

CIC Briefing Paper

Israel's Security Fence and the International Court of Justice

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1. BACKGROUND/RATIONALE:

- More than 900 Israelis have been killed and over 6,000 wounded in Palestinian terrorist attacks since the fall of 2000. A significant proportion of these attacks have originated in the West Bank; indeed, since the completion (in late 2001) of a continuous fence separating the Gaza Strip from Israel, there has not been one successful terrorist incursion from Gaza. The boundary between the West Bank and Israel is porous, with numerous 'soft' points that have been exploited by Palestinian terrorists.
- Israel has employed various measures to reduce terrorism emanating from the West Bank. While to some extent effective in deterring terrorists, many of these measures have elicited international criticism. Even friendly countries such as the United States and Canada, while affirming her right to self-defence, have cautioned Israel to use "proportionate force" and to avoid Palestinian civilian casualties (a task complicated by the terrorists' cynical practice of situating their bases, weapons caches and bomb-making factories in Palestinian civilian population centres).
- When examined in the broader context, Israel's decision to construct a fence separating Israelis from West Bank Palestinians is a relatively benign response to an untenable security situation. The sole purpose for building the barrier is to deter terrorism. If the PA had fulfilled its obligation to fight terrorism and dismantle the terrorist groups, there would have been no need for a security fence. If the PA had engaged in negotiations, the terms on which the security fence is being constructed could have been worked out in a way satisfactory to both sides. When the Palestinian leadership makes the strategic decision to end terrorism and resume serious negotiations, the security barrier can be moved or even dismantled. Until then, Israel has every right to build a barrier that will protect the lives of its citizens.
- Many Western countries, including Canada, say that they do not oppose the fence, only its extension into the 'occupied territories'. Much of the route of the fence approximates the Green Line (i.e., the temporary boundary delineated in the 1949 Israel-Jordan armistice agreement). The extensions of the barrier into the West Bank are deemed by the

government and the IDF as essential for protecting the lives of Israelis residing in those areas. Israel rejects the charges of a “land grab” or that the security fence is meant to establish the final permanent border.

2. COMPETING LEGAL ARGUMENTS

- The Palestinian legal objection to the security fence is based on a skewed interpretation of provisions of the Fourth Geneva Convention (1949) concerning the responsibilities of an “occupying power.” According to Palestinian negotiator Saeb Erekat, “The convention forbids the occupying power to build permanent structures on the occupied land, create facts on the ground or transfer people from and to the territory... the fence is part of Israel’s settlement policy, and is aimed at confiscating more and more Palestinian land ahead of a peace agreement... The main issue is land: If Israel will build the wall on its land we do not care that they build it.”^{1[1]} (Jerusalem Post, Jan. 5, 2004)

- Israel’s principal legal position rests on three propositions:
 - Article 51 of the UN Charter accords Israel the indisputable, sovereign right to act in defence of its citizens.

 - In seeking to ensure order and stability in the ‘occupied territories’ pending a political settlement, Israel’s erection of the security fence is consistent with the responsibilities of an occupying power according to the Geneva Convention.

 - Israeli officials have consistently emphasized that the security barrier need not be permanent, that it can be moved or dismantled once terrorism ends and serious negotiations resume

^{1[1]} There is, of course, no way to test the veracity of Erekat’s implication that the Palestinians would acquiesce to Israel’s building a fence on “its land.”

- Additional elements of Israel's position include the following:
 - The application of the Geneva Convention to Israel's status in the West Bank is unclear. The Convention deals with one country's occupation of the sovereign territory of another, whereas the sovereignty of the West Bank remains blurry.^{2[2]} Moreover, whereas the Convention speaks of occupation as the result of military aggression, Israel's presence in the West Bank is the direct consequence of its defensive war in June 1967.
 - The League of Nations Mandate legitimized the right of Jews to reside in all parts of Palestine. Acting on this right, vibrant Jewish communities were established throughout the West Bank. The Hebron community was destroyed in the 1929 Arab riots. All other communities were destroyed or evacuated in the 1948 war. Nevertheless, the legal right accorded by the Mandate for Jews to reside in the West Bank was never suspended.
 - There is no legal basis upon which the 1967 Green Line should be automatically assumed to be Israel's political border. The 1949 line separating Israeli and Jordanian troops pending a peace treaty. It left Israel's heartland severely vulnerable to attack. UN Security Council Resolution 242 (Nov. 1967) recognized these facts in explicitly recommending Israel's redeployment from *territories* not *the territories* in exchange for peace within *secure and recognized boundaries*.
 - At least since Camp David (2000), it has been widely understood that the Green Line would serve as the general parameter for negotiations about the political border between Israel and a future Palestinian state. By the same token, at Camp David all sides agreed that there should be adjustments to the Green Line to reflect political and demographic realities.
 - Israeli analysts contend that the PA's failure to fulfill the terms of the Oslo Accord (which has taken on the *de facto* status of international legal convention) obligates Israel, as the "occupying power", to remain in the West Bank in order to maintain stability and order pending a negotiated settlement.

^{2[2]} The British Mandate's legal regime affecting the sovereignty of the West Bank was never replaced. Jordan's 1951 annexation was recognized as illegitimate by all countries (including the Arab League) save Great Britain and Pakistan. Israel has never annexed the West Bank.

3. INTERNATIONAL COURT OF JUSTICE (ICJ)

- In the UN General Assembly's appeal to the ICJ concerning the security barrier, one can see the achievement of two elements of Yasser Arafat's political strategy.
 - From the outset of the *al-Aqsa intifada*, Arafat has planned to escalate terrorism to the point that Israel would take action that would provoke direct international intervention. This has now occurred, with potentially serious implications for Israel.

As Israel's Justice Minister Yosef Lapid noted (January 4, 2004), the ICJ hearing is "the first step toward turning Israel into the South Africa of today, and there is a danger that we will be exposed to international boycotts as was the case prior to the fall of the [apartheid] regime in South Africa."^{3[3]}

- A second element of Arafat's political strategy has been to cause divisions among Israelis. This, too, is reflected in the heated debate within Israeli society about the fence. Take, for example, the tension within the cabinet relating to Justice Minister Lapid's claim (January 5, 2004) that the source of international criticism is because "we didn't suffice with the original fence, but changed its route, which has become a matter of international dispute."
- The ICJ appeal is a cynical political act, the exploitation by the Palestinians and their supporters of yet another legitimate international institution for political purposes.

^{3[3]} A 1971 ICJ opinion against the legality of South Africa's claims to South West Africa (present day Namibia) led the way to the imposition of severe economic sanctions and South Africa's expulsion from international institutions.

- The ICJ's opinion has no binding effect.^{4[4]} Indeed, the outcome of the Court's deliberations are of secondary importance to the Palestinians, whose real victory was in persuading a majority of UN General Assembly members to support the call to have the legality of the fence considered by the ICJ, and then, in persuading the ICJ to hear the appeal.
- According to a *Jewish Telegraphic Agency* report (January 5, 2004), Israel's legal team is preparing a two-level strategy:
 - It will first suggest that the ICJ disqualify itself, on the grounds that "loaded" political issues such as the Israeli-Palestinian conflict can not be dealt with in a judicial way, but only through negotiations
 - Should this line of argumentation fail, Israel will then reportedly move to a second, substantive level, arguing:
 - i) that the fence is a legitimate act of self-defence (consistent with Israel's sovereign rights according to the UN Charter) that does not create unalterable facts on the ground; and
 - ii) that an ICJ opinion favouring the Palestinian position would undermine peacemaking, by strengthening Yasser Arafat's belief that there is more to be gained by *internationalizing* the conflict rather than by acting to resume serious diplomacy (i.e., by ending terrorism and dismantling terror groups, as stipulated in Phase One of the international "road map").

4. CANADA, THE ICJ AND THE FENCE

All United Nations members are entitled to submit statements on cases heard by the International Court of Justice. At this point, we do not believe that Canada is planning to intervene in the ICJ's consideration of Israel's security fence. As noted above, Canada has no objection to the construction of the fence, only to its intrusion into areas beyond the Green Line. Canada is strongly opposed both to the politicization of international institutions, and to efforts to isolate or expel Israel from those institutions.

^{4[4]} ICJ rulings are binding only when the sides agree, as in the case of the dispute between Israel and Egypt regarding the status of Taba, in the early 1980s.

APPENDIX

Chronology:

- May 2002: Israel's cabinet adopts the idea of a West Bank security fence.
- November 2002: Decision to proceed with Stage B, running from Salem towards Beit-Shean through the Jezreel Valley and the Gilboa Mountains, with the proposed target date of February 2004.
- August 2003: Stage A, running from Salem to Elkana in the northwest, and around Jerusalem (in the northern and southern sections) is completed.
- October 2003: Stage C, encompassing some 400 km and running south from Kfar Kassem and Jerusalem to almost the Dead Sea, is approved, with proposed completion by the end of 2005. The fence is to incorporate the settlements of Ariel and Kedumim; however, in response to US pressure, this section will remain temporarily unconnected from the main barrier.
- October 14, 2003: The United States vetoes a UN Security Council resolution condemning the security barrier and demanding its immediate dismantlement. A week later (October 22), the General Assembly overwhelmingly adopts a resolution declaring the barrier to be "in contradiction to relevant provisions of international law."
- December 8, 2003: By a vote of 90 for, 8 opposed (with 74 abstentions, including Canada), the General Assembly asks the International Court of Justice (ICJ) to issue an advisory opinion on the legal consequences of the fence. Hearings are scheduled to begin on February 23.

Vital Statistics:

- Approximately 97% of the planned 720 km. security barrier will consist of a chain-link fence system designed to deter terrorist infiltration. **Less than 3% of the fence will be constructed of concrete.** These portions are or will be situated primarily along sections of Israeli roadways most vulnerable to Palestinian sniper-fire.

Links to Further Reading:

- Saving Lives: Israel's Security Fence, Israel Ministry of Foreign Affairs
<http://www.mfa.gov.il/mfa/go.asp?MFAH0o170>
- "Fearing the worst, Israel prepares case on fence for International Court," by Gil Sedan, *Jewish Telegraphic Agency*, January 5, 2004
http://www.jta.org/page_view_story.asp?intarticleid=13634&intcategoryid=1
- "Israel to reject the Hague court's authority on fence," by Aluf Benn, *Ha'aretz*, January 5, 2004 - http://www.cicweb.ca/At_Issue/English/010804_reading.html#haaretz
- "Soviet-style justice," *Jerusalem Post* editorial, January 6, 2004 - http://www.cicweb.ca/At_Issue/English/010804_reading.html#jpost
- "IDF moving sections of separation fence westward," by Amos Harel, *Ha'aretz*, January 9, 2004 <http://www.haaretz.com/hasen/spages/381205.html>

MAPS OF SECURITY FENCE

Stage 1

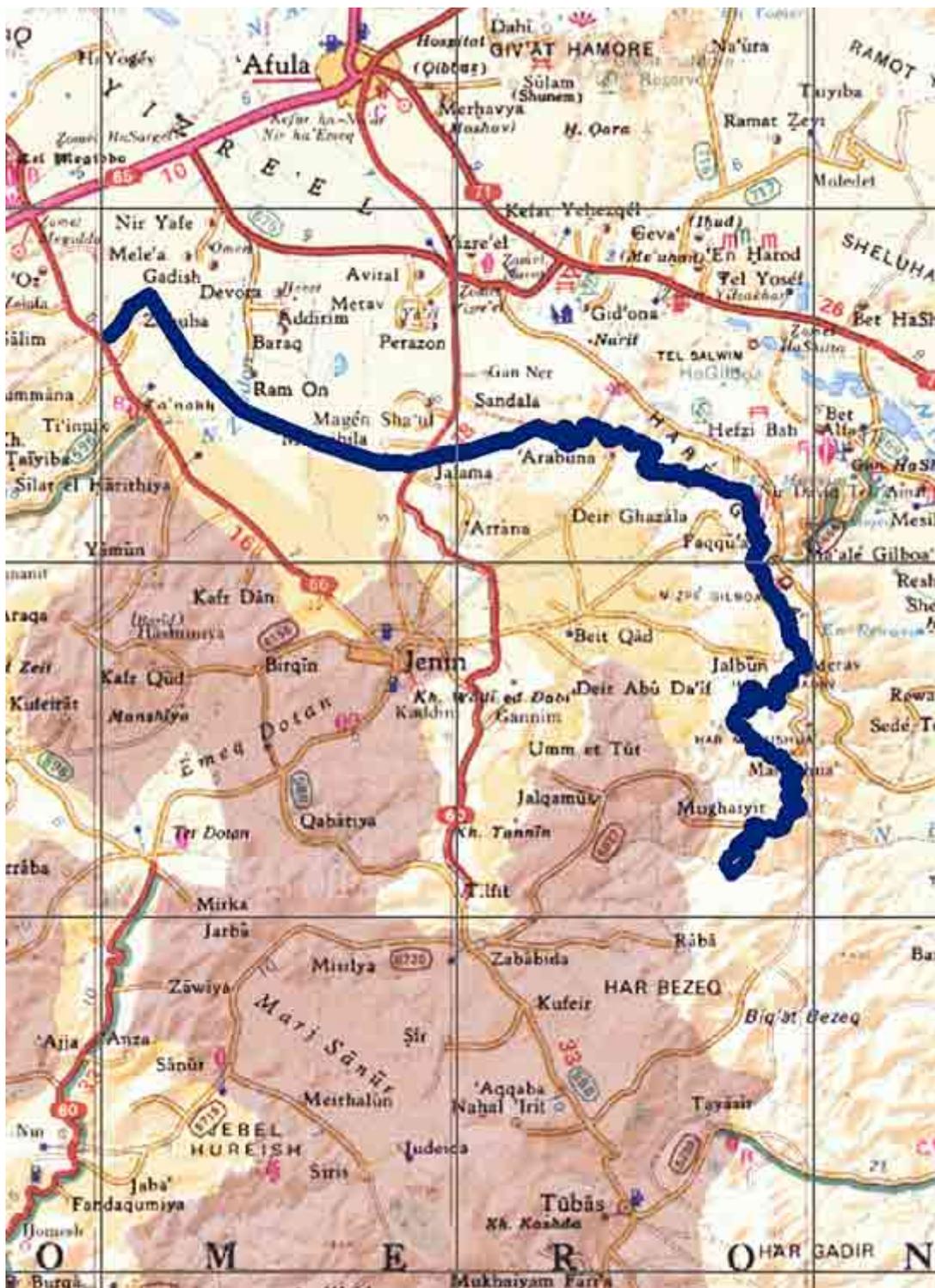
Completed sections in black



Source: Jewish Virtual Library

<http://www.us-israel.org/jsource/Peace/fence.html>

Stage 2



Source: Jewish Virtual Library

<http://www.us-israel.org/jsource/Peace/fence.html>

The Complete Route

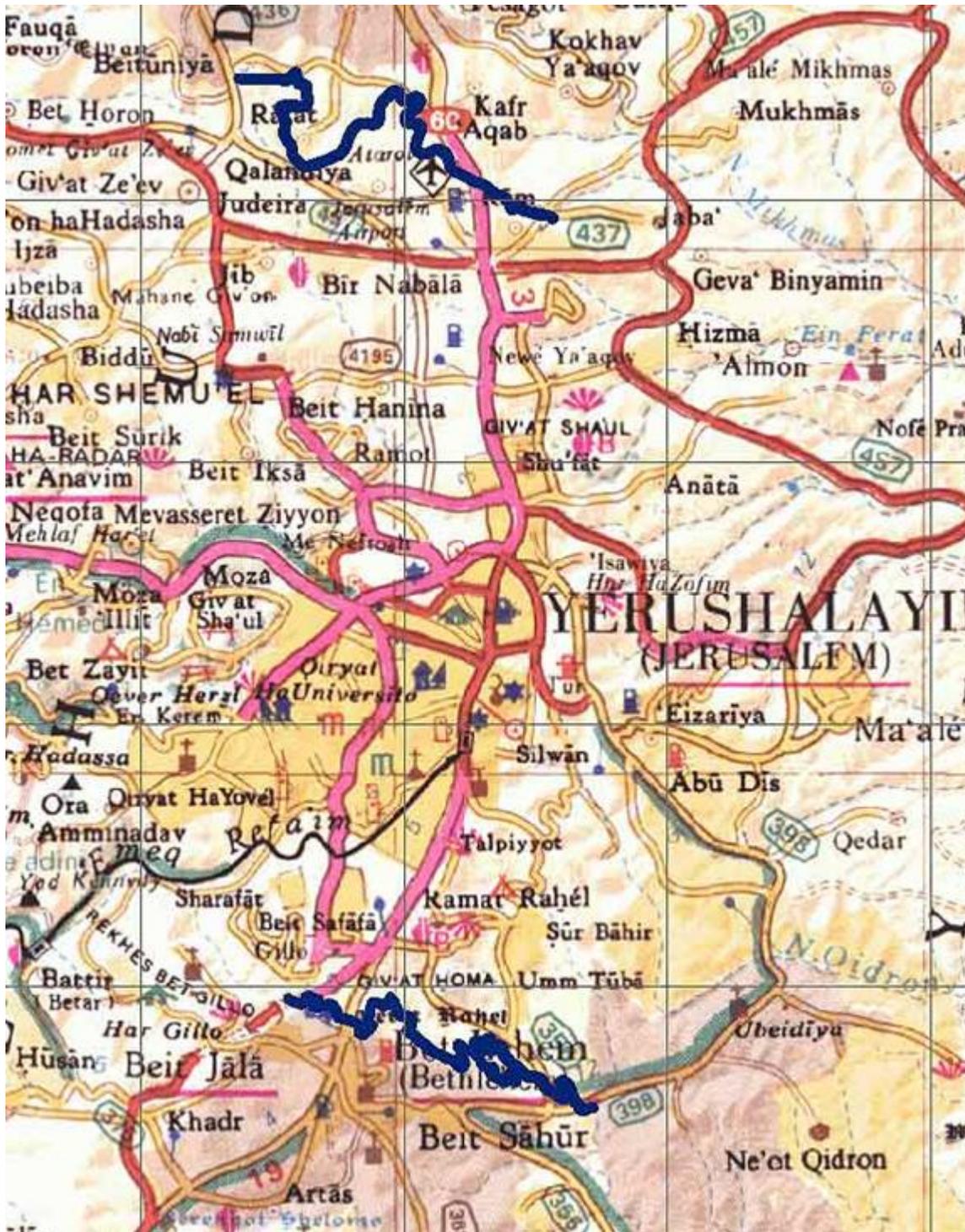
(as of October 23, 2003)



Source: Jewish Virtual Library

<http://www.us-israel.org/jsource/Peace/fence.html>

Map of Jerusalem



Source: Jewish Virtual Library

<http://www.us-israel.org/jsource/Peace/fence.html>