertake certain limited measures in cases of strict military necessity.” Under the Palestinian Authority’s view, the Barrier is a violation of international human rights and international humanitarian law because it is not “justified by military necessity,” contrary to the Fourth Geneva Convention. The Palestinian Authority asserts that the Barrier violates the principle of proportionality and requests that Israel be held accountable for human rights violations. Claiming the requirement of proportionality would be met if the line were built according to the Green Line, the Palestinian Authority urges Israel to evacuate Israeli nationals, rather than Palestinians, when constructing the Barrier.

The Palestinian Authority also views the Barrier as an attempt by the Government of Israel to annex Palestinian occupied territory in violation of international law. By building the Barrier on land in significant departure from the Line, the Palestinian Authority’s views Israel as attempting to expropriate land occupied by the Palestinians. The damages caused by the Barrier that the Palestinian Authority cites include the “extensive destruction of Palestinian homes and other property and appropriation of property not justified by military necessity, contrary to the Fourth Geneva Convention.” The Palestinian Authority also claims the Barrier is interfering with

Palestinians’ rights to work, education, health care, and freedom of movement in violation of the International Covenant on Economic, Social and Cultural Rights.

## THE ICJ’S ROLE

Replacing the Permanent Court of International Justice, the Hague-based Court began work in 1946, under the auspices of the Charter of the United Nations. Comprised of 15 judges elected to nine-year terms of office by the Assembly and the Security Council, the Court is the main judicial body of the United Nations. The Court has the dual role of settling legal disputes submitted to it by states and providing advisory opinions on legal questions referred to it by authorized international organs and agencies.

At present, the only bodies authorized to submit a request to the Court for an advisory opinion are the five main organs of the UN and the sixteen specialized agencies of the UN family, including the International Labour Organization, the International Monetary Fund, and the International Atomic Energy Agency. The Court has issued twenty-four advisory opinions to date, including a ruling on the territorial status of South-West Africa (Namibia) and Western Sahara.

The Court issued an order organizing the proceedings on December 19, 2003, allowing all member states of the Assembly to submit written statements concerning the issue until January 30, 2004. The Court also noted that

since Palestine has been granted “special observer status” in the Assembly and co-authored the draft resolution requesting an advisory opinion, Palestine may also submit a written statement. All of the member states, including Palestine, may present statements and comments to the Court during oral hearings set to open on February 23, 2004.

## CONCLUSION

Security and lasting peace for both Israelis and Palestinians is of paramount importance to both parties and to the international community. With the international support of the Mideast Road Map, developed by the United States, Russia, the UN, and the European Union, Israel’s construction of the Barrier cannot be viewed as a good-faith attempt to enter into successful negotiations. The placement of the Barrier in departure from the Armistice Line of 1949 is an impediment to negotiations for a lasting peace and security between Israel and the Palestinian leadership. While Israel emphatically maintains that the Barrier is temporary, the expense, effort, and placement of the Barrier imply that it is a more permanent solution. The Court’s advisory opinion on this issue, though not binding on Israel’s actions, should be respected and upheld by both the Israeli and Palestinian leadership, as well as the international community. *HRB*

*Nicole Trudeau, a J.D. candidate at the Washington College of Law, covers the UN for the Human Rights Brief.*