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ISRAEL'S SECURITY BARRIER: AN INTERNATIONAL COMPARATIVE ANALYSIS AND LEGAL EVALUATION

**DR. BARRY A. FEINSTEIN
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I. INTRODUCTION

Some call it a fence. Others call it a wall. Some see an outrageous land grab disrupting thousands of lives,¹ an "apartheid" scheme² with intent to expel³ the residents living on one side⁴ and to

1. See Karin Laub, *Israel's President Says Construction of Separation Barrier Should Be Halted If Palestinians Agree to Truce*, ASSOCIATED PRESS, Nov. 25, 2004.

2. See, e.g., TEKLA SZYMANSKI, *ISRAEL'S SECURITY FENCE: BACK TO THE WALL* (2004), <http://www.tekla-szymanski.com/fenceprint.html> (last visited Feb. 19, 2005); ANTI-APARTHEID WALL CAMPAIGN'S NORTHERN DISTRICTS' COMMITTEES, *THE ANTI-APARTHEID WALL CAMPAIGN STATEMENT AGAINST ISRAELI "PERMITS"* (2003), <http://www.stopthewall.org/latestnews/75.shtml> (last visited Feb. 19, 2005) [hereinafter *THE ANTI-APARTHEID WALL*].

3. See, e.g., Marc Neugroeschel, *The Palestinians and the Hague*, MEDIA LINE, Feb. 16, 2004, http://www.themedialine.org/news/news_detail.asp?NewsID=4841 (last visited Mar. 1, 2005).

4. See, e.g., *THE ANTI-APARTHEID WALL*, *supra* note 2.

imprison residents living on the other.⁵ Others look upon it as the ultimate passive, non-violent solution that will save lives, that will protect themselves and their children from the ongoing horror of suicide bombings and other deadly terror attacks.⁶ These are the incongruent perceptions of Palestinians and Israelis to the fence/wall⁷ that Israel is constructing between the two populations in the occupied/disputed⁸ territories of the West Bank.

5. See, e.g., MAHDI ABDUL HADI, *IN SEARCH OF A PALESTINIAN STRATEGY* (2004), www.passia.org/about_us/MahdiPapers/Palestinian-Strategy.htm (last visited Feb. 19, 2005). Dr. Mahdi Abdul Hadi founded both the Arab Thought Forum, a leading Palestinian think tank, and the Palestinian Academic Society for the Study of International Affairs (PASSIA). This piece originally appeared as a commentary in *THE DAILY STAR*, a newspaper published in Beirut, on January 24, 2004.

6. See, e.g., Interview with Marc Luria, Chairman of Israel Citizens For the Fence, in Jerusalem (Jan. 26, 2004); ISRAEL MINISTRY OF FOREIGN AFF., *THE REASONS BEHIND THE FENCE: FIRST PRIORITY—SAVING LIVES* (n.d.), <http://securityfence.mfa.gov.il> (last visited Feb. 19, 2005) [hereinafter *FIRST PRIORITY*]; see also SZYMANSKI, *supra* note 2; Laub, *supra* note 1.

7. This Article usually refers to the fence/wall with the neutral term "barrier," except (1) when discussing its construction, and (2) within quotations or in certain other instances where the authors have retained the terminology of the source material.

8. Using the term "occupied territories" implies an imbalance that denies Israel an even playing field in territorial negotiations regarding the future of the West Bank and Gaza Strip. The incessant Palestinian demand to "end the occupation" does not leave any room for territorial compromise over what are, in essence, "disputed" territories. In other territorial disputes around the globe—as the cases of Kashmir, Nagorno-Karabakh (an Armenian enclave located in Azerbaijan), the Kurile islands, the Turkish Republic of Northern Cyprus, the Western Sahara, and Zubarah (an island in the Persian Gulf) demonstrate—diplomats and international lawyers have consistently tried to avoid the "politically-loaded" terms of "occupation" or "occupied territories" and referred to these territories as "disputed areas." See DORE GOLD, *FROM "OCCUPIED TERRITORIES" TO "DISPUTED TERRITORIES"* (Jerusalem Letter/Viewpoints No. 470, 2002), <http://www.jcpa.org/jl/vp470.htm> (last visited Feb. 21, 2005). It appears to be the consistent practice of the international community to qualify territories, the status of which is under negotiation, as "disputed territories" rather than as "occupied territories." See GOLD, *supra*; see also U.S. DEP'T OF STATE, *CONSULAR INFORMATION SHEET, INDIA* (2005) (referring to area of Karakoram mountain range as "disputed"); BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, *1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AZERBAIJAN* (2000) (referring to "land mines laid near the disputed area of Nagorno-Karabakh"); Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (*Qatar v. Bahrain*), Merits, 2001 I.C.J. 40, 70 (Mar. 16) (referring to the Hawar Islands, located in the Persian Gulf, as "disputed territory"). In 1975, the International Court of Justice (ICJ) issued an advisory opinion declaring that the Western Sahara was not legally under Moroccan sovereignty. *Advisory Opinion on Western Sahara*, 1975 I.C.J. 12 (Oct. 16). Nonetheless, the Moroccan military operations in that area are widely considered as occurring in disputed, rather than occupied, territory. See GOLD, *supra*.

Besides international precedent of referring to such territories as "disputed" instead of as "occupied," Security Council Resolution 242—an important written instrument underlying the process of territorial negotiations between Israel and its Arab neighbors—also relies on similar neutral language. See S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg., at 8, U.N. Doc. S/RES/242 (1967). The resolution called on Israel to withdraw its forces "from territories" entered in self-defense during the June 1967 Six-Day War to "secure and

Whether it is called "terrorism," "an armed struggle against occupation," or "jihad," violent attacks by armed groups aimed at civilian populations and non-military targets constitute a new life-and-death challenge worldwide. To meet this challenge, states on the front lines in the global war on terrorism are taking defensive measures. These measures, designed to reduce the threat created by sustained waves of terrorism, include minefields, berms, trenches, buffer zones, barbed wire, sensors, sandbags, neutral zones, cement-filled pipelines, fences, and fortifications. Saudi Arabia, for example, is constructing a security barrier that includes cameras and other electronic sensing devices along its disputed border with Yemen that "is part of a larger plan to erect what will be an electronic surveillance system along the entire length of the Kingdom's frontiers . . . involving fencing, cameras and other electronic detection equipment."⁹ In 1999 Russian forces began digging a sixty-eight mile trench bounded by a barbed-wire fence and reinforced by surveillance towers to protect against attacks by Chechen rebels.¹⁰ Similarly, in response to Pakistani-supported terrorist infiltration,¹¹ India has been engaged in the construction of an electrified¹² security fence in disputed Kashmir that extends for

recognized boundaries." *Id.* By deliberately avoiding the expressions "the territories" or "all the territories," the Security Council did not prejudge the sovereignty over all these areas, thereby recognizing that Israel was entitled to control at least some of the territories to achieve defensible borders. See also GOLD, *supra*. The invitation to the Madrid Peace Conference declared Resolution 242 as its basis, see Letter of Invitation to the Madrid Peace Conference jointly issued by the United States and the Soviet Union (Oct. 30, 1991), as did the 1993 Declaration of Principles between Israel and the Palestinians, see Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, 32 I.L.M. 1525.

According to Ambassador Dore Gold, "[t]his deliberate language resulted from months of painstaking diplomacy. For example, the Soviet Union attempted to introduce the word 'all' before the word 'territories' in the British draft that became Resolution 242." Yet, the British U.N. Ambassador Lord Caradon "resisted these efforts . . . [Thus] there is no ambiguity about the meaning of the withdrawal clause contained in Resolution 242, which was unanimously adopted by the UN Security Council. . . . Britain's foreign secretary in 1967, George Brown, stated three years later that the meaning of Resolution 242 was 'that Israel will not withdraw from all the territories.'" GOLD, *supra*.

9. Michel Cousins, *Kingdom-Yemen Emergency Talks Set Over Border Fence*, ARAB NEWS, Feb. 10, 2004, <http://www.arabnews.com/services/print/print.asp?artid=39304&d>, (last visited Feb. 21, 2005); see also *Yemen Rejects Riyadh Building of a Wall on Its Borders*, ARABIC NEWS.COM, Feb. 2, 2004, <http://www.arabicnews.com/ansub/Daily/Day/040202/2004020212.html> (last visited Feb. 21, 2005).

10. See *Russia May Face New Chechen Conflict*, ASSOCIATED PRESS, July 8, 1999 [hereinafter *Russia May Face*].

11. See Ranjit Devraj, *India Pursues Fence Construction in Kashmir*, MANILA TIMES, Dec. 8, 2003, <http://www.manilatimes.net/national/2003/dec/08/yehey/opinion/20031208opi6.html> (last visited Feb. 21, 2005).

12. See *id.*

hundreds of miles.¹³ Fences and other barriers have also been constructed for other reasons in many other parts of the world. Thus, for example, the United States has built a barrier between it and Mexico as part of the struggle to control illegal immigration and drug trafficking, [s]ome sections [of which] are concrete, others sheet metal. The barrier is three layers deep in parts, fifteen-feet high, and surrounded by razor wire. The area around it is lit by searchlights, monitored by cameras, motion detectors, and magnetic sensors, and patrolled by armed guards with attack dogs.¹⁴

For similar reasons, an electrified fence ten¹⁵ to twelve¹⁶ feet high is currently under construction between Botswana and Zimbabwe,¹⁷ and is expected eventually to "snake across 300 miles of desert scrub."¹⁸ This Article discusses in detail these as well as many other examples of barriers.

While such barriers are rarely covered or even mentioned in the media, the security barrier under construction today by Israel is currently the focus of much of the world's attention. The United Nations Security Council (Security Council) not long ago considered a draft resolution¹⁹ claiming that Israel's barrier violates international law and that its construction "must be ceased and reversed."²⁰ The draft resolution was defeated.²¹ Then, on October 21, 2003, the United Nations General Assembly (General Assembly) adopted a resolution that "demanded 'Israel stop and reverse

13. See *id.*; see also United Press International, *India to Continue Building Security Fence*, (Jan. 19, 2004), at <http://feeds.bignewsnetwork.com/?sid=E01e8eea93949560> (last visited Feb. 21, 2005) [hereinafter *India to Continue*]; Raul Singh, Gen. Vij: Fencing Along the LoC Going on Well, TIMES OF INDIA, Nov. 9, 2003, <http://timesofindia.indiatimes.com/articleshow/273981.cms> (last visited Mar. 10, 2005); *We Have Right to Build Defenses in J&K: India*, THE HINDU, Feb. 6, 2005, www.hinduonnet.com/2001/04/04/stories/01040003.htm (last visited Feb. 21, 2005).

14. James S. Robbins, *When Bad Neighbors Require Good Fences*, NAT'L REV. ONLINE, Aug. 1, 2003, <http://www.nationalreview.com/robbins/robbins080103.asp> (last visited Feb. 21, 2005); see also LATIN AMERICA WORKING GROUP, UNITED STATES BORDER PATROL: MEXICO-ARIZONA BORDER FENCING PROJECT: FACTS ABOUT THE FENCE (n.d.), <http://www.lawg.org/docs/what%20is%20the%20fence.pdf> (last visited Feb. 21, 2005).

15. John Murphy, *In Botswana, Border Turns Electric*, BALT. SUN, Nov. 25, 2003.

16. *Botswana-Zimbabwe Fence Row*, BBC NEWS WORLD EDITION, Sept. 2, 2003, <http://news.bbc.co.uk/2/hi/africa/3201609.sum> (last visited Feb. 21, 2005).

17. See *id.*

18. Murphy, *supra* note 15.

19. *Annex to the Letter Dated 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations Addressed to the President of the Security Council: Draft Resolution*, U.N. SCOR, U.N. Doc. S/2003/973 (2003).

20. *Id.*

21. See U.N. SCOR, 4841st mtg., U.N. Doc. S/PV.4841; U.N. SCOR, 4842d mtg., U.N. Doc. S/PV.4842 (cited in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ___, 43 I.L.M. 1009, para. 20 (July 9)).

the construction of the wall in the Occupied Palestinian Territory.'²² Subsequently, in a controversial move, the General Assembly on December 8, 2003, requested the International Court of Justice (ICJ) to render an advisory opinion²³ on "the legal consequences arising from the construction of the wall being built by Israel."²⁴ Consequently, the ICJ took up the case to issue a non-binding advisory opinion, and, in its *Order Organizing the Proceedings*, specifically stipulated that "it is incumbent upon the Court to take all necessary steps to accelerate the procedure" on the matter.²⁵ In early 2004 the ICJ held public oral hearings.²⁶ In addition, numerous and lengthy written statements were submitted.²⁷ On July 9, 2004, the ICJ ruled, among other things, that the separation barrier was being built "contrary to international law," that "Israel is under an obligation . . . to cease forthwith the works of construction of the wall," and that "Israel is under an obligation to make reparation for all damage caused by the construction of the wall. . . ."²⁸ Subsequently, the General Assembly passed a resolution on July 20, 2004, in support of the ICJ's decision, which called on Israel to "comply with its legal obligations as mentioned in the advisory opinion."²⁹

22. G.A. Res. ES-10/13, U.N. GAOR, 10th Emergency Spec. Sess., 23rd mtg., at 2, U.N. Doc. A/RES/ES-10/13 (2003) (cited in Legal Consequences of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ___, 43 I.L.M. 1009, para. 21 (July 9)).

23. According to the U.N. Charter, "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." U.N. CHARTER art. 96(1).

24. G.A. Res. ES-10/14, U.N. GAOR, 10th Emergency Spec. Sess., 23rd mtg., U.N. Doc. A/ES-10/L (2003); see also Legal Consequences of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ___, 43 I.L.M. 1009 (July 9) (citing Resolution ES-10/14). Israel's Ambassador to the United Nations, Dan Gillerman, declared the vote (90 nations in favor, 8 opposed, and 74 abstentions) a "moral victory"; fewer than half of the delegates in the General Assembly had actually voted in favor of the resolution and "most of the world's enlightened democracies" did not support it. Julie Stahl, *Israel: UN Engaged in 'Moral Relativism'*, CYBERCAST NEWS SERVICE, Dec. 9, 2003, <http://www.cnsnews.com/ViewForeignBureaus.asp?Page=ForeignBureaus/archive\200312\FOR20031209b.html> (last visited Feb. 21, 2005).

25. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2003 I.C.J. 131 (Dec. 10) (request for advisory opinion).

26. See Legal Consequences of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ___, 43 I.L.M. 1009, para. 5 (July 9).

27. See *id.*

28. See *id.*; Aluf Benn, *The Judges in the International Court at the Hague: The Fence is Not Legal, Must Dismantle It and Compensate the Palestinians*, HA'ARETZ, July 9, 2004, at 1A.

29. G.A. Res. ES-10/15, U.N. GAOR, 10th Emergency Spec. Sess., 27th mtg., U.N. Doc. A/RES/ES-10/15 (2004); see also Herb Keinon & Melissa Radler, *Israel Slams Europeans for UN Fence Vote*, JERUSALEM POST, July 22, 2004, <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/Printer&cid=1090208241013&p=1078027574121> (last visited Feb. 21, 2005).

Just as the media has, for the most part, ignored comparisons to barriers erected by other countries, it likewise has almost completely neglected to consider historical comparisons to barriers erected by earlier governments in the land that is today contested by Israel and the Palestinians. A review of this history, and of similar historical examples from elsewhere, aids in understanding the instinct for barrier construction in the Middle East and beyond.

Why has this barrier, so similar to others found in many parts of the world, been enveloped in such controversy? Certainly its political and societal ramifications have engendered intense attention. Lacking, however, has been a rigorous analysis of the relevant international law, and in particular, the applicable laws of armed conflict. This Article, containing many interviews with senior Israeli and Palestinian officials, comprehensively identifies comparative issues and aspects of international law arising from Israel's construction of the security barrier. It considers and evaluates the factual circumstances and the motivations of both proponents and opponents of this highly controversial project that has become the focus of great concern around the world.

Following this introduction,³⁰ Section II³¹ examines the global context of security and other barriers, including those erected in disputed territory in response to terrorist violence. Section III³² discusses the history of fortifications in the Holy Land and the contemporary use of barriers by Israel. Section IV³³ describes the design and construction of the current Israeli security barrier, while Section V³⁴ analyzes legal arguments pertaining to the laws of warfare and the law of belligerent occupation, particularly as they relate to the restriction of movement and the seizure and destruction of property. The necessary legal, historical, and political context having been considered, Section VI³⁵ then addresses the roles of the United Nations and the ICJ and various issues these institutions have examined. Section VII³⁶ presents the conclusions and outlook of the Authors.

30. Authored jointly by Feinstein and Weiner.

31. Authored jointly by Feinstein and Weiner.

32. Authored by Weiner.

33. Authored by Weiner. Weiner was also responsible for all the interviews conducted for this Article.

34. Authored by Feinstein.

35. Authored by Weiner.

36. Authored jointly by Feinstein and Weiner.

II. SECURITY BARRIERS IN A GLOBAL CONTEXT

Israel is not alone in turning to the construction of a physical barrier in an effort to protect its citizens from lethal attacks by a hostile neighboring population. Contemporary and historical comparisons abound. Many states have similarly created barriers to thwart the infiltration of terrorists, while others designed obstructions to impede smuggling or illegal immigration, which are increasingly deemed tantamount to threats against a state's national security. Some countries intended such hindrances to carry out multiple purposes. These barriers necessarily restrict the movement of people across borders or in areas adjacent thereto, and some enclose them within restricted areas, with ensuing inconvenience. Construction of these barriers, moreover, often requires the taking of privately-owned property.

As demonstrated below, such barriers exist all over the world, and many of them, particularly those constructed for security purposes, have been erected in disputed territories and/or along contentious, controversial or uncertain borders. Some examples of these various barriers follow to illustrate their proliferation and dispersion.

A. Barriers Designed as Security Measures to Prevent Terrorist Infiltration that are Constructed in Disputed Territory or Along Contentious, Controversial, or Uncertain Borders

1. India's Barrier Between India and Pakistan

The province of Kashmir, located between Pakistan and India, is claimed by both countries and has been fought over in multiple wars since it was divided between the two in 1947.³⁷ Following at least 30,000 deaths in Kashmir combat over the last fifteen years,³⁸ and as one element in a tiered scheme of ground sensors, thermal

37. See Randeep Ramesh, *Divided by War, Kashmir Pins Hopes on Summit*, GUARDIAN UNLIMITED, Dec. 29, 2003, <http://www.guardian.co.uk/kashmir/Story/0%2C2763%2C1113445%2C00.html> (last visited Feb. 21, 2005); Deepak Mahaan, *Pakistani President's Remarks Draw Criticism From India*, CYBERCAST NEWS SERVICE, Mar. 3, 2003, <http://new.cnsnews.com/ViewForeignBureaus.asp?Page=ForeignBureaus\archive\200303\FOR200303031.html> (last visited Feb. 21, 2005); Gary Fitleberg, *India Builds Security & Separation Fence While Israel Stands Trial at ICJ*, PAKISTAN TODAY, Feb. 27, 2004, (on file with The George Washington International Law Review); N.K. Pant, *Indo-Pak Standoff-Origins and Dangerous Manifestations*, (reviewing SUMIT GANGULY, CONFLICT UNENDING: INDIA-PAKISTAN TENSIONS SINCE 1947 (2002)), <http://www.indolink.com/Book/book83.html> (last visited Feb. 21, 2005).

38. See Ramesh, *supra* note 37. Other sources double this death toll. See Fitleberg, *supra* note 37.

imagery, and night vision equipment, as well as mines,³⁹ the Indian government decided to build a US\$2.5 billion⁴⁰ security fence. When completed, the fence will stretch over 462 miles⁴¹ along the controversial 1972 Line of Control (LoC) bisecting Kashmir.⁴² Built⁴³ out of concrete and razor wire, and reinforced with electronic sensors, the fence is designed to deter terrorist attacks emanating from Pakistan against India and its people.⁴⁴

The Indian security fence is thus part of a system⁴⁵ to prevent Pakistan-trained terrorists, who are determined to obtain supremacy over the disputed region of Kashmir by force,⁴⁶ from infiltrating. "Why should we wait for them to come in and attack our people?" queries the head of India's Jammu and Kashmir Border Security Force.⁴⁷ Pakistan "has no intentions to dismantle the infrastructure of terrorists and stop Pakistan from serving as a platform for international terrorists," according to India's External Affairs Ministry.⁴⁸

The Indian barrier also consists of a mud wall ten-feet high, being built at nighttime to evade gunfire from Pakistan. In daytime Indian troops labor behind the wall.⁴⁹ The wall, and the three-

39. See Devraj, *supra* note 11.

40. See *id.*

41. See *id.*; see also India to Continue, *supra* note 13.

42. See Press Trust of India, *Indian Fence Along LoC Violates Agreements: Pakistan* (Dec. 7, 2003), <http://in.rediff.com/news/2003/dec/07pak1.htm> (last visited Feb. 21, 2005); Devraj, *supra* note 11; Sam Ser, *Others Building Fences in Disputed Areas*, JERUSALEM POST, Feb. 22, 2004, at 3; see also Fitleberg, *supra* note 37.

43. Helping the Indians construct their fence is Israel's Magal Security Systems Ltd., which provides India with motion detector and camera technology, and is involved in building the similar security fence that protects Israel from Palestinian terrorists. See Manjeet Kripalani & Neal Sandler, *Building Fences—And Growing Closer: From Security to Information Technology, Business Ties Between Israel and India are Proliferating*, BUSINESSWEEK, Feb. 23, 2004, at 22.

44. See Fitleberg, *supra* note 37.

45. See Devraj, *supra* note 11; Rama Lakshmi, *India's Border Fence Extended to Kashmir: Country Aims to Stop Pakistani Infiltration*, WASH. POST, July 30, 2003.

46. See Somini Sengupta, *The India-Pakistan Tension: Border Post Journal; With Wrath and Wire, India Builds a Great Wall*, N.Y. TIMES, Jan. 2, 2002, at A4.

47. Lakshmi, *supra* note 45.

48. Mahaan, *supra* note 37; see also Devraj, *supra* note 11.

49. See Lakshmi, *supra* note 45.

tier,⁵⁰ eight-foot-high,⁵¹ electrified,⁵² razor wire⁵³ security fence, are being constructed along the disputed region's border,⁵⁴ overlooked by floodlights twenty-five feet high,⁵⁵ to hinder Islamic militants from infiltrating into India from the part of Kashmir under Pakistani control.⁵⁶ Although reports point out that the Indian government does not consider the fence to be permanent,⁵⁷ Pakistan has repeatedly condemned its construction⁵⁸ because, among other reasons, it claims that Kashmir is disputed territory⁵⁹ and that various international agreements between the two sides forbid permanent changes in the area⁶⁰ until a final resolution of the conflict is achieved.⁶¹ The disputed region is populated primarily by Muslims,⁶² and is incidentally the only Indian state with a Muslim majority.⁶³ Local villagers complain that the security fence, together with land mines, have "swallowed up acres of fertile farmland"⁶⁴ and that they have yet to see any compensation for their confiscated lands.⁶⁵

2. Morocco's Barrier in Western Sahara

In 1884 Spain began colonizing Western Sahara,⁶⁶ an area lodged between Mauritania and Morocco along the coast of West-

50. *See id.*

51. *See id.*; Ramesh, *supra* note 37.

52. *See* Devraj, *supra* note 11; *India Detects Pakistan Border Tunnel*, BBC NEWS (Jan. 13, 2003), http://news.bbc.co.uk/1/hi/world/south_asia/2652155.stm (last visited Feb. 21, 2005).

53. *See India Building Fence Along Disputed Kashmir Border*, NAT'L PUBLIC RADIO, Apr. 12, 2004 (audio recording), <http://www.npr.org/templates/story/story.php?storyId=1833998> (last visited Feb. 21, 2005) [hereinafter *India Building Fence*]; Devraj, *supra* note 11.

54. *See India Building Fence*, *supra* note 53.

55. *See* Sengupta, *supra* note 46.

56. *See India Continues Security Fence*, BBC WORLD EDITION, Jan. 18, 2004, http://news.bbc.co.uk/2/hi/south_asia/3406997.stm (last visited Feb. 21, 2005); Ramesh *supra* note 37; *India to Continue*, *supra* note 13; Devraj, *supra* note 11; Lakshmi, *supra* note 45.

57. *See* Devraj, *supra* note 11.

58. *See India Continues Security Fence*, *supra* note 56; Devraj, *supra* note 11.

59. *See* Lakshmi, *supra* note 45.

60. *See* Devraj, *supra* note 11; Lakshmi, *supra* note 45.

61. *See* Devraj, *supra* note 11.

62. *See* Lakshmi, *supra* note 45; Sengupta, *supra* note 46.

63. *See* Lakshmi, *supra* note 45.

64. *See* Sengupta, *supra* note 46; *see also* Lakshmi, *supra* note 45; *Refugees in Their Own Land*, THE HINDU, Jan. 6, 2002, <http://www.hinduonnet.com/thehindu/2002/01/06/stories/2002010600661400.htm> (last visited Feb. 21, 2005).

65. *See* Sengupta, *supra* note 46. Although according to another report filed at about the same time, there was an offer of compensation for land rendered inaccessible. *See Refugees in Their Own Land*, *supra* note 64.

66. *See* Western Sahara, 1975 I.C.J. 12, para. 77 (Oct. 16) (advisory opinion).

ern Africa.⁶⁷ As a result the area eventually became known as the "Spanish Sahara."⁶⁸ Apparently at the outset of the colonization of the area by Spain there existed legal connections of allegiance between the Moroccan Sultan and some of the indigenous Western Saharan tribes, as well as legal connections between Mauritania and Western Sahara regarding some land and other rights. Yet, according to the ICJ, these connections were not such as might create a territorial sovereignty link between Western Sahara and either Morocco or Mauritania, and moreover these links would not affect the decolonization of Western Sahara and especially the self-determination principle through the authentic and free manifestation of the Western Saharan inhabitants' will.⁶⁹ In 1955 Morocco received its independence from France, and in the 1960s Spain began exploiting the phosphate resources discovered in the Western Sahara.⁷⁰

In 1975, despite the ICJ's denial of Morocco's claim over Western Sahara and its holding that the local inhabitants should be granted self-determination, Morocco invaded the region on the threshold of Western Sahara's planned independence from its colonial ruler, Spain.⁷¹ When Spanish colonial forces departed in 1976, Morocco proceeded to take control of the northern two-thirds of Western Sahara while Mauritania took over the southern third.⁷² A conflict ensued that at the outset involved Mauritania, Morocco, and Frente Polisario, or the Polisario Front.⁷³ Mauritania

67. *See* Michael Bhatia, *Western Sahara Under Polisario Control: Summary Report of Field Mission to the Sahrawi Refugee Camps (near Tindouf, Algeria)*, 28 REV. OF AFRICAN POL. ECON. 291 (2001).

68. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, WESTERN SAHARA (2005), <http://www.cia.gov/cia/publications/factbook/geos/wi.html> (last visited Mar. 10, 2005).

69. *See* Western Sahara, 1975 I.C.J. 12 (Oct. 16).

70. THE UNITED NATIONS FAILURE IN SOUTHERN MOROCCO, GLOBALSECURITY.ORG (1997), <http://www.globalsecurity.org/military/library/report/1997/Said.htm> (last visited Feb. 21, 2005) [hereinafter *FAILURE IN SOUTHERN MOROCCO*].

71. *See* Ian Williams & Stephen Zunes, *Self-Determination Struggle in the Western Sahara Continues to Challenge the U.N.*, FOREIGN POL'Y IN FOCUS, Sept. 2003, <http://www.fpif.org/papers/sahara2003.html> (last visited Feb. 21, 2005); *see also* Stefan Armbruster, *Oil: Western Sahara's Future*, BBC NEWS, Mar. 4, 2003, <http://news.bbc.co.uk/1/hi/business/2758829.stm> (last visited Feb. 21, 2005).

72. *See* Bhatia, *supra* note 67; *FAILURE IN SOUTHERN MOROCCO*, *supra* note 70; *see also* Toby Shelley, *Behind the Baker Plan for Western Sahara*, MIDDLE EAST REPORT ONLINE, Aug. 1, 2003 (articulating the various political positions of the Polisario Front, Morocco, Algeria, Mauritania, and the United States with respect to former Secretary of State James Baker's proposal for resolving the Western Sahara dispute), <http://www.merip.org/mero/mero080103.html> (last visited Feb. 21, 2005).

73. The Polisario Front, also known as the Popular Front for the Liberation of Saguia el Hamra and Rio de Oro, *see* INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 1999: WESTERN SAHARA (1999), http://www.icbl.org/lm/1999/western_sahara.

ended its role in the conflict in 1979, making peace with the Polisario Front⁷⁴ and abandoning its control over Western Sahara in favor of Morocco.⁷⁵ Since then, the sovereignty of Western Sahara has been the subject of a bitter dispute between the Polisario Front and Morocco, whose forces had been fighting each other on and off from 1975 until a cease-fire took effect in 1991⁷⁶ with the deployment in the area of the peacekeeping United Nations Mission for a Referendum in Western Sahara (MINURSO).⁷⁷ The dispute has resulted in tens of thousands of Western Saharan refugees fleeing to neighboring Algeria, as well as to other countries.⁷⁸

In reaction to Morocco's invasion of Western Sahara,⁷⁹ the Security Council in late 1975 passed Resolutions 379⁸⁰ and 380,⁸¹ which unequivocally demanded that Morocco withdraw from the Western Sahara. Ignoring these resolutions, Morocco began building the first in a series of defensive walls in 1981, six years into its armed conflict with the Polisario. Morocco eventually constructed a total of six such walls—called "berms"⁸²—to preserve Morocco's control and occupation of Western Sahara.⁸³ These defensive berms consist of twelve-foot high walls⁸⁴ approximately 750 miles in

html (last visited Feb. 21, 2005), is a militant movement that seeks independence for Western Sahara. See, e.g., WESTERN SAHARA ONLINE, POLISARIO FRONT, (n.d.), <http://www.wsahara.net/polisario.html> (last visited Feb. 21, 2005).

74. See LANDMINE MONITOR REPORT 1999, *supra* note 73.

75. See FAILURE IN SOUTHERN MOROCCO, *supra* note 70.

76. See *id.*

77. See INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2002: WESTERN SAHARA (2002), http://www.icbl.org/lm/2002/western_sahara.html (last visited Feb. 18, 2004).

78. See LANDMINE MONITOR REPORT 1999, *supra* note 73.

79. See Williams & Zunes, *supra* note 71.

80. S.C. Res. 379, U.N. SCOR, 30th Sess., 1854th mtg., U.N. Doc. S/RES/379 (1975).

81. *Id.*

82. INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2003: WESTERN SAHARA (2003), http://www.icbl.org/lm/2003/western_sahara.html (last visited Feb. 18, 2004); LANDMINE MONITOR REPORT 2002, *supra* note 77; LANDMINE MONITOR REPORT 1999, *supra* note 73.

83. See Carolyn Culver, *Arms to Morocco Challenge*, RED PEPPER, Nov. 2001, at 7.

84. See LANDMINE MONITOR REPORT 2003, *supra* note 82; LANDMINE MONITOR REPORT 2002, *supra* note 77; LANDMINE MONITOR REPORT 1999, *supra* note 73.

length by some reports⁸⁵ and up to 1375 miles⁸⁶ or more⁸⁷ according to others. The berms have a backing trench along topographical high points such as hills and ridges,⁸⁸ and are reinforced with between one million and two million anti-personnel and anti-tank mines to further strengthen their effect.⁸⁹

According to reports from the area, some of the mines along the berms are booby-trapped or fortified, at times with canisters containing liquefied petroleum gas.⁹⁰ Mines are situated in the immediate vicinity of the defensive berms, both to the west as well as to the east of it,⁹¹ yet the danger zone is said to intrude east of the defensive berms up to six miles in some places. Despite the existence of some unreliable maps of the minefields, the typical sand, wind, and sometimes heavy rains in the desert often cause the mines to shift position, making their detection extremely difficult.⁹²

Morocco has set up heavy gun emplacements along the berm,⁹³ as well as equipped it with special sensory devices intended to thwart the infiltration of Polisario personnel into Moroccan-held areas.⁹⁴ Every three miles or so there are observation posts manned by thirty-five to forty Moroccan soldiers, with groups of approximately ten soldiers spread out between these posts. About 2 to 2.5 miles to the rear of each main post there are tanks and other equipment comprising a rapid deployment force.⁹⁵ Morocco has placed both mobile as well as stationary radar units in a chain along the berm, with a detection distance into the territory under

85. See BUREAU OF POLITICAL-MILITARY AFF., U.S. DEP'T OF STATE, WALK THE EARTH IN SAFETY: THE UNITED STATES COMMITMENT TO HUMANITARIAN DEMINING, APPENDIX F: HIDDEN KILLERS 2001—THE WORLD'S LANDMINE PROBLEM (2001), <http://www.state.gov/t/pm/rls/rpt/hk/2001/6961.htm> (last visited Feb. 18, 2004) [hereinafter HIDDEN KILLERS].

86. See Bhatia, *supra* note 67.

87. According to Fatimetou Mofdh Sidi, of the International Youth and Student Movement for the United Nations, Morocco's electric fence is 1562 miles long. See Press Release, United Nations Commission on Human Rights, Commission on Human Rights Adopts Resolutions on Self-Determination in Western Sahara, Palestine (Apr. 6, 2001) (referring to the fence as "2,500 kilometres long").

88. See Bhatia, *supra* note 67.

89. See LANDMINE MONITOR REPORT 1999, *supra* note 73.

90. See LANDMINE MONITOR REPORT 2003, *supra* note 82; LANDMINE MONITOR REPORT 2002, *supra* note 77; LANDMINE MONITOR REPORT 1999, *supra* note 73.

91. See HIDDEN KILLERS, *supra* note 85.

92. LANDMINE MONITOR REPORT 1999, *supra* note 73.

93. See Culver, *supra* note 83.

94. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, A COUNTRY STUDY: MAURITANIA: GLOSSARY (n.d.), http://lcweb2.loc.gov/frd/cs/mauritania/mr_glos.html (last visited Feb. 21, 2005).

95. See Bhatia, *supra* note 67.

Polisario control ranging between some thirty-seven and fifty miles. Morocco uses this radar to guide artillery fire against detected Polisario units.⁹⁶

Over the course of the 1980s Morocco completed the "defensive berm," essentially sealing off the northwestern and most of the southern areas of Western Sahara, and also consolidating Moroccan-held areas from north to south,⁹⁷ physically separating the eastern area under the control of the Polisario.⁹⁸ Through the middle of the Sahara Desert, the defensive wall extends the length of the border between Algeria and the part of Western Sahara under Moroccan control.⁹⁹ It is interesting to note that U.N. discussion and consideration of the "berms" do not include condemnation of it.¹⁰⁰

Since 1975 about 200,000 Moroccan colonists have settled the western area, which contains a population of some 65,000 indigenous inhabitants.¹⁰¹ This region is subject to the "administering authority" of Morocco,¹⁰² which now controls over ninety percent of Western Sahara,¹⁰³ referred to by Morocco as "the Sahara provinces."¹⁰⁴ Moreover, the area is rich in mineral resources,¹⁰⁵ which, according to some reports, is the main reason for the invasion of the area by the energy-deficient Moroccans.¹⁰⁶

3. Saudi Arabia's Barrier Between Saudi Arabia and Yemen

Saudi Arabia and Yemen are embroiled in a dispute concerning a Saudi security barrier on their mutual frontier, which itself was in dispute between the two countries for over six decades.¹⁰⁷ Built

96. See *id.*

97. See LANDMINE MONITOR REPORT 1999, *supra* note 73.

98. See Bhatia, *supra* note 67.

99. See Pascale Harter, "Africa's Last Colony," BBC NEWS, Oct. 21, 2003, <http://news.bbc.co.uk/1/hi/world/africa/3208012.stm> (last visited Feb. 21, 2005).

100. See Press Release, U.N. Security Council, Unanimously Adopting Resolution 1263 (1999), Security Council Extends Minurso Mandate Until 14 December (Sept. 13, 1999), <http://www.un.org/News/Press/docs/1999/19990913.sc6726.doc.html> (last visited Feb. 21, 2005).

101. See Bhatia, *supra* note 67; Ian Urbina, *The Other Mideast Settlers*, THE MIDDLE EAST RESEARCH AND INFORMATION PROJECT, July 12, 2001, http://www.merip.org/newspaper_opeps/IA-Other-MidEast-Settlers.html (last visited Feb. 21, 2005).

102. See Bhatia, *supra* note 67.

103. *Id.*

104. See Williams & Zunes, *supra* note 71.

105. See Armbruster, *supra* note 71.

106. *Id.*

107. See Brian Whitaker, *Saudi Security Barrier Stirs Anger in Yemen*, THE GUARDIAN, Feb. 17, 2004, at 12; see also YOTAM FELDNER, THE SAUDI SEPARATION FENCE (The Middle East

along an uncertain border¹⁰⁸ some 1125 miles long,¹⁰⁹ the Saudi security barrier is designed as one element in an electronic surveillance apparatus on the frontier. The estimated cost of the barrier is US\$8.57 billion,¹¹⁰ and according to some reports, it may encroach up to four miles into Yemeni territory.¹¹¹ The building of the barrier immediately enraged the Yemeni Shi'ite Wayilah tribe, which disputes the border that Saudi Arabia demarcated with its fence.¹¹² The barrier, essentially a chain-link fence containing segments made of concrete, possesses electronic surveillance equipment as well as cameras,¹¹³ all of which Saudi Arabia maintains are designed to curb the flow of weapons and terrorists from neighboring Yemen.¹¹⁴ Initially, though, Saudi Arabia seemed to deny the nature of the fence it was constructing. In February 2004 Saudi officials stated to the London Arabic-language daily *Al-Sharq Al-Awsat* that the "barrier of pipes and concrete" could in no way be called a 'separation fence.'¹¹⁵

It is reported that Saudi Arabia confiscates contraband weapons from Yemen on a nearly daily basis.¹¹⁶ In December 2003 Saudi Arabia announced that it had arrested in Najran province alone over 4,000 "infiltrators" and confiscated ammunition and weapons.¹¹⁷ Yemen provides a flourishing market for illicit weaponry, such as anti-aircraft and 85mm surface-to-surface missiles.¹¹⁸ These weapons, including dynamite, grenades, bazookas, and ammunition, have been used by Islamic extremists in terrorist attacks that

Media Research Institute Inquiry and Analysis Series No. 162, 2004), <http://memri.org/bin/articles.cgi?Page=archives&Area=IA&ID=IA16204> (last visited Feb. 21, 2005).

108. See Fitleberg, *supra* note 37.

109. See Cousins, *supra* note 9. Another source indicates that the Saudi Arabia-Yemen border is about 843 miles long. See *Yemen Rejects Riyadh Building of a Wall on its Borders*, *supra* note 9.

110. See John R. Bradley, *Saudi Arabia Enrages Yemen with Fence*, INDEPENDENT, Feb. 11, 2004, http://news.independent.co.uk/world/middle_east/story.jsp?story=490024 (last visited Feb. 21, 2005).

111. See Jonathan Gurwitz, *Blame Terror, Not Fence, For No Peace*, SEATTLE POST-INTELLIGENCER, Mar. 2, 2004, at B6; Feldner, *supra* note 107; Fitleberg, *supra* note 37.

112. Feldner, *supra* note 107.

113. See Fitleberg, *supra* note 37.

114. See Feldner, *supra* note 107.

115. *Id.* "What is being built within our borders," said Talal 'Anqawi, the Saudi Border Police commander, "is a barrier of pipes full of concrete, aimed at deterring infiltration and smuggling . . . This barrier does not in any way resemble a fence. The site chosen to establish it is located within sovereign Saudi territory." *Id.* Mash'al bin Abd Al-Aziz, the Saudi prince of Najran, also "denied that the barrier was a separation fence." *Id.*

116. See Whitaker, *supra* note 107; see also Fitleberg, *supra* note 37.

117. See Cousins, *supra* note 9.

118. See Bradley, *supra* note 110.

during 2003 alone accounted for hundreds of casualties within Saudi Arabia. Among the terrorist attacks carried out in Saudi Arabia was a bomb that exploded in a U.S. residential compound in the capital city of Riyadh, killing nine people.¹¹⁹ Those conducting terrorist attacks in Saudi Arabia include supporters of *al-Qa'ida*,¹²⁰ who use Yemen as their home base,¹²¹ crossing into Saudi Arabia to carry out the attacks.¹²² Unsurprisingly, Saudi Arabia therefore considers Yemen a security threat.¹²³

4. Spain's Fences Between Morocco and Spanish-African Cities of Ceuta and Melilla

Spain considers the cities of Ceuta and Melilla, each with a population of around 60,000,¹²⁴ as integral parts¹²⁵ of the Spanish homeland, despite the fact that they are not contiguously part of the Spanish mainland.¹²⁶ These Spanish enclaves comprise approximately thirty-two square kilometers combined.¹²⁷ Together they share a border approximately six miles in length with Morocco on one side, and with the Alboran/Mediterranean Sea, on the other.¹²⁸ Ceuta is located only eight miles south of the Spanish mainland, almost directly across the Strait of Gibraltar, on the tip of North Africa,¹²⁹ and Melilla is located on a peninsula¹³⁰ on the Moroccan coast some 200 miles to the east of Ceuta.¹³¹ Morocco claims Ceuta and Melilla and the land they occupy.¹³² "The situa-

119. See *id.*

120. See Whitaker, *supra* note 107.

121. See Bradley, *supra* note 110.

122. See Gurwitz, *supra* note 111.

123. See Bradley, *supra* note 110.

124. See Paul Reynolds, *Analysis: Spanish or Moroccan Land?*, BBC NEWS ONLINE, July 16, 2002, <http://news.bbc.co.uk/1/hi/world/europe/2131853.stm> (last visited Feb. 21, 2005). According to another report, the population of Ceuta is 79,000. See Kim Willsher, *Mustafa, the Swimming Fridge Smuggler, and His Macabre Pact*, TELEGRAPH, Oct. 19, 2003, <http://www.telegraph.co.uk/news/main.jhtml?xml=/News/2003/10/19/wmor19.xml&sSheet=/News/2003/10/19/ixworld.html> (last visited Feb. 21, 2005).

125. See Keith B. Richburg, *At Spain's Gate, Africans Dream of Europe*, WASH. POST, Mar. 28, 2001, at A1.

126. See Reynolds, *supra* note 124; see also *Spain's North African Enclaves*, BBC NEWS, July 19, 2002, <http://news.bbc.co.uk/1/hi/world/europe/2131636.stm> (last visited Feb. 21, 2005).

127. See *Spain's North African Enclaves*, *supra* note 126.

128. See Richburg, *supra* note 125, and accompanying map.

129. See Sara B. Miller, *Spain to Morocco's Child Migrants: Go Home*, CHRISTIAN SCIENCE MONITOR, May 2, 2003, at 7; Willsher, *supra* note 124.

130. See Emma Daly, *Disdain in Spain: New Wall for 'Fortress Europe'*, CHRISTIAN SCIENCE MONITOR, Aug. 27, 1998, at 1.

131. See Reynolds, *supra* note 124.

132. See, e.g., *id.*

tion of the occupied cities," stressed the Foreign Minister of Morocco, "is an anachronistic colonial fact from the beginning of the 16th century."¹³³

The increase in illegal immigration into Europe has been particularly worrisome for the European Union. Spain, and in particular Ceuta, is frequently seen as a weak link in attempts to stem this ever-expanding problem.¹³⁴ Thousands of Moroccans and sub-Saharan Africans yearly use these two cities as entry-ways to immigrate illegally into Spain and elsewhere in Western Europe.¹³⁵ For instance, there has been almost a 450 percent increase in the number of Moroccan minors entering Spain between 1998 and 2002.¹³⁶

On March 11, 2004, a massive terror attack hit the city of Madrid, killing over 190 and wounding over 1400.¹³⁷ The Spanish authorities have charged several Moroccans involved in the attack. The revelation that Jamal Ahmidan, the financial director of the Muslim fundamentalist group that apparently organized and carried out the attacks, was a Moroccan immigrant illegally living in Spain, underscores the growing terrorist threat posed by illegal immigrants.¹³⁸ Moreover, the European Union views its internal security as threatened by more "conventional" cross-border crime as well.¹³⁹ Therefore, in an effort to curtail this tide of illegal immigration from Morocco and other parts of Africa through Ceuta, which in the 1990s had turned into a European-African junction after the easing of intra-European Union border restrictions, the European Union subsidized a six-mile long, US\$300 million fence¹⁴⁰ of barbed wire¹⁴¹ to cordon off this Spanish enclave from Africa.¹⁴² The EU also provided most of the funding for another fence, a steel barrier at a cost of US\$35 million, separating Melilla

133. Frank Sholdice, *Spain Keeps Firm Grip on Its Outpost in North Africa*, IRISH TIMES, Jan. 28, 2003.

134. See Richburg, *supra* note 125.

135. See, e.g., MICHAEL PUGH, *EUROPE'S BOAT PEOPLE: MARITIME COOPERATION IN THE MEDITERRANEAN* (Institute for Security Studies Chaillot Paper No. 41, 2000), <http://www.iss-eu.org/chaillot/chaill41e.html> (last visited Feb. 21, 2005).

136. See Miller, *supra* note 129.

137. Elaine Sciolino, *10 Bombs Shatter Trains in Madrid, Killing 10*, N.Y. TIMES, Mar. 12, 2004, at A1.

138. See Dale Fuchs, *Spain Gives Details on Terror Cell; Drug Sales and Petty Criminals Contributed*, *Minster Says*, INT'L HERALD TRIB., Apr. 15, 2004, at 3.

139. See MALCOLM ANDERSON ET AL., *POLICING THE EUROPEAN UNION* 73 (1995).

140. See Miller, *supra* note 129; see also Willsher, *supra* note 124.

141. See, e.g., Sholdice, *supra* note 133.

142. See Willsher, *supra* note 124.

from Morocco, that is four miles in length¹⁴³ and ten feet high.¹⁴⁴ According to reports, this seven-square mile piece of Spanish sovereign territory is separated from the rest of the northern coast of Morocco "by two high-rise metal fences that stand about five yards apart and are topped by razor wire,"¹⁴⁵ guarded by police officers manning sentry posts along its length.¹⁴⁶ Another source describes both fences as consisting of "two rows of high wire barricades equipped with security cameras and fiber-optic sensors, with a road running between them for police patrols."¹⁴⁷ Because they are "magnets for illegal immigrants,"¹⁴⁸ these two Spanish cities on Morocco's northern coast have been surrounded by fences to reduce illegal migration.

5. Turkey's Barrier Between Greek and Turkish Cyprus

At the end of 1963, Nicosia, the capital of Cyprus, had become the setting for clashes between and riots of Turkish and Greek Cypriots. As part of British attempts to calm the situation and bring the two communities to a ceasefire, which Britain was to supervise, the confrontation line that would be the buffer zone between the Turkish and the Greek Cypriots was drawn in the color green on the map. This was thus the origin of the "green line" in Cyprus.¹⁴⁹

Following the designation of the "green line," inter-communal fighting continued at a low level, until 1974, when the military junta then governing Greece backed a coup in the (Greek) Republic of Cyprus that overthrew the president of Cyprus, Archbishop

143. See *Spain's North African Enclaves*, *supra* note 126.

144. See Jeff Howe, *The New Border Wars*, WIRED MAGAZINE, June 2003, http://www.wired.com/wired/archive/11.06/border_wars.html (last visited Mar. 10, 2005); AUSTRALIA TRAVEL VISA & IMMIGRATION SERVS., Spain: Building Border Fence (1998), http://www.australia-travel-visa-immigration.com/news/liechtenstein/aug_1998-13mn.asp (last visited Mar. 10, 2005).

145. See Richburg, *supra* note 125.

146. See *id.*

147. SPAIN: BUILDING BORDER FENCE, *supra* note 144. According to another source, "Melilla's wall" is reinforced with "spotlights, noise and movement sensors, and video cameras [connected] to a central control booth." Howe, *supra* note 144; see also Daly, *supra* note 130.

148. Reynolds, *supra* note 124.

149. See NICOSIA MUNICIPALITY, HISTORY OF NICOSIA: NICOSIA 1963 (n.d.), http://www.nicosia.org.cy/english/lefkosia_istoria_lefkosia1963.shtm (last visited Feb. 21, 2005); THE GREEN LINE (n.d.), <http://www.kypros.org/Lefkosia/line.htm> (last visited Feb. 21, 2005). The "green line" on Israel's map was drawn in much the same way, delineating the armistice line between Jordanian and Israeli troops following Israel's War of Independence. PALESTINE FACTS, ISRAEL 1948-1967: ISRAEL'S BORDERS (2005) (depicting map of Green Line, courtesy of Israel Ministry of Foreign Affairs), http://www.palestinefacts.org/pf_1948to1967_land_1948.php (last visited Mar. 10, 2005).

Makarios.¹⁵⁰ Various armed militias then began attacking Turkish Cypriots and threatened to oust the Turkish enclave. In response, Turkey sent in thousands of troops and dozens of tanks to protect the Turkish Cypriots.¹⁵¹ Greece and much of the international community saw this as "an invasion and an illegal occupation that continues today."¹⁵²

Turkish troops took up positions, enforcing the partition between the northern thirty-seven percent of the island that was Turkish,¹⁵³ and the south. Out of concern for their safety, Greek Cypriots who had been living in the north fled to the south, while Turkish Cypriots who had been living in the south fled north. During this period, the conflict reportedly left some 3000 people dead, while 200,000 Greek Cypriots,¹⁵⁴ and 50,000 Turkish Cypriots,¹⁵⁵ became "refugees in their own country."¹⁵⁶ A razor wire fence was erected,¹⁵⁷ and a buffer zone was created, over 110 miles in length and ranging in width from ten feet in Nicosia to four miles in Athienou. The buffer zone encompasses about three percent of the surface area of Cyprus¹⁵⁸ and is heavily reinforced with landmines.¹⁵⁹ It has been reported that Turkey has laid twenty-six minefields in the buffer zone, and the Greek-Cypriots have laid eleven more. There are minefields that extend even beyond the buffer zone as well.¹⁶⁰

The city's streets have . . . been cut in two by ugly roadblocks. A wall of sandbags and gun emplacements have split the city in

150. BBC NEWS, TIMELINE: CYPRUS: A CHRONOLOGY OF KEY EVENTS (2005), <http://news.bbc.co.uk/2/hi/europe/1021835.stm> (last visited Feb. 21, 2005); Deaglán de Bréadún, *Crossing the Green Line*, IRISH TIMES, at 4.

151. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, A COUNTRY STUDY: CYPRUS: THE TURKISH MILITARY INTERVENTION, JULY-AUGUST 1974 (n.d.), <http://lcweb2.loc.gov/frd/cs/cyoc.html> (last visited Mar. 10, 2005).

152. See Gerald Butt, *Cyprus' Quiet Crisis*, BBC NEWS, Dec. 3, 2001, <http://news.bbc.co.uk/1/hi/world/europe/1689365.stm> (last visited Feb. 22, 2005).

153. See *Crossing the Green Line*, *supra* note 150.

154. THE GREEN LINE, *supra* note 149; *Crossing the Green Line*, *supra* note 150.

155. *Crossing the Green Line*, *supra* note 150.

156. THE GREEN LINE, *supra* note 149.

157. *Id.*

158. See UNITED NATIONS PEACEKEEPING FORCE IN CYPRUS, FACTS & FIGURES (n.d.), <http://www.unficyp.org/Facts+figures/facts+fig.htm> (last visited Feb. 22, 2005); INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2004: CYPRUS (2004), <http://www.icbl.org/lm/2004/cyprus#fnB2549> (last visited Feb. 22, 2005).

159. See LANDMINE MONITOR REPORT 2004: CYPRUS, *supra* note 158; Butt, *supra* note 152; GLOBAL IDP PROJECT, PROFILE OF INTERNAL DISPLACEMENT: CYPRUS 13 (2003) (referring to the need to clear "mines in the buffer zone"), [http://www.db.idpproject.org/Sites/Idp-ProjectDb/idpSurvey.nsf/wCountries/Cyprus/\\$file/Cyprus+May+2003.doc](http://www.db.idpproject.org/Sites/Idp-ProjectDb/idpSurvey.nsf/wCountries/Cyprus/$file/Cyprus+May+2003.doc) (last visited Feb. 22, 2005).

160. See LANDMINE MONITOR REPORT 2004: CYPRUS, *supra* note 158.

two. In 1974, tanks extended the line outside the city, dividing the entire island in two. The Green Line is no longer a line on the map of Nicosia, it's a line on the whole map of Cyprus. A line on the map, grim barbed wire on the ground that you can touch and see every day, a tangible sign of occupation. Behind the barbed wire [are] the painful realities of invasion. . . .¹⁶¹

During the past twenty years efforts at reconciliation have alternated with periods of heightened conflict and violence along the buffer zone. Greek Cypriot leaders see the barrier as "a symbol of the inability of the internationally recognised government to exert its authority over the northern part of the island,"¹⁶² while the Turkish Cypriot community considers it "as a defensive line of protection."¹⁶³

6. Korean Barrier Between South Korea and North Korea

The Demilitarized Zone (DMZ) separating North Korea and South Korea, which crosses the 38th Parallel, is considered the world's most strongly reinforced border.¹⁶⁴ At any given time, roughly one million soldiers of the army of the Democratic People's Republic of Korea are involved in a standoff against the Republic of Korea's 600,000 troops, supported by an additional 37,000 U.S. soldiers.¹⁶⁵ The 2.5 mile wide¹⁶⁶ DMZ is demarcated by barbed wire fences, watchtowers, tank-traps, heavy weapons, and landmines.¹⁶⁷ The Korean DMZ is in fact one of the most intensely land-mined areas in the world.¹⁶⁸ Approximately 1.15 million landmines have been laid in the DMZ as well as in a controlled area located from three to twelve miles just beneath the DMZ's southern periphery called the Civilian Control Zone (CCZ) that together account for about 1368 million square meters that are mined.¹⁶⁹ New landmines were planted in this area controlled by

161. THE GREEN LINE, *supra* note 149.

162. Butt, *supra* note 152.

163. *Id.*

164. See Joe Havelly, *Korea's DMZ: 'Scariest Place on Earth'*, CNN HONG KONG, Aug. 28, 2003, <http://edition.cnn.com/2003/WORLD/asiapcf/east/04/22/koreas.dmz/> (last visited Feb. 22, 2005).

165. See *id.*

166. See Don Kirk, *Shots Fired Across DMZ by 2 Koreas*, INT'L HERALD TRIB., July 18, 2003, at 1; Havelly, *supra* note 164.

167. See Havelly, *supra* note 164.

168. See INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2002: REPUBLIC OF KOREA (2002), http://www.icbl.org/lm/2002/south_korea.html (last visited Feb. 22, 2005).

169. *Id.*

South Korea as recently as 1988.¹⁷⁰ Moreover, it has been reported that extensive use has been made of antipersonnel mines by the U.S. as well as South Korea to protect military facilities south of the CCZ and DMZ.¹⁷¹ According to the Korean Campaign to Ban Landmines, an estimated 1000 civilian casualties (including children), as well as 2000 to 3000 military casualties have been sustained.¹⁷² Thus far, both North¹⁷³ and South Korea¹⁷⁴ have refused to sign the 1997 Convention to Ban Landmines.¹⁷⁵ The enormous minefields likely will stay in place for the indefinite future, while the casualty toll continues to mount.

The 38th Parallel had originally served as the boundary between the Soviet and U.S. zones of occupation at the end of World War II, and thus served to create a frontier between the new states of pro-Soviet North and pro-U.S. South Korea. During the course of the Korean War from 1951 to 1953, in the ebb-and-flow of the conflict, the two sides reached a stalemate at a location that roughly corresponds to today's DMZ, demarcated in 1953 in the Korean War Armistice¹⁷⁶.

Throughout the past half-century North Korea has committed numerous violations of the DMZ.¹⁷⁷ North Korean operatives have attempted to infiltrate into the South by various means, including via tunnels dug underneath the DMZ. In the 1970s and 1980s, North Koreans were repeatedly discovered in such tunnels, often caught wearing South Korean army uniforms.¹⁷⁸ In addition, apparent attempts to infiltrate without having to cross the DMZ—by submarine, for instance—have ended in disaster for the North Koreans. In 1996 twenty-four North Korean commandos were

170. *Id.*

171. See INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2001: REPUBLIC OF KOREA (2001), http://www.icbl.org/lm/2001/south_korea/ (last visited Feb. 22, 2005).

172. See LANDMINE MONITOR REPORT 2002: REPUBLIC OF KOREA, *supra* note 168.

173. See INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2004: DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA (2004), http://www.icbl.org/lm/2004/north_korea (last visited Feb. 22, 2005).

174. *Id.*

175. See generally Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 241 (entered into force Mar. 1, 1999) [hereinafter Mine Ban Treaty].

176. See GREG BARBER, THE NEWSHOUR WITH JIM LEHRER, NORTH KOREA: NUCLEAR STANDOFF, THE DEMILITARIZED ZONE (n.d.), <http://www.pbs.org/newshour/bb/asia/northkorea/dmz.html> (last visited Feb. 22, 2005).

177. See Rick Atkinson, *Hostility Along Korean DMZ Vented in a Battle over Trivia*, WASH. POST, May 16, 1984, at A16.

178. *Id.*

killed when their submarine ran aground on the South Korean coast, and in 1998 nine North Korean commandos were found dead in their mini-submarine, which had been caught near the coast of South Korea in fishing nets.¹⁷⁹

In July 2003, as diplomatic attempts were picking up to convince the North Korean government to participate in multilateral discussions regarding its nuclear weapons program, the North and South exchanged gunfire in the DMZ and in apparent violation of the Armistice.¹⁸⁰ A former officer of the South Korean Army, who had been briefly stationed at the DMZ, stated that both the North and South continually violate the Armistice by bringing heavy weapons into the DMZ. He also noted that while attempts to infiltrate the DMZ directly have decreased in recent years, the North Koreans continue to dispatch spies disguised as refugees to the South by way of China, because their prospects for crossing the DMZ are virtually nil.¹⁸¹ Joining the thousands of other North Korean refugees escaping famine and political repression, these spies are frequently able to evade detection by the South Korean authorities.¹⁸²

The North's numerous attempts at infiltration have made it clear to the South that the DMZ and the troop buildup are not simply a relic of a half-century old conflict but rather are necessary defensive measures against a rogue state with declared nuclear capabilities.¹⁸³ Senior intelligence sources indicate that North Korea is producing long-range ballistic missiles, which could threaten Asia and even parts of the United States.¹⁸⁴

179. See Shane Green, *Border Gunfight Adds to Korean Urgency*, SYDNEY MORNING HERALD, July 18, 2003, at 8.

180. See Kirk, *supra* note 166.

181. Interview by Michael Etedgui with a former officer of the South Korean Army, in Jerusalem (May 12, 2004).

182. *Id.*

183. See Phillip C. Saunders, *Confronting Ambiguity: How to Handle North Korea's Nuclear Program*, ARMS CONTROL TODAY, Mar. 2003, http://www.armscontrol.org/act/2003_03/saunders_mar03.asp#notes (last visited Feb. 22, 2005).

184. See Lauren Bemis, *Testing the Waters: U.S. Responds to Open Threats and Provocation by Pyongyang*, JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS, Mar. 27, 2003, <http://www.jinsa.org/articles/articles.html/function/view/categoryid/169/documentid/1953/history/3,2360,652,169,1953> (last visited Feb. 22, 2005).

B. *Other Barriers Designed as Security Measures to Prevent Terrorist Infiltration from Neighboring Countries*

1. *India's Fence Between India and Bangladesh*

When independence came to the Indian sub-continent in 1947,¹⁸⁵ tens of millions of Hindus were living in what is today Bangladesh and Pakistan, while at the same time tens of millions of Muslims were living in India. Most of the Hindus and Sikhs who were living in Bangladesh and Pakistan eventually escaped to India, while India's Muslims mostly remained where they were due in large part to the decent manner with which India related to its Muslim inhabitants compared to the blatant discrimination, both economic and political, as well as to vicious pogroms to which Hindus are subjected in Bangladesh and Pakistan.¹⁸⁶ According to some reports, roughly seventeen million people were affected by the partitioning of the Indian subcontinent,¹⁸⁷ while other reports discussing refugees place their number anywhere between twelve million to twenty-four million.¹⁸⁸ More recently, as many as twenty million illegal Muslim Bangladeshi immigrants have crossed over into India.¹⁸⁹

To curb terrorist infiltration and illegal immigrants, India recently constructed in sensitive areas along its 3000-mile long border with Bangladesh a security fence that covers almost thirty-five percent of the entire border,¹⁹⁰ that is, the "sensitive"¹⁹¹ third of the entire fencing project.¹⁹² According to some reports, the rest of

185. See Paul Watson, *The World Military Inc. Dominates Life in Pakistan*, L.A. TIMES, Oct. 7, 2002, at A3; CATHERINE REY-SCHIRR, *THE ICRC'S ACTIVITIES ON THE INDIAN SUBCONTINENT FOLLOWING PARTITION (1947-1949)* (Int'l Rev. of the Red Cross No. 323, 1998), <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList167/77D17430F8DD4940C1256B66005C0766> (last visited Feb. 22, 2005).

186. See Diana Appelbaum, *The Security Fence*, WAR TO MOBILIZE DEMOCRACY LLC, Dec. 15, 2003, <http://netwmd.com/articles/article345.html> (last visited Mar. 10, 2005).

187. See REY-SCHIRR, *supra* note 185.

188. See, e.g., ONWAR.COM, *PARTITION OF THE BRITISH INDIAN EMPIRE 1946-1947* (2000), <http://www.onwar.com/aced/chrono/c1900s/yr45/findia1946.htm> (last visited Feb. 22, 2005).

189. See Appelbaum, *supra* note 186; N.K. Pant, *Invasion from Bangladesh*, ORGANISER, Mar. 16, 2003, <http://www.organiser.org/16mar2003/page10.htm> (last visited Feb. 22, 2005).

190. *India Finishes Fence Along "Sensitive" Third of Bangladesh Border*, AGENCE FRANCE-PRESSE, Nov. 11, 2003 [hereinafter *India Finishes Fence*].

191. See *id.*

192. See Rajiv Sharma, *CCS Reviews Internal Security, Fencing on India-Bangladesh Border*, TRIB. (INDIA), Oct. 13, 2004, <http://www.tribuneindia.com/2004/20041014/main5.htm> (last visited Feb. 22, 2005).

the fence is expected to be completed by the year 2007,¹⁹³ while according to others it will be finished as early as 2006.¹⁹⁴ An important purpose of the security fence India is erecting is to deter the terrorist acts carried out by armed insurgents from various religious, ethnic, and tribal groups located in northeastern India. The objective is to make it more difficult for them to escape to neighboring Bangladesh, and thus avoid capture by Indian forces.¹⁹⁵ Some of these terrorist groups operate from Bangladesh,¹⁹⁶ greatly assisted by the border's permeability.¹⁹⁷ According to various reports, one group, the National Liberation Front of Tripura,¹⁹⁸ notorious for its vicious attacks, has alone been responsible for killing 900 people, kidnapping 1430, and forcing 59,000 from their homes.¹⁹⁹ India calculates that there are almost one hundred facilities that train terrorists in Bangladesh, which has not shut them down despite Indian requests to do so.²⁰⁰ India's security fence is therefore designed to thwart the perpetration of terrorist acts in India as well as to halt illegal immigration.²⁰¹

2. China's Fence Between China and Pakistan

China has been pleading with Pakistan since 1992 to curb militant activities conducted by fundamentalist Pakistani groups that include arms training of local radicals and inciting strife in China's Xinjiang region. As a consequence of the militant activities, China announced plans as early as 1997 to construct a security fence along its border with Pakistan designed to prevent Islamic extrem-

193. See *India Finishes Fence*, *supra* note 190.

194. See Sharma, *supra* note 192.

195. See Appelbaum, *supra* note 186.

196. See *India to Fence Part of Border With Bangladesh to Check Militants*, AGENCE FRANCE-PRESSE, Feb. 15, 2001, 2001 WL 2341908 [hereinafter *India to Fence Border*].

197. See *India Finishes Fence*, *supra* note 190.

198. See *India to Fence Border*, *supra* note 196.

199. See Appelbaum, *supra* note 186.

200. See *India Finishes Fence*, *supra* note 190.

201. See BORDER SECURITY FORCE, BORDER SECURITY FORCE PRESS RELEASE (n.d.), <http://www.bsfnic.in/prconf.htm> (last visited Feb. 22, 2005); BORDER SECURITY FORCE, HISTORY AND ROLE: BORDER FENCING/FLOOD LIGHTING/ROADS (n.d.), <http://bsfnic.in/introduction.htm> (last visited Feb. 22, 2005); *India to Fence Border*, *supra* note 196; Appelbaum, *supra* note 186. Bangladesh rejects the claim that its citizens are entering India in large numbers. It also disagrees with India's charges that it shelters terrorists. See Appelbaum, *supra* note 186. Furthermore, Bangladesh is upset with Indian attempts to connect almost forty Indian rivers in the framework of an elaborate scheme costing billions of dollars, a strategy Bangladesh contends would seriously impair its supply of water which is being diverted by India. See *India Finishes Fence*, *supra* note 190; Appelbaum, *supra* note 186.

ists from trafficking their fundamentalism in China and to curb drug couriers from infiltrating into China.²⁰²

3. Pakistan's Wall/Fence Between Pakistan and Afghanistan

According to reports, Pakistan is constructing a twenty-five-mile long wall/fence along its common border with Afghanistan.²⁰³ This security barrier is intended to curb *al-Qaeda* terrorists and Taliban fighters from entering into Pakistan from neighboring Afghanistan.²⁰⁴ Pakistani Major General Shaukat Sultan explained that the Pakistanis were setting up light towers and new checkpoints, and that "Pakistan does not need the permission from any other country to take security measures on the border specifically aimed at countering the scourge of terror."²⁰⁵

4. Thailand's Fence Between Thailand and Malaysia

While around the world many existing or planned separation fences and walls are disputed for various reasons, there are also barriers whose construction is supported by both sides.²⁰⁶ One such example is the security fence that Thailand is now planning to build along parts of its border with Malaysia.²⁰⁷ Both countries are home to Muslim populations and Muslim terrorist/separatist

202. See *China and the Taliban: Some Facts*, STRATEGIC AFF., Nov. 15, 2000, <http://www.stratmag.com/issue2Nov-15/page05.htm> (last visited Feb. 22, 2005).

203. See Amin Tarzi, *Pakistan Reportedly Building Fences to Stop Infiltrations into Afghanistan*, RADIO FREE EUROPE/RADIO LIBERTY AFGHANISTAN REPORT, Vol. 2, No. 38, Oct. 30, 2003, <http://www.rferl.org/reports/afghan-report/2003/10/38-301003.asp> (last visited Feb. 22, 2005); *Clashes Between Afghan and Pakistani Forces Reported as Islamabad Wants Tripartite Commission to Investigate Incident*, RADIO FREE EUROPE/RADIO LIBERTY NEWSLINE: SW. ASIA AND THE MIDDLE EAST, Vol. 7, No. 210, Nov. 5, 2003, <http://www.rferl.org/newsline/2003/11/6-SWA/swa-051103.asp> (last visited Feb. 22, 2005).

204. See Tarzi, *supra* note 203, (citing a report in the October 23, 2003 issue of the Pakistani newspaper THE NATION).

205. See *id.*

206. See, e.g., *Thailand to Build Security Fence Along Border with Malaysia*, AGENCE FRANCE-PRESSE, Feb. 17, 2004, 2004 WL 69946484 [hereinafter *Thailand to Build*]. "Malaysia commended the plan to build the fence, with [Malaysian] Deputy Defence Minister Shafie Apdal saying it would help security forces from both nations to tackle smuggling, illegal entry and other cross-border criminal activities. "They have a right to build the fence on their side. . . . It will be good," said the Deputy Defence Minister of Malaysia. *Id.*

207. See *Thailand to Build*, *supra* note 206; see also Sarosha Pornudoisak, *Security Issues Top Agenda of Meeting Between Malaysian and Thai PMs*, CHANNEL NEWSASIA, Jan. 16, 2004, <http://www.channelnewsasia.com/stories/southeastasia/view/66630/1/.html> (last visited Feb. 22, 2005).

groups,²⁰⁸ although Thailand is a principally Buddhist country.²⁰⁹ In addition, approximately 5000 people hold dual Thai-Malaysian citizenship.²¹⁰

The two states share a 316-mile border and are active trade partners, but are engaged in a dispute over a very small area at the Golok River's mouth.²¹¹ Recently southern Thailand, where the majority of the country's Muslim population lives,²¹² has suffered from a wave of Muslim separatist violence. Since January 2004 these separatists have killed more than fifty people, including government and security officials²¹³ as well as Buddhist monks.²¹⁴ The Thai government maintains that the perpetrators of these attacks cross the porous border that is situated along a narrow peninsula, and then slip back into Malaysia undetected after carrying them out.²¹⁵

Particularly hard hit by insurgency fomented by Islamic insurrectionists have been the three largely Muslim-populated Thai provinces located in the south of the country,²¹⁶ adjoining Malaysia.²¹⁷ Local sedition and subversion, it is suspected, is supported by insurgents traversing in and out of Thailand, from and to Malaysia, crisscrossing the permeable border through the jungle. These Islamic militants perpetrate terrorist attacks within Thailand and after-

208. See U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM—2003: EAST ASIA OVERVIEW (2004), <http://www.state.gov/s/ct/rls/pgtrpt/2003/31611.htm> (last visited Feb. 22, 2005).

209. See *Thailand to Build*, *supra* note 206.

210. See *id.*; see also Pornudomsak, *supra* note 207; John Burton, *Malaysia Rejects Thai Claims it Hides Islamic Militants*, FIN. TIMES, Apr. 8, 2004, at 2 (suggesting that those primarily responsible for terrorist attacks in Thailand hold dual Thai-Malaysian citizenship).

211. See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK: THAILAND (2005) <http://www.cia.gov/cia/publications/factbook/geos/th.html> (last visited Feb. 22, 2005).

212. See *Thailand to Build*, *supra* note 206; see also Pornudomsak, *supra* note 207.

213. See Burton, *supra* note 210.

214. See *Thailand to Build*, *supra* note 206.

215. See Burton, *supra* note 210; see also Pornudomsak, *supra* note 207; *Thailand to Build*, *supra* note 206.

216. See Pornudomsak, *supra* note 207; *Fencing out Troublemakers*, STRAITS TIMES (SING.), Feb. 19, 2004, 2004 WL 55598677.

217. See *Thailand to Build*, *supra* note 206.

wards are sheltered in Malaysia.²¹⁸ Smugglers and criminal elements are also playing a role in local agitation in Thailand.²¹⁹

In response to these security issues, Thailand announced in 2004 that it was planning to build a security fence along certain parts of its southern border with Malaysia. The fence will cover remote areas that Thai security forces cannot easily reach, and will be approximately sixty-two miles long.²²⁰ The fence is to be built out of concrete "at sensitive points" along the demarcation line between the two countries to prevent terrorists²²¹ and smugglers from infiltrating into Thailand.²²²

The Malaysian government recognizes Thailand's right to build the barrier.²²³ Thailand insists that the barrier would "help security forces from both nations to tackle smuggling, illegal entry and other cross-border criminal activities."²²⁴ The Malaysian army field commander echoed this sentiment, acknowledging that the security barrier "would also have a positive impact in the fight against terrorism."²²⁵

5. Uzbekistan's Fence Between Uzbekistan and Kyrgyzstan

The two largest Central Asian states, Kyrgyzstan and Uzbekistan, have been enmeshed in a complicated, drawn out border dispute for a number of years.²²⁶ Apparently Uzbekistan unilaterally delineated its border with neighboring Kyrgyzstan in a manner that essentially resulted in seizing considerable portions of farming land allegedly belonging to Kyrgyzstan. During Soviet rule this Kyrgyz land had been loaned to Uzbekistan on what was meant to

218. See *Thailand to Erect Security Fence Along Border with Malaysia*, ABC RADIO AUSTRALIA, Apr. 16, 2004, http://www.abc.net.au/ra/newstories/RANewsStories_1089281.htm (last visited Feb. 22, 2005) [hereinafter *Thailand to Erect*]; *Thailand Seeks Border Fences to Fend Off Militants*, REUTERS, Apr. 16, 2004 [hereinafter *Thailand Seeks Border Fences*]; *Fencing out Troublemakers*, *supra* note 216; Barani Krishnan, *Malaysia, Thailand Agree to Fight Terror*, REUTERS, Apr. 12, 2004; Burton, *supra* note 210; see also *Thailand to Build*, *supra* note 206.

219. See *Fencing out Troublemakers*, *supra* note 216; see also *Thailand to Build*, *supra* note 206.

220. *Thailand to Erect*, *supra* note 218.

221. See *Fencing out Troublemakers*, *supra* note 216; see also *Thailand to Erect*, *supra* note 218; *Thailand Seeks Border Fences*, *supra* note 218.

222. See *Fencing out Troublemakers*, *supra* note 216.

223. See *id.*; *Thailand to Build*, *supra* note 206.

224. *Thailand to Build*, *supra* note 206.

225. Adenan Jahaya, *M'sia, Thailand to Enhance Intelligence Cooperation*, BERNAMA DAILY MALAYSIAN NEWS, Feb. 25, 2004, 2004 WL 56875391.

226. See Nick Megoran, *Bad Neighbors, Bad Fences*, RADIO FREE EUROPE/RADIO LIBERTY NEWSLINE, Mar. 15, 2000, <http://www.rferl.org/newsline/2000/03/5-not/not-130300.asp> (last visited Feb. 22, 2005).

be a temporary basis but was in the end never returned to Kyrgyzstan.²²⁷ In reaction to various incidents, including the 1999 bombings in the capital city of Uzbekistan presumably carried out by Islamic militants, Uzbekistan closed its border with Kyrgyzstan and later began erecting a barbed wire fence along its Kyrgyzstan border.²²⁸ Uzbekistan also placed border outposts in territory that Kyrgyzstan claims as its own.²²⁹ The border closure in turn created goods shortages in Kyrgyzstan as well as price increases, in addition to stimulating a burgeoning smuggling business.²³⁰ In an effort to thwart further attacks and to better secure what used to be a permeable boundary, Uzbekistan has demarcated this border and militarized it as quickly as it can,²³¹ despite the consequent economic hardships and family separations.²³²

C. Barriers Designed as Security Measures in Conflict Zones

1. Fences of Coalition Forces Operating in Iraq

Even when coalition forces ease up on their military activities in Iraq, for instance in respect for Islamic holy days, hostile mortar fire continues, often coming from orchards surrounding towns, accompanied by roadside bombings and shooting from homes.²³³ It thus eventually became widely recognized that a more pragmatic, sensible approach to the political and military realities on the ground was vital.²³⁴ The U.S. strategy involved a stricter technique designed to suppress terrorism, while at the same time making it

227. *Id.*

228. *Id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. *See id.*

233. *See* Dexter Filkins, *A Region Inflamed: Strategy; Tough New Tactics by U.S. Tighten Grip on Iraq Towns*, N.Y. TIMES, Dec. 7, 2003, at 11.

234. *See id.* Lt. Gen. Ricardo Sanchez, then commander of coalition forces in Iraq, revealed the stricter methods after it became better realized that, as one Fourth Infantry Division company commander put it: "You have to understand the Arab mind. . . . The only thing they understand is force—force, pride and saving face." *Id.* A lieutenant colonel battalion commander mentions the need for "a heavy dose of fear and violence . . ." *Id.* When U.S. forces enter an Iraqi home, a strategy based on "45 seconds of rage and fury" is deemed crucial so as to guarantee the instantaneous obedience required to protect the soldiers. Doors are broken down by the soldiers, who shout out for the occupants to lie down on the floor, and the troops race through the dwelling, all in order to try to scare the people in the house into immediate compliance. *See* David Hilfiker, *Winning Hearts and Minds*, January 29, 2004, http://www.zmag.org/content/print_article.cfm?itemID=4907§ionID=15.

evident to normal Iraqis that there will be a price for non-cooperation with coalition forces.²³⁵

One tactic used to counter the intensified war Iraqi terrorists are waging against the coalition is to surround whole villages in razor-sharp barbed wire.²³⁶ There is only one way to get into town and to leave it, and signs are put up in front of the barbed-wire barrier that sometimes sprawls for miles, saying: "This fence is here for your protection" and "Do not approach or try to cross, or you will be shot."²³⁷ To leave or enter such areas, Iraqis must line up and file by a U.S. troop-guarded check-point, showing printed identification cards. Coalition forces also bomb homes from which attacks on them have been made, seal off villages for days, and bulldoze or in other ways destroy buildings that have sheltered terrorists.²³⁸ As the then-military commander of the United States military operation in Iraq, Combined Joint Task Force 7, Lt. Gen. Ricardo Sanchez, explained, "what we need to do is go back to the laws of war and the Geneva Convention and all of those issues that define when a structure ceases to be what it is claimed to be and becomes a military target." He continued to point out that "[w]e've got to remember that we're in a low-intensity conflict where the laws of war still apply."²³⁹

2. Russia's Fence Along the Chechen border

During a war fought by Russia in Chechnya from 1994 to 1996, Russia killed, according to some estimates, about 80,000 Chechens,²⁴⁰ and according to other reports, closer to 100,000 people during that Chechen war.²⁴¹ In mid-1995 Chechen terrorists took hundreds hostage at a southern Russian hospital and over 100 people were killed in the hospital raid and ensuing Russian commando operation to free the hostages.²⁴²

Following a string of bombings of Moscow apartment buildings that Russia claimed were perpetrated by Chechen terrorists,²⁴³ kill-

235. *See* Filkins, *supra* note 233.

236. *See id.*

237. *Id.*

238. *See id.*

239. *Id.*

240. *See* Paul Quinn-Judge, *No Way Out?*, TIME, Oct. 13, 2003, at 40.

241. *See* BBC NEWS, TIMELINE: CHECHNYA (2005) http://news.bbc.co.uk/2/hi/europe/country_profiles/2357267.stm (last visited Feb. 22, 2005) [hereinafter TIMELINE: CHECHNYA].

242. *See id.*

243. *See* Quinn-Judge, *supra* note 240.

ing about 300 people,²⁴⁴ as well as the kidnappings and murder of foreigners and Russian officials,²⁴⁵ Russia invaded Chechnya in 1999. By the first part of 2000, Russia had destroyed the Chechen capital city of Grozny and killed about 10,000 Chechens.²⁴⁶ An estimated 200,000 Chechens fled the advancing Russian forces.²⁴⁷ Consequently, as part of a determined effort to patrol the unstable and unpredictable area, Russia started to dig a trench bounded by a fence of barbed wire along a sixty-eight-mile stretch of its Chechen border, reinforced by surveillance towers.²⁴⁸ The declared purpose of the trench and fence was said to be to assist Russian law enforcement agencies in fighting crime.²⁴⁹

Today, Russia employs barbed wire and concrete checkpoints to inspect buses and cars, searching for terrorists in Chechnya.²⁵⁰ As Russian President Vladimir Putin declared: "We control the territory and can legally detain anyone we like."²⁵¹ Meanwhile, Chechen armed groups have been fighting the superior Russian army at home while at the same time continuing to export terrorism to Moscow,²⁵² including suicide terrorist bombings at a Moscow rock concert and an attempted bombing at a main thoroughfare in Moscow.²⁵³ Chechen terrorists took hostage some 800 people in a theater in Moscow in October 2002, and in December 2003 took Russian hostages in nearby Dagestan, as well.²⁵⁴ In September 2004 about thirty Chechen terrorists took hostage around 1000 people in a school in the southern Russian town of Beslan, forced them into a gymnasium wired with explosives, set off a blast tearing through the roof and causing debris to tumble down on top of the hostages, and opened fire on hostages attempting to

244. See TIMELINE: CHECHNYA, *supra* note 240.

245. See *id.*

246. See Quinn-Judge, *supra* note 240; U.N. Chief: No Chechen 'Catastrophe', BBC NEWS Nov. 19, 1999, <http://news.bbc.co.uk/1/hi/world/europe/528491.stm> (last visited Feb. 22, 2005).

247. See TIMELINE: CHECHNYA, *supra* note 240.

248. See *Russia May Face*, *supra* note 10.

249. See *id.*

250. See Quinn-Judge, *supra* note 240; see also NATO Condemns Russia's Offensive in Chechnya, BBC NEWS, Dec. 15, 1999, <http://news.bbc.co.uk/1/hi/world/europe/493959.stm> (last visited Feb. 22, 2005).

251. See Quinn-Judge, *supra* note 240.

252. See *id.*

253. See *id.*

254. See TIMELINE: CHECHNYA, *supra* note 240.

escape during the ensuing fight with Russian security forces. Hundreds of hostages were killed, including numerous children.²⁵⁵

3. Kuwait's Fence Between Kuwait and Iraq

The Kuwaiti demilitarized zone along its 120-mile long border with Iraq is reinforced by an electrified fence and obstacle of concertina wire, supported by a trench fifteen feet wide and fifteen feet deep, and buttressed by a berm, or dirt wall that is ten feet high.²⁵⁶ Kuwait also recently decided to construct a US\$28 million iron separation fence on its Iraqi border. The Kuwaitis consider this a "security need to protect the northern border."²⁵⁷

4. Northern Ireland Fences Between Protestant and Catholic Areas in Belfast

Terrorist violence in Northern Ireland reached a brutal peak in the 1960s and 1970s,²⁵⁸ causing the British government to separate with fences Protestant and Catholic neighborhoods in the Northern Irish capital city of Belfast. The unstable and explosive circumstances and the ensuing Catholic and Protestant antagonism and hostility forced Britain in the 1970s during a time called "The Troubles" to begin erecting the barriers between the two sides in an attempt to quell the vehement and intense hatred and accompanying violence.²⁵⁹ In some three decades of bloodshed, over 3350 people have been killed. Fences that are almost forty-feet high in some places have achieved the separation of the Protestant and Catholic areas. The intent was to deter youths from throwing petrol bombs and to thereby mitigate and defuse the prevailing enmity, violence, and hostility.²⁶⁰

255. See, e.g., *Russia Mourns Beslan's Dead*, GUARDIAN, Sept. 6, 2004, <http://www.guardian.co.uk/russia/article/0,,1298245,00.html> (last visited Feb. 22, 2005); see also *High Death Toll in Russia Siege*, BBC NEWS, Sept. 4, 2004, <http://news.bbc.co.uk/2/hi/europe/3624024.stm> (last visited Feb. 22, 2005).

256. See Darrin Mortenson, *The Neutral Zone: 120-Mile Barrier Keeps Iraq, Kuwait at Arm's Length*, NORTH COUNTY TIMES, Mar. 5, 2003, <http://www.nctimes.com/articles/2003/03/05/export5020.txt> (last visited Feb. 23, 2005).

257. *Kuwait Installs Iron Barrier on Its Borders with Iraq*, ARABIC NEWS.COM, Jan. 14, 2004, <http://www.arabicnews.com/ansub/Daily/Day/040114/2004011402.html> (last visited Feb. 23, 2005).

258. See, e.g., Sharon Sadeh, *Belfast Separation Fences Divide, But Slow Violence*, HA'ARETZ, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=336559> (last visited Feb. 25, 2004).

259. See, e.g., *id.*

260. See, e.g., *id.*

There are presently some forty such Belfast separation barriers, each of which is approximately a third of a mile in length. These barriers have been effective in reducing friction between the Protestants and Catholics. Not only do the barriers succeed in hindering the movement of terrorists and consequently thwarting attacks, they are also cost-effective in terms of manpower and other resources.²⁶¹ Because sectarianism has always been so rampant and endemic in Belfast, the city's mayor believes that such fences are "regrettable, but understandable and necessary. . . . The sad fact of life is that we still need fences in Belfast because sectarianism has always been rife," explains the mayor.²⁶²

D. *Barriers Designed as Security Measures to Prevent Illegal Immigration or Undocumented Workers from Neighboring Countries*

I. U.S. Fence Between the United States and Mexico

Illegal immigration is deemed a security threat by the United States.²⁶³ Of the approximately seven million illegal immigrants in the United States as of 2003, nearly seventy percent of them were from Mexico,²⁶⁴ whose border with the United States is one of the world's longest,²⁶⁵ extending for some two thousand miles.²⁶⁶ Most of the illegal narcotics entering the United States come through Mexico, as well.²⁶⁷ The United States is thus, understandably, so concerned about smuggled narcotics that it also considers drugs to be a national security threat.²⁶⁸ Consequently, since the 1990s the United States has been constructing walls and erecting fences along its border with Mexico to curb the flood of illegal immigra-

261. See, e.g., *id.*

262. See, e.g., *id.*

263. See, e.g., *Excellntissimo Clinton*, *ECONOMIST*, May 10, 1997, at 30; Robbins, *supra* note 14.

264. See, e.g., Terry Frieden, *INS: 7 Million Illegal Immigrants in United States*, CNN.COM, Feb. 1, 2003, <http://www.cnn.com/2003/US/01/31/illegal.immigration/> (last visited Feb. 23, 2005).

265. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK: FIELD LISTINGS—LAND BOUNDARIES* (2005), <http://www.cia.gov/cia/publications/factbook/fields/2096.html> (last visited Feb. 23, 2005).

266. See, e.g., Kevin J. Middlebrook, *The Ties That Bind: "Silent Integration" and Conflict Regulation in U.S.-Mexican Relations*, 26 *LATIN AM. RES. REV.* 261 (1991).

267. See, e.g., *Excellntissimo Clinton*, *supra* note 263, at 30.

268. See, e.g., Robbins, *supra* note 14; *Excellntissimo Clinton*, *supra* note 263, at 30.

tion²⁶⁹ and illicit narcotics.²⁷⁰ The security fence along the United States-Mexican border encompasses many types; some portions are constructed of sheet metal and others of concrete²⁷¹ and in some places the barrier consists of three layers.²⁷² The barricade can reach fifteen feet in height and is often covered with razor wire. Spotlights flood the area surrounding the fence, cameras scrutinize, while magnetic sensors and motion detectors monitor all activity, and armed guards and attack dogs conduct patrols.²⁷³

2. European Union's Barrier

The European Union is planning to construct a fence hundreds of kilometers in length to separate itself from Russia, Ukraine, and Belarus in order "to prevent the free movement of migrants seeking to enter the EU."²⁷⁴

3. France's Barrier

A fence that encircles a refugee camp at Sangatte, near the northwestern French city of Calais, is one of many similar barriers erected to enclose and restrict the movement of refugees and illegal immigrants. In this case the camp is located near the entrance to the Channel Tunnel (Chunnel) that connects England and France via railway.²⁷⁵ The fence has not proven to be much of a barrier for the hundreds of migrants who have slipped through on their way to the Chunnel entrance, where they can stow away on a

269. See *Border Fence Plan Riles Environmentalists*, FOX NEWS, Dec. 3, 2003, <http://www.foxnews.com/story/0%2C2933%2C104672%2C00.html> (last visited Feb. 23, 2005); Robbins, *supra* note 14.

270. See Robbins, *supra* note 14; REP. DUNCAN HUNTER, *CALEXICO BORDER FENCING PROJECT NEARS COMPLETION* (1999), <http://www.house.gov/hunter/calexfence-const.htm> (last visited Feb. 23, 2005).

271. See Robbins, *supra* note 14.

272. See Interview by *IN MOTION MAGAZINE* with Roberto Martinez, Director of the U.S./Mexico Border Program, Sept. 14, 1997, <http://www.inmotionmagazine.com/border.html> (last visited Feb. 23, 2005); Robbins, *supra* note 14.

273. See Robbins, *supra* note 14.

274. See Felix Frisch, *Magal to Participate in Tender for European Separation Fence*, GLOBES [ONLINE], Feb. 12, 2005, <http://www.globes.co.il/serveen/globes/docview.asp?did=823974&fid=942> (last visited Feb. 23, 2005). The Israeli company Magal Security Systems, specializing in building warning fences and security systems, will participate in the tender offer, and it is anticipated that it will cooperate with a large Western company in the construction of fences, as well as command and control systems. The Israeli firm El-Far Electronics also anticipates participating in the tender together with a major multinational partner. See Frisch, *supra*.

275. See *French Reject Closing Refugee Camp*, CNN.COM, May 15, 2002, <http://www.cnn.com/2002/WORLD/europe/05/15/chunnel.immigrants/> (last visited Feb. 22, 2005) [hereinafter *French Reject*].

freight train for a free, but dangerous, ride to England.²⁷⁶ The stow-away problem is not only hazardous for those making the trip, but has also created difficulties for the British government and the railway companies. More than 1700 freight trains had to be canceled between November 2001 and May 2002, costing the privately owned rail company, which operates the freight services through the tunnel, a loss of up to US\$725,000 each week.²⁷⁷

England has demanded that the French close down the refugee camp, but France has rejected that demand, claiming that the problem can only be solved by stopping the flood of refugees coming from elsewhere. According to French officials, France is "facing the same difficulties . . . [with] 1,500 people at least at Sangatte who are staying [there] and [France does not] know what to do with them."²⁷⁸

4. Holland's Barrier

A barbed-wire fenced enclosure has also been built in the harbor area of Hoek van Holland. Its purpose is to prevent illegal immigrants and refugees from leaving the harbor area and to keep undesirable people out of the country.²⁷⁹

5. Botswana's Fence Between Botswana and Zimbabwe

In 2003 Botswana began constructing an electrified fence along the 300-mile long border separating it from Zimbabwe.²⁸⁰ The electrified fence,²⁸¹ designed to prevent the stream of illegal immigrants who traverse the border in attempts to escape Zimbabwe's political and economic suffering,²⁸² extends up to twelve-feet high

276. Apparently, many of the camp inhabitants believe "immigration laws are more lenient and job prospects brighter in Britain." *See id.*

277. *See id.*

278. *See id.*

279. MIDDLE-EAST-INFO.ORG, LET'S REMOVE ALL FENCES IN THE WORLD (n.d.), <http://www.middle-east-info.org/know/removefences.pps> (last visited Mar. 10, 2005).

280. *See Botswana-Zimbabwe Fence Row*, *supra* note 16; *Corpses of Zimbabweans Unclaimed*, BUSINESS DAY (S. AFR.), Sept. 3, 2003 [hereinafter *Corpses of Zimbabweans*]; *Botswana: Electric Fence Likely to Reduce Foot and Mouth Outbreaks*, DAILYNEWS ONLINE (BOTS.), Sept. 27, 2002, <http://www.gov.bw/cgi-bin/news.cgi?d=20020925> (last visited Feb. 28, 2005) [hereinafter *Electric Fence Likely*].

281. *See Electric Fence to Cut Cross-Border Crime*, ALLAFRICA.COM, Dec. 3, 2003, <http://www.cleansafeworldwide.org/doc.asp?doc=1543&cat=168> (last visited Feb. 23, 2005) [hereinafter *Electric Fence to Cut*]; *Corpses of Zimbabweans*, *supra* note 280.

282. *See* Rory Carroll, *Botswana Erects 300-Mile Electrified Fence to Keep Cattle (and Zimbabweans) Out*, GUARDIAN, Sept. 10, 2003, <http://www.guardian.co.uk/zimbabwe/article/0,2763,1039033,00.html> (last visited Feb. 28, 2005).

according to some reports.²⁸³ With a population of only 1.7 million in contrast to Zimbabwe's 11.8 million, the geographically larger Botswana feels extremely insecure.²⁸⁴ It considers the fence a legitimate response to the threat caused by jobless people from Zimbabwe, many of whom, it is claimed, are scroungers and criminals who have swamped Botswana in recent years.²⁸⁵

Botswana also feels threatened by diseased livestock entering it from Zimbabwe.²⁸⁶ The unwanted disease-ridden cattle²⁸⁷ are basically the result of recent hoof and mouth disease outbreaks said to originate in Zimbabwe.²⁸⁸ The outbreaks catastrophically struck what were at the time profitable beef exports from Botswana, causing thousands of head of cattle to be put to death and countless job losses.²⁸⁹ Botswana's vital exports of beef to the EU were also suspended.²⁹⁰ Zimbabwe has expressed its official disapproval of the fence in no uncertain terms, claiming that it violates human rights. Zimbabweans have ripped up fence sections in protest.²⁹¹ The high commissioner of Zimbabwe in Gaborone, Botswana's capital city, explained to the *Botswana Gazette* that "[p]eople will continue to destroy the fence because it has divided families on either side of the border."²⁹² Notwithstanding the criticism of the fence, Botswana's foreign minister explains that "[t]he construction of the fence must continue and it will continue. We have to go ahead with the fence and when need be, we will open some more border posts."²⁹³ The fence is characterized as a security measure.²⁹⁴

283. *See Botswana-Zimbabwe Fence Row*, *supra* note 16. Other reports differ on the height of the fence. *See Electric Fence to Cut*, *supra* note 281 (10 feet); Carroll, *supra* note 282 (8 feet); *Electric Fence Likely*, *supra* note 280 (7.2 feet); and *Corpses of Zimbabweans*, *supra* note 280 (7 feet).

284. Carroll, *supra* note 282.

285. *See id.*

286. *See id.*; *see also Electric Fence to Cut*, *supra* note 281.

287. *See* Carroll, *supra* note 282.

288. *See id.*; *Electric Fence Likely*, *supra*, note 280.

289. *See* Carroll, *supra* note 282.

290. *See Corpses of Zimbabweans*, *supra* note 280.

291. *See* Carroll, *supra* note 282.

292. *See id.*

293. *Id.*; *see also Corpses of Zimbabweans*, *supra* note 280.

294. *See Botswana-Zimbabwe Fence Row*, *supra* note 16.

E. *Other Barriers Designed as Security Measures vis-à-vis Neighboring Countries*

1. Russia's Fence Between Russia and Estonia

A barbed-wire fence, some six feet in height, erected along the Russo-Baltic demarcation line that not only separates Estonia and Russia but even divides homes in the middle, is reinforced with an electronic detection system and guard towers.²⁹⁵

2. Botswana's Fence Between Botswana and Namibia

Due to its fear of dreaded livestock disease, Botswana constructed a fence along its border with Namibia in an attempt to contain an outbreak.²⁹⁶ Botswana justified the fence's construction by explaining that a hoof and mouth disease outbreak that its authorities claimed had its source in Namibia forced it to slaughter almost 300,000 cattle in 1995.²⁹⁷

F. *Israel's Security Barrier: Comparative Perspectives*

1. Is Israel's Barrier Unique?

We have described some of the many barriers that are built and maintained by countries around the world, fences and walls built to keep out or in those considered a security threat, an economic burden, a criminal peril, or a simple nuisance. Yet only one fence has been singled out in the United Nations, the ICJ, and the court of public opinion for denunciation and approbation. Only one of the governments that has or is building a barrier has been accused of "crimes against humanity" for doing that. It is therefore not unreasonable to ask what is different about Israel's barrier? That is, what distinguishes it from all other barriers, walls, minefields, enclosures, fences, berms, and cement-filled pipes?

295. See Ricai Kambak, *NATO and the Estonian Farmer*, UNTIMELY THOUGHTS, Feb. 6, 2004, <http://www.untimely-thoughts.com/index.html?part=355> (last visited Feb. 28, 2005).

296. See Swartz *Wants P676m for Agriculture*, DAILYNEWS ONLINE (BOTS.), Mar. 6, 2001, http://www.gov.bw/cgi-bin/news.cgi?d=20010306&ci=Swartz_wants_P676m_for_Agriculture (last visited Feb. 28, 2005); Chrispin Inambao, *Botswana, Nam Act on Killer Fence*, NAMIBIAN, June 10, 1998, http://www.namibian.com.na/Netstories/Environ6-98/killer_fence.html (last visited Feb. 28, 2005); *Welcome Move by Botswana*, NAMIBIAN, June 12, 1998, <http://www.namibian.com.na/Netstories/Cols6-98/edit061298.html> (last visited Feb. 28, 2005).

297. *Welcome Move By Botswana*, *supra* note 296.

Is Israel's barrier unique because much of it is being built on disputed land?²⁹⁸ As illustrated above, Saudi Arabia, Spain (funded by the European Union), Morocco, India, and the Turkish Cypriots have all built fences on disputed land, yet none of these states has been subjected to fierce, nearly worldwide censure.

Is the length or height of Israel's barrier, or the nature of its associated components (such as cameras and electronic motion detectors) peculiar or unique? No, the walls and fences described above vary in their length, height, and construction. Some are longer than Israel's barrier, only about 100 miles of which has been completed,²⁹⁹ and some are higher. Still, the essential features of Israel's barrier, which is approximately ninety-five percent chain-link fence with its high-tech aspects,³⁰⁰ are common to many of the other barriers around the world. It should be kept in mind that some segments of concrete wall are indeed part of Israel's barrier, constituting about five percent of its length,³⁰¹ along some intercity highways to deter terrorist sniping at passing Israeli civilian

298. See Kristina Nwazota, *Israel's Berlin Wall?*, ONLINE NEWSHOUR, Sept. 22, 2003, http://www.pbs.org/newshour/extra/features/july-dec03/wall_9-22_printout.html (last visited June 22, 2004).

299. See Barry A. Feinstein, *Terror Forces Israel to Act in Self-Defense*, BALT. SUN, July 9, 2004, at 13A. Certainly different sources will indicate different lengths of the barrier completed depending on the respective dates of the source, the relevant information available at that time, and different ideas as to what constitutes completion of the barrier. For further discussion see *infra* Sections IV and V.

300. For further discussion see *infra* Section IV.

301. See Written Statement of the Government of Israel on Jurisdiction and Propriety, Jan. 30, 2004, para. 2.7 [hereinafter Israel's Written Statement on Construction of the Wall] ("8.8 kilometres, or less than 5 percent, is made up of a concrete barrier, generally in areas where Palestinian population centres abut onto Israel."). For further discussion as to the length of the concrete portions of the barrier, see *infra* Section V. Reports of the percentage amount of concrete in the barrier differ. The Israeli government places the percentage of concrete sections in the barrier at about 3.8%. See ISRAEL MINISTRY OF FOREIGN AFF., THE ANTI-TERRORIST FENCE—FACTS AND FIGURES (2004), <http://securityfence.mfa.gov.il/mfm/Data/49058.pps> (last visited Dec. 14, 2004) [hereinafter THE ANTI-TERRORIST FENCE—FACTS AND FIGURES]. Other sources place the concrete portion of the barrier at around 6% of the total length of the barrier. See, e.g., Feinstein, *supra* note 299. Yet, as of late March 2004, according to the Israel Foreign Ministry, "[l]ess than 3% of the fence will be constructed of concrete." ISRAEL MINISTRY OF FOREIGN AFF., CONCEPT AND GUIDELINES: A FENCE, NOT A WALL (n.d.), <http://securityfence.mfa.gov.il/mfm/web/main/Document.asp?SubjectID=45874&MissionID=45187&LanguageID=0&StatusID=3&DocumentID=1> (last visited Feb. 28, 2005) [hereinafter *A Fence, Not a Wall*]. Whatever the exact percentage will ultimately be once the barrier is complete, it is clear that only a small portion of the barrier will consist of concrete. See ISRAEL MINISTRY OF FOREIGN AFF., CONCEPT AND GUIDELINES: A TEMPORARY MEASURE, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45221&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 6, 2005) [hereinafter *A TEMPORARY MEASURE*]. For further discussion see *infra* Section IV.B.

vehicles³⁰² as has been taking place for years, and in some populated places to minimize the amount of land that must be used to construct an antiterrorist barrier.³⁰³ These segments have been the target of particular criticism, and have frequently been equated with the despised "Berlin wall,"³⁰⁴ yet governments have not condemned nor has the media castigated in a similar manner the high walls built between and within neighborhoods in Northern Ireland and elsewhere. What is it then about Israel's barrier that arouses such selective condemnation?

Compared to the barriers described above, are the humanitarian consequences of Israel's barrier uniquely harmful to those who are living on the other side? Saudi Arabia, India, Morocco, and Turkish Northern Cyprus, for example, maintain, as Israel does, that the barriers they have erected are defensive antiterrorism barriers, whereas governments on the other side have protested that the barriers are built on "occupied" territory, constitute a land grab, or deny the human rights of their citizens. Israel's barrier is therefore not unique in this regard either.

The deaths of countless men, women, and children, the stories of families ripped apart, of dislocation, unemployment, pain, and suffering are a consequence of the massive fence built by the United States along its border with Mexico. Its human consequences appear as devastating as those caused by any other barrier we have considered. If the number of persons killed and disabled by the antipersonnel minefields that typically accompany barriers is measured, Morocco's barrier, the Korean DMZ, and Russia's barrier in Chechnya are certainly in a far more hazardous category than Israel's barrier, which has no mines reinforcing it. Furthermore, one must keep in mind that while the U.S.-Mexico barrier, as well as those that France, Holland, Botswana, and others have built, and the barrier the European Union is planning, are all designed to keep out illegal immigrants and workers, while Israel's barrier in the meantime is being built to protect Israeli citizens from terror attacks, thus saving lives from acts of terrorism such as suicide bombings.³⁰⁵ Section IV below returns to this point and considers its implications. First, however, it is instructive to consider the Israeli barrier in historical perspective.

302. See, e.g., A TEMPORARY MEASURE, *supra* note 301.

303. Typically, the ground area needed to construct concrete portions of the barrier in a populated vicinity is about one-third of that needed to construct a barrier consisting of chain-link fence. For further discussion see *infra* Section IV.

304. See, e.g., Nwazota, *supra* note 298.

305. See, e.g., FIRST PRIORITY, *supra* note 6.

2. Noteworthy Historical Examples of Protective Barriers

Significant impediments have been constructed on other frontiers in various parts of the world throughout history. Three of the better known fortifications are mentioned here for illustrative purposes: Hadrian's wall, the Great Wall of China, and Wall Street in lower Manhattan.

In the second century A.D., the Roman Emperor Hadrian constructed a seventy-three mile wall across England,³⁰⁶ intended to prevent barbarian infiltration into Roman Britain.³⁰⁷

In the seventh century B.C., construction began in China on the Great Wall,³⁰⁸ one of the largest building projects in world history.³⁰⁹ During the Chou Dynasty, various states in the northern border region each constructed defensive walls.³¹⁰ Following China's unification, the Emperor of the Chin dynasty ordered the creation in the third century B.C. of a great wall connecting the chain of walls already built by these border states. The resulting Great Wall eventually reached a length of about 4500 miles, including all of its branches.³¹¹ This mammoth project was fifteen to thirty feet in breadth, and generally about thirty feet high.³¹² It was built to deter barbarian infiltration and provided an element of protection to northern China.³¹³

A third interesting example is the narrow street in lower Manhattan called Wall Street, now well known as the financial center of

306. See Diana Muir, *Fencing out the Barbarians*, PROVIDENCE J., Feb. 24, 2004, http://www.projo.com/opinion/contributors/content/projo_20040224_ctmuir.126e12.html (last visited Feb. 28, 2005).

307. See *id.*; JOHN H. LIENHARD, *THE GREAT WALL OF CHINA* (University of Houston, Engines of Our Ingenuity Series No. 1590, n.d.), <http://www.uh.edu/engines/epi1590.htm> (last visited Feb. 28, 2005); Michael Woods, *Controversial Israel Security Fence 'Engineering Tour de Force'*, PITTSBURGH POST-GAZETTE, Mar. 1, 2004, <http://www.post-gazette.com/pg/04061/279284.stm> (last visited Feb. 28, 2005).

308. *The Great Wall of China*, in 5 THE NEW ENCYCLOPEDIA BRITANNICA 449 (15th ed. 2003).

309. *Id.*

310. *Id.*; see also PURDUE UNIVERSITY DEP'T OF AGRICULTURAL AND BIOLOGICAL ENGINEERING, MULTICULTURAL HOME PAGE: THE GREAT WALL (n.d.), <http://pasture.ecn.purdue.edu/~agenhtml/agenmc/china/scengw.html> (last visited Feb. 28, 2005).

311. See *The Great Wall of China*, *supra* note 308.

312. *Id.*

313. *Id.*; BRANKICA RADONJIC, CONSTRUCTION OF THE GREAT WALL BEGINS: 221 BC (1996), <http://campus.northpark.edu/history/WebChron/China/GreatWall.html> (last visited Feb. 28, 2005); Lienhard, *supra* note 307. Yet the effectiveness of the wall itself is the subject of some controversy, because some assailants were able to bribe guards to let them pass through. See, e.g., Damien McElroy, *Chinese March to Save Great Wall*, TELEGRAPH, Aug. 4, 2002, <http://www.portal.telegraph.co.uk/news/main.jhtml?xml=%2Fnews%2F2002%2F08%2F04%2Fwchina04.xml> (last visited Feb. 28, 2005).

the world.³¹⁴ This famous east-west street³¹⁵ that traverses southern Manhattan³¹⁶ derives its name from the wooden wall that Governor Peter Stuyvesant erected along its length to prevent the British from invading the seventeenth-century Dutch settlement—then known as New Amsterdam.³¹⁷ Due to its location on the northern periphery of New Amsterdam, the wall was constructed to protect the residents of the settlement from attacks from the north.³¹⁸

Whether to protect vital trade routes, guard populated areas, protect a frontier, or for a combination of these reasons, defensive structures have been the rule throughout history up to and including the modern era. It should be noted, however, that while contemporary maps endeavor to represent with as much precision as possible the (defensible) territorial limits of nation states, the concept and practice of national self-defense was rather different throughout most of recorded history.³¹⁹ Up until the last few hundred years, and in some regions more recently, national self-defense was a much more fluid concept.³²⁰ Often, precisely delineated borders were not marked with signs, fences, walls or the like, nor were they often defended at all. A countryside was not considered defensible; instead, in the event of an invasion, much of the rural population fled their villages ahead of the invading army and found refuge in walled cities and towns.³²¹ The national government would defend its cities and towns, as distinct from the countryside, desert, and other sparsely populated and economically insignificant areas.³²²

III. SECURITY BARRIERS IN THE ISRAELI HISTORICAL CONTEXT

A. *The History of Fortifications in the Holy Land*

The history of fences and other fortifications in the Holy Land helps to understand the wide range of barriers in use today. Fortifications are hardly an unprecedented imposition on the Israeli

314. See e.g., *Virtual Tour, New York City, Just Like We Pictured It*, <http://newyork.citysearch.com/feature/4775/wallstreet.html> (last visited Mar. 20, 2005).

315. See *NEW YORK MAGAZINE, WALL STREET* (2004), <http://www.newyorkmetro.com/pages/venues/232.htm> (last visited Feb. 28, 2005).

316. *Id.*

317. *Id.*

318. *Id.*

319. Interview with Mark Sugarman, Licensed Tour Educator, in Jerusalem (June 21, 2004).

320. *Id.*

321. *Id.*

322. *Id.*

landscape. From antiquity to modern times, the areas that today comprise the State of Israel and the disputed territories have always been situated at the crossroads between the most strategic areas in the ancient world—Egypt, Syria, Mesopotamia, and the Mediterranean Sea.³²³ History is replete with examples of defensive structures around cities, such as the walls around Jerusalem and Jaffa. Today's crumbling ruins of fortifications are visible reminders of the competing entities and cultures that have contested the area. This can be seen in the ruins of Jericho dating as far back as 10,000 years ago.³²⁴ Its massive protective walls, identified by the noted archeologist Kathleen Kenyon, served as the defense system for the earliest urban community yet discovered anywhere in the world. Kenyon dated the site to the beginning of the Neolithic Age (New Stone Age) at approximately 8000 B.C.³²⁵ Formidable fortifications from the Bronze Age (3300–1200 B.C.) are also found at Jericho and other sites throughout Israel.³²⁶

The Israelite conquest of the land, estimated to have taken place around 1200 B.C., coincided with the beginning of the Iron Age.³²⁷ The Israelite king, David, captured the strongly-walled and fortified city of Jebus, where he established his capital, Jerusalem, in 996 B.C.³²⁸ His son and heir Solomon extended the walls of the city northward, and in the late eighth century B.C., Jerusalem's walls were expanded westward into what is today the Jewish Quarter of the Old City. These walls played a role in defending the city's growing population against an Assyrian onslaught (701 B.C.) during the

323. See AMIHAI MAZAR, *ARCHEOLOGY OF THE LAND OF THE BIBLE: 10,000–586 B.C.E.* at 1 (1992).

324. *Id.*

325. See *id.* Jewish sources typically use the designation B.C.E. (Before the Common Era) rather than the designation B.C. (Before Christ).

326. Interview with Jonathan Cutler, Licensed Tour Educator, in Jerusalem (June 21, 2004).

327. Interview with Mark Sugarman, *supra* note 319.

328. Michael Avi-Yonah, *Building History from the Earliest Times to the Nineteenth Century*, in *HISTORICAL GEOGRAPHY OF JERUSALEM THROUGH THE AGES 13* (Dr. Shaul Sapir & Jeremy Hildebrand eds., 1973). Sources differ as to the exact date King David took over Jerusalem and set up his capital there. Some sources cite 1004 B.C. as the traditional date. See, e.g., *NATIONMASTER.COM, JEBUSITES* (2005), <http://www.nationmaster.com/encyclopedia/Jebusites> (last visited Feb. 28, 2005). Others understand the date to be 1000 B.C. See, e.g., *JEWISH VIRTUAL LIBRARY, TIMELINE FOR THE HISTORY OF JERUSALEM* (2004), <http://www.jewishvirtuallibrary.org/jsourc/Peace/jerutime.html> (last visited Feb. 28, 2005). According to yet another source, King David "made Jerusalem his capital sometime in the tenth century [B.C.E.]. However, the precise date cannot be determined . . ." Daniel Gavron, *King David and Jerusalem: Myth and Reality*, *ARIEL—ISRAEL REV. OF ARTS & LETTERS*, Vol. 102, Sept. 6, 2003.

reign of Hezekiah, King of Judah (727–698 B.C.).³²⁹ In the seventh century B.C. Jerusalem's walls spread further to the north, but these improved fortifications were not able to save Jerusalem from destruction by Nebuchadnezzar's Babylonian army in 586 B.C.³³⁰

Jerusalem was just one of many walled cities that existed in the Holy Land during the Biblical period and going back to the aforementioned Iron Age. In the north of the country, for example, the Israelite fortifications of Megiddo and Hazor were located along the ancient trade route known in Latin as the Via Maris or "Way of the Sea."³³¹ Defending the frontier was another great concern for the Kingdoms of Israel and Judah. The cities of Hazor and Dan were part of a network of fortifications designed to protect the northern frontier and trade routes of the Kingdom of Israel.³³² Ein Gedi and Arad functioned in a similar manner in defending the southern frontier of the Kingdom of Judah.³³³

The return of Jews to Jerusalem from exile in Babylonia during the late sixth and fifth centuries B.C. led to its reconstruction. In the mid-fifth century B.C., Nehemiah, a Jewish man who served as the governor of Judah under the Persian King Artaxerxes I, rebuilt the walls and gates of the city.³³⁴ During the Hasmonean period (143–37 B.C.), Jerusalem's defensive wall was extended to the south and west, thereby encompassing Mount Zion and the eastern slopes of the Hinnom Valley. It was built in stages, beginning in the mid-second century B.C.³³⁵ King Herod (37–4 B.C.), whose passion for building and security was unprecedented, reinforced the Hasmonean walls according to their original layout and began the process of further extending Jerusalem's walls northward.³³⁶ Herod's

329. Avi-Yonah, *supra* note 328; see also Benjamin Mazar, *Jerusalem in Biblical Times*, in *THE JERUSALEM CATHEDRA* 10, 16 (1982). Israel and Judah split into two independent kingdoms after the death of King Solomon in 922 B.C. The northern Kingdom of Israel, comprised of ten tribes, fell to the Assyrians in 722 B.C. The southern Kingdom of Judah, comprised of two tribes, survived until the Babylonians sacked Jerusalem in 587 B.C. Interview with Jonathan Cutler, *supra* note 326.

330. JEROME MURPHY-O'CONNOR, *THE HOLY LAND: AN OXFORD ARCHEOLOGICAL GUIDE FROM EARLIEST TIMES TO 1700*, at 71 (1998).

331. Interview with Mark Sugarman, *supra* note 319. This trade route, which was intermittently fortified, ran from Gaza along the Mediterranean coast through the Carmel mountain range turning inland through Wadi Ara, across the Jezreel Valley, past Megiddo and Hazor, and continued north to Damascus. *Id.*

332. Interview with Jonathan Cutler, Licensed Tour Educator, in Jerusalem (Dec. 31, 2004).

333. *Id.*

334. See Avi-Yonah, *supra* note 328.

335. See *id.*; Interview with Jonathan Cutler, *supra* note 332.

336. See Avi-Yonah, *supra* note 328.

grandson, King Agrippa I (41–44 A.D.), began construction of the Third Wall around the expanding northern neighborhoods of the city, but did not complete it. During the Jewish revolt against Rome (66–70 A.D.), the rebels apparently completed this wall as a part of their unsuccessful attempt to defend the city from Roman forces. The Romans breached the walls and destroyed the city.³³⁷ After the second Jewish revolt (132–135 A.D.), the Roman emperor Hadrian had "the walls of the city [drawn] into a small and compact form."³³⁸ They resembled today's walls of Jerusalem's Old City.³³⁹

During the mid-fifth century A.D., the Byzantine Empress Eudocia refortified Jerusalem's southern walls according to the earlier Hasmonean-Herodian plan.³⁴⁰ In 638 A.D., however, a weakened Byzantine Empire, exhausted by its protracted war with Persia, lost Jerusalem to an Arab army, a very recent arrival to the region following a new religion called Islam. Within a century after the Muslim conquest of Jerusalem, the city's walls were reinforced under the rule of the Muslim Arab Umayyad Caliph 'Abd al-Malik.³⁴¹ In the eleventh century, Jerusalem came under the control of the Arab Fatimid rulers of Egypt, who refortified its walls in 1033 and again in 1063.³⁴² In 1098, as the Crusaders approached Jerusalem, the Fatimids fortified the city one last time, strengthening the walls especially in the northern part of the city where the terrain was favorable for attack.³⁴³ Despite these efforts, however, the Crusaders breached Jerusalem's walls and the city fell to their forces. Thereafter, the Crusaders restored and strengthened the walls twice during the twelfth century.³⁴⁴ In 1187, after recapturing the city from the Crusaders, the Muslim Ayyubid leader, Saladin strengthened Jerusalem's walls.³⁴⁵

Thus Jews, Romans, Byzantines, Arabs, Crusaders, and Ottomans, among others, were all involved in fortifying Jerusalem as

337. Interview with Jonathan Cutler, *supra* note 332. Traces of a massive defense line have been uncovered in northern Jerusalem, far from the current Ottoman walls. See Meir Ben-Dov, *Herodian Jerusalem Revisited*, 25 *CHRISTIAN NEWS FROM ISRAEL* 138, 140–41 (1978).

338. MICHAEL AVI-YONAH ET AL., *JERUSALEM, THE SAGA OF THE HOLY CITY* 31 (1954).

339. Interview with Mark Sugarman, Licensed Tour Educator, in Jerusalem (Dec. 30, 2004).

340. Avi-Yonah, *supra* note 328.

341. Interview with Mark Sugarman, *supra* note 339. During the period of the Umayyad Dynasty (660–750), Syria and Palestine were considered the center of the Muslim world. Interview with Jonathan Cutler, *supra* note 326.

342. Shlomo D. Goiten, *Jerusalem in the Arab Period (638–1099)*, in *THE JERUSALEM CATHEDRA* 185 (1982).

343. MERON BEVENISTI, *THE CRUSADERS IN THE HOLY LAND* 35 (1970).

344. *Id.* at 49.

345. *Id.* at 51.

well as other parts of the country. The Mediterranean port of Caesarea, for example, contains the remains of Roman, Byzantine, Arab, and Crusader defensive walls.³⁴⁶ Throughout Israel as well as in southern Lebanon one can view crumbling medieval Crusader fortresses that were intended to secure their frontiers. The Crusaders themselves had difficulty overcoming the fortifications of Acre, before building their own fortifications for that city, which was to become their maritime capital.³⁴⁷ During 1228–1230 the Muslims erected the fortifications of Nimrud in the Golan Heights, overlooking the Huleh Valley of the Upper Galilee, which they designed in order to “defend the road to Damascus from a possible Crusader attack from the coast.”³⁴⁸ Saladin’s Ayyubid dynasty initially succeeded in repulsing the Crusaders at the Horns of Hattin in the Galilee³⁴⁹ and in Jerusalem. At Acre, however, the Mamluks,³⁵⁰ a Muslim dynasty descended from slaves brought into Egypt by the Ayyubids in order to serve in their armies,³⁵¹ dealt the Crusaders their final military defeat in 1291.³⁵²

After defeating the Mamluks in 1517 the Ottomans engaged in fortification projects throughout the country.³⁵³ The Ottoman fortress at Tel Aphek, built during the sixteenth century, towers over the Via Maris and stands on the ruins of an older Crusader fortress and other fortified cities, some dating back to approximately 3000 B.C.³⁵⁴ Perhaps the most recognizable remnant from the Ottoman period fortifications, however, is the wall around Jerusalem that Suliman the Magnificent completed in 1540. This wall continues today to encircle the Old City of Jerusalem.³⁵⁵ The Ottomans also

346. Not all walls were defensive in nature. For example, during the first Jewish revolt, the Romans erected a siege wall 6 feet wide, 2.5 miles long, surrounding the last trace of Jewish resistance at the Herodian fortress of Masada. See YIGAL YADIN, *MASADA* 211, 214 (1966); Interview with Jonathan Cutler, *supra* note 326.

347. See AKKO: THE MARITIME CAPITAL OF THE CRUSADER KINGDOM (Israel Ministry of Foreign Aff., Archaeological Sites No. 5, 1999), <http://www.mfa.gov.il/MFA/History/Early%20History%20-%20Archaeology/Akko-%20The%20Maritime%20Capital%20of%20the%20Crusader%20Kingdom> (last visited Mar. 1, 2005).

348. MURPHY-O’CONNOR, *supra* note 330, at 378.

349. PHILIP K. HITTI, *HISTORY OF THE ARABS* 647–48 (1970).

350. BERYL RATZER, *A HISTORICAL TOUR OF THE HOLY LAND* 87 (1996).

351. *Id.*

352. *Id.* at 87–88. Prior to the defeat of the Crusaders, the Mamluks, under Sultan al-Malik Beybers, stopped the advance of the Mongol tribes under Ghangis Khan in 1260 at Ein Harod, located in present-day Israel. Interview with Jonathan Cutler, *supra* note 326.

353. Interview with Jonathan Cutler, *supra* note 326.

354. MURPHY-O’CONNOR, *supra* note 330, at 161–62.

355. RATZER, *supra* note 350, at 90.

built a new defensive wall for Acre after Napoleon’s unsuccessful siege of the city in 1799.³⁵⁶

In 1860, when Jews left the crowded conditions in the Old City of Jerusalem and began to settle outside the walls, they took up residence in the new neighborhood of Mishkenot Sha’ananim. This new residential area, the first Jewish neighborhood outside the city walls of the Old City in modern times, was a gated community surrounded by walls architecturally resembling on a smaller scale the sixteenth century Ottoman Turkish walls of the Old City.³⁵⁷ Elsewhere, stone fences protected many Jewish farming communities established during the late nineteenth century and the first decades of the twentieth century.³⁵⁸

During the Arab revolt of 1936–1939, fifty-five new Jewish agricultural communities were constructed and fortified by stockade fences and watchtowers.³⁵⁹ They proved to be of strategic importance in Israel’s War of Independence.³⁶⁰ Simultaneously the British Mandatory government erected substantial fortifications during the 1930s. In order to cope with a deteriorating security situation during this Arab revolt, the noted British counterterrorism expert, Sir Charles Tegart, “had a security fence erected along the northern border to prevent the infiltration of terrorists.”³⁶¹ He also “built dozens of police fortresses around the country and put up concrete guard posts, which the British called pillboxes, along the roads.”³⁶²

The armistice lines that were set following the 1948–1949 Israeli Independence War were fortified in many places.³⁶³ In Jerusalem, for example, the valley between Mishkenot Sha’ananim and the Old City was clogged with barbed wire entanglements, fortified

356. MURPHY-O’CONNOR, *supra* note 330, at 156.

357. S. Hock-Markovitz, in *JERUSALEM: A WALK THROUGH TIME* II 42 (E. Meiron ed., 1999).

358. Interview with Jonathan Cutler, *supra* note 326.

359. S. Ettinger, in *3 A HISTORY OF THE JEWISH PEOPLE* 1014 (H.H. Ben Sasson ed., 1976).

360. Interview with Jonathan Cutler, *supra* note 326.

361. TOM SEGEV, *ONE PALESTINE COMPLETE: JEWS AND ARABS UNDER THE BRITISH MANDATE* 416 (2000).

362. *Id.* at 416.

363. See MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* 182 (2002) (“In some cases, even houses were divided, where property fell within the width of the pencil used to draw the armistice map in 1949.”); CHAIM HERZOG, *THE ARAB-ISRAELI WARS* 201–02, 285–86 (1982). Fortifications were constructed in the Sinai and the Golan as well. Interview with Jonathan Cutler, *supra* note 326.

emplacements, high anti-sniper walls, and minefields.³⁶⁴ Jerusalem's strongest fortifications were at the Jordanian position at Ammunition Hill where "a ganglia of trenches, bunkers minefields, and concrete obstacles" was situated on the 1949 Jordan-Israel armistice line in the northern part of the city.³⁶⁵ The city's southern border near Kibbutz Ramat Rachel was similarly fenced off and surrounded by trenches.³⁶⁶

B. *The Contemporary Use of Barriers by Israel*

Contemporary Israelis, much like their ancient Israelite ancestors, live in a threatening environment requiring structures designed to enhance their security. Security fences ring many Israeli residential communities today, and particularly in open areas one will find security fences around any likely target. These include military installations, airports, power stations, fuel depots, nature reserves, schools, and universities. Fences and other fortifications are likewise a common sight along Israel's contemporary borders, and even deep inside the country. Some of these borders are international borders. In the south of the country from the Red Sea port of Eilat to the Erez checkpoint dividing Israel from the Gaza strip, an approximately 100-mile long barbed wire fence separates Israel from Egypt. This fence continues north, separating the Gaza Strip from Israel proper. A similar fence on Israel's northern border with Lebanon, designed to stop terrorist infiltration, runs along the Golan Heights frontier between Israel and Syria. Extending south along Israel's long eastern border, the peaceful international boundary with the Hashemite Kingdom of Jordan, Israel has constructed several rows of barbed-wire fencing together with a width of unpaved road that is regularly examined for fresh footprints. Further to the south the fence continues along the border between Jordan and the disputed West Bank.³⁶⁷

364. Interview with Mark Sugarman, *supra* note 339; cf. Julian Landau, *Mishkenot Sha'ananim: From Alms House to Cultural Centre—Jerusalem's First Building Outside the Old City's Wall*, ARIEL—ISRAEL REV. OF ARTS & LETTERS, Vol. 102, Sept. 6, 2003.

365. See OREN, *supra* note 363, at 219.

366. JERUSALEM ARCHIVES, 1967 AND THE SIX-DAY WAR: THE SAUSAGE AND THE BELL (n.d.), <http://www.jerusalem-archives.org/period6/6-9.html> (last visited Mar. 1, 2005).

367. Interview with Jonathan Cutler, *supra* note 326.

IV. PERSPECTIVES ON THE DESIGN AND CONSTRUCTION OF THE ISRAELI SECURITY BARRIER

A. *Palestinian and Other Objections to the Barrier*

1. The Impact of the Israeli Security Barrier on Life in the Palestinian Areas

Israel Prime Minister Ariel Sharon considers the security barrier a key element in Israel's policy of reducing the toll of Palestinian terrorist attacks.³⁶⁸ The vast majority of Israelis also view the security barrier as an essential, non-violent defense against these horrific terror attacks, while a very different perspective emerges from the Palestinians and their supporters. The late Palestinian Authority (PA) Chairman, Yasser Arafat, described the barrier as "the biggest Nakba (catastrophe) of all Nakbas" to befall the Palestinians.³⁶⁹ Putting aside Arafat's hyperbole, the Palestinian as well as Israeli media, and many non-governmental organization (NGO) web sites, have prominently reported the negative impact of the barrier on Palestinian daily life. These negative consequences have affected the economy, social structures, psychological, mental, and physical health and general wellbeing of thousands of Palestinians in various parts of the West Bank.

Senior policy advisor at the Palestinian Ministry of National Economy, Saad Kahtib, describes the situation as follows:

Right now, all Palestinian lands are under a severe military siege, thus economic actors are restricted in their ability to move internally as well as externally. As a result of hindrances to free movement, the added cost of transportation has increased to as much as 30 to 50 percent of the overall cost of the products. Agricultural products are the most severely hit, since they are perishable. This year, some of the farmers left their strawberries on the ground because they could not sell them to Israel in time.³⁷⁰

The barrier, its proponents point out, would eliminate the matrix of Israeli checkpoints and other internal hindrances on transportation in the populated Palestinian areas. Once Israel can control who and what enters its population centers, the Israel Defense Forces (IDF) will have less need or incentive to monitor traffic within the populated Palestinian areas. The barrier, how-

368. See *60 Minutes: Will Fence Solve Israel's Woes?* (CBS Television Broadcast, Dec. 11, 2003), <http://www.cbsnews.com/stories/2003/12/11/60minutes/main588084.shtml> (last visited Mar. 1, 2005).

369. Gwen Ackerman, *Tears Run as Israeli Barrier Rises Near Jerusalem*, REUTERS, Jan. 13, 2004.

370. Telephone Interview by Agnes Szorenyi with Saad Kahtib, Senior Policy Advisor at the Ministry of National Economy, Ramallah, West Bank (Apr. 2, 2004).

ever, will neither solve the difficulties created in external Palestinian trade with Israel, nor will it solve economic problems created by restrictions on the movement of persons between Israel and the areas under PA control.

Actually, one of the great causes of concern for Palestinians is that the construction of the separation barrier, which may be followed by a policy of unilateral disengagement, has the potential to permanently change movement patterns, generating economic losses. Palestinians who held steady jobs in Israel have been particularly hard-hit. Due to the barrier, it now takes Jadid, a forty-seven year old resident of Ein Abus, located close to Nablus, a whole day of traveling in order to get to the road that spans Samaria, where he catches a cab to go to work.³⁷¹ "I've been working in Jaffa for almost 30 years, and now it is becoming nearly impossible to reach my work," he says.³⁷² According to Palestinian Ministry of National Economy senior policy advisor Saad Khatib, before the current Intifada broke out in September 2000, about 120,000 Palestinian workers used to work illegally in Israel, not to mention a large number of illegal workers. This labor force was employed in low-skill jobs, mainly in agriculture and construction. Now their number is down to 4000 to 5000.³⁷³

The agricultural sector, which was already in crisis from the onset of the Palestinian violence, faces even greater difficulties with the building of the barrier, according to Khalid Jaber, spokesperson at the Palestinian Ministry of Agriculture. Due to restrictions of movement inside the territories as well as the closure of crossing points between Israel and the PA, some farmers have been cut off from their land and do not have unimpeded access to their and livestock. Farm produce and other perishable items cannot be quickly and easily traded, and the general population's physical access to food is extremely problematical.³⁷⁴ Jaber referred to a

371. See Matthew Gutman, *Analysis: Fence Has Momentum of Its Own*, JERUSALEM POST, Jan. 20, 2004, <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1074485522129&p=1006688055060> (last visited Mar. 1, 2005).

372. *Id.*

373. Telephone Interview by Agnes Szorenyi with Saad Khatib, *supra* note 370.

374. Telephone Interview by Agnes Szorenyi with Khalid Jaber, Spokesperson at the Palestinian Ministry of Agriculture, Gaza City, Gaza Strip (Apr. 3, 2004); FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS, RAPIDLY DETERIORATING FOOD SITUATION IN WEST BANK AND GAZA STRIP (Global Information and Early Warning System on Food and Agriculture, Special Alert No. 321, 2002), http://www.fao.org/documents/show_cdr.asp?url_file=/Docrep/005/y6501e/y6501e00.htm (last visited Mar. 1, 2005).

World Bank report according to which many families now rely on food aid to survive.³⁷⁵

Qalqilya, a Palestinian city of approximately 42,000 residents,³⁷⁶ has been almost completely surrounded by the barrier. Palestinians cite this city as one that has been particularly hard-hit. According to Raham Ibrahim Mahmoud Ayyash, spokesperson at the Qalqilya Chamber of Commerce, Industry and Agriculture:

As a result of the wall, the farmers in and around Qalqilya have lost approximately 26,000 dunams [there are approximately four dunams in an acre] of agricultural land. Some of this land was confiscated and the plants on the area were destroyed because of the construction of the fence, while a considerably greater part of this territory has become difficult to access because of the permit system and the unreliability of the agricultural gates.³⁷⁷

Other commercial and services sectors of the Palestinian economy have been seriously disrupted by the building of the separation barrier. Ayyash explains that before the resumption of hostilities, a large portion of the income of Qalqilya was derived from trade and services provided to visitors from nearby Israeli towns and villages, and a large number of the city's residents used to work in Israel. Since the beginning of the violence in September 2000, approximately 600 economic institutions closed down in the city and unemployment rose to eighty-five percent. The economic recession resulting from the drastic decline in commerce between Israel and the PA was further exacerbated and perpetuated by the building of the security barrier, which now almost encircles the town.³⁷⁸

2. The Palestinian Perception of the Barrier

Many Palestinians view the restrictions imposed by that barrier as collective punishment for the acts of militant organizations operating in their vicinity. In February 2004 the Israel High Court of Justice received a petition submitted by the residents of several

375. THE WORLD BANK, TWO YEARS OF INTIFADA, CLOSURES AND PALESTINIAN ECONOMIC CRISIS: AN ASSESSMENT (2003), [http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/WBGsummary-ENG/\\$File/WBGsummary-ENG.pdf](http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/WBGsummary-ENG/$File/WBGsummary-ENG.pdf) (last visited Mar. 1, 2005) [hereinafter TWO YEARS OF INTIFADA].

376. THOMAS BRINKHOFF, CITY POPULATION: PALESTINIAN TERRITORIES (2003), <http://www.citypopulation.de/Palaestina.html> (last visited Mar. 1, 2005).

377. Telephone Interview by Agnes Szorenyi with Raham Ibrahim Mahmoud Ayyash, Spokesperson of the Qalqilya Chamber of Commerce, Industry and Agriculture, West Bank (Mar. 28, 2004).

378. *Id.*

Palestinian villages located near the northeastern section of the security barrier in the vicinity of Jerusalem. The goal of the petition, according to attorney Muhammad Dahla, who represented the villagers, was to "prevent the Palestinians from being swallowed up inside the fence and to allow the Palestinian villages space to naturally grow and develop." Dahla argued that "[y]ou can't strangle 30,000 residents and turn their villages into a prison."³⁷⁹ Many more petitions contesting the legality of the barrier have been submitted to the Israel High Court of Justice.³⁸⁰

Similarly, Hani Amer has six children and lives in Masha, a village in the northern part of the West Bank. His home is bounded on all sides by a barrier that he says makes him feel like he is in a "small prison."³⁸¹ Amer's anger, however, is directed more against the Palestinian leadership than against Israel. Although the PA held a large part of the responsibility for the situation in which he found himself, no one from the Palestinian Authority came to offer help:

I'm living in my own state because I have been cut off from my village and I don't have permission to enter Israel. The only people who are visiting me are Israeli and foreign journalists and activists. I haven't seen a single Palestinian official here. They don't care about us. They only care about making money and living a luxurious life. We are the ones who are paying the real price.³⁸²

The belief of Amer reflects that of many Palestinians. According to a former Palestinian minister:

The people are very angry with the corruption and the anarchy in the Palestinian Authority But these are issues we are not supposed to be talking about while Israel is building the fence. Frankly, I do not see the connection between the fence and cor-

379. Etgar Lefkovits & Yaakov Katz, *Court Stops Work on Part of Barrier*, JERUSALEM POST, Mar. 1, 2004, at 1, 2004 WL 61254440.

380. For further discussion pertaining to the involvement of the Israel High Court of Justice in matters regarding the security barrier, see *infra* Section V.

381. Khaled Abu Toameh, *Concrete Rage*, JERUSALEM POST, Feb. 26, 2004, at 10, 2004 WL 61254980.

382. *Id.*

ruption or reforms in our government.³⁸³ These are two separate issues.³⁸⁴

An example of the PA's attempts to divert Palestinian anger toward Israel was that while the ICJ was holding its first day of hearings on February 23, 2004, the PA declared "a day of 'rage and protest' against the security barrier, calling on Palestinians to stage rallies and demonstrations in the West Bank, Gaza Strip, and Jerusalem."³⁸⁵ Later that same week, Israeli border policemen killed two Palestinian demonstrators engaged in violent anti-barrier demonstrations.³⁸⁶ Afterward, and visibly embarrassed by the fact that Fatah—the largest Palestine Liberation Organization (PLO) faction that was headed by Arafat—was behind a major suicide attack carried out on the eve of the ICJ hearing on the legality of the barrier, the PA leadership called for "an immediate cease-fire."³⁸⁷ This cease-fire, however, as the "day of rage and protest" demonstrates, did not prevent Arafat from transferring the struggle against Israel to the international arena.

Many Palestinians, NGOs, independent activists and even certain elements of the international media have leveled claims that the barrier constitutes a "land grab" and is an "apartheid" wall.³⁸⁸ On November 9, 2003, on the anniversary of the fall of the Berlin wall, many of these organizations participated in protests against Israel's barrier in what was labeled an "International Day of Action Against the Wall,"³⁸⁹ which was immediately followed by an "International Week of Action Against the Wall," held from November 9–16,

383. According to the World Bank, in 2003 the PA adopted a program of reform that attempted the following:

[The PA] aims to weed out corruption by enforcing full fiscal accountability, to create a predictable and transparent legal environment, and to build a modern, merit-based civil service. . . . [H]aving acknowledged the need to combat corruption and to transform itself into a democratic, modern and accountable instrument of statehood, the PA must deliver a successful reform program or lose its legitimacy.

TWO YEARS OF INTIFADA, *supra* note 375.

384. Toameh, *supra* note 381.

385. Khaled Abu Toameh, *Arafat: Fence Prevents PA State; Rage Day Declared*, JERUSALEM POST, Feb. 23, 2004, <http://www.jpost.com/servlet/Satellite?pagename=JPost/JParticle/ShowFull&cid=1077423457223&p=%201006688055060> (last visited Mar. 1, 2005).

386. Etgar Lefkovits, *Two Killed at Fence Protest*, THE JERUSALEM POST, Feb. 27, 2004, at 1.

387. Toameh, *supra* note 385.

388. See, e.g., Jason Keyser, *Israel Looks to Change Name, Image of Security Wall*, NAT'L POST (CAN.), at A12.

389. See, e.g., GLOBAL EXCHANGE, ACTION ALERT: MAKE THE APARTHEID WALL (n.d.), <http://www.globalexchange.org/countries/palestine/wallfall.html> (last visited Mar. 1, 2005).

2003,³⁹⁰ consisting of a week of protest demonstrations in several dozen countries.³⁹¹ A year later an international week was proclaimed for November 9–16, 2004.³⁹²

The accusation that the barrier constitutes a land grab is particularly important in the context of Palestinian-Israeli peacemaking, given the territorial aspect of the conflict. Saeb Erekat, PA chief negotiator and Minister of Local Government, has repeatedly claimed that the by-way of the barrier undermines the possibility of a two-state solution to the Palestinian-Israeli conflict.³⁹³

The Arab/Muslim world has followed lockstep with the Palestinians in their denunciation of Israel's barrier, but public protest action in the street has been surprisingly more subdued than in the Western world. When the Palestinians called for the February 23, 2004 "day of rage and protest" against the barrier, small groups protested in several Arab capital cities. Some 125 demonstrators chanting "we oppose the racist wall faced about 350 riot police in Cairo,³⁹⁴ while in Damascus, courts closed for an hour in a show of solidarity with the Palestinians, and in front of the offices of the European Commission, several dozen Palestinians and Syrians staged a sit-in.³⁹⁵ At the Cairo protest, Farouq el-Ashri, the Nasserite party's highest ranking member there, berated the government of Egyptian government for not giving enough support to the Palestinians on the issue of the wall.³⁹⁶

390. See, e.g., United Nations International Conference of Civil Society in Support of the Palestinian People, *End Israel's Occupation of Palestine*, U.N. Doc. CPR/CCS/2003/22 (2003), <http://www.un.org/Depts/dpa/dpr/planofaction.pdf> (last visited Mar. 1, 2005).

391. See, e.g., THE GRASSROOTS PALESTINEAN ANTI-APARTHEID WALL CAMPAIGN, LIST OF WORLDWIDE ACTIVITIES FOR NOV. 9TH INTERNATIONAL DAY AGAINST THE WALL! (2003), <http://stopthewall.org/worldwideactivism/62.shtml> (last visited Mar. 1, 2005). The number of organizations that responded to this "call to arms" can easily be gleaned from a simple Internet search for the phrase "International Day of Action Against the Wall." See, e.g., COUNCIL FOR ARAB-BRITISH UNDERSTANDING, CURRENT CAMPAIGNS—ISRAEL'S SECURITY WALL (2003), <http://www.caabu.org/campaigns/amnesty-wall.html> (last visited Mar. 1, 2005).

392. See, e.g., Press Release, PENGON/Anti-Apartheid Wall Campaign, 9th–16th November 2004—2nd International Week Against the Apartheid Wall: Massive Mobilization in over 20 Countries Worldwide! (Nov. 8, 2004), <http://stopthewall.org/worldwideactivism/800.shtml> (last visited Mar. 1, 2005).

393. Dan Williams & Jeffrey Heller, *Israel Redraws West Bank Barrier*, REUTERS, Feb. 8, 2004.

394. See Jasper Mortimer, *Arab World Protests Security Fence*, JERUSALEM POST, Feb. 24, 2004, at 3; Ravi Nessman, *Thousands of Palestinians Protest Israeli Separation Barrier*, ASSOCIATED PRESS, Feb. 24, 2004.

395. See Mortimer, *supra* note 394.

396. See *id.*

3. The Legal Stance of Palestinians on the Issue of the Barrier

According to the PLO's Legal Position, as annexed to the Report of U.N. Secretary-General Kofi Annan, "[t]he construction of the Barrier is an attempt to annex the . . . territory contrary to international law."³⁹⁷ The *de facto* annexation of land interferes with territorial sovereignty and consequently with the right of the Palestinians to self-determination.³⁹⁸

In addition to these claims, which inevitably raise political issues, other Palestinian legal arguments are centered on the economic and social consequences of the construction. Humanitarian principles and human rights principles are often cited to underline various grievances.³⁹⁹

The PLO's legal position alleged the following:

The measure of constructing the wall within the occupied Palestinian territory and related measures taken by the Government of Israel constitute violations of international humanitarian law because those measures are not justified by military necessity and violate the principle of proportionality. The harm those measures have caused include:

Extensive destruction of Palestinian homes and other property and appropriation of property not justified by military necessity, contrary to the Fourth Geneva Convention;⁴⁰⁰

Infringements on the freedom of movement contrary to the International Covenant on Civil and Political Rights and in violation of the obligations of the Gov-

397. *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, U.N. GAOR, 10th Emergency Special Sess., Agenda Item 5, Annex II, U.N. Doc. A/ES-10/248 (summarizing the legal position of the Palestine Liberation Organisation) [hereinafter *Report of the Secretary-General*]; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Request for an Advisory Opinion), Written Statement Submitted by Palestine, Jan. 30, 2004 [hereinafter *Palestine's Written Statement on Construction of the Wall*]. In their legal battle against the fence, Palestinians argue that it is not built on the "demarcation line," also known as the "Green Line," which marks the "de facto boundary between Israel and the Palestinian territories" based upon the situation before the 1967 War. The argument continues that the construction project is taking place "not within the territories of Israel, but within the Palestinian territories its military occupies." Zaha Hassan & Steven Goldberg, *Israel's Wall: An Analysis of Its Legal Validity Under U.S. and International Law*, NAT'L LAWYERS GUILD, Nov. 2003, <http://www.nlg.org/programs/mideast/wall.htm> (last visited Mar. 1, 2005); Arjan El Fassed, *False Wisdoms About Israel's Security Fence*, ELECTRONIC INTIFADA, Aug. 29, 2002, <http://electronicintifada.net/cgi-bin/artman/exec/view.cgi/4/571> (last visited Mar. 1, 2005).

398. See *Report of the Secretary-General*, *supra* note 397; *Palestine's Written Statement on Construction of the Wall*, *supra* note 397.

399. See *Report of the Secretary-General*, *supra* note 397; *Palestine's Written Statement on Construction of the Wall*, *supra* note 397; Hassan & Goldberg, *supra* note 397.

400. *Report of the Secretary-General*, *supra* note 397; *Palestine's Written Statement on Construction of the Wall*, *supra* note 397; see Hassan & Goldberg, *supra* note 397.

ernment of Israel under the Fourth Geneva Convention;⁴⁰¹

Infringements on the rights to education, work, an adequate standard of living and health care contrary to the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights and in violation of the obligations of the Government of Israel pursuant to the Fourth Geneva Convention;⁴⁰²

Violations of the prohibition against arbitrary interference of the home contrary to the International Covenant on Economic, Social and Cultural Rights and the freedom to choose one's residence contrary to the International Covenant on Civil and Political Rights and in violation of the protections provided in the Fourth Geneva Convention as a result of the permit system established in the Closed Area.⁴⁰³

The laws of armed conflict, the Palestinians point out, equally prohibit an occupying power from undertaking permanent changes in the occupied area, unless these are due to military needs in the strict use of the term, or unless they are undertaken for the benefit of the local population. The Legal Position of the PLO cites the "violation of these Palestinian rights, including facilitating the entry into and residency of Israeli civilians in the Closed Area while restricting Palestinian access to and residency in that Area, are causing long-term, permanent harm, including the transfer of Palestinians."⁴⁰⁴

The majority of the above-mentioned legal arguments address humanitarian and human rights concerns resulting from the con-

401. See *Report of the Secretary-General*, *supra* note 397; Palestine's Written Statement on Construction of the Wall, *supra* note 397; see Hassan & Goldberg, *supra* note 397.

402. See *Report of the Secretary-General*, *supra* note 397; Palestine's Written Statement on Construction of the Wall, *supra* note 397. According to the Palestinians, Israel has a duty of ensuring the food and medical supplies of the Palestinian population. To this end, they claim, Israel should bring in the necessary foodstuffs, medical stores and other articles, if the resources of the occupied territory are inadequate. See Palestine's Written Statement on Construction of the Wall, *supra* note 397; see also Hassan & Goldberg, *supra* note 397. Restrictions on movement within the occupied territories are alleged to create serious food and water shortages. See generally *The Right to Food: Report by the Special Rapporteur, Jean Ziegler. Addendum: Mission to the Occupied Palestinian Territories*, U.N. ESCOR, 60th Sess., Provisional Agenda Item 10, Doc. No. E/CN.4/2004/10/Add.2 (2003). According to the Palestinians, Israel's fence would aggravate this situation, since it "separates Palestinian communities, denies access to land to farmers, [and] breaks off water lines." Hassan & Goldberg, *supra* note 397.

403. See *Report of the Secretary-General*, *supra* note 397; Palestine's Written Statement on Construction of the Wall, *supra* note 397.

404. *Report of the Secretary-General*, *supra* note 397; see Palestine's Written Statement on Construction of the Wall, *supra* note 397.

struction of the barrier. When asked to comment on Israel's readiness to alleviate the negative effects of the barrier, however, Michael Tarazi, the legal adviser to the PLO, declared: "This conflict is not about a humanitarian issue. . . . We appreciate that Palestinians will have access to schools and hospitals. But that's not going to solve the problem."⁴⁰⁵ Thus, objections that Tarazi advanced against the barrier were more political than judicial. The PLO's legal adviser called the barrier, "the latest step in Zionism's long-term strategy of taking Palestinian land while trying to get rid of Palestinian people."⁴⁰⁶ Although he acknowledged that the land where the barrier is being erected "never was under responsibility of the Palestinian Authority," he nevertheless called the barrier's construction a "land grab."⁴⁰⁷ He stated "Israel is caging in Palestinian population while it takes as much Palestinian land as possible."⁴⁰⁸

B. Israeli Perspectives

1. Realities that Resulted in Israel Building the Barrier

Parallel to the growing Palestinian dissatisfaction with PA politics, there is a disquieting phenomenon of fragmentation and radicalization, which is translated into increasing hostility towards America and Israel. According to one survey, only 3.2% of Palestinians accept the role of the United States in the Israeli-Palestinian negotiations. More alarmingly, eighty percent of the public support "military" (a euphemism for terrorist) attacks against Israel and seventy-three percent are in favor of "military operations" against U.S. targets in the area, while only thirty-three percent of Palestinians believe that there will be a chance of peaceful coexistence between Palestinians and Israelis after the founding of a Palestinian state.⁴⁰⁹

The views held by Palestinian grassroots organizations generally reflect the opinions of the majority of the Palestinian public about the legitimacy of attacks against Israeli civilians.⁴¹⁰ In fact, Palestin-

405. Interview by Marc Neugroeschel with Michael Tarazi, Legal Advisor to the PLO, Ramallah, West Bank (Jan. 19, 2004); see also Neugroeschel, *supra* note 3.

406. Interview with Michael Tarazi, *supra* note 405; see Neugroeschel, *supra* note 3.

407. Interview with Michael Tarazi, *supra* note 405; see Neugroeschel, *supra* note 3.

408. Interview with Michael Tarazi, *supra* note 405.

409. Development Studies Program of Birzeit University, *Survey #2: The Palestinian Intifada and the Peace Process: Integrity & Objectivity* (Public Opinion Poll conducted in November 2000 of 1234 Palestinians in 75 locations throughout the West Bank and Gaza Strip), http://home.birzeit.edu/dsp/DSPNEW/polls/poll_2/ (last visited Mar. 1, 2005).

410. See *id.*

blocks in the West Bank will be lifted because of the fence."⁴²⁴ As a result of Israeli disengagement, the Palestinians in the West Bank will be able to move more freely. "I found it very easy to explain to the Palestinians that the fence will improve their situation as well. I told them, 'The fence is to your benefit.' And they totally understand that. And they do say, 'yes, we agree.' But they oppose the deviation of the fence from the Green Line."⁴²⁵ Ben Eliezer adds, "[i]f I would be in charge, the fence would have remained on the Green Line."⁴²⁶

Initially, Prime Minister Ariel Sharon was opposed to the barrier, as he did not want the Labor Party to acquire credit for it among the Israeli public.⁴²⁷ He also stood under political pressure from Israelis living in the disputed territories who initially opposed the barrier, as they were afraid that the terrorists would concentrate their activities on them and their settlements once the barrier prevented them from entering the Israeli cities on the other side of the barrier.⁴²⁸ They were equally afraid that the barrier would be conceived as a border barrier that would delegitimize their settlements lying to the east of it. Only when it became clear that the barrier would not mark a future border did most of them consent to its construction.⁴²⁹

According to Mark Luria, head of an Israeli grassroots initiative lobbying for the construction of the barrier, "Uzi Dayan [former Israel National Security Advisor] decided that the barrier in Jerusalem more or less should be along the line of the municipal boundaries. Sharon actually said that there's no way he would build a fence in Jerusalem. Uzi Dayan said, 'Listen, after a few *Piguim* [terror attacks] he'll do it' and that's what happened."⁴³⁰

As Daniel Taub, Director of the General Law Department of the Israel Foreign Ministry explained:

3 years ago you would have been hard-pressed to find anyone who supported the idea of the security fence. It looks ugly, it causes genuine hardship to Palestinians, it costs an absolute fortune—even though it is temporary . . . there's only one argument in favor of this fence and that is that it works. We have a fence between Israel and the Gaza Strip and not a single suicide bomber has succeeded in crossing it. In those parts of the West

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. Interview with Marc Luria, *supra* note 6.

Bank where the fence has been built, suicide bombings are down by the region of 30 % [J]ust a month ago we caught two suicide bombers who were on their way to a High School in the north of Israel—only because of the security fence were they stopped.⁴³¹

The result of the as yet partially-completed barrier is that terrorists have not even once tried to cross the segments of the barrier that Israel has erected. They try to go around it, and this usually causes them to fail. An example is the attack they planned against the school in the north of Israel mentioned above by Taub. Had the barrier not been in place, the attackers would only have had to travel seventeen miles and could have reached their target quickly and easily. Instead due to the partially completed barrier, they had to travel some ninety-eight miles, taking part of their journey by tractor and part of it walking because there was no road. This half-day in transit enabled the IDF to catch them.⁴³²

The sections of the barrier that have been completed have, through January 2004, prevented twenty-nine suicide bombings. "If these planned attacks would not have been prevented by the fence, they would have caused counter reactions and thereby contributed to an escalation of the conflict,"⁴³³ explains MK Ben Eliezer.

Former Israel Justice Minister Yosef Lapid, referring to the terror attack that occurred on the eve of the hearing held by the ICJ on the issue of the barrier, commented that "[t]he despicable attack in Jerusalem is the answer to the accusations against Israel about the security fence at the ICJ." He continued: "If the Jerusalem envelope [fence] were to be completed then the attack wouldn't have happened."⁴³⁴ Similarly, the July 30, 2002 Hebrew University cafeteria bombing in which nine people were killed⁴³⁵ and eighty were wounded,⁴³⁶ could have been prevented had the barrier existed at the time.⁴³⁷ A terrorist cell from a nearby eastern Jerusa-

431. *Hardtalk* (BBC television interview with Daniel Taub, Director of the Israel Foreign Ministry General Law Department, Feb. 5, 2004).

432. Press Conference, Brigadier General Eival Giladi, former Head of Strategic Planning of the IDF, Jerusalem (Jan. 6, 2004).

433. Interview with Binyamin Ben Eliezer, *supra* note 421.

434. *Mofaz: Fence is Potent Deterrent to Attacks*, JERUSALEM POST, Feb. 22, 2004, <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=10774234> 52750 (last visited Mar. 2, 2005).

435. Sudarsan Raghavan, *Israeli Officials Break Up East Jerusalem-Based Militant Cell*, KNIGHT RIDDER/TRIB. BUS. NEWS, Aug. 22, 2002, available at <http://www.miami.com/mld/miami/3910564.htm?1c> (last visited Mar. 2, 2005).

436. Marc Lavie, *5 Americans Among Israel Victims*, DESERET MORNING NEWS, Aug. 1, 2002, at A6.

437. Interview with Marc Luria, *supra* note 6.

lem neighborhood had prepared the university attack, obtaining the bomb from the West Bank town of Ramallah where the commanders of their Hamas cell were located.⁴³⁸

According to former Israel Minister of Internal Security Uzi Landau:

Israel is now building the fence in Samaria, and we will continue to do so between the mountains of Judea and our southern coastal plain because 130 suicide bombers crossed over from these areas. Only three suicide bombers have come from Gaza where there is already a security fence. Two of them, British citizens, crossed through the gate as tourists . . . There exists a huge fence and walls along long segments of the border between the United States and Mexico, a fence meant to stop people who come to find jobs in the US. It takes a lot of audacity to come and demand of us not to have a fence, when we have this fence to intercept those who come to commit mass murder.⁴³⁹

2. Israeli Opinions Regarding the Barrier

An opinion poll published by the Israeli daily newspaper *Ma'ariv*, as early as April 2002 showed that between thirty-five to fifty-seven percent of Israelis supported the withdrawal of Israeli forces from eighty percent of the territories of the West Bank on the condition of installing a barrier between Israel and the Palestinian Authority territories.⁴⁴⁰

By the year 2004, the support for the barrier among the Israeli public rose to include a vast majority of the Jewish population. According to the findings of the February 2004 Peace Index survey, the Jewish population of Israel supports construction of the barrier by an overwhelming eighty-four percent, despite both foreign and domestic criticism. Support for the barrier is based on the prevalent belief (seventy percent) that it can reduce terror attacks by a significant extent, while a minority (16.5%) even believe in its ability, together with methods, to totally prevent such attacks. The extensive support behind the barrier cuts across political lines. Among Shinui, Likud, and Labor party voters the support is close

438. Laurie Copans, *Hebrew University Handyman Arrested in Bombing that Killed Nine*, USA TODAY, Aug. 21, 2002, http://www.usatoday.com/news/world/2002-08-21-israel-arrests_x.htm (last visited Mar. 2, 2005).

439. UZI LANDAU, THE SECURITY FENCE: AN IMPERATIVE FOR ISRAEL (Jerusalem Center for Public Affairs Issue Brief No. 3-15, 2004), <http://www.jcpa.org/brief/brief3-15.htm> (last visited Mar. 2, 2005).

440. *Israeli Opinion Poll on the Palestinians*, ARABIC NEWS.COM, Apr. 13, 2002, <http://www.arabicnews.com/ansub/Daily/Day/020413/2002041306.html> (last visited Mar. 2, 2005).

to being complete (about ninety percent), while amid voters of the National Union, the National Religious, Shas, and Meretz parties it is somewhat less (sixty to seventy percent).⁴⁴¹

According to Marc Luria, the grassroots initiative, Israel Citizens For the Fence, was founded in response to a wave of terrorism that peaked with the Dolphinarium attack in the summer of 2001,⁴⁴² in which some twenty people were killed and 120 wounded when a suicide bomber blew himself up outside a popular discothèque in Tel Aviv along the seafront promenade while standing in a large group of teenagers waiting to enter the disco.⁴⁴³ The sole intention of Luria's initiative has been to press for the construction of a barrier that will improve the security of Israeli citizens. His initiative did not seek to serve any other political purpose.⁴⁴⁴

As Luria points out:

There were people who initially supported the idea of the fence, but rather would have no fence at all then one deviating from the Green Line. Here we disagree. We said let's build it wherever we can. The terror attacks will be stopped wherever the fence will be built . . . I have some personal reservations regarding the route of the fence. However, I would much prefer to have this fence then having no fence at all. And, if necessary, we can change the route of the fence some time in the future. The debate about the route of the fence is legitimate. But its construction should not be delayed because of that.⁴⁴⁵

Indeed, security concerns have come to convince the majority of Israelis, regardless of their political views, of the need for the anti-terrorism barrier. Daniel Greenspan, a resident of the settlement called Revava located in the northern West Bank, says that although ideologically he thinks that there should not be any divisions, borders, or barriers in the land of *Eretz Israel* (the Hebrew term for the Biblical land that God promised to the Jewish people), he is in favor of the barrier from a practical standpoint because it

441. EPHRAIM YAAR & TAMAR HERMANN, PEACE INDEX: FEBRUARY 2004 (n.d.), <http://spirit.tau.ac.il/socant/peace/peaceindex/2004/files/feb2004e.pdf> (last visited Apr. 3, 2005); see SZYMANSKI, *supra* note 2.

442. Interview with Marc Luria, *supra* note 6.

443. See ISRAELI MINISTRY OF FOREIGN AFF., SUICIDE AND OTHER BOMBING ATTACKS IN ISRAEL SINCE THE DECLARATION OF PRINCIPLES (SEPT. 1993) (2005), <http://www.mfa.gov.il/mfa/terrorism-%20obstacle%20to%20peace/Palestinian%20terror%20since%202000/Suicide%20and%20Other%20Bombing%20Attacks%20in%20Israel%20Since> (last visited Mar. 2, 2005).

444. The group has struggled in putting across its idea that a mere security fence without any further political implications should be built. The public was habituated to automatically associating the idea of the fence with certain political intentions. Interview with Marc Luria, *supra* note 6.

445. *Id.*

will probably help to protect centers of the Israeli population. If he had to vote for or against the barrier, therefore, he would vote in favor.⁴⁴⁶

Virtually all the Jewish settlers were initially opposed to the barrier. Sharon and the Likud party were likewise opposed to it because it was seen as the partitioning of the land with the Palestinians.⁴⁴⁷ Now, however, there is no organized opposition because the Yesha Council, which comprises the political representatives of the settlers, is in favor of the barrier. In fact, in embracing the idea of a barrier, they have demanded that the barrier encircle certain settlement blocks. There are many individual settlers, however, who do not want a barrier either for ideological or political reasons.⁴⁴⁸ They are worried that the barrier would impose a template for a future border between Israel and a Palestinian state—a border to which they vehemently object.⁴⁴⁹ They see the barrier as a first step toward dismantling settlements that are located on its eastern side, even using the loaded language that “ethnic cleansing of Jews” from their homes will be the result.⁴⁵⁰ Some Israelis living in West Bank settlements had friendly relationships with neighbors in Arab villages before the start of the present Palestinian violence,⁴⁵¹ and do not believe that the barrier will bring greater security.⁴⁵²

Eve Harow, a member of the city council of the West Bank settlement of Efrat, wrote in an open letter to her neighbors that “[e]stablishing borders without a national agreement, or even a debate, is sneaky at best, chilling at worst.”⁴⁵³ In an interview with the Israeli *Arutz-7*'s radio newsmagazine after she had participated

446. Interview by Marc Neugroeschel with Daniel Greenspan, medical student at Tel-Aviv University and resident of the West Bank settlement of Revava, in Revava, West Bank (Mar. 15, 2004).

447. See Yosef Goell, *Pardon the Inconvenience*, JERUSALEM POST, July 5, 2004, at 13.

448. Interview by Michael Etedgui with Elyakim Haetzni, lawyer, member of the Yesha Council, columnist for the Israeli daily newspaper YEDHIOT AHARONOT, in Jerusalem (Mar. 25, 2004).

449. See, e.g., Eve Harrow, *Against the Fence: A Call to My Neighbors in Efrat and the Rest of Israel*, ISRAEL RESOURCE REV., Mar. 22, 2004, <http://israelbehindthenews.com/Archives/Mar-22-04.htm> (last visited Mar. 2, 2005).

450. See, e.g., Bernard J. Shapiro, *Coping with Terrorism and Demography, Israel's Virtual Surrender to Arafat & Terrorism*, MACCABEAN ONLINE, Oct. 2004, http://www.freeman.org/m_online/October04/ (last visited Mar. 2, 2005); Harrow, *supra* note 449.

451. See, e.g., *Behind The Fence* (BBC television broadcast, May 25, 2003) (transcript available at <http://news.bbc.co.uk/nol/shared/spl/hi/programmes/correspondent/transcripts/25.5.03.txt> (last visited Mar. 2, 2005)).

452. See, e.g., *id.*

453. Harrow, *supra* note 449.

in a seminar at the College of Judea and Samaria in Ariel on the topic of the security barrier, the Mayor of the Israeli settlement of Kedumin, Daniella Weiss, said:

I am opposed to a fence altogether; the fact that they plan to include one or two given communities within the fence doesn't make me happy in the least bit. I am against all fences in Israel in any way, shape or form—whether they be around a community or dividing up the Land of Israel. . . . What is going on there on the other side behind the fence? Are the Arabs there developing any kind of love for the Jewish people? Is a society being built that appreciates the Zionist endeavor in any way—or is a society of hatred being built up on the other side of the fence, one that [is] developing its arsenal of weapons of war against us? . . . Every thinking person knows that this fence is merely an illusion, one that lulls the people and the army into thinking that there is security when in fact there isn't. . . . I say categorically: Not only will the fence not help in stopping terrorism, it is one of the most serious factors in the lessening of our security and increasing the terrorism, both practically and psychologically!⁴⁵⁴

Similarly, some Israelis on the left oppose the barrier because of the suffering and hardship it imposes on the Palestinians and the increasing Palestinian anger and frustration that has resulted. Some object to the breaking off of friendly social and business contacts between Palestinians and Israelis resulting from its construction. More than thirty residents of Mevaseret Zion, a suburb of Jerusalem, joined a petition submitted to the Israel High Court of Justice by eight adjoining Arab villages. The petition challenges the construction of the barrier around the Arab villages. The High Court issued a temporary injunction to stop the construction until a satisfactory solution for the petitioners could be found.⁴⁵⁵ In similar appeals the High Court has halted over half a dozen other sections of the barrier to the west and north of Jerusalem in response to petitions signed by some 800 Jewish residents. Israeli human rights groups have initiated many of these petitions.⁴⁵⁶

Israeli Arab MK's have been especially critical of the barrier. “The wall is one of the most brutal and prominent obstacles toward the creation of an independent Palestinian state alongside Israel,” according to MK Ahmed Tibi. “The Israel-Palestinian crisis is an

454. *Veteran Yesha Leader: Sharon Will Fall*, ARUTZ SHEVA, Mar. 29, 2004, <http://www.arutzsheva.org/print.php3?what=news&id=60251> (last visited Mar. 2, 2005).

455. Lefkovits & Katz, *supra* note 379.

456. Dan Izenberg, *Court Weighs Fence Petition*, JERUSALEM POST, May 4, 2004, at 5.

international dispute We are in the opposition and it is our duty to be pioneers and even get criticized for it."⁴⁵⁷

3. The Oslo Interim Peace Agreements and the Barrier

Much of the Arab world, along with states outside the Middle East, have criticized the barrier as an attempt by Israel to annex Palestinian lands and unilaterally establish borders.⁴⁵⁸ The government of Israel emphatically rejects such claims and insists that the barrier does not annex any land; nor does it establish any borders. Israel believes that questions of land annexation and borders are issues for final status peace negotiations and insists that it maintains its support for the "Road Map" peace proposal.⁴⁵⁹

According to Ben Eliezer, the barrier is not prejudging a political agreement. Once there is a political agreement, it is very likely that the course of the barrier may be changed or that the entire barrier may even be removed completely.⁴⁶⁰ Israel Foreign Minister Silvan Shalom in fact declared that the barrier will benefit the peace process, and, in the event that a peace agreement with the Palestinians is finally achieved, the barrier will be moved.⁴⁶¹

The question whether Israel has jurisdiction to construct security installations in the disputed territories is readily answered by the Oslo peace accords,⁴⁶² which Yasser Arafat signed on behalf of the

457. Tovah Lazaroff, *Protests to Overshadow Legal Show at the Hague*, JERUSALEM POST, Feb. 20, 2004, at 1.

458. *U.S. Said to be Mulling Financial Penalties for Israel over Security Barrier*, MUSLIM AMERICAN SOC'Y, Aug. 5, 2003, <http://www.masnet.org/news.asp?id=330> (last visited Mar. 3, 2005).

459. See ISRAEL MINISTRY OF DEFENCE, QUESTIONS AND ANSWERS: WHAT IS THE GOAL OF THE FENCE FROM A POLITICAL POINT OF VIEW? (2004) [hereinafter WHAT IS THE GOAL], <http://www.seamzone.mod.gov.il/Pages/ENG/questions.htm> (last visited Mar. 2, 2005).

460. Interview with Binyamin Ben Eliezer, *supra* note 421.

461. Greer Fay Cashman, *Shalom: Fence is Not a Wall*, JERUSALEM POST, Jan. 20, 2004, 2004 WLNR 248730.

462. See, e.g., Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-P.L.O., 32 I.L.M. 1525 [hereinafter DOP]; Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-P.L.O., 33 I.L.M. 622; Agreement on Preparatory Powers and Responsibilities, Aug. 29, 1994, Isr.-P.L.O., 34 I.L.M. 455; Protocol on Transfer of Powers, Aug. 27, 1995, Isr.-P.L.O., <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Further+Transfer+of+Powers+and+Responsibilities.htm> (last visited Mar. 2, 2005); Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-P.L.O., 36 I.L.M. 557 [hereinafter Oslo II]; Protocol Concerning the Redeployment in Hebron and Related Documents, Jan. 17, 1997, Isr.-P.L.O., 36 I.L.M. 653; Wye River Memorandum, Oct. 23, 1998, Isr.-P.L.O., 37 I.L.M. 1251; Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, Sept. 4, 1999, Isr.-P.L.O., http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1999/9/SharmI-Sheikh+Memorandum+on+Implementation+Timel.htm (last visited Mar. 2, 2005). At this time only the

PA and the PLO, that describe those aspects of the former Israeli jurisdiction that were transferred to the Palestinian Authority. In September 1995, upon conclusion of the Oslo II agreement⁴⁶³ extending Palestinian administration to the West Bank, then Israeli Foreign Minister Simon Peres announced: "[O]nce the agreement will be implemented, no longer will the Palestinians reside under our domination."⁴⁶⁴ Since then, ninety-eight percent of all West Bank and Gaza Strip Palestinians have come under their own jurisdiction, while civilian authority was transferred by Israel to the Palestinians in forty areas, in addition to the responsibility for public order and security. Israel did insist, though, on maintaining the authority to protect its external security as well as that its citizens.⁴⁶⁵ Article XII(1) of the Oslo II agreement provides as follows:

*Israel shall continue to carry the responsibility for defense against external threats . . . as well as the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility.*⁴⁶⁶

Likewise, Article XV of the Oslo II agreement states that "[b]oth sides shall take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against each other, against individuals falling under the other's authority . . . and shall take legal measures against offenders."⁴⁶⁷ In light of the demonstrated inability, indeed unwillingness, of Arafat and the PA to meet their commitments under this and other similar provisions, there can be little doubt as to Israel's authority to act under the terms of the peace agreements.

It is clear, therefore, that Israel never gave up its jurisdiction with regard to "external threats," "overall security," and, in particular, the "security of Israelis" in the disputed territories. Israel has expressly retained powers, even in the territory turned over to the PA, to take measures that enhance the security of its citizens. In

DOP, Oslo II, Hebron Protocol, Wye River Memorandum, and Sharm el-Sheikh Memorandum are relevant, because the other agreements have been superseded.

463. Oslo II, *supra* note 462.

464. Gold, *supra* note 8.

465. *Id.*

466. Oslo II, *supra* note 462, art. XII(1) (emphasis added). See also *id.* art. X(4) ("Israel shall continue to carry the responsibility for external security, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order.") (emphasis added); DOP, *supra* note 462, art. VIII. Annex I of Oslo II, which contains the Protocol Concerning Redeployment and Security Arrangements, also uses similar language in Article V(2)(a) on the Security Arrangements in the West Bank.

467. Oslo II, *supra* note 462, art. XV (emphasis added).

light of the ongoing prolonged wave of terror attacks that the PA was obligated to combat, Israel used these powers to establish checkpoints, conduct hot pursuit operations, confiscate weapons in the possession of terrorist organizations, and to begin building a security barrier in order to protect, to the greatest extent possible, the security of its citizens and to guard against external threats. This jurisdictional argument is *a fortiori* given the total failure of the PA to meet its obligation to "take all measures necessary in order to prevent acts of terrorism."⁴⁶⁸

4. Considerations in Design and Placement of the Barrier

Israel has completed, according to one source, about 150 miles of the barrier, most of which consists of a 150- to 250-foot-wide, multi-layered obstacle course.⁴⁶⁹ The main feature is a ten-foot-high chain-link fence equipped with sensors. Two wide strips of sand run parallel, one on each side of the barrier to detect footprints. A ditch on the eastern side of the barrier, patrol roads and coils of barbed wire running parallel on both sides of the fence complete the barrier.⁴⁷⁰

Between three and six percent of the running length of the barrier will contain concrete segments.⁴⁷¹ Whenever there is a wall, it is along the Green Line, and no Palestinians live west of the section that is a wall.⁴⁷² These sections consist of a concrete wall either because in certain populated areas an insufficiently wide strip of land is available to construct the entire fence structure as earlier described, or because the barrier runs parallel to an Israeli road that has been subjected to sniper fire, and a chain-link fence would either not be feasible or would provide inadequate security. The

468. *Id.* (emphasis added).

469. Telephone Interview with Major Gil Limon, *supra* note 420. For further discussion on the length of the barrier completed, see *supra* Section V. Certainly different sources will indicate different lengths of the barrier completed depending on the respective dates of the source, the relevant information available at that time, and different ideas as to what constitutes completion of the barrier.

470. Telephone Interview with Major Gil Limon, *supra* note 420.

471. At any given point in time during the construction of this multi-year project various calculations of the percentage of concrete segments in the then-completed barrier will result in different figures. See, e.g., Israel's Written Statement on Construction of the Wall, *supra* note 301, para. 2.7 (indicating that less than five percent of the barrier is of concrete). Other sources calculate the percentage of concrete in the barrier at about six percent of its total length. See, e.g., Feinstein, *supra* note 299. Still others determine that less than three percent will be concrete. See, e.g., *A Fence, Not a Wall*, *supra* note 301. For further discussion of the concrete portions of Israel's barrier, see *supra* Section II.

472. Press Conference, Brigadier General Eival Giladi, *supra* note 418.

height of the wall in each case is determined by the potential angle of sniper fire.⁴⁷³

According to Brig. Gen. Eival Giladi, the former head of Strategic Planning of the IDF, the number one cause of death of Israelis during the current wave of terrorism is from suicide bombs, but the number two cause, which few people realize, is from terrorists that ambush drivers from the side of a road. One of the reasons for the largest part of the concrete wall sections was the shooting that came from Qalqilya at buses and cars traveling on inter-city Route 6. This high wall was put up only after the population of Qalqilya was asked to stop the shooting, and the shooting did not desist.⁴⁷⁴

While security should be the determining factor in establishing the barrier's route according to some two-thirds of the Jewish public, only thirty-one percent think that the harm caused to the Palestinian's ability to cultivate lands and the difficulties created in moving about in the West Bank, should be a significant consideration in choosing the barrier's route. A considerably larger section of the population (sixty-four percent) views the issue of hardship caused by the barrier to Palestinians as a secondary, or even a negligible concern.⁴⁷⁵

Reflecting the views of the majority of the Jewish public, Luria, the head of the grassroots initiative Israel Citizens for the Fence, claimed, "I haven't seen any particular part of the fence that could be interpreted as to be designed for 'land grabbing.' I spoke to Nezach Mashiach, Dani Tirza and the other major planners of the fence. For the route and location of every section of the fence there is a particular technical explanation."⁴⁷⁶

As Brig. Gen. Giladi explains, the line on which Israel is constructing the fence was not decided from the top in the political echelon and imposed on the military, but rather the uniformed security services determined its placement by standing on hills and looking around. Topography was taken into consideration when deciding on the path of the fence, and it was also designed to avoid

473. See, e.g., *A Fence, Not a Wall*, *supra* note 301. A 25-foot wall in Abu Dis, for example, is often photographed from its western side, to illustrate the overwhelming massiveness of the wall in comparison to small figures standing in front of it. What one does not see from the low level of such photographs is the hill rising on the eastern side of the wall, and the buildings from which snipers can shoot at Israelis on the western side. See, e.g., Photograph by Ariel Jerozolinski, *In Jerusalem*, THE JERUSALEM POST, Feb. 27, 2004.

474. Press Conference, Brigadier General Eival Giladi, *supra* note 418.

475. Yaar & Hermann, *supra* note 441.

476. Interview with Marc Luria, *supra* note 6.

blind spots. The idea was for soldiers who patrol the barrier to be able to protect every single foot of it. Another factor considered in placing the barrier was how long it would take soldiers to get to the barrier if the IDF discovered an attempt to breach it and also whether the soldiers would be in a good position if shooting broke out.⁴⁷⁷

Not surprisingly, Israel is constructing a segment of the barrier in Jerusalem on top of earlier Roman fortifications built some 2000 years ago.⁴⁷⁸ This illustrates that although technology has been revolutionized, the need to protect Jerusalem by controlling the high ground and blocking likely avenues of attack has changed little in two millennia.

Except for operational considerations, the planners tried to preserve archeological sites and nature reserves. They also attempted *not* to divide Palestinian towns and villages that were built along the Green Line and attempted to avoid demolishing houses, even illegally built ones.⁴⁷⁹ Sometimes the planners changed the route of the fence to go around cemeteries. At other times they negotiated with Palestinian farmers who wanted to retain access to as much of their fields as possible. An important consideration was trying to avoid taking private land, so at times the fence was moved 200 or 300 yards to place it on public land instead.⁴⁸⁰

An important consideration in the placement of the fence was that of demography.⁴⁸¹ According to Nezach Mashiah, the Ministry of Defense official in charge of the construction of the fence, the idea to have as much of the Jewish population as possible on the Israeli side of the fence was a key determinant in the construction. As opposed to a fence that would be built on the Green Line, the current route of the fence adds another hundred thousand Jews to those living on the Israeli side of the barrier by including the West Bank settlement of Ariel, while relatively few Arabs are added to the Israeli side. There are 180,000 Arabs living in East Jerusalem in addition to another 15,000 Arabs in all the other areas between the barrier and the Green Line. At the same time there are well over 100,000 Jews living in the same area.⁴⁸² The original

477. Press Conference, Brigadier General Eival Giladi, *supra* note 418.

478. Interview by Justus Reid Weiner with Major Gil Limon, Advocate, Legal Advisor's Office Region of Judea and Samaria, IDF, in Jerusalem (Mar. 9, 2004). Limon was a Captain at the time of interview, and has subsequently been promoted to the rank of Major.

479. *Id.*

480. Press Conference, Brigadier General Eival Giladi, *supra* note 418.

481. *Id.*

482. Interview with Marc Luria, *supra* note 6.

plan, explained Brig. Gen. Giladi, was for Ariel, to be outside the fence, showing that its route was not chosen on a political basis (because there was consensus that Israel would not withdraw from Ariel), but after a number of terror attacks in Ariel, however, the plan was amended to incorporate it.⁴⁸³ "The Green Line is not a border," elucidates Giladi, "and it has nothing to do with security. If we build the fence on the Green Line it will give the Palestinians the idea that they achieved something by using terrorism."⁴⁸⁴

According to Daniel Taub, Director of the General Law Department of the Israel Foreign Ministry:

There is nothing political in trying to save the lives of Israelis living on the other side of the green line, until such time as we can reach a peace agreement. That's why this fence is temporary And the proof is that Israel has actually removed more fences than we've built On the border with Lebanon we moved 52 km of fence in order to comply with UN resolutions And Prime Minister Sharon was himself responsible for dismantling the town of Yamit, and all the Israeli infrastructure in the Sinai desert, in order to enable a peace agreement with Egypt. It will take far less time to move or remove this fence than it's taken to put it up in the first place.⁴⁸⁵

The fence indeed is constructed in a manner that would allow it to be readily moved or taken apart⁴⁸⁶ if and when the security situation improves as it is the continuing hope of Israelis that the barrier will become irrelevant, and can be dismantled once the peace negotiations will bring lasting security.⁴⁸⁷

There are three types of passages through the barrier:

- (1) gates for workers and goods going into Israel;⁴⁸⁸
- (2) gates for farmers and students; and
- (3) military checkpoints.⁴⁸⁹

When asked about the inconveniences this will impose on the Palestinian population, Major Gil Limon, a legal advisor for the IDF, explained that in those places where drivers will have to travel longer distances than before, the Army will build checkpoint-free

483. Press Conference, Brigadier General Eival Giladi, *supra* note 418.

484. *Id.*

485. BBC television interview with Daniel Taub, *supra* note 431.

486. For example, "[a]s regards the new wall in Abu Dis," says Giladi, "if we can build it quickly because it is prefabricated, then we can also remove it just as quickly." Press Conference, Brigadier General Eival Giladi, *supra* note 418.

487. See ISRAEL MINISTRY OF DEFENCE, QUESTIONS AND ANSWERS: WHY ISN'T THE SECURITY FENCE BUILT ALONG THE "GREEN LINE"? (2004), <http://www.seamzone.mod.gov.il/Pages/ENG/questions.htm> (last visited Mar. 3, 2005).

488. Telephone Interview with Major Gil Limon, *supra* note 420.

489. *Id.*

bypass roads.⁴⁹⁰ Limon pointed out that checkpoint openings (gates) have been built into the fence on average 1.8 miles apart to allow for the supervised passage of people, goods, and vehicles. To date there are approximately thirty operational gates along the existing segments of the barrier. The Army has also decided to fund school buses for Palestinian students traveling to the West Bank from the Seam Zone⁴⁹¹ (an area located between the security barrier on the east and the "Green Line" on the west⁴⁹²) and also to reduce the number of roadblocks.⁴⁹³

5. Built-in Safeguards Aimed at Minimizing Hardship and Inconvenience

Despite security considerations, Israel explains that every effort is being made to avoid undue hardship to the Palestinian local population. According to the Israel Ministry of Foreign Affairs, the use of public land for building the barrier has been a priority. Where this has not been feasible, however, private land has been *requisitioned*, not confiscated. The land thus remains the property of the landowners who are compensated for the land requisitioned and for any damage that may be incurred (for example, to trees or crops) during the construction of the barrier. Landowners who object to the property seizure may institute legal proceedings,⁴⁹⁴ and even file an appeal to the Israel High Court of Justice,⁴⁹⁵ as will be discussed below.

Moreover, and overwhelming support for the barrier notwithstanding, seventy-one percent of Israelis back the right of those who are against the barrier or its route to express their opinion so long as their protest does not break the law. This reflects the "strongly legalistic worldview" of the Israeli-Jewish public.⁴⁹⁶ As Maj. Gil Limon explains, the Israeli army functions in compliance

490. Interview with Major Gil Limon, *supra* note 478.

491. *Id.*

492. See, e.g., *The Trials of Living in an Open-Air Prison*, IRISH TIMES, Nov. 8, 2003, at 15 [hereinafter *The Trials of Living*].

493. See Prime Minister Ariel Sharon, Speech at the Herzliya Conference on Security (Dec. 18, 2003), <http://www.jrf.org/edu/israel-documents/sharon-121803.html> (last visited Mar. 3, 2005).

494. See WHAT IS THE GOAL, *supra* note 459; see also *infra* immediately below and Section V for further discussion of these issues.

495. See ISRAEL MINISTRY OF DEFENCE, EXECUTION ASPECTS (2005), <http://www.seamzone.mod.gov.il/Pages/ENG/execution.htm> (last visited Feb. 6, 2005) ("If the objection is rejected there exists an additional period of at least seven days before any work may begin to allow an appeal to be submitted to Israel's High Court of Justice, prior to the execution of the planned work.")

496. Yaar & Hermann, *supra* note 441.

with the laws of belligerent occupation, which state that security purposes may justify the temporary requisition of occupied land.⁴⁹⁷ There is a long history of High Court of Justice decisions that address the prevention of threats from the disputed territories to Israel as a military necessity.⁴⁹⁸

Maj. Limon explained in his interview for this Article that the Army does not own the land on which the barrier is located, but rather rents it for a period of three years. He admits that the Army arbitrarily decided this period and that Palestinian landowners are subject to a "forced rent."⁴⁹⁹ The Hague Regulations state that an occupying force must pay for such requisitions. Thus, Israel offers landowners payment⁵⁰⁰ in two categories. The first is payment for natural damage, which includes any damage that the IDF has caused to the land during its construction of the barrier. The second is payment for the use of the land itself. The value of this is calculated at six percent of total value of the land, paid on a yearly basis.⁵⁰¹ The Israelis whose lands are requisitioned generally accept the sums for annual usage, but the Palestinians usually refuse such sums.⁵⁰² Israel nonetheless has allocated all payable funds owed to the landowners to a special budget in case there are future claimants.⁵⁰³

After the IDF decides to requisition land it informs the Civil Administration, which then publishes the land requisition order through the District Coordination Office. The landowners then receive a tour of the land in question.⁵⁰⁴ Every landowner has the right to raise an objection within seven days. Limon admits that this is a short time period—often too short—and often the Army will extend that period. He explained: "[O]ur policy is to give the landowners the time they need to raise their objections."⁵⁰⁵

According to Maj. Limon, the IDF will enter negotiations with landowners who raise objections to the route of the barrier. He tells the story of a case in the village of Chableh where the owner of

497. Interview with Major Gil Limon, *supra* note 478; see *infra* Section V for an analysis of the relevant principles of the laws of armed conflict.

498. Interview with Major Gil Limon, *supra* note 478; see *infra* Section V for an analysis of some of the relevant High Court of Justice decisions.

499. Interview with Major Gil Limon, *supra* note 478.

500. For further discussion, see *infra* Section V.

501. Interview with Major Gil Limon, *supra* note 478.

502. Press Conference, Brigadier General Eival Giladi, *supra* note 418.

503. Interview with Major Gil Limon, *supra* note 478.

504. *Id.*; see *infra* Section V for further discussion of these issues.

505. Interview with Major Gil Limon, *supra* note 478; see *infra* Section V for further discussion of these issues.

a house that was about to be separated from the rest of the village raised an objection. The Army offered him compensation for his house, but he refused, claiming that his great-grandfather had built this house, and he wasn't prepared to part with it. At that point the Army decided to change the barrier's route so this individual's home wouldn't be separated from the village.⁵⁰⁶

As previously mentioned, landowners have the option of taking their case to the Israel High Court of Justice if their negotiations with the Army fail.⁵⁰⁷ In response to legal challenges the Israel High Court of Justice has issued temporary injunctions to stop construction of the barrier in several contested locations.⁵⁰⁸ A recent High Court decision from June 30, 2004,⁵⁰⁹ demonstrates the independence of the Israeli judiciary and the willingness to order modifications of the route of the barrier in order to minimize the inconvenience and disruption caused to the Palestinian population, even where it will result in increased costs and delays as well as diminished security.⁵¹⁰

According to the Ministry of Defense:

In a number of cases, following the filing of appeals to the High Court of Justice, the authorities and the complainants reached agreement regarding alterations of the path and mutual understandings regarding other local considerations. For example, in one case a compromise was arrived at so as to avoid damage to a water reservoir that served farmers in the area between Zayta and Atil. In another case a detailed compromise was reached with the Armenian Patriarch with regard to the use of church-owned lands in the Security Fence surrounding Jerusalem.⁵¹¹

In spite of the declared intentions of the Israel Ministry of Defense to consider the needs and concerns of the Palestinians whose lives may be affected by the barrier, there have been numerous reports to the effect that the barrier has caused hardship and inconvenience, as mentioned in an earlier context. Some Palestinians, for instance, have been forced to travel miles in order to reach destinations on the other side of the barrier—travel such as to get

506. Interview with Major Gil Limon, *supra* note 478.

507. *Id.*; see *infra* Section V for further discussion of these issues.

508. See, e.g., Laura King, *Israel's High Court Puts a Dent in West Bank Barrier*, L.A. TIMES, July 1, 2004, at A1; Molly Moore, *Israeli Court Orders Changes in Barrier; Route Through West Bank Found to Violate Palestinians' Right*, WASH. POST, July 1, 2004, at A1.

509. H.C. 2056/04, Beit Sourik Village Council v. The Government of Israel (Isr.), available at http://62.90.71.124/files_eng/04/560/020/a28/04020560.a28.htm (last visited Mar. 3, 2005); see *infra* Section V for further discussion of this decision and its ramifications.

510. See King, *supra* note 508.

511. See ISRAEL MINISTRY OF DEFENCE, *supra* note 495.

to work, or for medical or other services.⁵¹² The barrier has cut off children from their schools and has separated farmers from their fields.⁵¹³ The barrier has also separated families and friends from each other, and has disrupted economic transactions within and between communities, with disastrous effects on the local Palestinian economy.⁵¹⁴ Israel says that it is committed to helping resolve these difficulties.⁵¹⁵

To assist in overcoming these inconveniences, Israeli Defense Minister, Shaul Mofaz, has brought in Brig. Gen. (res.) Baruch Spiegel to head an inter-agency team that includes the National Security Council, the Shin Bet security service, the police, the IDF, and other agencies, all focused on finding solutions for "present and future civilian and humanitarian problems."⁵¹⁶ For instance, a lieutenant colonel of the Civil Administration arranged to provide a school bus to transport children to their school on the other side of the barrier,⁵¹⁷ as mentioned earlier. In situations where the barrier has separated owners from their agricultural lands, Israel has built special gates to allow Palestinian farmers and their workers to pass from one side of the barrier to the other. These gates are in addition to the regular checkpoints for pedestrians, goods, and cars.⁵¹⁸

The inter-agency team has also been able to make some changes in the route of the barrier when it was particularly disruptive to normal life. At Baqa al-Sharqiya, for example, the team had about five miles of the original barrier taken down and moved, as it had surrounded thousands of inhabitants of the town in an enclave.⁵¹⁹ A similar move was planned for the barrier at Khirbet Jubara, giving the residents continuity with other parts of the West Bank.⁵²⁰ Additional alterations are being considered, as well, such as in the area of the villages of Beit Sourik and Azun Atma.⁵²¹ As a result,

512. See, e.g., *The Trials of Living*, *supra* note 492.

513. See, e.g., *id.* Cf. Goell, *supra* note 447.

514. See *The Trials of Living*, *supra* note 492.

515. See WHAT IS THE GOAL, *supra* note 459.

516. See Isabel Kershner, *The Fence Mender*, JERUSALEM REPORT, Apr. 19, 2004, at 20. General Spiegel's career in the army included serving as deputy coordinator of government activities in the territories, and as a special liaison in Southern Lebanon to UNIFIL. His goal now is to provide "a balance between security and civilian needs, to allow as normal a life as possible . . . [for Palestinians] [t]o give hope." *Id.* (internal citation omitted).

517. Telephone Interview with Major Gil Limon, *supra* note 420.

518. *Id.*

519. See Kershner, *supra* note 516.

520. See *id.*

521. See *id.*

there are some places where the route of the barrier was changed four times before it was finally constructed.⁵²²

C. Perspectives of the United States

Given the central role of Middle East affairs for the United States, whether the war on terrorism or the various peace processes, it is useful to consider the attitudes of the U.S. administration and U.S. public opinion on Israel's security barrier. The Bush administration, which was initially somewhat critical of the barrier, ultimately moved in the direction of accepting it provided that Israel was willing to adjust the route to meet U.S. concerns. The U.S. public is generally supportive of the barrier as an anti-terrorism measure. In parallel, U.S. attitudes, and particularly official attitudes, have demonstrated increasing apprehension at the possibility that the ICJ may, via its advisory opinion, assume a heightened status that interferes with the conduct of U.S. foreign affairs and with dispute resolution undertaken by the world's only remaining superpower.

1. The U.S. Administration's Changing View of the Security Barrier

On July 25, 2003, after meeting then-Palestinian Prime Minister, Mahmoud Abbas (Abu Mazen), U.S. President George W. Bush stated that the security barrier "snaking through the West Bank" is a "problem" that makes it "very difficult to develop confidence between the Palestinians and Israel."⁵²³ In his meeting with President Bush, Mr. Abbas had presented a map showing the supposed predicted location of the barrier once it was finished. The projections that Mr. Abbas displayed to President Bush predicted a barrier that encircled the Palestinians and in essence carved up their land. "Small wonder that President Bush announced with Mr. Abbas in the Rose Garden that the 'wall' was a 'problem,'" wrote Dennis Ross, formerly the chief U.S. negotiator on the peace process in the Middle East for the Clinton and first Bush administrations.⁵²⁴

522. Press Conference, Brigadier General Eival Giladi, *supra* note 418.

523. Herb Keinon & Janine Zacharia, *Bush Tones Down Criticism of Fence*, THE JERUSALEM POST, July 30, 2003, at 1; Paul Adams, *Israel's Line in the Sand*, GLOBE & MAIL (CAN.), Feb. 14, 2004, at F4.

524. Dennis Ross, Editorial, *When is the Fence Not a Fence?*, WALL ST. J., Aug. 4, 2003, at A8.

Yet, while Israel Prime Minister Ariel Sharon for his part "has agreed to consult with the administration as the construction proceeds,"⁵²⁵ the United States "will not do . . . the [peace] process a favor if [it] insist[s] on stopping the fence without Palestinian performance,"⁵²⁶ writes Dennis Ross, and if the capability of the terrorists is eliminated, then as President Bush has said, the barrier "becomes irrelevant":⁵²⁷ "[T]he most effective way to fight terror is dismantle terrorist organizations," emphasized President Bush, and then the barrier "would be irrelevant."⁵²⁸ The president thus opened the door for embracing the idea of the barrier, while at the same time expressing concerns about its actual implementation. "We'll continue to discuss and to dialogue how best to make sure that the fence sends the right signal that not only is security important, but the ability for the Palestinians to live a normal life is important as well," said President Bush.⁵²⁹

On July 30, 2003, then-Secretary of State Colin Powell expressed the U.S. concern that Israel would construct the barrier in a way that would hinder the Bush-sponsored roadmap to peace in the region.⁵³⁰ "We are going to press on this issue. There are other phases of construction coming along and the President has made it clear that if the fence is constructed in a way . . . that makes it harder to go forward with the additional elements of the roadmap, especially the creation of a Palestinian state with transitional features to it on the way to a final solution, a permanent solution, then that is a problem," Secretary Powell declared.⁵³¹ The fact that Bush administration officials were considering a reduction in aid and loan guarantees to Israel by the amount Israel was spending for the construction of the barrier revealed the initial tough stance of the Bush administration. The administration had considered reducing the US\$9 billion in loan guarantees and the US\$1 billion in military aid that were originally approved in the spring of 2002

525. *Id.*

526. *Id.*

527. *Id.*

528. Keinon & Zacharia, *supra* note 523; see Max Abrahms, *Over the Fence & Through the Terror Woods*, NAT'L REV. ONLINE, July 30, 2003, <http://www.nationalreview.com/comment/comment-abrahms073003.asp> (last visited Mar. 5, 2004).

529. Keinon & Zacharia, *supra* note 523; Abrahms, *supra* note 528.

530. BUREAU OF INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, POWELL SAYS U.S. HAS CONCERNS OVER ISRAELI FENCE (2003), <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=July&x=20030730175555namfuaks0.7389948&t=xarchives/xarchitem.html> (last visited Mar. 5, 2005).

531. *Id.*

to assist Israel in overcoming the economic consequences of the war against Iraq.⁵³²

Protests were raised in the Congress regarding Israel's possible punishment. Senator Joe Lieberman, for instance, admonished that "[t]he administration's threat to cut aid to Israel unless it stops construction of a security fence is a heavy-handed tactic It has no place in relations between allies. The Israeli people have the right to defend themselves from terrorism, and a security fence may be necessary to achieve this."⁵³³ Senator Charles E. Schumer, as well, recommended to President Bush not to postpone giving out the loan guarantees that Congress had already approved.⁵³⁴ Senator Schumer continued:

By building a security fence in the West Bank, the Israeli government is pushing a reasonable defensive policy that respects the terms of the cease-fire currently in force and does no violence to the Palestinian people [A] shift in emphasis by the White House on implementing provisions of the road map leaves Israel terribly vulnerable to terrorist attack.⁵³⁵

While Secretary Powell was explaining that the administration was addressing the issue of the security fence with Israel,⁵³⁶ David Makovsky and Dennis Ross summed up the development of the administration's stance as follows:

The Bush administration seems increasingly willing to accept the fence as tomorrow's reality. While initially opposed to its existence on the grounds that it would hinder efforts to launch the roadmap for peace, the administration now focuses its deliberations on the contours of the barrier. Indeed, the US is quietly engaging in "fence diplomacy," meeting Israelis and Palestinians separately to discuss the best route for it.⁵³⁷

Among the most important criterion guiding these diplomatic efforts, they continue, is that the barrier has to be built such that it will "preserve a political future for Israelis and Palestinians, not preclude it."⁵³⁸ Hence, "handled correctly," conclude Makovsky

532. Barry Schweid, *Israel Security Fence Worries Powell*, ASSOCIATED PRESS, Aug. 5, 2003; Clarence H. Wagner, *Israel's Security Fence*, DISPATCH FROM JERUSALEM, Sept.-Oct. 2003, at 14 (on file with The George Washington International Law Review).

533. *Israel Security Fence Worries Powell*, *supra* note 532; Wagner, *supra* note 532, at 14.

534. *Israel Security Fence Worries Powell*, *supra* note 532; Wagner, *supra* note 532, at 14.

535. Wagner, *supra* note 532, at 14.

536. *Israel Security Fence Worries Powell*, *supra* note 532.

537. Dennis Ross & David Makovsky, Editorial, *The West Bank Fence Need Not Be the End of the Road*, FIN. TIMES, Oct. 13, 2003, at 23.

538. *Id.*

and Ross, "keeping Israelis and Palestinians apart might ultimately be the best way to bring them together."⁵³⁹

2. U.S. Public Opinion

In an opinion poll released by the Alliance for Research on National Security Issues in Washington, D.C., a large majority in the United States backs Israel's right to erect a security barrier to counter the terrorist threat.⁵⁴⁰ The Ipsos-Public Affairs opinion poll conducted between January 23-25, 2004 found that some sixty-eight percent of those polled in the United States agreed that Israel had the right to erect the barrier, "even if many other countries disagree,"⁵⁴¹ while only twenty-two percent indicated that they believed that Israel did not have the right to put up a barrier. Moreover, fifty-one percent of the public thought that the barrier was justified "even if it encroaches on Palestinian land," contrasted with thirty-two percent who said it was not justified.⁵⁴²

The image of the ICJ in the United States is quite low, as many of the respondents consider that the ICJ is likely to be biased.⁵⁴³ Some twenty-six percent of the respondents believed that the ICJ would probably be biased against Israel, and twelve percent thought that the Court was likely to be biased against the Palestinians.⁵⁴⁴ In addition, fifty-seven percent of the respondents felt that they did not merely agree with Israel's construction of the fence, but also that it had the right to continue erecting it "even if the international court opposes it."⁵⁴⁵

3. The View of the United States Regarding the Involvement of the International Court of Justice

Relations between the U.S. government and the ICJ are anything but cordial, as the United States fears that its diplomatic power and prestige might be eroded if the Court rules against its interests.⁵⁴⁶

539. *Id.* For further discussion, see *supra* Section VII.

540. Melissa Radler, *Poll: Americans Support Security Fence*, JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1076506709658&p=1008596981749> (last visited Mar. 5, 2005).

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. See, e.g., U.S. DEP'T OF STATE, STATEMENT ON THE U.S. WITHDRAWAL FROM THE PROCEEDINGS INITIATED BY NICARAGUA IN THE INTERNATIONAL COURT OF JUSTICE (1985), 24 I.L.M. 246 (criticizing the Court's finding that it has jurisdiction to hear Nicaragua's claims).

Although the ICJ, as opposed to the International Criminal Court, does not have the authority to try individuals charged with crimes, the United States is still alarmed by the possibility of using the instrument of advisory opinions to obtain court rulings against states without their consenting to jurisdiction.⁵⁴⁷

It is well established that, pursuant to Article 65 of its Statute, the Court has discretion whether to give an advisory opinion even where it has jurisdiction to entertain the request. The Court's concern for judicial propriety in exercising this discretion has been focused in particular on ensuring that the Court maintains the distinction, reflected in its Statute, between contentious and advisory proceedings . . . [T]he Court's authority to issue advisory opinions is discretionary, and the Court may decline to accede to a request for an advisory opinion where the request requires the Court to resolve a dispute in which a State party to the dispute has not provided its consent.⁵⁴⁸

On January 30, 2004, the United States submitted a written statement to the ICJ in The Hague. In its statement, the United States pointed out that it had voted against the General Assembly Resolution that referred the security barrier issue to the ICJ and explained that, in its judgment, the request for an advisory opinion by the ICJ was "inappropriate and . . . may impede efforts to implement the Roadmap and to achieve a two-state solution."⁵⁴⁹ The United States maintained that "the essence of the Roadmap is a negotiating process between Israelis and Palestinians on the basis of agreements between the parties . . ."⁵⁵⁰ and that the "Quartet-led Roadmap is the method for bringing peace between Israelis and Palestinians . . ."⁵⁵¹ The United States advised the ICJ to take heed that its jurisdiction in an advisory opinion not be used as a mechanism whereby the right of a state to decide whether or not to submit to judicial settlement a dispute in which it is involved is bypassed. This matter is of special significance, according to the United States, when a recognized structure exists to deal with the dispute.

[T]he United States believes it is particularly important for the Court to give due regard to the principle that advisory opinion

547. Written Statement of the United States of America, para 1.4, Request by the United Nations General Assembly for an Advisory Opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" ("[T]he United States believes that the giving of an advisory opinion in this matter risks undermining the peace process and politicizing the court.").

548. *Id.* para. 3.4.

549. *Id.* para. 3.1.

550. *Id.* para. 2.6.

551. *Id.* para. 2.21.

jurisdiction is not intended as a means of circumventing the right of States to determine whether to submit their disputes to judicial settlement. This principle carries special importance where there is an established framework for addressing disputed issues through a negotiating process.⁵⁵²

The two fundamental aspects of the peace process, stressed the United States, should not be jeopardized as a result of the referral of the matter by the General Assembly to the ICJ, that of each side's requirement to carry out its security obligations and that of resolving the permanent status issues by way of negotiating.⁵⁵³ The United States thus "urge[d] the Court to keep in mind two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfill their security responsibilities so that the peace process can succeed."⁵⁵⁴

State Department Spokesman Richard Boucher was initially critical of the Israeli security barrier, distinguishing it from the Indian fence being built across Kashmir. He stated, "these are two different fences. . . . The issue with the fence that Israel is putting up is because building this fence involves taking land; it prejudices or *might be seen to prejudice* the outcome of future discussions; and it basically complicates the situation . . ."⁵⁵⁵ He noted that the Administration had accepted the idea of the barrier, while stating "the route of the barrier is the primary concern that we have." According to Boucher, the United States has "expressed views about the route of the security barrier and the issues of displacement involved in construction and the concern that it might, in fact, try to prejudice final status issues that need to be negotiated."⁵⁵⁶

Boucher continued, however, as follows:

[t]here's a difference between our having an opinion and many, many countries in the world having a strong opinion on this, versus saying that this is a dispute that can be resolved by an international court. And there's a difference between saying that we have an opinion and others may have a strong opinion

552. *Id.* para. 3.3.

553. *See id.*

554. *See id.* para. 4.2.

555. *U.S. Backs Indian Border Fencing*, TIMES OF INDIA, July 31, 2003, <http://timesofindia.indiatimes.com/cms.dll/html/uncomp/articleshow?msid=104468> (last visited Mar. 5, 2005) (emphasis added).

556. Press Conference, U.S. Dep't of State, State Department Spokesman Richard Boucher, Jan. 30, 2004, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=January&x=20040130173042swssor0.8761865&t=xarchives/xarchitem.html>; <http://usinfo.org/wf/040130/epf502.htm> (last visited Mar. 5, 2005).

about this, and saying the General Assembly has a backdoor to get the Court to intervene in any disputes that it feels like.⁵⁵⁷

Boucher expressed the U.S. concern that this case might create a precedent for the use of the advisory opinion jurisdiction in a manner that is inconsistent with the principle that it remains the prerogative of the state to decide if it wants to submit its disputes to the ICJ. According to Boucher, "[t]here is a bigger principle. It's not just this case. It's the way this case got there, and some of the implications of the way it might be decided that we have raised in our submission because that has a . . . more general problem for us."⁵⁵⁸

Competing with the central issue—whether Israel should or should not build the barrier—is thus what many have come to view as a more fundamental issue; that is, the future role of the ICJ in dispute resolution. As New York Senator Hillary Clinton stated, reflecting the view of the majority in the United States, the question whether Israel should build a security barrier is "at best a political decision, and in our courts, as in the International Court, political issues are not legal issues, and the Court has no jurisdiction."⁵⁵⁹ Parenthetically, government officials in Canada voiced similar sentiments. Canada's foreign minister, for instance, declared that the opinion of his government was that "the construction of the wall in ways which will destroy the peace process . . . is both unwise and not the right thing to do." Yet, three months later the Canadian Foreign Minister nonetheless submitted a written opinion to the International Court of Justice "to the effect that we consider that it's not time for the court to take this [the Israeli barrier] as a legal question."⁵⁶⁰

V. THE SECURITY BARRIER EXAMINED UNDER THE LAWS OF WARFARE AND BELLIGERENT OCCUPATION

A. *Historical Context: Jordan's Illegal Occupation and Annexation of the West Bank*

As a result of defensive action in a war not of Israel's choosing and not waged on Israel's initiative, among the territory that Israel found itself in control of was territory that had been formerly occupied by Jordan,⁵⁶¹ one of the states that had attacked Israel in June

557. *Id.*

558. *Id.*

559. Adams, *supra* note 523.

560. *Id.*

561. See, e.g., ISRAEL DIPLOMATIC NETWORK, ISRAEL MINISTRY OF FOREIGN AFF., LEGAL ASPECTS: LEGAL STATUS OF THE LAND (n.d.), <http://securityfence.mfa.gov.il/mfm/web/>

1967. Jordan had illegally occupied this territory since the failure of its attempt, along with that of other Arab states,⁵⁶² to prevent the creation of Israel⁵⁶³ and to destroy it in 1948–1949. In 1950 the area that Jordan had militarily occupied was annexed by it, thereby creating the Hashemite Kingdom of Jordan.⁵⁶⁴ No Arab state ever recognized Jordanian annexation of this territory.⁵⁶⁵ Neither did the Arab League ever recognize this annexation. In fact, only two states in the world ever recognized it: Pakistan and the United Kingdom.⁵⁶⁶

From the standpoint of the law of belligerent occupation, however, Jordan's status in the territories it had illegally occupied was in fact that of "merely a military occupant after the seizure in 1948."⁵⁶⁷ Moreover, writes Julius Stone, Jordan's "unlawful resort to war beclouded even [its] limited status of Military Occupant."⁵⁶⁸ As Stephen Schwebel explains, "[t]he facts of the 1948 hostilities between the Arab invaders of Palestine and the nascent state of Israel further demonstrate that . . . Jordan's seizure and subsequent annexation of the West Bank and the Old City of Jerusalem, were unlawful."⁵⁶⁹ Schwebel continues:

This rejection of the State of Israel within the boundaries allotted to her by the General Assembly's resolution . . . was no warrant for the invasion by [Jordan] . . . of Palestine, whether of territory allotted to Israel, to the projected, stillborn Arab state or to the projected, internationalized city of Jerusalem. It was not warrant for attack by the armed forces of neighboring Arab states upon the Jews of Palestine, whether they resided within or without Israel. But that attack did justify Israeli defensive measures, both within and as necessary, without the boundaries allotted her by the partition plan . . . It followed that . . . the Jordanian annexation of the West Bank and Jerusalem, could not vest in . . . Jordan lawful, indefinite control, whether as occupying Power or sovereign: *ex injuria jus non oritur*.⁵⁷⁰

[main/document.asp?SubjectID=45870&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1](http://www.jcpa.org/jcprg10.htm) (last visited Mar. 5, 2005).

562. See, e.g., JULIUS STONE, NO PEACE—NO WAR IN THE MIDDLE EAST 39 (1969).

563. See, e.g., Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage, in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967–1980: THE LEGAL ASPECTS 13, 34 (Meir Shamgar ed., 1982).

564. *Id.*

565. See STONE, *supra* note 562, at 39.

566. See, e.g., Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279, 290 (1968); Dore Gold, JERUSALEM IN INTERNATIONAL DIPLOMACY, (2005), <http://www.jcpa.org/jcprg10.htm> (last visited Mar. 5, 2005).

567. STONE, *supra* note 562, at 39.

568. *Id.*

569. Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 346 (1970).

570. *Id.*

Hence, "based on the proper legal frame of reference of the status till 1967 . . . of Jordan in the West Bank" with that of Israel since then, Jordan's legal standing was one of "relative inferiority" compared to that of Israel.⁵⁷¹

"Belligerent occupation," explains Gerhard von Glahn, "as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the *legitimate* government, of the occupied territory is at war with the government of the occupying forces."⁵⁷² The legal status of Israel, acting in exercise of its legitimate and inherent right to self-defense when its forces entered the disputed territory, was therefore superior on a relative basis to that of any other country at the time, and its legal rights in the territory were certainly superior to those of ousted Jordan, which then had been illegally occupying that territory. The reversionary rights of an ousted sovereign indeed have to be safeguarded and respected,⁵⁷³ however, and because the entire premise behind the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War⁵⁷⁴ restriction of powers of occupying authorities is "that there is a sovereign who was ousted and that he has been a legitimate sovereign, the automatic and unqualified application of the Convention could have enhanced the legal rights of . . . Jordan, and this, paradoxically, from the date of the *termination* of [its] . . . government."⁵⁷⁵

Thus, because the ousted sovereign, Jordan, was never a *legitimate* sovereign over the disputed territories, on the eve of the entrance of Israeli forces into these territories no *legitimate* sovereign was in control of them. It is therefore doubtful whether the "occupied" territory may appropriately be referred to as "occupied" at all.⁵⁷⁶ Consequently, the belligerent occupation principles that are designed to secure the reversionary rights of the *legitimate* sovereign arguably do not apply here.⁵⁷⁷ Also as a result of the fact that on the eve of the Six Day War in June 1967 this was not territory that belonged to any legitimate sovereign, the Fourth Geneva Con-

571. See Shamgar, *supra* note 563, at 34 (discussing Jordan's [formerly Transjordan] 1948 attempt to prevent the creation of the state of Israel).

572. GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 273 (1957) (emphasis added).

573. Shamgar, *supra* note 563, at 37.

574. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

575. Shamgar, *supra* note 563, at 37.

576. For further discussion see also *supra* Section I.

577. See Blum, *supra* note 566, at 279, 293, 301.

vention is not applicable, according to the Israeli view, as the Convention applies "to all cases of partial or total occupation of the territory of a High Contracting Party."⁵⁷⁸ Although Jordan was indeed a High Contracting Party to the Convention in 1967, this again was not *legally* "the territory of" Jordan as Jordan was in illegal possession of that territory.

Although it does not view the Fourth Geneva Convention to be strictly applicable, *de jure*, Israel nevertheless does apply its humanitarian provisions.⁵⁷⁹ Irrespective of whether or not the Fourth Geneva Convention is formally applicable to the disputed territories, it is consequently Israeli policy to distinguish its "practical approach from the formal legal questions and to act in accordance both with customary international law and *de facto* with the humanitarian provisions of the Convention . . ."⁵⁸⁰ In other words, despite serious doubts over the *de jure* applicability of the Fourth Geneva Convention, Israel nonetheless has applied the Fourth Geneva Convention's humanitarian provisions to its administration of the territories.

Israel moreover decided at the outset of its administration of the territory that the military government's actions would be subject to judicial review by its High Court of Justice.⁵⁸¹ The Israel High Court of Justice therefore holds public officials acting in the West Bank and the Gaza Strip on behalf of the civil and military administration to the principles of administrative law applicable to Israeli civil servants.⁵⁸² Residents of these areas who stand to be harmed by an administrative action accordingly enjoy due process protections similar to those afforded Israeli citizens. What this means in practical terms is that even though there exist no provisions in

578. Geneva Convention IV, *supra* note 574, art. 2.

579. See Shamgar, *supra* note 563, at 42.

580. *Id.*; see Yuval Yoaz, *Evaluation in the Ministry of Justice: Retreat from the Philidelphi Axis Will be Considered in the World as the Termination of the Occupation in the [Gaza] Strip*, HA'ARETZ, Dec. 19, 2004 (in Hebrew, on file with Authors). Nevertheless, an Israeli inter-ministerial committee, *see id.*, and the legal adviser to the government, *see* Yuval Yoaz, *Between Hague and the Disengagement, the Adviser Tries to End Putting the Head in Sand in Relation to International Law*, HA'ARETZ, Jan. 5, 2005, at 5A (in Hebrew, on file with Authors), recently suggested that the Government of Israel set up a professional team to examine the *de jure* application of the Fourth Geneva Convention in the disputed territories. In support of this new approach, Yoram Dinstein perceptively points out that because Israel in reality does apply the Geneva Conventions, there is no advantage in maintaining a concept that has outlived its usefulness. *See id.*

581. See Shamgar, *supra* note 563, at 42-43.

582. *See, e.g.*, H.C. 69/81, Abu Itta v. Commander of the Judea and Samaria Area, 37(2) P.D. 197, 231 (Isr.).

either the Fourth Hague Convention⁵⁸³ or the Fourth Geneva Convention⁵⁸⁴ requiring the occupier to allow the occupied population access to its national courts, since 1967 when the military government was set up in the West Bank, the territories' inhabitants have been able to pursue claims against Israel, the military government, and all its authorities in Israeli courts. As there is no other known instance of allowing the residents of occupied territory to bring such actions against the occupying authorities,⁵⁸⁵ the access that Israel has granted Palestinians to its highest court therefore is most likely unprecedented.

B. *Anti-Israel Terrorism Pre-Dates 1967*

The Palestinians contend that terrorism against Israeli targets is the consequence of Israel's "occupation" of the West Bank and Gaza.⁵⁸⁶ In actuality, terrorists have been targeting Israel and Israelis for decades before Israel acquired control over the disputed territories in self-defense in June 1967. From 1920 through 1966, a total of 1513 residents of Mandatory Palestine and, since 1948, of the State of Israel, were victims of hostile enemy action, most in the form of terrorist attacks.⁵⁸⁷ Before the State of Israel was established in 1948, Arab terrorism was rife, particularly during the anti-Jewish riots in 1920-1921, during the year 1929 when among other terrorist atrocities a pogrom was carried out in Hebron against the Jews living there, as well as between the years 1936 and 1939.⁵⁸⁸ From May 1948 when Israel became a State through June 1967, Arab terrorists murdered some 1000 Israelis, most of them civilians, and wounded numerous others. In 1952 alone, for example, terrorists carried out roughly 3000 attacks across Israel's borders,

583. See Hague Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

584. See Geneva Convention IV, *supra* note 574.

585. See Eli Nathan, *The Power of Supervision of the High Court of Justice over Military Government, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967-1980: THE LEGAL ASPECTS* 109, 110 (Meir Shamgar ed., 1982). Parenthetically, local courts in occupied territory have no authority under international law over the occupying power. See VON GLAHN, *supra* note 572, at 108; Nathan, *supra*, at 109.

586. See, e.g., Opinion, *Terrorism is a Result of Israel's Denying a People Its Rights*, July 22, 2002, <http://www.acj.org/Daily%20News/July%20'02/July%2022.htm#4> (last visited Mar. 10, 2005).

587. See ISRAEL MINISTRY OF FOREIGN AFF., TERROR DEATHS IN ISRAEL: 1920-1999 (1999), <http://mfa.gov.il/mfa/go.asp?MFAH0o7f0> (last visited Mar. 10, 2005).

588. See ISRAEL MINISTRY OF FOREIGN AFF., WHICH CAME FIRST—TERRORISM OR "OCCUPATION"—MAJOR ARAB TERRORIST ATTACKS AGAINST ISRAELIS PRIOR TO THE 1967 SIX-DAY WAR (2002), <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0ldc0> (last visited Mar. 6, 2005).

many resulting in civilian casualties and the destruction of property.⁵⁸⁹

C. *The Current Terrorist Campaign Against Israel*⁵⁹⁰

Since September 2000 Israel and Israelis have been subjected to an intensive terrorist offensive. From the outset of this onslaught, Israel has been under massive, ruthless, and extensive terror attack. Tens of thousands of terrorist attacks have been conducted against Israelis over the past four and one-half years,⁵⁹¹ ranging from isolated shootings to rocket, missile, and mortar attacks on Israeli cities, towns, and villages, in addition to thousands of shooting incidents. Terrorists have perpetrated close to 1000 of these strikes in Israel within the pre-1967 "Green Line,"⁵⁹² and have caused more than 8175 casualties.⁵⁹³ Of the total number of people killed

589. See *id.*

590. The current terrorist campaign being waged against Israel and Israelis is often—and mistakenly—called the second "Intifada." See, e.g., Yaakov Amidror, *Israel's Security: The Hard-Learned Lessons*, MIDDLE EAST Q., Winter 2004, <http://www.meforum.org/article/575> (last visited Mar. 6, 2005); "Intifada suggests a popular uprising," explained Danny Ayalon, Israel's Ambassador to the United States. Paula Amann, *Olive Branch and Shield: Israeli Envoy Tough, Flexible in D.C. Debut*, WASH. JEWISH WEEK, Sept. 12, 2002. "[I]t's not a popular uprising—it was a very well-orchestrated . . . coalition of terror where you see the Palestinian Authority cooperating with Hamas, Tanzim, PFLP, [Islamic] Jihad—all of them working together against all the commitments and agreements." *Id.* Far from being a "popular uprising," see, e.g., Amidror, *supra*, the current wave of terrorism committed against Israel and Israelis is in fact considered a "crime against humanity." See, e.g., Dr. Barry A. Feinstein, *Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation*, 11 J. TRANSNAT'L L. & POL'Y 201, 285 n.298 (2002). "The scale and systematic nature of the [terrorist] attacks on [Israeli] civilians . . . meets the definition of a crime against humanity." HUMAN RIGHTS WATCH, ERASED IN A MOMENT: SUICIDE BOMBING ATTACKS AGAINST ISRAELI CIVILIANS 45 (2002), <http://hrw.org/reports/2002/isrl-pa/ISRAELPA1002.pdf> (last visited Mar. 6, 2005). So too, the Rome Statute of the International Criminal Court classifies "murder," as well as "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" as "crimes against humanity" when they are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . ." Rome Statute of the International Criminal Court, July 17, 1998, art. 7, 37 I.L.M. 1002, 1005-06.

591. See ISRAEL DEFENSE FORCES, TOTAL OF ATTACKS IN THE WEST BANK, GAZA STRIP AND HOME FRONT SINCE SEPTEMBER 2000 (2004), http://www1.idf.il/SIP_STORAGE/DOVER/files/9/21829.doc (last visited Mar. 6, 2005) [hereinafter TOTAL OF ATTACKS]. Through July 2004, a total of 22,406 terrorist attacks were perpetrated against Israelis. See *id.*

592. See *id.* Through July 2004, some 889 terrorist attacks were executed within pre-1967 "Green Line" Israel. See *id.*

593. See CASUALTIES SINCE 29.09.2000, *supra* note 416. In the United States, this would be the proportional equivalent to almost a third of a million casualties and the equivalent of over 40,000 murdered. The total number killed in the suicide terrorist hijackings of September 11, 2001 was around 3000 people. See Sara Kugler, *WTC Toll Leveling off at About 2,800*, DESERET MORNING NEWS, Feb. 9, 2002, at A2. That means that Israel has suffered—

by terrorist attacks since September 2000, 732 of them—the vast majority—have been civilians.⁵⁹⁴ The following list categorizes some typical types of attack and the victims therefrom:

- Suicide bombings: 445 fatalities (397 of whom were civilians)
- Car bombings: 38 fatalities (15 of whom were civilians)
- Mortar bombings: 4 fatalities (3 of whom were civilians)
- Other bombings: 62 fatalities (24 of whom were civilians)
- Shootings at a vehicle from an ambush: 82 fatalities (69 of whom were civilians)
- Drive-by shootings: 37 fatalities (28 of whom were civilians)
- Shootings at towns and villages: 22 fatalities (16 of whom were civilians)
- Other shootings: 205 fatalities (98 of whom were civilians)
- Running over with a motor vehicle: 8 fatalities (one of whom was a civilian)
- Stabbings: 6 fatalities (all of whom were civilians)
- Rock throwing: 2 fatalities (both of whom were civilians).⁵⁹⁵

Typically many suicide terrorists stroll over to Israeli cities and villages, often located just minutes away on foot from Palestinian-controlled areas,⁵⁹⁶ quickly finding themselves in the midst of throngs of Israelis. The terrorists' mission of inflicting indiscriminate death is made easier by the proximity of women, children, and elderly people going about their daily lives—shopping in malls, eating in restaurants, drinking in pubs, lined up waiting to enter a discotheque, traveling on buses,⁵⁹⁷ celebrating religious

in terms of its proportion of terrorist victims over the past four and one-half years—the equivalent of almost 104 "September 11ths." Palestinian terrorism has in fact claimed some 136 U.S. casualties since the "renunciation" of violence by the Palestinians in the September 1993 Oslo Peace Agreement. DOP, *supra* note 462. Of these, fifty-three were murdered by Palestinian terrorists. JEWISH VIRTUAL LIBRARY, AMERICAN VICTIMS OF MIDEAST TERRORIST ATTACKS (2004), <http://www.jewishvirtuallibrary.org/jsourc/Terrorism/usvictims.html> (last visited Mar. 6, 2005). For further discussion, see *supra* Section V.N.

594. See CASUALTIES SINCE 29.09.2000, *supra* note 416. It bears mention that despite the peace process, over the course of the seven-year period preceding the current terrorist campaign, from September 1993, when the first of the Oslo peace accords between the Israelis and the Palestinians was signed until September 2000, 256 civilians and soldiers were killed in terrorist attacks in Israel. See ISRAEL MINISTRY OF FOREIGN AFF., FATAL TERRORIST ATTACKS IN ISRAEL SINCE THE DOP (SEPT. 1993) (2000) [hereinafter FATAL TERRORIST ATTACKS], <http://www.mfa.gov.il/MFA> (last visited Mar. 6, 2005).

595. See CASUALTIES SINCE 29.09.2000, *supra* note 416.

596. ISRAEL MINISTRY OF FOREIGN AFF., THE REASONS BEHIND THE FENCE: GEOGRAPHY (n.d.), <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45210&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 6, 2005).

597. See FIRST PRIORITY, *supra* note 6.

ceremonies and holidays, and the like. It is only a fifteen-minute walk from the Palestinian city of Qalqilya to the Israeli city of Kfar Saba, where five people have been murdered in four recent terrorist attacks; it is also a fifteen-minute walk from Palestinian-controlled territory to the Israeli kibbutz Metzger, where terrorists murdered six people in two attacks; it is a thirty-minute walk from Palestinian-controlled territory to the Megiddo Junction in Israel, where terrorists killed seventeen people in a terrorist attack; and it is a sixty-minute walk from Palestinian-controlled territory to the Israeli city of Afula, where terrorists murdered twenty-six people in five terrorist attacks.

D. *The Oslo Peace Process: No Perceived Need for a Security Barrier*

With all that has been going on lately in the Middle East, recent history is easily forgotten. Between 1993 and 2000, the Palestinians and Israelis were engaged in negotiations aimed at settling their dispute of decades in a peaceful manner.⁵⁹⁸ Most Israelis were euphoric. The economy was booming. Foreign investments were flowing in. Israel was dedicated to making the Palestinians into prosperous neighbors as well as into economic partners.⁵⁹⁹ Between thirty and forty percent of the Palestinian labor force's income was generated from work in Israel,⁶⁰⁰ while forty-eight percent of all the income in Gaza was generated by work in Israel.⁶⁰¹ The annual income of Palestinian workers in Israel had reached some US\$1 billion by September 2000,⁶⁰² and the economic relations framework between the Palestinians and Israel was valued at around US\$4 billion.⁶⁰³ Cooperation between Palestinians and Israelis abounded in areas such as health, police, security, agriculture, rescue services, fire control, pollution, and universities.⁶⁰⁴ Israel and the Palestinians were determined to improve the socio-

598. See Dr. Barry A. Feinstein & Dr. Mohammed S. Dajani-Daoudi, *Permeable Fences Make Good Neighbors: Improving a Seemingly Intractable Border Conflict Between Israelis and Palestinians*, 16 AM. U. INT'L L. REV. 1, 3 (2000).

599. See Oslo II, *supra* note 462, Annex V.

600. See ISRAEL MINISTRY OF FOREIGN AFF., ECONOMIC RELATIONS BETWEEN ISRAEL AND THE PALESTINIAN AUTHORITY—UPDATE MAY 1998 (1998), <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH01vn0> (last visited Mar. 6, 2005); Feinstein & Dajani-Daoudi, *supra* note 598, at 85.

601. See *Palestinian Workers in Israel—Facts and Figures*, HA'ARETZ, Aug. 30, 1999, at 6A (in Hebrew, on file with authors).

602. See Amos Harel, *The Chairman Prefers Business Before Independence*, HA'ARETZ, Sept. 13, 2000, at 2A (in Hebrew, on file with authors); Feinstein & Dajani-Daoudi, *supra* note 598, at 85.

603. See Harel, *supra* note 602; Feinstein & Dajani-Daoudi, *supra* note 598, at 87.

604. Feinstein & Dajani-Daoudi, *supra* note 598, at 122–23.

economic status of the entire region, and both perceived the enhancement of their bi-lateral economic relations as critical to the success of the peace process.⁶⁰⁵ On a social level, personal friendships bourgeoned between Israelis and Palestinians as the latter frequented Israeli malls, cities, restaurants, and social and athletic events. Perhaps most importantly, none of the successive prime ministers of Israel so much as contemplated taking on the enormous expense of building a security barrier as a means against infiltrating terrorists from the West Bank. Simply put, there was no need or justification for such a mammoth, expensive project as a security barrier.

Then, in 2000 Yasser Arafat was offered a deal during peace negotiations with the Israelis to finally end the conflict between the Palestinians and Israel, a deal, according to Ambassador Dennis Ross, in charge of Middle East peace process negotiations for the first President Bush and President Clinton, that would have given the Palestinians a state "with territory in over 97 percent of the West Bank, Gaza, and Jerusalem,"⁶⁰⁶ with the Arab neighborhoods of East Jerusalem as its capital, and with the unlimited right of return to it for Palestinian refugees.⁶⁰⁷ Before the onset of the recent unrelenting violence against Israel, observed Ambassador Ross, not only was then-Israel Prime Minister Ehud Barak prepared to give up most of the West Bank and Gaza, as well as Arab East Jerusalem, but there was wide support across the political spectrum in Israel for a solution like this, assuming of course that the Palestinians would give up violence and their claim of a right of return to Israel.⁶⁰⁸ Arafat's response to this generous offer was, regrettably, to exchange war for negotiations, thereby denying the Palestinian people an opportunity for peace, dignity, and prosperity while instigating and stimulating them to become living bombs.⁶⁰⁹

605. See ISRAEL MINISTRY OF FOREIGN AFF. & MINISTRY OF DEFENSE, ISRAELI-PALESTINIAN ECONOMIC RELATIONS: AUGUST 1998 (1998), <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH07sc0> (last visited Mar. 6, 2005).

606. Dennis B. Ross, *Think Again: Yasir Arafat*, FOREIGN POL'Y, July/Aug. 2002, http://www.foreignpolicy.com/story/cms.php?story_id=179&page=0 (last visited Mar. 6, 2005); Feinstein, *supra* note 299.

607. See Ross, *supra* note 606; Feinstein, *supra* note 299.

608. See Ross, *supra* note 606; Feinstein, *supra* note 299.

609. See Feinstein, *supra* note 299; ISRAEL MINISTRY OF FOREIGN AFF., THE REASONS BEHIND THE FENCE: PALESTINIAN TERROR ASSAULT (n.d.), <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45212&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 6, 2005).

Since the outbreak of Palestinian violence, Arafat and other Palestinian leaders made one excuse after another to reject multiple Israeli attempts to reach out for a negotiated peace and thereby to finally put an end to the conflict. They focused their efforts not on peacefully trying to achieve a settlement with Israel, but rather on redirecting international attention away from their strategic choice of terrorism in place of the peace process. They tried to turn the public eye instead to some of the consequences of Israel's actions directed at protecting Israeli citizens from this terror, necessary actions such as the construction of a security barrier. The criticisms of the security barrier by Palestinian leaders are disingenuous, serving to divert awareness from their negation of the peace process.

Had the Palestinian leadership under Arafat demonstrated fidelity to the peace process instead of initiating and perpetuating violence and incitement, there would be no barrier today.⁶¹⁰ There would have been no need for one.⁶¹¹ The barrier was not even on the minds of most Israelis until the recent spate of terrorism and violence that literally forced the barrier upon them. As a response to violence run amok, and only in this environment, the security barrier has been embraced by Israelis virtually across the political spectrum as a necessary means to diminish terrorism. Significantly, Israeli experience in the Gaza Strip, which has had a security barrier separating it from Israel for years, has shown that terrorism drops dramatically where there is a security barrier. Even the portions of barrier built so far in the West Bank,⁶¹² as well as the fence

610. See *id.*

611. See ISRAEL MINISTRY OF FOREIGN AFF., THE REASONS BEHIND THE FENCE: A LAST RESORT (n.d.), <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45216&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 6, 2005); ISRAEL MINISTRY OF FOREIGN AFF., THE REASONS BEHIND THE FENCE: PROTECTING THE PEACE PROCESS (n.d.), <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45214&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 6, 2005) [hereinafter PROTECTING THE PEACE PROCESS].

612. See ISRAEL MINISTRY OF FOREIGN AFF., CONCEPT AND GUIDELINES: A PROVEN EFFECTIVENESS, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=46063&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 27, 2004) [hereinafter A PROVEN EFFECTIVENESS]. Ra'anah Gissin, senior advisor to Israeli Prime Minister Ariel Sharon, attributed the eighty-seven mile portion of the barrier that had been built at the time with reducing the success rate of suicide terrorist attacks by seventy percent. See *Israeli High Court: Redraw Part of Barrier*, CNN.COM, June 30, 2004, <http://www.cnn.com/2004/WORLD/meast/06/30/israel.barrier/> (last visited Mar. 6, 2005). Some reports cite an even higher success rate in preventing attacks in specific areas. See, e.g., SZYMANSKI, *supra* note 2 (asserting a ninety percent success rate in curbing terrorist attacks); INTELLIGENCE AND TERRORISM INFORMATION CENTER, CENTER FOR SPECIAL STUDIES, ANTI-TERRORIST FENCE CUTS SAMARIA-BASED ATTACKS BY 90% (2004), http://www.intelligence.org.il/eng/c_t/fence/images/july_6_04.pdf (last visited Mar. 6, 2005) (same).

along the Lebanese border, have proven their efficacy. Simply put, the security barrier is a non-violent, reversible form of defense that quickly and effectively reduces terrorism.⁶¹³

E. *Irrelevance of the 1949 Armistice Demarcation Line (the "Green Line") in Determining the Necessary Route of the Barrier*

Israel has emphasized time and time again that the security barrier is an interim, temporary measure⁶¹⁴; private property required for the erection of the fence is seized under orders valid for only a limited period of time⁶¹⁵ in the effort to impede the perpetration of deadly terrorist attacks against innocent Israelis. If it is to achieve this purpose, the route of the barrier ought not take some arbitrary line drawn in green color on a map for political reasons,⁶¹⁶ a line that even splits Arab villages down the middle,⁶¹⁷ the armistice demarcation line (that is, in essence, the pre-1967 "Green Line") from the 1949 General Armistice Agreement with Jordan,⁶¹⁸ as determinative of what will accomplish this. Although the armi-

Others indicate an eighty percent decrease in attacks perpetrated in Israel. See King, *supra* note 508. It is certainly very difficult to quantify by a particular percentage the rate of success in prevention of terrorist attacks, depending on which—and how many—factors are taken into account, including when the specific statistics were compiled. Thus, there are other reports that point to a reduction of suicide terrorist attacks by fifty percent, see Gutman, *supra* note 371, while according to others, the fence has brought about a thirty percent decrease in suicide bombings. See BBC television interview with Daniel Taub, *supra* note 431. Yet, whatever the source relied upon, it is clear that the fence is indeed performing its function of reducing terrorist attacks. The security barrier in fact has proven itself to be the most effective obstacle that Israel has put up between terrorism and its citizens within the Green Line. See Amos Harel, *Fear: The Terrorists Will Learn from Car Thieves to Circumvent the Fence*, HA'ARETZ, Jan. 17, 2005, at 1A (in Hebrew, on file with authors).

613. See *A Proven Effectiveness*, *supra* note 612. "[J]us ad bellum has an effect upon the conduct of hostilities" in the sense that a state engaged in an armed conflict situation may utilize "such force . . . as is necessary to achieve the goals permitted by the right of self-defence." Christopher Greenwood, *Historical Development and Legal Basis, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 1, 31 (Dieter Fleck ed., 1995).

614. See, e.g., *A TEMPORARY MEASURE*, *supra* note 301.

615. See ISRAELI DEFENCE FORCES, IDF FACT SHEET: THE PROCEDURE FOR THE ERECTION OF THE SECURITY FENCE IN THE SEAM ZONE (2004) (in Hebrew, on file with authors) [hereinafter FENCE ERECTION PROCEDURE].

616. See Israel's Written Statement on Construction of the Wall, *supra* note 301, para. 3.45 (alluding to the Armistice Demarcation Line of 1949, also known as the "Green Line," to illustrate the Israeli perception that the ICJ would complicate the conflict by using a "broad brush" to solve the problem); Gil Sedan, *Backgrounder: Green Line Began as Cease-Fire Line, But Now Has Great Political Meaning*, JEWISH TELEGRAPHIC AGENCY, http://www.jta.org/page_view_story.asp?intarticleid=11468&intcategoryid=1 (last visited Mar. 6, 2005).

617. Some notable examples are the village of Barta'a in the Wadi Ara region and two Arab villages further south. See Sedan, *supra* note 616.

618. General Armistice Agreement, Apr. 3, 1949, Isr.-Jordan, 42 U.N.T.S. 303 [hereinafter Jordan-Israel Armistice].

stice demarcation line reflected a contextual reality relevant at that time, it is hardly relevant to what is needed today to impede and block terrorist infiltration being carried out against Israelis.

Additionally, the Armistice Agreement itself specifically dictated in Article II(2) that it shall in no "way prejudice the rights, claims and positions" of Jordan or Israel "in the ultimate peaceful settlement of the Palestine question, the provisions of the Agreement having been dictated exclusively by military considerations."⁶¹⁹ According to Article VI(9), moreover, Jordan and Israel agreed upon the armistice demarcation lines "without prejudice to future territorial settlement or boundary lines or to claims of either Party relating thereto."⁶²⁰

It is ironic that the Palestinians are now championing the Green Line, as they have never considered it as binding on them or limiting Palestinian aspirations,⁶²¹ yet they reveal their own motives when they nonetheless demand that the "Green Line" unilaterally bind Israel.⁶²²

F. *Considerations Taken into Account in Determining the Route of the Barrier*

Taking into account current relevant topographical, demographic, and strategic criteria,⁶²³ and not antiquated map lines that

619. Jordan-Israel Armistice, *supra* note 618, art. II(2); Israel's Written Statement on Construction of the Wall, *supra* note 301, para. 3.47.

620. Jordan-Israel Armistice, *supra* note 618, art. IV(9); Israel's Written Statement on Construction of the Wall, *supra* note 301, para. 3.47.

621. See, e.g., *Palestinian Envoy Queries Israel's Pre-1967 Borders*, FUTURE NEWS: THE DAILY REPORT, Mar. 26, 1999, <http://www.future.com.lb/news/archive/1999/e2603.htm> (referencing a letter to Secretary-General Kofi Annan by Palestinian U.N. observer Nasser al-Kidwa).

622. Peculiarly, in Palestine's Written Statement on Construction of the Wall, *supra* note 397, the Palestinians demonstratively contend that "the former border [is] . . . the 'Green Line' . . ." *Id.* at 77. "There is no doubt that Israel has, in principle, the right to construct a wall on Israeli soil, along the Israeli side of the Green Line. . . . Israel plainly has both the legal right to build a security wall on its own territory along the Green Line and the practical possibility and ability to do so." *Id.* at 198.

623. See Feinstein, *supra* note 299; ISRAELI MINISTRY OF FOREIGN AFF., CONCEPT AND GUIDELINES: A LINE OF DEFENSE—NOT A BORDER (n.d.), <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45392&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 6, 2005) [hereinafter A LINE OF DEFENSE]; ISRAELI MINISTRY OF FOREIGN AFF., CONCEPT AND GUIDELINES: THE ROUTE (n.d.), <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45876&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 27, 2004) [hereinafter THE ROUTE].

were never intended to serve as a permanent border,⁶²⁴ is thus the only way to attempt effectively and efficiently to create an effectual defense against terrorism. In planning the route of the fence, great effort is in parallel made to minimize the disruption to both Palestinian as well as Israeli daily life along its route.⁶²⁵

Israel realizes that the determination of any permanent border can be accomplished only through direct negotiations with the Palestinians. In the meantime, the security barrier annexes no territory to Israel,⁶²⁶ nor does it in any way affect the ownership of private Palestinian lands or any Palestinian's legal status.⁶²⁷ Israel strives to erect the fence on public land, but in instances in which this is not feasible, and private land is as a result requisitioned, compensation is proffered for its use.⁶²⁸ Furthermore, barren land is preferred to agricultural land and unproductive land to productive land. Additionally, Israel takes into account the effect that the fence will have on the daily lives of the Palestinian residents of the area as a major factor influencing the routing of the fence. The maintenance of daily life along the barrier has several facets: (1) the assurance of access to agricultural lands located on the other side of the barrier; (2) access to employment, health care, municipal services, education, shopping, and family; and (3) maintenance of commerce. Serious consideration is consequently given to

624. See Israel's Written Statement on Construction of the Wall, *supra* note 301, para. 3.48.

625. See A LINE OF DEFENSE, *supra* note 623; THE ROUTE, *supra* note 623; ISRAEL MINISTRY OF FOREIGN AFF., HUMANITARIAN ASPECTS: IMPACT ON PALESTINIANS (n.d.), <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45227&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 6, 2005) [hereinafter IMPACT ON PALESTINIANS]; see also Feinstein, *supra* note 299.

626. See Feinstein, *supra* note 299; A LINE OF DEFENSE, *supra* note 623; ISRAEL MINISTRY OF FOREIGN AFF., LEGAL ASPECTS: OVERVIEW (n.d.), <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45665&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=1> (last visited Mar. 6, 2005) [hereinafter LEGAL ASPECTS: OVERVIEW].

627. See Feinstein, *supra* note 299; A LINE OF DEFENSE, *supra* note 623; LEGAL ASPECTS: OVERVIEW, *supra* note 626.

628. See Feinstein, *supra* note 299; A TEMPORARY MEASURE, *supra* note 301; IMPACT ON PALESTINIANS, *supra* note 625. The Chief Justice of the Israel Supreme Court, Aharon Barak, explained that "[p]ursuant to standard procedure, every land owner whose land is seized will receive compensation for the use of his land." H.C. 2056/04, *Beit Sourik Village Council v. The Government of Israel (Isr.)* (Barak, C.J.; emphasis added), available at http://62.90.71.124/files_eng/04/560/020/a28/04020560.a28.htm (last visited Mar. 6, 2005). Justice Dorit Beinisch also pointed out that "[t]he State details a line of measures that will be taken to minimize the harm in cases in which it is not possible to prevent the harm to residents. For example, the giving of compensation to the owners of the seized land . . ." H.C. 8172, 8532/02, *Abtasam Muhammad Ibrahim v. Commander of IDF Forces in the West Bank (Isr.)* (Beinisch, J.; emphasis added), available at <http://62.90.71.124/files/02/720/081/n05/02081720.n05.HTM> (last visited Mar. 6, 2005).

aspects of daily life such as the location of agricultural fields, familial connections, municipal planning boundaries, commercial, and educational ties as well as access to health care and other municipal services.⁶²⁹ Where possible, the route of the fence is adjusted according to these concerns in order to prevent the disruption of daily life.⁶³⁰ In cases where such route adjustments are impossible, local solutions for daily life issues are adopted. Every effort is thus made to minimize the effect of the fence on the daily lives of the Palestinian population.⁶³¹

The procedure for seizure of property in the erection of the fence contains significant, built-in protections such as notification, an objections process, and petitioning the Israel High Court of Justice. Notification to property owners regarding an intended seizure takes place in a number of ways: direct notification by delivery of the seizure order to the property owner by way of the Palestinian liaison offices, copies of the seizure notice and an invitation to a "walkthrough" of the planned route are posted on the bulletin board in the offices of the Civil Administration, and invitations to the walkthrough are also scattered around the property that is planned for seizure.⁶³² When possible, the heads of the villages affected as well as the village engineers are also notified.⁶³³

After the publication of the seizure notice, and on the date indicated in the invitation, the walkthrough of the planned route is held. The purpose of the walkthrough is to clarify the exact planned route and to enable any property owner to ascertain the extent of damage, if any, expected to his property.⁶³⁴ Hundreds of property owners have participated in these walkthroughs.⁶³⁵

629. See, e.g., Israel's Response in the Matter Concerning H.C. 11344/03, Faiz Salim v. Commander of IDF Forces in the West Bank (Isr.), <http://www.acri.org.il/hebrew/acri/engine/story.asp?id=813> (last visited Mar. 6, 2005).

630. See FENCE ERECTION PROCEDURE, *supra* note 615; A TEMPORARY MEASURE, *supra* note 301; IMPACT ON PALESTINIANS, *supra* note 625; H.C. 2056/04, *Beit Sourik Village Council v. Aluf Benn et al., Sharon Orders Illegal Sections of Fence Rerouted*, HA'ARETZ, July 2, 2004, <http://www.haaretz.com/hasen/spages/446433.html> (last visited Mar. 6, 2005); Aluf Benn & Arnon Regular, *Sharon: Re-Examine All the Route of the Fence in Accordance with the High Court of Justice*, HA'ARETZ, July 2, 2004, at 1A; Israel's Response in the Matter Concerning H.C. 11344/03, *Faiz Salim*; Feinstein, *supra* note 299. For further discussion see *infra* at Section V.G.

631. See FENCE ERECTION PROCEDURE, *supra* note 615; see also A TEMPORARY MEASURE, *supra* note 301; IMPACT ON PALESTINIANS, *supra* note 625.

632. See FENCE ERECTION PROCEDURE, *supra* note 615.

633. See *id.*

634. See *id.*

635. See *id.*

Property owners affected by the planned route are notified that they have a week from the walkthrough to object to the seizure of their property.⁶³⁶ There are no formal requirements for the format of the objections, nor is any cost attached to filing them. The objecting property owner need not have legal representation, though he may if he so chooses, and most have indeed chosen to be represented by legal counsel. Often, owners initially request an extension of the period for filing the objection. These requests are routinely granted. Numerous local route changes have been effected through the objections process. These changes are primarily designed to ensure that local life along the fence can be maintained.⁶³⁷

Moreover, once the route of the fence is established, a further examination is undertaken to determine the uses of the land and other material links for the area between the fence and the Armistice Line (that is, within the Seam Zone). If residents of areas on the eastern side of the fence cultivate land within the Seam Zone or if other specific interests link residents to the Seam Zone, arrangements are made to enable the continued cultivation or links to continue.⁶³⁸

Should the process of objections not yield the desired result for the owners of property affected by the fence, they may, as described earlier, file an objection to the land requisitions with the Supreme Court of Israel sitting as the High Court of Justice.⁶³⁹ Decisions of the High Court have annulled army seizure orders in cases in which it has determined that not enough account was taken of the disruption caused to the daily life of the Palestinians, ordering the alteration of the route of the barrier. In June 2004, for instance, the Israel High Court of Justice upheld a Palestinian petition and indeed annulled several army land seizure orders.⁶⁴⁰ The ruling determined that the security advantages aris-

636. *See id.*

637. *See id.*

638. *See* Israel's Response in the Matter Concerning H.C. 11344/03, Faiz Salim v. Commander of IDF Forces in the West Bank (Isr.), <http://www.acri.org.il/hebrew-acri/engine/story.asp?id=813> (last visited Mar. 6, 2005).

639. *See* FENCE ERECTION PROCEDURE, *supra* note 615; *see also* IMPACT ON PALESTINIANS, *supra* note 625. A recent example demonstrating the effectiveness of the objection procedure was the refusal of the Israel High Court of Justice in January 2005 to lift an interim injunction it had previously issued two weeks earlier that had suspended all work on a section of the barrier located northwest of Jerusalem. *See* Dan Izenberg, *IDF Stunned as Court Keeps Fence in Limbo*, JERUSALEM POST, Jan. 28, 2005, at 3.

640. *See* H.C. 2056/04, Beit Sourik Village Council v. The Government of Israel (Isr.), http://62.90.71.124/files_eng/04/560/020/a28/04020560.a28.htm (last visited Mar. 6,

ing from the planned route of a section of the barrier near Jerusalem were not proportional to the disruption caused to Palestinian daily life in that area, and that the route must be altered in some places and re-examined in others to take into account the proper balance between security and humanitarian considerations.⁶⁴¹ In compliance, Israel Prime Minister Ariel Sharon ordered the Israel Ministry of Justice and the defense establishment to find a less disruptive route for the barrier.⁶⁴² Accordingly, after months of reassessment and deliberations, the defense establishment presented Prime Minister Sharon and Minister of Defense Shaul Mofaz with a new route for the security barrier that will diminish by roughly sixty percent the area encompassed by the barrier's original route.⁶⁴³

G. *Limiting Inconvenience Suffered by Palestinians in Light of Harsh Realities of War*

In actuality, most West Bank Palestinians reside east of the security barrier, and very few villages are located to its west.⁶⁴⁴ Although the barrier does restrict some movement (its purpose, after all, is to save Israeli lives by keeping out terrorists⁶⁴⁵), Israel strives to minimize the inconvenience by permitting people and commodities to

2005); Feinstein, *supra* note 299. Nevertheless, the Israel High Court also held in the same ruling that since the barrier is not being erected for political reasons, there is no prohibition on continuing its construction. *See Beit Sourik Village Council*.

641. *See* H.C. 2056/04, *Beit Sourik Village Council*, Ilil Shahar, *Sharon Orders New Barrier Route in Accordance with Court Decision*, MAARIV, July 3, 2004; Feinstein, *supra* note 299.

642. *See* Anonymous, Editorial, *Israel's Aim Is Self-Defense, Not Hurting Palestinians*, CHI. SUN-TIMES, July 8, 2004, at 39 ("Prime Minister Ariel Sharon . . . [said] Israel would review 'every kilometer' of the 310-mile stretch of barrier left to be built along the West Bank so that there was no violation of Palestinian rights or international law."); Benn & Regular, *supra* note 630; Feinstein, *supra* note 299. As a consequence of the ruling of the Israel High Court of Justice, *see* H.C. 2056/04, *Beit Sourik Village Council*, the Ministry of Justice undertook a detailed examination of each and every mile of the entire route of the barrier in order to evaluate it in light of the new standards set by the High Court. *See* Yoaz, *Between Hague and the Disengagement*, *supra* note 580. In parallel, the defense establishment decided that as a result of the High Court's judgment, the adjusted route of the barrier would be situated as close as possible to the Green Line. Moreover, the defense establishment's decision to reassess the barrier's route related to the entire route and was not limited solely to the eighteen miles of barrier that the High Court had in its judgment considered problematic, nor did the decision of the defense establishment differentiate between parts of the barrier that already had been constructed or were in the process of being constructed, and other parts of the barrier that were still in the planning stage. *See* Yuval Yoaz & Arnon Regular, *In the Security Establishment it Was Decided: The Entire Length of the Fence will About the Green Line as Much as Possible*, HA'ARETZ, July 14, 2004, at 5A (in Hebrew, on file with authors).

643. *See* Amnon Brazili, *The New Route of the Fence will Annex to Israel 400 Thousand Dunams of the Bank Area*, HA'ARETZ, Nov. 29, 2004, at 1A.

644. *See* A LINE OF DEFENSE, *supra* note 623.

645. Goell, *supra* note 447.

pass through the many gates placed into the barrier for the use of both Palestinians as well as for Israelis.⁶⁴⁶

As mentioned previously, the potential of the fence to disrupt daily life along its route is taken into account during its construction.⁶⁴⁷ The initial routing of the fence, in fact, is done in such a way as to minimize potential hardships along the route. Solutions for anticipated problems are sought and integrated into the initial planning of the route.⁶⁴⁸ During the first phase of the routing of the fence some mistakes were made, with several communities becoming separated from their agricultural lands while some Palestinian communities were enclosed within the fence. Following the fence's initial operation period, the Israel Civil Administration performed a study of its effects on the ground. The implementation of its recommendations has already begun with the dismantling of the fence initially erected east of Baqa al-Sharqiya.⁶⁴⁹ Other changes of the fence's route are planned. Additionally, new roads also have been planned to accommodate daily needs of the Palestinian residents of the area, as well as an underground passageway between the Palestinian cities Hable and Qalqilya. In places where the barrier caused delays in the arrival of schoolchildren to school, Israel initiated, and funds, a busing program to ensure the arrival of students on time for their classes.⁶⁵⁰

Although the barrier does restrict some Palestinians from going easily from one place to another, the resulting inconvenience itself does not make the barrier illegal under international humanitarian law. Even if the inconvenience affects those who neither participated nor assisted in the perpetration of hostile actions, they nevertheless must adjust themselves to the reality of measures that are taken due to military necessity.⁶⁵¹ Every time there is an armed

646. See Feinstein, *supra* note 299; Avi Machlis, *Israel Hopes Fence Will Stop Suicide Bombers*, FIN. TIMES, June 16, 2002, 2002 WLNR 6766362; IMPACT ON PALESTINIANS, *supra* note 625.

647. See Israel's Response in the Matter Concerning H.C. 11344/03, Faiz Salim v. Commander of IDF Forces in the West Bank (Isr.), available at <http://www.acri.org.il/hebrew-acri/engine/story.asp?id=813> (last visited Mar. 6, 2005).

648. See *id.*

649. See *id.*; Kershner, *supra* note 516. For further discussion see *supra* Section IV.

650. See Israel's Response in the Matter Concerning H.C. 11344/03, Faiz Salim; see also FENCE ERECTION PROCEDURE, *supra* note 615.

651. See, for example, the holding to a similar effect in H.C. 302/72, Sheikh Suleiman Hussein Aoda Abu Hilu v. The Government of Israel, 27(2) P.D. 169, 178 (Isr.) (Landau, J.). As Justice Landau of the Israel Supreme Court opined, "[e]ven if the terrorist activity . . . has diminished for now, it is not known if it might be re-ignited, and it is better to forestall this eventuality with an ounce of prevention rather than a pound of cure and to complete the other security measures that have been undertaken by totally isolating the area from

conflict there will be people who will be inconvenienced or even suffer profound losses. This is one of the lamentable aspects of war, a part of "the stern realities of warfare,"⁶⁵² "the harsh necessities of war,"⁶⁵³ that reflect "the harsh realities of naked power in war-time."⁶⁵⁴ It is unfortunately impossible to divorce the horrendous consequences of war from the reality of its impact on civilian life in the vicinity. Even "while observing the specific prescriptions of the Hague Regulations against spoliation and appropriation," for example, observed Julius Stone, an occupying power can "still reduce the local people and territory to economic ruin."⁶⁵⁵ The right to move about freely is not a protected right during situations of armed conflict. Under international humanitarian law, therefore, civilian freedom of movement may be restricted.⁶⁵⁶

The dreadful consequences of armed conflict were not lost on the drafters of the Hague Regulations Respecting the Laws and Customs of War on Land⁶⁵⁷ and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War,⁶⁵⁸ yet the architects of these international conventions nevertheless realized that military necessity is, however problematic, a legitimate and essential consideration as well. As the Hague Convention's Preamble reveals, "*military necessity* has been taken into account in framing the regulations . . ."⁶⁵⁹ It is thus only to state the obvious to say that military considerations must play a crucial and vital role in any armed conflict situation.

uncontrolled infiltration from the outside." *Id.* at 178; see also H.C. 606, 610/78, Saleiman Tufik Ayoub v. Minister of Defence, 33(2) P.D. 113, 130-31 (Isr.) (Landau, J.); H.C. 258/79, Falah Hassin Abraham Amira v. The Minister of Defense, 34(1) P.D. 90 (Isr.) (Landau, J.) ("[A]ppropriate military planning must take into account not only existing dangers but also dangers that may be created as a result of dynamic development in the territory.").

652. VON GLAHN, *supra* note 572, at 227.

653. JEAN S. PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 184 (1952).

654. JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES AND WAR-LAW 726 (2d ed. 1959).

655. *Id.* at 729. As Ernst Fraenkel pointed out, "[i]t certainly could not be said that the years 1920-22 were for Germany a period of peaceful development. On the contrary, it was then that the German people first began to realize the full social and economic devastation of the war." ERNST FRAENKEL, MILITARY OCCUPATION AND THE RULE OF LAW, OCCUPATION GOVERNMENT IN THE RHINELAND, 1918-1923, at 111 (1944).

656. See Feinstein, *supra* note 299. For further discussion see *infra* Section V.O.

657. Hague Regulations, *supra* note 583.

658. Geneva Convention IV, *supra* note 574.

659. Hague Regulations, *supra* note 583, at pmbl. (emphasis added).

H. Government's Responsibility to Protect All its Citizens

It is true that there is a substantial Israeli population that is a constant victim of terrorism and that currently lives on the other side of the "Green Line" in the disputed territories, the final status of which, according to international agreements with the Palestinians, is to be negotiated.⁶⁶⁰ Until direct negotiations between the parties resolve this final status, however, the Israeli government, just as any government in the world, must endeavor to protect its citizenry from terrorist atrocities.⁶⁶¹ The government of Israel, therefore, is obligated to defend all its citizens, including those living in disputed territories, in the best, most effective way possible.⁶⁶² The Oslo Agreements with the Palestinians in fact gave Israel "the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order" and granted Israel "all the powers to take the steps necessary to meet this responsibility."⁶⁶³

660. According to the DOP, the two sides understand that the "negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, border relations and cooperation with their neighbors, and other issues of common interest." DOP, *supra* note 462, art. V (emphasis added).

661. See, e.g., the holding to a similar effect in H.C. 4219/02, *Yusuf Muhammad Gusen v. Commander of IDF Forces in the Gaza Strip* (Isr.) (Barak, C.J.), available at <http://62.90.71.124/files/02/190/042/a03/02042190.a03.HTM> (last visited Mar. 8, 2005); H.C. 4363/02, *Khider Abed Ahmad Zindah et al. v. Commander of IDF Forces in the Gaza Strip* (Isr.), available at <http://62.90.71.124/files/02/630/043/a02/02043630.a02.HTM> (last visited Mar. 8, 2005); see also H.C. 72/86, *Jalab Judi Hassan Zelum, et al v. Military Commander of the Judea and Samaria Region*, 41(1) P.D. 528, 532 (Isr.) (Barak, C.J.).

662. See, e.g., the holding to a similar effect in H.C. 72/86, *Jalab Judi Hassan Zelum*, 41(1) P.D. at 532 (Barak, C.J.); see also H.C. 256/72, *Elec. Co. for the Jerusalem Dist., Ltd. v. Minister of Defence*, 27(1) P.D. 124, 138 (Isr.) (Landau, J.); H.C. 4363/02, *Khider Abed Ahmad Zindah v. Commander of IDF Forces in the Gaza Strip* (Isr.), available at <http://62.90.71.124/files/02/630/043/a02/02043630.a02.HTM> (last visited Mar. 8, 2005).

663. Oslo II, *supra* note 462, art. XII (emphasis added). Also, under the DOP, Israel was specifically authorized to take such measures in the disputed territories as would safeguard the security of Israelis there and public order:

In order to guarantee public order and internal security for the Palestinians of the West Bank and Gaza Strip, the [Palestinian] Council will establish a strong police force, while Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order.

DOP, *supra* note 462, art. VIII (emphasis added).

I. Armed Conflict Short of War With A Non-Conventional Foe

In a relatively recent Israel High Court of Justice ruling, *Ajuri v. Commander of IDF Forces*, Chief Justice⁶⁶⁴ Aharon Barak accentuated, and in essence summarized, the exceptionally problematic circumstances currently confronting the State of Israel as follows:

Since the end of the month of September 2000, fierce warfare has been taking place in the regions of Judea and Samaria and the Gaza Strip. This is not a police action. This is an *armed conflict* A new and harsh reality has been placed before the State of Israel, which is fighting for its security and the security of its citizens.⁶⁶⁵

In an earlier decision, *Kanan v. Commander of IDF Forces in Judea and Samaria*, the High Court of Justice emphasized that "in the area of Judea and Samaria and the Gaza Strip actual warfare incidents have been taking place."⁶⁶⁶ In another decision dealing specifically with the security barrier, *Abtasm Muhammad Ibrahim v. Commander of IDF Forces in Judea and Samaria*, the High Court spoke of "the state of warfare which has prevailed in the Region."⁶⁶⁷

While, on the one hand, the scale and intensity of the events, particularly over the last four and one-half years, certainly justify the classification of the situation as an armed conflict,⁶⁶⁸ war is classically defined as a conflict between the military apparatuses of two or more states,⁶⁶⁹ a condition which the Palestinian-Israeli situation does not meet.⁶⁷⁰ Despite this conceptual dilemma, "one may need to place antiterrorist actions within the international legal

664. The official title of the head of the Israel Supreme Court is "President." For the sake of convenience and for purposes of clarification, the term "Chief Justice" will be used in this Article.

665. H.C. 7015, 7019/02, *Ajuri v. Commander of IDF Forces in the West Bank* (Isr.) (Barak, C.J.; emphasis added), available at <http://62.90.71.124/files/02/150/070/a15/02070150.a15.HTM> (last visited Mar. 8, 2005).

666. H.C. 2461/01, *Kanan v. Commander of IDF Forces in Judea and Samaria* (Isr.) (emphasis added; translation by the authors).

667. H.C. 8172, 8532/02, *Abtasm Muhammad Ibrahim v. Commander of IDF Forces in the West Bank* (Beinish, J.) (emphasis added), available at <http://62.90.71.124/files/02/720/081/n05/02081720.n05.HTM> (last visited Mar. 8, 2005).

668. See, e.g., Tracy Wilkinson, *Israeli Activists Urge Army to Probe Civilian Slayings*, L.A. TIMES, Dec. 31, 2001, at A1 (Colonel Daniel Reisner, then head of the international law division of the Israel Defense Forces, explaining that "[t]he dimensions of the conflict as far as the magnitude of clashes between the sides and the extent of casualties make this a war").

669. A classical definition of war would be that of Oppenheim: "War is a contention between two or more states through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases." L. OPPENHEIM, II INTERNATIONAL LAW: A TREATISE: DISPUTES, WAR AND NEUTRALITY 202 (Hersch Lauterpacht ed., 7th ed. 1952) (emphasis added).

670. See *supra* note 668 and accompanying text.

paradigm of war, rather than unbroken peace," according to Ruth Wedgwood, "with a right of ongoing offensive action against an adversary's paramilitary operations and network."⁶⁷¹ It might perhaps therefore be most suitable to classify the legal position between the Palestinians and Israel as indeed an "armed conflict," yet one "short of war."⁶⁷²

In similar fashion, U.S. President George W. Bush signed a military order two months after the horrendous September 11, 2001 suicide terrorist attacks in the United States, acknowledging that these terrible attacks were of a magnitude creating a state of armed conflict:

International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.⁶⁷³

The theatre of war, though, has changed from that of the past; now the whole world is a potential arena for the conducting of war against terror. As President Bush declared, "our war on terror will be much broader than the battlefields and beachheads of the past. This war will be fought wherever terrorists hide, or run, or plan."⁶⁷⁴

671. Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 575 (1999).

672. See *supra* note 668 and accompanying text. While war in its material meaning is "a comprehensive use of force in the relations between two or more States," Yoram Dinstein, *The International Law of Inter-State Wars and Human Rights*, 7 ISR. Y.B. ON HUMAN RIGHTS 139, 140 (1977) (emphasis removed), even recurrent, extensive incidents taking place might still be regarded as "short of war." *Id.* at 142.

673. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 1(a), 66 Fed. Reg. 57,833 (Nov. 13, 2001) (emphasis added) [hereinafter Military Order]; see also JENNIFER ELSEA, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS at CRS-14 (Congressional Research Service Report for Congress RL31191, 2001) ("[T]o label the attacks as 'acts of war' does not imply that they are lawful."). Furthermore, "[t]errorists are not members of armed forces for the purpose of the law of war and do not, by definition, conduct themselves as lawful combatants." *Id.* at CRS-2. Still, some contend that "[t]he September attacks were not 'acts of war' in the traditional sense, because the perpetrators were not overtly acting on behalf of a state . . ." *Id.* at CRS-13. More generally, others point out, for example, that "[w]ithout state control or support, the terrorists would not be combatants for purposes of the Geneva Conventions." Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 183 (2000). "A possible exception would be if the terrorist organization was sufficiently organized and had sufficient control over territory and population to be a 'quasi-state,' [for example], the PLO prior to the peace accords with Israel, perhaps the Geneva Conventions would be applicable." *Id.* at 183 n.135.

674. President George W. Bush, Radio Address of the President to the Nation, Sept. 29, 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010929.html> (last visited Mar. 8, 2005).

The main connotation of a "state of armed conflict" is the applicability of the rules of armed conflict recognized as the laws of war.⁶⁷⁵ When considered in a pragmatic manner, the circumstances surrounding attacks carried out by non-state elements may make little difference to the overall application of the laws of war, irrespective of the issues that arise from a theoretical standpoint.⁶⁷⁶ "I think that despite the fact that the terrorists present an unconventional foe," explained Charles Allen, Deputy General Counsel for International Affairs, U.S. Department of Defense, "the fundamental principles of the law of armed conflict have proven themselves to be applicable to this conflict With regard to the global war on terrorism, wherever it may reach, the law of armed conflict certainly does apply."⁶⁷⁷ Thus the same rules that apply in traditional, "battlefield" wars, will also be controlling in the war on terrorism as well.⁶⁷⁸

Notwithstanding the characterization of the current conflict between Israel and Palestinian terrorists as an international armed conflict, the conflict is of a unique nature. This is not, after all, an armed conflict between two sides applying a similar set of rules to regulate their conduct. This is, rather, a conflict between the forces of a state committed to the rule of law and to the conduct of hostilities in accordance with the laws of war, and terrorist groups blatantly disregarding the most fundamental rules relating to the conduct of war. Waging this armed conflict from the midst of innocent Palestinian civilians, the terrorist organizations violate the

675. It is paradoxical that the phrase "laws of war" contains the word "laws" and the word "war." The use of the word "law" usually denotes an organized, well-behaved society where conduct and interaction among its human members are regulated by rules that are meant to encourage peace, and in turn, must have peace for their successful functioning. War, however, implies the rejection of restraint in the behavioral rules of international relations, and their replacement with dependence on sheer might. See MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 3 (1959).

676. Cf. ELSEA, *supra* note 673, at CRS-11 to CRS-12.

677. Anthony Dworkin, *Law and the Campaign Against Terror: The Case from the Pentagon*, GLOBAL POL'Y FORUM, Dec. 16, 2002, <http://www.globalpolicy.org/intljustice/general/2002/1216terror.htm> (last visited Mar. 8, 2005).

678. Adams Roberts explains this disconnect between the laws of war and their application to the war on terrorism:

[I]n anti-terrorist military operations, certain phases and situations may well be different from what was envisaged in the main treaties on the laws of war. They may differ from the provisions for both international and non-international armed conflict. Recognising that there are difficulties in applying international rules in the special circumstances of anti-terrorist war, the attempt can and should nevertheless be made to apply the law to the maximum extent possible.

Adam Roberts, *Counter-Terrorism, Armed Force and the Laws of War*, SURVIVAL, Spring 2002, at 7.

most sacred principle of the laws of war—the principle of distinction. The terrorists violate the principle of distinction in every way possible: they refuse to distinguish between combatants and non-combatants as objects of their attacks, and they refuse to distinguish themselves as combatants from civilians which would avoid the unintentional harming of innocent people.

Israel Supreme Court Chief Justice Aharon Barak further underscored the unique characteristics of this conflict, some of which were mentioned earlier, as follows:

This is not a police action. This is an *armed conflict* Israel's warfare is complicated. The Palestinian side uses, *inter alia*, "guided human bombs." These suicide bombers get to any place where there are Israelis (inside the State of Israel and in the Jewish communities in the areas of Judea and Samaria and the Gaza Strip). They sow death and destruction in cities and villages. Indeed, the forces fighting Israel are terrorists; they are not part of a regular army; they do not wear uniforms; they hide among the Palestinian civilian population in the region, including in holy places; they enjoy the support of a portion of the civilian population in general, and the support of their family members and relatives in particular. A new and harsh reality has been placed before the State of Israel, which is fighting for its security and the security of its citizens. This reality has more than once found its way to this court⁶⁷⁹

It is within this environment that Israel, like other states combating terrorism, must conduct its military operations. These unique characteristics require certain adaptations of the traditional laws of war, and hence require states in the forefront of the fight against terrorism to constantly examine the rules and assumptions under which they operate and attempt to apply, as best as possible, rules originally developed for armies clashing under conditions of parity.

Another special characteristic of this particular type of armed conflict lies in the fact that acts of hostility are not continuously perpetrated throughout the West Bank and Gaza Strip, rather several different legal regimes exist on the ground simultaneously. In certain places an armed conflict is taking place, while in others life goes on normally. The international rules of occupation govern in some places while other places operate under the *sui generis* regime created by the Oslo accords.

679. H.C. 7015, 7019/02, Ajuri v. Commander of IDF Forces in the West Bank (Isr.) (Barak, C.J.) (emphasis added), available at <http://62.90.71.124/files/02/150/070/a15/02070150.a15.HTM> (last visited Mar. 8, 2005).

Israel's actions in the West Bank vis-à-vis the barrier accordingly are examined in light of two basic sets of rules applicable to the current situation: (1) the laws of warfare and (2) the laws of belligerent occupation. Following the determination that a situation of armed conflict exists, and that the body of relevant rules for the examination of the situation before us is the laws of armed conflict, the *jus in bello*, considerations of *jus ad bellum* justifications for the use of force are no longer relevant. Yet despite the focus of this Article on *jus in bello*, it nevertheless bears mention that to the extent that *jus ad bello* would be relevant, Israel, just as any other state, is permitted to exercise its inherent right of self-defense to thwart terrorist attacks against it and its citizens and to rid itself of any threat caused by the terrorists.⁶⁸⁰

J. *International Law Grants Belligerents Leeway in Balancing Humanitarian Concerns with Military Necessity*

At the outset, it should be pointed out that, in the apt words of Richard B. Lillich and Frank C. Newman, "[i]t is somewhat ironic that one of the oldest and most venerable branches of international human rights law governs armed conflict, which is itself a highly organized and systematic campaign of human rights deprivation."⁶⁸¹ Clearly, "it is not the function of the international law of war to oblige belligerents to create wartime paradises which nobody is under an obligation to establish even in peacetime."⁶⁸²

680. See generally BARRY A. FEINSTEIN, *A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States That Aid and Abet Them*, 17 TRANSNAT'L LAW. 51 (2004).

681. RICHARD B. LILLICH & FRANK C. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 670 (1979). The difference between the applicability of human rights treaties and the applicability of the humanitarian law regime to situations of armed conflict was elucidated by Jochen Abr. Frowein. "For situations in which humanitarian law gives a special justification for an interference with individual rights, this must also be accepted as justification for interference with rights protected according to human rights treaties." Jochen Abr. Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 ISR. Y.B. ON HUMAN RIGHTS 1, 9 (1998). "[S]pecific rules take precedence as *lex specialis* whenever they have a specific justification for dealing with specific problems. That will mean that in many areas humanitarian treaties will take precedence." *Id.* In other words, "[i]nternational humanitarian law takes precedence over human rights treaties as *lex specialis* in so far as it may constitute a special justification in armed conflicts for interference with rights protected under human rights treaties" *Id.* at 16. As a result, "[i]n cases of belligerent occupation . . . the specific rules of the Fourth Geneva Convention take precedence [over obligations arising under applicable human rights conventions] regarding specific measures which are justified on the basis of these provisions." *Id.* at 11.

682. ERNST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 18 (1942). For instance, the occupation of the Rhineland following World

Ernest H. Feilchenfeld explains. A fundamental principle that underlies the law of armed conflict, expounds the 2004 British *Manual of the Law of Armed Conflict*, is military necessity, which allows a state involved in an armed conflict situation to use "that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial *submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.*"⁶⁸³ Regarding "[t]he practical application of the principle of military necessity. . . in the context of belligerent occupation," the British law of war manual⁶⁸⁴ also cites *The Hostages Case*, elucidating that "[i]t is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. *Private homes and churches even may be destroyed if necessary for military operations.*"⁶⁸⁵ Yet, at the same time, today's rules, founded on the Hague Conventions of 1907, deal with, among other things, regulating the use of force in wartime and what steps may be employed by an occupying state in occupied territory, as well as who may be allowed to benefit from the status of a belligerent.⁶⁸⁶

Following World War II, the innovative Fourth Geneva Convention represented a crucial development towards protecting civilians who were not nationals of a state but that due either to war or occupation, found themselves under its power. The Geneva principles were founded on the protection of civilians not actively participating in war and who should be dealt with in a humanitarian

War I was characterized by one writer in the following fashion: "[I]n the Rhineland a hostile military occupation is seen at its best; and at best . . . it is brutal; it is provocative; it is continuing war." FRAENKEL, *supra* note 655, at 107.

683. U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 21-22, para. 2.2 (2004) (emphasis added) [hereinafter *THE MANUAL*].

684. *Id.* at 22, para. 2.2.3.

685. *Id.*; (quoting *The Hostages Trial*, Trial of Wilhelm List and Others, VIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 66 (1949) [hereinafter *The Hostages Trial*]) (emphasis added).

686. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 729-30 (1991). The Hague Conventions, which reflect "the law of armed conflict written from the standpoint of the soldier, in the sense that it takes the form of a statement of the rights and duties of the military in a conflict," Greenwood, *supra* note 613, at 18, "have been largely recognized as customary law." Greenwood, *supra* note 613, at 24. The Fourth Hague Convention and its Regulations—which were held by the Nuremberg International Military Tribunal to be customary international law in 1939 and hence binding on every state—"remain of the utmost importance," with Articles 42-56 still constituting "the principal text on the government of occupied territory and the treatment of property in occupied territory." Greenwood, *supra* note 613, at 24, 25.

manner.⁶⁸⁷ The Additional Protocols to the Geneva Conventions⁶⁸⁸ that were agreed to in 1977 essentially further expanded the existing principles.⁶⁸⁹

Generally speaking, those not taking part in actual warfare are to be distinguished from combatants.⁶⁹⁰ The Fourth Geneva Convention thus elaborates the rules to apply to protect civilians during war,⁶⁹¹ and Protocol I recognizes the principle that military operations may be directed only against military targets. Moreover, there must be a distinction made between military targets and civilians, as well as between the combatants and the civilian population.⁶⁹²

It is through the laws of war that the international community consequently endeavors to bring some measure of order to the conduct of hostilities between states.⁶⁹³ By imposing rules that require participants to carry out hostilities in a humane fashion and protect the victims of war during the course of conflict, the international law of armed conflict attempts to preserve a fine and sensitive balance between humanitarian concerns and military necessity.⁶⁹⁴ Thus, in striving to attain military advantage, the amount of suffering that is necessarily incurred as a result must not be disproportionate.⁶⁹⁵ "The conduct of armed hostilities on land is regulated by the law of land warfare," explains the U.S. Army Field Manual No. FM27-10 of *The Law of Land Warfare*, and "is inspired by the desire to diminish the evils of war by . . . [p]rotecting both combatants and noncombatants from unnecessary suffering"; by "[s]afeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians"; and by

687. See SHAW, *supra* note 686, at 730.

688. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 4 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

689. See SHAW, *supra* note 686, at 730-31. However, the Protocols have not attained the almost universal recognition realized by the Geneva Conventions of 1949, and have yet to be applied officially to any significant international armed conflict. See Greenwood, *supra* note 613, at 25.

690. See SHAW, *supra* note 686, at 731.

691. See *id.* at 733.

692. See *id.* at 734; Protocol I, *supra* note 688, arts. 48, 51.

693. See SHAW, *supra* note 686, at 729.

694. See *id.* at 735; MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR, TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 82 (1994).

695. See SHAW, *supra* note 686, at 736.

"[f]acilitating the restoration of peace."⁶⁹⁶ As the British military manual points out, "[t]he law of armed conflict is consistent with the economic and efficient use of force. It is intended to minimize the suffering caused by armed conflict rather than impede military efficiency."⁶⁹⁷

Specifically regarding occupied territory, Gerhard von Glahn points out that "[i]n view of the fact that the occupant exercises administrative control in the territory under his authority and . . . is obliged to restore public order and safety as far as possible, it appears that the occupied territory should be administered not only in the (military and other) interests of the occupant, but also to the greatest possible extent for the good of the native inhabitants."⁶⁹⁸

The laws of war have thus in effect created a delicate balance between two parameters: humanitarian principles and military necessity. Yet, while the freedom of action of the belligerents is restricted, they nevertheless retain a great deal of latitude in the conduct of their military activities. According to Yoram Dinstein:

It is possible to say that the whole purpose of the laws of warfare—to use the language of the 1868 St. Petersburg Declaration—is "alleviating as much as possible the calamities of war." The thrust of the concept is not absolute mitigation of the calamities of war, but relief from tribulations of war "as much as possible," meaning as much as possible considering the fundamental interest of each belligerent to win the war.⁶⁹⁹

As D.W. Greig explains:

Somewhere there has to be a compromise between humanitarian ideals and the realities of the demands of a war situation. As the preamble to the 1907 [Hague] Convention put it, the wording of the provisions contained therein was "inspired by the desire to diminish the evils of war, as far as military requirements permit."⁷⁰⁰

In other words, the laws of war strive to strike a compromise between military necessity and humanitarian considerations.⁷⁰¹

But exactly how is "military necessity" to be determined? Military necessity during war can mean necessary acts undertaken to

696. U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE § 1, para. 2 (Field Manual No. FM27-10, perm. ed., rev. vol. 1976).

697. THE MANUAL, *supra* note 683, at 21, para. 2.1.

698. VON GLAHN, *supra* note 572, at 33-34.

699. Yoram Dinstein, *The International Law of Inter-State Wars and Human Rights*, 7 ISR. Y.B. ON HUMAN RIGHTS 139, 146 (1977).

700. D.W. Greig, *The Underlying Principles of International Humanitarian Law*, 9 AUSTR. Y.B. INT'L L. 46, 53 (1985).

701. See Dinstein, *supra* note 699, at 146.

directly support particular military actions or actions the cumulative effect of which is destruction of the war-making capacity of the enemy, which consequently draw the war to a close more quickly. "The first and most dominant" of the basic, fundamental principles according to which war is to be conducted and the means which can be used to conduct it is "the principle of military necessity. That is, the right to apply that amount and kind of force that is necessary to compel the submission of the enemy with the least possible expenditure of time, life, and money."⁷⁰² As defined in the U.S. Army Field Manual No. FM27-10 on *The Law of Land Warfare*, "military necessity" means "that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."⁷⁰³ In similar fashion, the 2004 British law of armed conflict manual explains, as mentioned earlier, that a state engaged in armed conflict is permitted to use "that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial *submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.*"⁷⁰⁴

Quite understandably, writes Morris Greenspan, "[t]he question in what circumstances a necessity arises cannot be decided by any hard-and-fast rule."⁷⁰⁵ Although some have written, for example, that in an armed conflict situation, a state may use force "necessary for the achievement of the goals of that state,"⁷⁰⁶ perhaps the most sound explanation of "military necessity" during armed conflict situations is that of Greenspan:

In judging actions of destruction and seizure of property committed under a plea of military necessity, a fair standard to be applied in assessing their justifiability would be that of their reasonableness. In other words, would a reasonably prudent commander acting in compliance with the laws of war have authorized such destruction or seizure under similar circumstances. In applying such a test due latitude should be allowed for the stress under which men make their decisions in conducting military operations, and they should be judged according to the conditions under which they operated, rather than whether they would have made the same decision looking back

702. GREENSPAN, *supra* note 675, at 313-14 (citations omitted).

703. THE LAW OF LAND WARFARE, *supra* note 696, para. 3.

704. THE MANUAL, *supra* note 683, at 21-22, para. 2.2 (emphasis added); The Hostages Trial, *supra* note 685, at 66.

705. GREENSPAN, *supra* note 675, at 285.

706. Greenwood, *supra* note 613, at 31.

on the matter from the unhurried calm of court-room proceedings. Wanton destruction and seizure may be distinguished from that which is necessary by the gross disparity between the extent of the destruction and seizure and any valid reason for it.⁷⁰⁷

For an occupying power, the primary consideration, according to von Glahn, "is the prosecution of the war to a successful conclusion."⁷⁰⁸ As he points out, however, in the typical occupation scenario the military necessity in an area being administered by an occupying power is likely to be somewhat different than military necessity during actual combat:

[F]ew if any of the measures likely to be undertaken by occupation authorities in enemy territory will reasonably contribute decisively to the end of the conflict, to the surrender of the enemy, or will be invested with supremely vital character It must be remembered that practically all measures of real importance undertaken by an occupant in hostile territory fall in a period of time when the military phase of active hostilities has passed from the occupied territory⁷⁰⁹

The circumstances that Israel faces, however, are far from the typical occupation scenario, with thousands of Israeli casualties to bear witness to this uncharacteristic occupation situation. Von Glahn consequently concludes that the occupation authorities' judgment as to whether a case of military necessity exists that would justify the commission of certain acts otherwise forbidden,⁷¹⁰ "has to be measured against the known facts and, if at all possible, against any evidence that there existed an honest conviction to the effect that necessity proper existed."⁷¹¹ As von Glahn makes clear, if it can be demonstrated that "an urgent need" impelled an action whereby a rule qualified by necessity had to be set aside and "the breach of the rule was accomplished, not by rash individual action, but under

707. GREENSPAN, *supra* note 675, at 279-80.

708. VON GLAHN, *supra* note 572, at 224.

709. *Id.* at 226. Consequently, in occupied territory "military necessity" means those acts which are both necessary and legitimate for the occupant to fulfill the duties, responsibilities, and obligations incumbent upon it pursuant to international law—"to take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety," in the language of Article 43 of the Hague Regulations—and to establish its authority in the area under its control, pursuant to the terms of Article 42 of the Hague Regulations—"[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Hague Regulations, *supra* note 583, arts. 42-43. For further discussion see *infra* Section V.L.

710. See VON GLAHN, *supra* note 572, at 224.

711. *Id.* at 226.

some form of supervised regulation or administration, then the plea of necessity would normally be upheld as valid."⁷¹²

In other words, where international humanitarian law expressly provides for engaging in prescribed behavior due to military necessity, these actions are permissible.⁷¹³ Such an allowance for reasons of military necessity constitutes an integral part of the international humanitarian law in armed conflict situations and reflects an intentional balance between humanitarian principles and the demands incumbent in war in the form of military necessity.⁷¹⁴ Although normal life of the occupied area's inhabitants must be ensured to the extent possible, the rights and obligations of an occupied territory's military regime must be characterized by its own needs as well.⁷¹⁵

K. *Military Necessity of Protecting the Citizens of the Occupying State*

Article 43 of the Hague Regulations stipulates that "the occupant . . . shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety"⁷¹⁶ Certainly the duty to ensure public order and safety includes the maintenance of an orderly administration that embraces security,⁷¹⁷ and military necessity can be a legitimate consideration for an occupying power's endeavors in occupied territory.⁷¹⁸ It is consequently not possible to divorce the purposes of the war from military necessity that, as a matter of course, may include defending the citizens of the occupying state. The occupying authority, especially in a situation of ongoing belligerency, is responsible for precluding within the occupied area imminent dangers not only to the occupied region but also to the occupying power as well. The military facet is then actually one and the same as the facet of security.⁷¹⁹ As Justice Witkon held in the

712. *Id.*

713. See Greenwood, *supra* note 613, at 32.

714. See *id.* at 33.

715. See, e.g., the holding to the same effect in H.C. 256/72, Elec. Co. for the Jerusalem Dist., Ltd. v. Minister of Defence, 27(1) P.D. 124, 138 (Isr.) (Landau, J.).

716. Hague Regulations, *supra* note 583, art. 43 (emphasis added).

717. See, e.g., the holding to a similar effect in H.C. 202/81, Said Muhammed Tabib v. Minister of Defence, 36(2) P.D. 622, 629 (Shilo, J.).

718. See Yoram Dinstein, *Ensuring the Public Order and Life in Occupied Territories*, 10 IJL 405, 407 (1984) (in Hebrew, on file with authors); see also the holding to a similar effect in H.C. 393/82, Jamait Askan Amaalmin Altaunia Almahdoda Almasolia, A Cooperative Soc'y Legally Registered in the Judea and Samaria Command v. Commander of the IDF Forces in the Judea and Samaria Region, 37(4) P.D. 785, 794 (Isr.) (Barak, J.).

719. See, e.g., the holding to a similar effect in H.C. 606, 610/78, Saleiman Tufik Ayoub v. Minister of Defence, 33(2) P.D. 113, 117 (Isr.) (Witkon, J.).

Israel High Court of Justice case *Ayoub v. Minister of Defense* regarding seizing land in occupied territory:

[T]he existing situation is one of belligerency, and the occupying power has the responsibility to ensure order and security in the occupied territory. It must also meet the dangers posed from such territory to the occupied territory itself and to the State itself. The warfare these days has taken the form of acts of terror, and even one who views these acts (which harm innocent civilians) as a form of guerilla war, will admit that the occupying power is authorized and even obligated to take all the necessary measures to prevent them. *The military aspect and the security aspect are only therefore a single aspect.*⁷²⁰

In other words, military necessity may include the occupant's actions, undertaken in occupied territory, designed to have a defensive effect beyond it and applied to the occupying state's territory.⁷²¹ "The occupation of a foreign territory does not represent an end in itself," commented Ernst Fraenkel, citing the remarks of one observer following the World War I; "its end is the realization or the protection of certain public interests; it is an act of sovereignty. The occupying power makes use of its army, which is nothing else but its executive agent, in order to exercise its sovereignty and to realize and protect its interests."⁷²² In referring specifically to the granting to military tribunals jurisdiction in all matters touching on the occupying army's security, the same observer, again cited by Fraenkel, emphasized that this was "intended to protect not only the army itself but also the state of which it is the executive agent, and that state's sovereignty and independence."⁷²³

The security barrier in fact was not even on the minds of most Israelis until the recent spate of terrorism and violence that forced the barrier upon them. It had become excruciatingly and painfully obvious that in order to protect Israel and Israelis against terrorist attacks, and particularly against suicide terrorism, a barrier was necessary between most of the territory's Palestinian residents and most Israelis. The Israel Government's Ministerial Committee for National Security Matters therefore decided to construct a security barrier for "improving and strengthening the operational capabilities and preparedness in the framework of contending with terrorism, and in order to foil, disrupt and prevent the infiltration of

720. *Id.* (emphasis added).

721. *See, e.g., id.*; see also the holding to a similar effect in H.C. 302/72, *Sheikh Suleiman Hussein Aoda Abu Hilu v. The Government of Israel*, 27(2) P.D. 169, 178 (Isr.).

722. *See* FRAENKEL, *supra* note 655, at 198 (emphasis added).

723. *See id.* (emphasis added).

terror activities from the area of Judea and Samaria to Israel."⁷²⁴ The Israel Government subsequently approved this decision.⁷²⁵

L. *Effects of Belligerent Occupation*

"For practical purposes," explains Greenspan, "a military occupation may be divided into two phases. The first is the combat or wake-of-battle phase, which begins as soon as the area comes into control of the occupying or liberating force. . . . The second, or occupational, phase occurs when the tide of battle has receded well beyond the occupied territory, conditions there are fairly well settled, and administration becomes the main problem rather than battle."⁷²⁶ Typically, then, belligerent occupation is a stage of the general hostilities that reflects the fact that the phase of intense warfare is over and has finished in the belligerently occupied territory.⁷²⁷ This is "a period of time when the military phase of active hostilities has passed from the occupied territory and when the occupant attempts to establish an orderly administration," explains von Glahn.⁷²⁸ "In positive terms, and broadly stated," writes Julius Stone, "the Occupant's powers are . . . to continue orderly government . . . [and] to exercise control over and utilise the resources of the country so far as necessary for that purpose and to meet his own military needs."⁷²⁹ What in essence occurs, clarifies Oppenheim, is that "the legitimate Government is prevented from exercising its authority," and it is therefore the occupying power that "actually exercises" it.⁷³⁰ The occupant accordingly "acquires a temporary right of administration over the territory and its inhabi-

724. H.C. 8172, 8532/02, *Abtasam Muhammad Ibrahim v. Commander of IDF Forces in the West Bank* (emphasis added), available at <http://62.90.71.124/files/02/720/081/n05/02081720.n05.HTM> (last visited Mar. 9, 2005).

725. *Id.*

726. *See* GREENSPAN, *supra* note 675, at 214.

727. *See* McDUGAL & FELICIANO, *supra* note 694, at 740; MYRES S. McDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER, THE LEGAL REGULATION OF INTERNATIONAL COERCION* 740 (1961) [hereinafter McDUGAL & FELICIANO, *THE LEGAL REGULATION*].

728. VON GLAHN, *supra* note 572, at 226.

729. STONE, *supra* note 654, at 697.

730. OPPENHEIM, *supra* note 669, at 436. In the same way, *THE LAW OF LAND WARFARE* states:

Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory. The necessity for such government arises from the failure or inability of the legitimate government to exercise its functions on account of the military occupation, or the undesirability of allowing it to do so.

THE LAW OF LAND WARFARE, *supra* note 696, para. 362.

tants."⁷³¹ Article 43 of the Hague Regulations provides the foundation for this power and responsibility, prescribing that the occupying power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety"⁷³² The 2004 *Manual of the Law of Armed Conflict* of the United Kingdom stipulates in almost identical fashion that the occupying authority "must take all measures in its power to restore, and ensure, as far as possible, public order and safety"⁷³³ and moreover "is responsible for the orderly government of the territory."⁷³⁴ Thus as a practical result "[w]here hostile territory is occupied," elucidates Morris Greenspan:

all functions of the enemy government—legislative, executive, or administrative; general, provincial, or local—cease, or continue only with the sanction, express or implied, of the occupant. In their place the invader sets up his own administration. No matter what name he applies to his government, whether it is termed military or civil, the circumstances in which it arose alone determine its true nature and as a military occupant he is bound by the relevant rules of international law.⁷³⁵

Accordingly, when Israel entered the disputed territories, international law obligated it to assume and execute all the tasks of an administrative nature that Jordan was unable to fulfill, as Israel was the authority in actual control of the territory. Yet, writes Oppenheim:

the administration of the occupant is in no wise [sic] to be compared with ordinary administration, for it is distinctly and precisely military administration. In carrying it out the occupant is totally independent of the constitution and the laws of the territory, since occupation is an aim of warfare, and *the maintenance and safety of his forces and the purpose of war, stand in the foreground of his interest, and must be promoted under all circumstances and conditions* [A]s regards the safety of his army and the purpose of war the occupant is *vested with an almost absolute power* [H]e must ensure public order and safety⁷³⁶

To illustrate this aspect of military administration it may be instructive to turn to the World War II U.S. administration in Germany. In April 1945 the Combined Joint Chiefs of Staff issued a directive to the Commanding General of the United States occupation forces in Germany, General Dwight Eisenhower, to guide him

731. OPPENHEIM, *supra* note 669, at 436.

732. Hague Regulations, *supra* note 583, art. 43.

733. THE MANUAL, *supra* note 683, at 278, para. 11.9.

734. *Id.* at 281, para. 11.16.1.

735. GREENSPAN, *supra* note 675, at 223.

736. OPPENHEIM, *supra* note 669, at 437 (emphasis added).

concerning the legal obligations and rights of the administration of military government of the United States in occupied Germany. The directive stipulated, among other things, that:

[Y]ou are, by virtue of your position, clothed with supreme legislative, executive, and judicial authority in the areas occupied by forces under your command. This authority will be broadly construed and includes *authority to take all measures deemed by you necessary, appropriate or desirable in relation to military exigencies and the objectives of a firm military government.*⁷³⁷

As a matter of fact, "a decision had been reached at the highest Allied levels (Yalta Conference)," von Glahn points out, "that the occupying powers would have authority *greater* than the traditional 'military occupant' possessed,"⁷³⁸ and the anticipated length of Allied occupation of Germany was at the time "always discussed in terms of *decades.*"⁷³⁹ Parenthetically, the Japanese surrender instruments and the July 26, 1945 Potsdam Proclamation also granted the Allies occupation powers beyond those of the Hague Regulations.⁷⁴⁰

Listed among the basic objectives of military government in occupied Germany was the following directive:

The principal Allied objective is to prevent Germany from ever again becoming a threat to the peace of the world. Essential steps in the accomplishment of this objective are the elimination of Nazism and militarism in all their forms, the immediate apprehension of war criminals for punishment, the industrial disarmament and demilitarization of Germany, with continuing control over Germany's capacity to make war, and the preparation for an eventual reconstruction of German political life on a democratic basis.⁷⁴¹

Israel's assumption of Jordan's former responsibilities, obligations, and authority was thus pursuant to the requirements of international law, which bestows on the occupant the competence to manage the occupied area in place of the previous administration so as to avert vacuity in public order maintenance and in the effective management of daily life in the occupied area. As former Chief Justice of the Israel Supreme Court Meir Shamgar opines, "[t]he

737. Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany; April 1945, U.S. Dep't of State Bulletin, Oct. 17, 1945, para. 2(b) (emphasis added) [hereinafter Directive to Commander-in-Chief]. It bears mention that this directive dealt with the policies concerning the initial post-war phase in Germany. *Id.*

738. VON GLAHN, *supra* note 572, at 276 (emphasis added).

739. *Id.* (emphasis added).

740. *See id.* at 286.

741. Directive to Commander-in-Chief, *supra* note 737, para. 4(c).

first and foremost aim of the Israel Military Government" in the territories that came under the control of Israel as the result of actions engaged in self-defense during a war waged against it by Arab States in June 1967

was the restoration and maintenance of public order and safety The entry of Israeli military forces into the areas under consideration accorded to them the right and duty to establish an orderly and just administration. This was not regarded merely as an aim of warfare, or as a means for the maintenance and safety of the military forces, but as the consequence of their duty to be guided in every situation, including military administration, by the rule of law⁷⁴²

Chief Justice Shamgar continues and explains that:

[t]he establishment of military government was the direct result of the armed conflict and of the entry of Israeli armed forces into areas in which the former governments, whatever their legal standing, were prevented from exercising their authority. According to International Law the exercise of the right of military administration over the territory and its inhabitants had no time-limit, because it reflected a factual situation and pending an alternative political or military solution this system of government could, from the legal point of view, continue indefinitely.⁷⁴³

M. *The Obligation of Obedience as a Reciprocal Duty of the Occupied Population*

International law demands a parallel reciprocal duty of the inhabitants of the occupied areas to the occupant's authority and obligation to ensure public order and safety. Stated simply, the inhabitants owe to the occupying authority an obligation of obedience as is required for the security of the occupant's forces, ensuring law and order, and administering the area in an appropriate fashion. "In practice," explains Greenspan, "this means that the inhabitants must give, and the occupant can enforce, an obedience which is essentially the same as that which they gave to the preexisting legitimate government" ⁷⁴⁴ This establishes a regime of mutual commitments between the inhabitants and the occupying power. The occupant must afford the inhabitants "the same consideration and protection that a civilized state affords to its peaceful

⁷⁴² Shamgar, *supra* note 563, at 43.

⁷⁴³ *Id.* As Greenspan points out, "[a] military occupation . . . involves a relationship between the occupant and the inhabitants which may continue over a lengthy period of time." GREENSPAN, *supra* note 675, at 266 n.181 (emphasis added); see also VON GLAHN, *supra* note 572, at 276.

⁷⁴⁴ GREENSPAN, *supra* note 675, at 264.

population"⁷⁴⁵ and adhere to international law standards. At the same time, points out Greenspan, the civilians in the occupied areas must "behave peaceably, carry on their normal pursuits as far as possible, take no part in the hostilities, refrain from all injurious acts toward the troops of the occupant or their operations, and generally render strict obedience to the occupant's officials."⁷⁴⁶ In its discussion on enforcing obedience, the U.S. army field manual on *The Law of Land Warfare* prescribes as follows:

Subject to the restrictions imposed by international law, the occupant can demand and enforce from the inhabitants of occupied territory such obedience as may be necessary for the security of its forces, for the maintenance of law and order, and for the proper administration of the country. It is the duty of the inhabitants to carry on their ordinary peaceful pursuits, to behave in an absolutely peaceful manner, to take no part whatever in the hostilities carried on, to refrain from all injurious acts toward the troops or in respect to their operations, and to render strict obedience to the orders of the occupant.⁷⁴⁷

⁷⁴⁵ *Id.* at 265.

⁷⁴⁶ *Id.*

⁷⁴⁷ THE LAW OF LAND WARFARE, *supra* note 696, para. 432 (emphasis added). In similar fashion, the 2004 MANUAL OF THE LAW OF ARMED CONFLICT of the United Kingdom stipulates that "an occupying power . . . is entitled to require obedience to lawful orders." THE MANUAL, *supra* note 683, at 281, para. 11.15.1.

Certain specific, fundamental conditions must exist for inhabitants of occupied areas to be recognized as lawful combatants, and if they take part in hostilities without having fulfilled these essential conditions, they have no right to be treated as lawful belligerents. Article 4 of the Third Geneva Convention of 1949 has

conferred the status of lawful combatants on members of organized resistance movements belonging to a party to the conflict who operate in or outside their own territory, even if this territory is occupied, provided they fulfill the four conditions of being commanded by a person responsible for his subordinates, of having a fixed distinctive sign recognizable at a distance, or carrying arms openly, and of conducting their operations in accordance with the laws and customs of war.

GREENSPAN, *supra* note 675, at 266 (emphasis added). Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War provides:

- A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) That of being commanded by a person responsible for his subordinates;
 - (b) That of having a fixed distinctive sign recognizable at a distance;
 - (c) That of carrying arms openly;
 - (d) That of conducting their operations in accordance with the laws and customs of war.

Hence, "a military occupation," explains Greenspan, "involves a relationship between the occupant and the inhabitants which *may continue over a lengthy period of time*. The object of the laws of war on military occupation is to assure a *modus vivendi* between the occupant and the inhabitants compatible with the state of war"748 The laws of war thus require the occupying authority to "do all in his power to restore, and ensure, as far as possible, public order and safety" in the occupied area, "a duty which certainly operates as much for the benefit of the inhabitants as it does for the occupant."⁷⁴⁹ Consequently, concludes Greenspan, "[i]t would be difficult to argue that this duty on the part of the occupant does not imply a corresponding duty on the part of the general inhabitants to refrain from acts which would interfere with public order and safety. To hold otherwise would be to claim that while the occupant was under a duty to ensure public order, the population was free to keep the territory in a turmoil."⁷⁵⁰

N. Occupied Territory as a Combat Zone

The humanitarian and military necessity considerations and ramifications during belligerent occupation are typically considered to be different from those during battle, as usually actual combat has either moved on to other places or has ended altogether.⁷⁵¹ Yet, belligerent occupation is in essence but "a phase of *war as yet undecided*," writes von Glahn and is "a temporary phenomenon,

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A), 6 U.S.T. 3316, 75 U.N.T.S. 135.

Thus, if inhabitants of occupied areas do not fulfill these crucial and indispensable criteria, they "have no right in law to engage in hostilities against the occupying power." GREENSPAN, *supra* note 675, at 265 n.181. Consequently, "[o]ffenses committed by the inhabitants in violation of these obligations are punishable by the occupying power." *Id.* at 265. As the 2004 MANUAL OF THE LAW OF ARMED CONFLICT of the United Kingdom explains, "[o]nly combatants have the right to participate directly in hostilities. If civilians take a direct part in hostilities without satisfying the conditions under which they acquire lawful combatant status, they are *not entitled to be treated as belligerents* and may be punished by the occupying power." THE MANUAL, *supra* note 683, at 278-80, para. 11.14 (emphasis added). Nevertheless, it bears mention that there were some cases tried before courts in the aftermath of World War II—in the Netherlands for example—that ruled that there was no obligation for civilians under occupation to abstain from engaging in aggressive behavior against the occupation forces and occupant itself. See GREENSPAN, *supra* note 675, at 265 n.181.

748. GREENSPAN, *supra* note 675, at 266 n.181 (emphasis added).

749. *Id.* (citations and quotations omitted).

750. *Id.*

751. See MCDUGAL & FELICIANO, *supra* note 694, at 739-40; MCDUGAL & FELICIANO, THE LEGAL REGULATION, *supra* note 727, at 739-40; see also GREENSPAN, *supra* note 675, at 214; VON GLAHN, *supra* note 572, at 226.

subject to the changing fortunes of the conflict."⁷⁵² It is a "precarious" phenomenon, explains Feilchenfeld, in that international law takes "cognizance of that kind of precariousness which results from the fact that a *war is still going on*. . . . Belligerent occupation . . . is treated as precarious as long as the war continues."⁷⁵³ A fluid, uncertain situation can exist, vacillating between all-out war and the relative calm of administration of occupied territory.⁷⁵⁴ Because "any part of a territory controlled by a belligerent is a potential fighting zone," concludes Georg Schwarzenberger, "the distinction between fighting zones, occupied enemy territories and unoccupied territories of belligerents is becoming increasingly blurred, and all these areas tend to merge into potential fighting zones."⁷⁵⁵ Following World War I's armistice of November 11, 1918, during the Allied occupation of the Rhineland, for instance, the Allies undertook various military measures in the occupied territory in anticipation that the war might erupt again.⁷⁵⁶ One observer in fact termed the Rhineland *occupation* as a "continuing war."⁷⁵⁷ Consequently, even during a period of relative calm in occupied territories, military operations, taken in anticipation of the threat of terrorism, may be necessary at times, thereby blurring the distinction between the occupying power's authority during active warfare and its powers in calm periods.⁷⁵⁸ Not only during actual warfare is military necessity of vital importance; it may be crucial also in occupied territory in order to pre-empt material danger.⁷⁵⁹

The Combined Joint Chiefs of Staff thus, for example, as mentioned earlier, specifically authorized a very broad implementation of military necessity in an occupation setting when they issued a directive in April 1945 to General Dwight Eisenhower, the commander-in-chief of U.S. Forces of Occupation, to assist him with

752. VON GLAHN, *supra* note 572, at 273 (emphasis added); see also FEILCHENFELD, *supra* note 682, at 4, 7.

753. FEILCHENFELD, *supra* note 682, at 5 (emphasis added).

754. Cf. VON GLAHN, *supra* note 572, at 275.

755. GEORG SCHWARZENBERGER, II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 314-15 (1968). For further discussion on the difficulty of distinguishing between armed conflict *per se* and belligerent occupation, see *infra* Section V.P, entitled *Requisition, Seizure, and Destruction of Private Property*.

756. See FRAENKEL, *supra* note 655, at 9.

757. *Id.* at 107.

758. See, e.g., the holding to a similar effect in H.C. 606, 610/78, Saleiman Tufik Ayoub v. Minister of Defense, 33(2) P.D. 113, 131 (Isr.) (Landau, J.).

759. See, e.g., *id.* at 117 (Witkon, J.); see also H.C. 302/72, Sheikh Suleiman Hussein Aoda Abu Hilu v. The Government of Israel, 27(2) P.D. 169, 178 (Isr.); Saleiman Tufik Ayoub, 33(2) P.D. at 131.

respect to the legal rights and obligations concerning the United States' military government administration in occupied Germany. The directive, in considering the basis of military government, dictated, to reiterate, that General Eisenhower was due to his position vested "with supreme legislative, executive, and judicial authority in the areas occupied by forces under [his] command" and that this authority was to "be broadly construed and includes authority to take all measures deemed by [him] necessary, appropriate or desirable in relation to *military exigencies* and the objectives of a *firm* military government."⁷⁶⁰

Over 22,400 terrorist attacks have been carried out against Israelis over the past four and one-half years⁷⁶¹ These attacks, executed by suicide bombings, mortars, missiles, car bombs, machine guns, hand grenades, mines, petrol bombs, and rockets on villages, towns, and cities, as well as countless shooting incidents, have inflicted well over 8000 casualties, killing more than 1000 people since September 2000.⁷⁶² This situation, as explained earlier, has created a legal position that might best be categorized as an "armed conflict short of war."⁷⁶³ As a result, it would be difficult to contend that the basic premise of belligerent occupation is *always* present in the disputed territories—that of the *termination* of intense combat in the belligerently occupied territory.⁷⁶⁴ The attacks that Palestinian terrorists, operating from within the disputed territories, have been carrying out against Israel and Israelis are of such an extent and magnitude for Israel that their scale renders them to be tantamount to the September 11, 2001, attacks on the United States, that, according to President Bush "created a state

760. Directive to Commander-in-Chief, *supra* note 737, para. 2(b) (emphasis added). For further discussion see *supra* Section V.L. While this directive, as previously pointed out, dealt with the policies concerning the initial post-war phase in Germany, *id.*, it did not indicate how long that period would last. Such a determination in April 1945, when the directive was first issued, would certainly have been difficult if not impossible to establish. Also, even though the directive "[a]s such . . . [was] not intended to be an ultimate statement of policies" of the United States concerning Germany's post-war treatment, *id.*, this is not reason enough to assume that such measures as contemplated in the directive would not have been potentially necessary beyond the initial period.

761. See TOTAL OF ATTACKS, *supra* note 591.

762. See CASUALTIES SINCE 29.09.2000, *supra* note 416. The vast majority of those killed have been civilians. See *id.*

763. See *supra* note 668 and accompanying text.

764. Cf. McDUGAL & FELICIANO, *supra* note 694, at 740; McDUGAL & FELICIANO, THE LEGAL REGULATION, *supra* note 727, at 740. For further discussion on the difficulty of distinguishing between armed conflict *per se* and belligerent occupation, see *infra* Section V.P., entitled *Requisition, Seizure, and Destruction of Private Property*.

of armed conflict that requires the use of the United States Armed Forces."⁷⁶⁵ To be more exact, in light of the number of casualties that Israel has suffered from terrorist attacks over the last four and one-half years, relative to its population, it actually would be as if the terrorist attacks of September 11, 2001, had occurred a total of some 104 times against Israel and Israelis since the year 2000.

The situation of Israel in the disputed territories thus is comparable, at the very least, to the military situation confronting the coalition forces in Iraq—that is, a military situation that has been described as "a state of armed conflict *and* a state of occupation"⁷⁶⁶ that exist simultaneously. Consequently, the laws of warfare *and* of belligerent occupation are concurrently applicable. As Colonel Marc Warren, staff judge advocate for Combined Joint Task Force 7, the U.S. military operation in Iraq, explained in August 2003, "[o]ur soldiers are conducting combat operations" and they "are still engaged in combat operations,"⁷⁶⁷ notwithstanding President George W. Bush's declaration more than three months earlier, on May 1, 2003, that major combat operations in Iraq were over.⁷⁶⁸ Hostilities have not yet ceased, pointed out Col. Warren.⁷⁶⁹

O. Restrictions on Freedom of Movement

The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 addresses the restriction of movement of civilians in *occupied territory* and in Article 27 explicitly authorizes restrictions on the freedom of movement by taking "such measures of control and security in regard to protected persons as may be necessary as a result of the war."⁷⁷⁰ Article 27 is the first article of Section I of Part III. This section enumerates provisions that are applicable to *occupied territories* as well as to the territories of the

765. Military Order, *supra* note 673, § 1(a) (emphasis added); see also text accompanying note 593.

766. HUMAN RIGHTS WATCH, HEARTS AND MINDS: POST-WAR CIVILIAN DEATHS IN BAGHDAD CAUSED BY U.S. FORCES 42 (2003) (citing interview with the U.S. Judge Advocate General and Coalition Provisional Authority legal officials in Iraq, Lt. Col. Marc Warren, Col. Mike Kelly, and Major P.J. Perrone, Baghdad) (emphasis added), <http://www.hrw.org/reports/2003/iraq1003/iraq1003full.pdf> (last visited Mar. 9, 2005).

767. Vivienne Walt, *Iraqis Seek Retribution for Civilian Casualties*, HOUSTON CHRON., Aug. 9, 2003, <http://www.chron.com/cs/CDA/ssistory.mpl/special/iraq/2038968> (last visited Mar. 9, 2005).

768. See Lisa Burgess, *Different Iraqi Prisoners Have Different Legal Rights*, STARS & STRIPES, Aug. 6, 2003, <http://www.estripes.com/article.asp?section=104&article=16235&archive=true> (last visited Mar. 8, 2005).

769. *Id.*

770. Geneva Convention IV, *supra* note 574, art. 27 (emphasis added).

parties to the conflict.⁷⁷¹ Similarly, both the U.S. Army Field Manual on *The Law of Land Warfare* and the United Kingdom's 2004 *Manual of the Law of Armed Conflict* emphasize international law's unequivocal authorization to restrict the movement of civilians in occupied territory. After repeating verbatim in paragraph 266 of Chapter 5⁷⁷² the Fourth Geneva Convention's authorization to take the security and control actions as may be necessitated by war concerning civilians in *occupied territory*,⁷⁷³ the U.S. Army Field Manual on *The Law of Land Warfare* in paragraph 379 of Chapter 6,⁷⁷⁴ expressly and unambiguously applies these "measures of control and security" to an *occupied territory's* population, making it clear that the "measures of control and security in regard to protected persons as may be necessary as a result of the war" are indeed applicable to "the population of occupied territory."⁷⁷⁵ The 2004 *Manual of the Law of Armed Conflict* of the United Kingdom, as well, repeats the concept that "[t]he parties to the conflict may take such measures of control or security in regard to protected persons as may be necessary as a result of the conflict,"⁷⁷⁶ applying the principle to the treatment of civilians in occupied territory.⁷⁷⁷ Greenspan also reaffirms that "[t]he belligerents may . . . take such measures of control and security in regard to protected persons as may be necessary as a result of the war."⁷⁷⁸

In explaining and interpreting the intent behind the "measures of control and security" to which civilians may be subjected in accordance with the Fourth Geneva Convention's Article 27, the authoritative and internationally acclaimed commentator on the Geneva Conventions, Jean S. Pictet, points out that:

[t]he right to personal liberty, and in particular, the right to move about freely, can naturally be made subject in war time to certain restrictions made necessary by circumstances. So far as the local population is concerned, the freedom of movement of civilians of enemy nationality may certainly be restricted, or even temporarily suppressed, if circum-

771. See Geneva Convention IV, *supra* note 574, pt. III, § 1, arts. 27-34 (entitled *Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories*).

772. THE LAW OF LAND WARFARE, *supra* note 696, para. 266.

773. Paragraph 266 of THE LAW OF LAND WARFARE opens Chapter 5, Section III, whose title—*Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories*—follows the language of Geneva Convention IV. *Id.*

774. THE LAW OF LAND WARFARE, *supra* note 696, para. 379.

775. *Id.* (first paragraph in Chapter 6, Section III, entitled *Rights of the Population of Occupied Territory*).

776. THE MANUAL, *supra* note 683, at 226, para. 9.22 (emphasis added).

777. *Id.* at 226 (discussed in Chapter 9, Section E, entitled *Rules for the Treatment of Protected Persons in Both a Party's Own Territory and in Occupied Territory*).

778. GREENSPAN, *supra* note 675, at 50, 168 (emphasis added).

stances so require. That right is not, therefore, included among the other absolute rights laid down in the Convention.⁷⁷⁹

Pictet later describes the variety of security and control measures that occupying states may exercise:

There are a great many measures, ranging from comparatively mild restrictions such as the duty of registering with and reporting periodically to the police authorities, . . . to harsher provisions such as a prohibition on any change in place of residence without permission, *prohibition of access to certain areas, restrictions of movement*, or even assigned residence and internment . . .⁷⁸⁰

Restrictions on free movement, for instance, are permitted the occupying authority under Article 78 of the Fourth Geneva Convention "[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons."⁷⁸¹ The U.S. Army Field Manual *The Law of Land Warfare* repeats this same authorization to restrict occupied territory

779. PICTET, *supra* note 653, at 201-02 (emphasis added).

780. *Id.* at 207 (emphasis added).

781. Geneva Convention IV, *supra* note 574, art. 78 (emphasis added). Also as regards enemy aliens and other protected persons in the territory of a belligerent, Article 41 of the Fourth Geneva Convention, as well, empowers the belligerent to engage in further restrictions on the freedom of movement in the form of "measures of control." See *id.* art. 41 (emphasis added). Civilians, however, may not be subject to measures any "more severe than that of assigned residence or internment." *Id.* (emphasis added); see also THE MANUAL, *supra* note 683, at 229, para. 9.31.

Pictet explains the implication that employing "measures of control" in the form of "assigned residence" and "internment" has for this restriction of the freedom of movement of civilians:

The object of assigned residence is to move certain people from their domicile and force them to live, as long as the circumstances motivating such action continue to exist, in a locality which is generally out of the way and where supervision is more easily exercised. . . . Internment is also a form of assigned residence, since internees are detained in a place other than their normal place of residence.

PICTET, *supra* note 653, at 256 (emphasis added).

Article 42 of the Fourth Geneva Convention continues with the subject of restriction of the freedom of movement by "the internment" of civilians or "placing" them "in assigned residence": "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." Geneva Convention IV, *supra* note 574, art. 42 (emphasis added). Greenspan also points out that protected persons may be "required to leave their usual places of residence for assigned residence elsewhere . . ." and that "[i]nternment and assigned residence may be ordered only if the security of the detaining power makes it absolutely necessary." GREENSPAN, *supra* note 675, at 50 (emphasis added). Thus, elucidates Pictet, the Convention sanctions restricting the freedom of movement of civilians, specifically in the form of "internment" or "in assigned residence" when there is "serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances," or that these civilians "may seriously prejudice its security by other means." PICTET, *supra* note 653, at 258 (emphasis added).

Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose

inhabitants' free movement by exercising "safety measures" with regard to civilians "for imperative reasons of security."⁷⁸² Pictet explains that the reasoning behind the principle expressed in Article 78 of the Fourth Geneva Convention according to which the occupying authority may "take safety measures," when it deems it "necessary, for imperative reasons of security," that affect civilians in occupied territory, is that "[t]he persons subjected to these measures are not, in theory, involved in the struggle."⁷⁸³

Article 49 of the Fourth Geneva Convention further specifically demonstrates that in occupied territory there may be restriction on the freedom of movement by the occupying authority if "*imperative military reasons so demand.*" The second paragraph of Article 49 stipulates that:

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 displace-

ment of protected persons, or that they may seriously prejudice its security by other means, such as sabotage or espionage.

Id. (emphasis added).

The Fourth Geneva Convention's Article 46 recognizes that "*restrictive measures*" indeed may be "*taken regarding protected persons*" situated in a belligerent's territory. Geneva Convention IV, *supra* note 574, art. 46 (emphasis added). The permissible "*restrictive measures*" must be withdrawn, however, "as soon as possible after the close of hostilities." *Id.*

782. See THE LAW OF LAND WARFARE, *supra* note 696, para. 433. Paragraph 280 also reiterates its Fourth Geneva Convention Article 41 counterpart. See *id.* para. 280. Paragraph 281 discusses the "Grounds for Internment or Assigned Residence," and repeats the provision in Article 42 of the Fourth Geneva Convention to the effect that "[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." *Id.* para. 281 (emphasis added); see also THE MANUAL, *supra* note 683, at 229-30, para. 9.31. THE LAW OF LAND WARFARE also stipulates in identical language to that of Article 46 of the Fourth Geneva Convention that "*restrictive measures*" may be "*taken regarding protected persons*" located in the territory of a belligerent. THE LAW OF LAND WARFARE, *supra* note 696, para. 285 (emphasis added). The permissible "*restrictive measures*," however, need to be withdrawn "as soon as possible after the close of hostilities." *Id.*

783. PICTET, *supra* note 653, at 368. Pictet writes that "[t]he security measures envisaged are 'assigned residence' and 'internment' . . ." *Id.* at 368. Greenspan points out that "as an absolutely necessary measure of control for *imperative reasons of security*," a belligerent may intern civilians. GREENSPAN, *supra* note 675, at 171-72 (emphasis added). In specifically referring to "safety measures" against officials, he also writes that "the occupying power may, for *imperative reasons of security*, take safety measures against officials considered dangerous to its interests by subjecting them to assigned residence or to internment . . ." GREENSPAN, *supra* note 675, at 262-63 (emphasis added). It should be clarified, however, that Article 78's language does not limit the "safety measures" that may be exercised by the occupying authority with respect to civilians when it considers those measures "necessary, for imperative reasons of security" to "assigned residence" and "internment." The article merely stipulates that the "the Occupying Power . . . may, at the most, subject them to assigned residence or to internment." Geneva Convention IV, *supra* note 574, art. 78 (emphasis added).

ment of protected persons outside the bounds of the occupied territory *except when for material reasons it is impossible to avoid such displacement.*⁷⁸⁴

The U.S. Army Field Manual *The Law of Land Warfare* reiterates verbatim the authorization from Article 49 of the Fourth Geneva Convention for the occupying force to restrict the freedom of movement when "*imperative military reasons so demand.*"⁷⁸⁵ Likewise the 2004 *Manual of the Law of Armed Conflict* of the United Kingdom repeats in a similar manner that "[a]n area may be totally or partially evacuated by the occupying power if . . . such evacuation is required either for the security of the population or *for reasons of imperative military necessity*" and "protected persons are not moved outside occupied territory, *unless there is no alternative . . .*"⁷⁸⁶

Pictet, as well, repeats the restriction on civilian's freedom of movement under circumstances of evacuation that "*imperative military reasons so demand*" or "*when the presence of protected persons in an area hampers military operations*":

[E]vacuation may . . . be ordered . . . when the safety of the population or *imperative military reasons so demand.* If therefore an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power has the right and, subject to the provisions of Article 5, the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge. *The same applies when the presence of protected persons in an area hampers military operations.* Evacuation is . . . permitted in such cases, . . . when overriding military considerations make it imperative . . ."⁷⁸⁷

Moreover, Paragraph 5 of the Fourth Geneva Convention's Article 49 in fact explicitly allows an occupying authority to require civilians to *remain* in a specific location, even though they may thereby be exposed to war risks, where "*imperative military reasons so demand*": The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war *unless the security of the population or imperative military reasons so demand.*⁷⁸⁸ The U.S. *Law of Land Warfare* army field manual,⁷⁸⁹ as well as the 2004 British *Manual of the Law of Armed Conflict*,⁷⁹⁰ reiterate this

784. Geneva Convention IV, *supra* note 574, art. 49(2) (emphasis added). The paragraph continues and provides that "[p]ersons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."

785. THE LAW OF LAND WARFARE, *supra* note 696, para. 382 (emphasis added).

786. THE MANUAL, *supra* note 683, at 293, para. 11.55 (emphasis added).

787. PICTET, *supra* note 653, at 280 (emphasis added).

788. Geneva Convention IV, *supra* note 574, art. 49(5) (emphasis added).

789. THE LAW OF LAND WARFARE, *supra* note 696, para. 382.

790. THE MANUAL, *supra* note 683, at 293, para. 11.55.

same authorization to detain civilians in a precise place, when demanded by "imperative military reasons," even if as a result they may be particularly and especially "exposed to the dangers" of armed conflict. Pictet elaborates on Article 49(5) as follows:

*[T]he rule whereby individuals are free to move from place to place is subject to certain restrictions in wartime. Two such restrictions are mentioned here: the Occupying Power is entitled to prevent protected persons from moving, even if they are in an area particularly exposed to the dangers of war, if the security of the population or imperative military reasons so demand.*⁷⁹¹

Consequently, Pictet concludes, "two considerations—the security of the population and 'imperative military reasons'—may, according to the circumstances, justify either the evacuation of protected persons . . . or their retention . . ."⁷⁹²

Article 43 of the Hague Regulations, in stipulating that the occupying power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety,"⁷⁹³ also allows for restrictions on the freedom of movement of civilians in occupied territory. As Greenspan explains, when "absolutely prevented" from doing so, the occupying authority need not follow "the laws in force in the country occupied": "[T]he Hague Regulations (Article 43) require the occupant to respect, unless absolutely prevented, the laws in force in the country occupied."⁷⁹⁴ Thus, according to Gerhard von Glahn, in occupied territory travel laws, among others, will for instance naturally be altered, repealed, or suspended:

The occupant will naturally alter, repeal, or suspend . . . all laws which affect the welfare and safety of his command Second in importance, in most cases, are *all laws relating to travel in the affected zone* These rights and privileges will be suspended by the occupant as a matter of course in the interest of his [the occupant's] safety and security.⁷⁹⁵

Greenspan similarly points out that it is normal for the occupying authority to amend or suspend the right of unrestricted travel in occupied territory: "Naturally, the occupant will suspend or amend . . . laws which adversely affect the welfare and safety of his command. Examples are laws relating to . . . the *right to travel freely*

791. PICTET, *supra* note 653, at 282 (emphasis added).

792. *Id.* at 283.

793. Hague Regulations, *supra* note 583, art. 43 (emphasis added). It bears mention that the principles of Article 43 were adhered to after World War II in the allied occupation of Japan and Germany. See GREENSPAN, *supra* note 675, at 296.

794. GREENSPAN, *supra* note 675, at 241 (emphasis added; citations omitted).

795. VON GLAHN, *supra* note 572, at 98 (emphasis added).

in the territory or leave it."⁷⁹⁶ The occupying power "possesses a right to regulate the circulation of persons in the occupied enemy territory," explains von Glahn. "Quite often additional regulations *prohibit travel beyond a certain distance from a person's domicile, except on passes granted by the occupation authorities.*"⁷⁹⁷ In referring to the freedom of movement, the U.S. Army Field Manual on *The Law of Land Warfare* similarly prescribes that "[t]he occupant may withdraw from individuals the right to change their residence, restrict freedom of internal movement, forbid visits to certain districts, prohibit emigration and immigration."⁷⁹⁸ The *British Manual of the Law of Armed Conflict* from 2004 also allows restrictions on civilians in the form of security measures by permitting the occupying power to "*impose various restriction on civilians, including restricting freedom of movement within the occupied territory, . . . visits to particular districts or immigration . . .*"⁷⁹⁹ The law of warfare thus very much restricts freedom of movement, summarizes Greenspan:

One of the usual methods of exercising control over the population is to issue identity cards to all inhabitants. *Movement by civilians within the territory is restricted, and only allowed outside defined areas by a system of passes. Road blocks are set up at various points to enforce such regulations. Certain areas may be entirely closed to the inhabitants living outside them. Entry and exit from the territory is strictly regulated. Curfews are often imposed.* . . .⁸⁰⁰

796. GREENSPAN, *supra* note 675, at 223 (emphasis added).

797. VON GLAHN, *supra* note 572, at 141 (emphasis added). Moreover, the occupying power has "the customary rights . . . to prohibit anything tending to promote or stimulate a spirit of resistance or of hostility on the part of the inhabitants against the new authorities . . ." *Id.* For further discussion on the occupied population's obligation of obedience as a reciprocal duty, see *supra* Section V.M., entitled *The Obligation of Obedience as a Reciprocal Duty of the Occupied Population*.

798. THE LAW OF LAND WARFARE, *supra* note 696, para. 375 (emphasis added).

799. THE MANUAL, *supra* note 683, at 287, para. 11.37 (emphasis added).

800. GREENSPAN, *supra* note 675, at 233 (emphasis added). Not only do civilians living under occupation *not* have an unrestricted right of freedom of movement, but the passage of basic necessities may even be controlled and restricted by the occupying authority. In accordance with Article 23 of the Fourth Geneva Convention, restrictions may be placed on the transit of food and clothing, medical and hospital supplies, as well as religious paraphernalia. Geneva Convention IV, *supra* note 574, art. 23. Certainly "the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary," must be allowed. *Id.* Moreover, "the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases" must be permitted. *Id.* This "free passage" of goods, however, is "subject to the condition that this Party is satisfied that there are no serious reasons for fearing" the following:

(a) That the *consignments may be diverted from their destination*; (b) That the control may not be effective; or (c) That a definite *advantage may accrue to the military efforts or economy of the enemy* through the substitution of the above-mentioned consign-

ments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

Id. (emphasis added). In addition, "[t]he Power which allows the passage of [these] consignments . . . may make such *permission conditional* on the distribution to the persons benefited there by being made under the local supervision of the Protecting Powers. . . ." *Id.* (emphasis added). Furthermore, "the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed." *Id.*

These permissible restrictions on the "free passage of consignments" are repeated in like manner in THE LAW OF LAND WARFARE, *supra* note 696, para. 262. The 2004 MANUAL OF THE LAW OF ARMED CONFLICT of the United Kingdom also reiterates that the free passage of consignments is:

conditional on the party being satisfied that there is *no serious reasons for fearing* that: (a) the *consignments may be diverted from their destination*; (b) control may not be effective; or (c) the provision of these goods would lead to a *definite advantage accruing to the military efforts or economy of the enemy*.

THE MANUAL, *supra* note 683, at 220-21, para. 9.12.1 (emphasis added). Moreover, continues the MANUAL, the party permitting the "free passage" of the consignments "retains the right to *prescribe the technical arrangements for the movement of relief supplies, including search, and to insist that distribution be supervised . . .*" *Id.* (emphasis added).

Greenspan similarly reiterates these same authorized limitations, elaborating that "the party permitting may also impose a condition that the consignments be distributed under the local supervision of the protecting powers" and that "the party permitting has the right to *prescribe the technical arrangements under which passage is allowed . . .*" GREENSPAN, *supra* note 675, at 166 (emphasis added). Pictet explains that the Fourth Geneva Convention's Article 23 "brings together, under (a) to (c), a number of conditions offering guarantees to the belligerents granting free passage that the consignments will not serve any purpose other than those for which provision is made in the Convention." PICTET, *supra* note 653, at 181. The list of safeguards is finalized, continues Pictet, "by a last condition, under which the right of free passage would not be granted to consignments through which a *definite advantage might accrue to the enemy*. This condition refers to the indirect effect the consignments in question might have on the enemy's position." *Id.* at 182 (emphasis added). He concludes "if . . . a belligerent has *serious reason to think that the size and frequency of the consignments are likely to assist the military or economic efforts of the enemy, he would be entitled to refuse free passage.*" *Id.* at 182 (emphasis added).

The drafters of the Convention, Pictet elucidates, "had to bow to the harsh necessities of war; otherwise they would have had to abandon all idea of a general right of free passage. . . . It is doubtless true that the conditions in question cannot be gauged with mathematical precision," yet "constant surveillance is necessary to ensure that the articles are in actual fact received by those for whom they are intended and that any illegal trafficking is made impossible." *Id.* at 183. Furthermore, he points out:

The State authorizing free passage is . . . entitled to prescribe the technical arrangements [T]he Power authorizing free passage is entitled to check the consignments and arrange for their forwarding at prescribed times and on prescribed routes. That will ensure the safety of the convoys and at the same time adequately safeguard the belligerents against abuses.

Id. at 184 (emphasis added). Importantly, "[t]he [Hague] Regulations are silent as to responsibility of the Occupant to ensure minimum living standards . . ." STONE, *supra* note 654, at 729.

Logically, then, if seemingly innocent food and clothing, or medical and hospital supplies, or religious paraphernalia, can under certain circumstances be deemed a security threat that permits the occupying authority to restrict its free movement, it is obviously permissible to restrict free movement of inhabitants of occupied territories to deter terrorists who are seeking to carry out violent acts against innocent Israeli civilians.

Such restrictions are typical of state practice. During the Allied occupation of the Rhineland, for instance, when there were fears that the war might re-ignite, "the military forces took the responsibility for preserving public order," writes Ernst Fraenkel, "and the civil liberties of the population were drastically restricted."⁸⁰¹

Military necessity requiring restrictions on the freedom of movement of inhabitants of occupied territory may invariably encompass actions taken in defense of the occupying power.⁸⁰² The restriction of movement of civilians is a usual method of exercising control, during actual fighting as well as in occupied territory. Because an occupying authority, in those instances where "*imperative military reasons so demand*," has the right and, depending on the circumstances, indeed the obligation to restrict the movement of civilian inhabitants of the occupied territory, freedom of movement is certainly not a protected right of civilian inhabitants of occupied territory. As Pictet thus concludes, "the rule whereby individuals are free to move from place to place is *subject to . . . restrictions in wartime.*"⁸⁰³ Israel's construction of a security barrier designed to thwart and deter terrorists from committing violent attacks against Israelis is hence not a contravention of international law in this regard, because it is natural that during situations of armed conflict civilian freedom of movement may be restricted.⁸⁰⁴

P. Requisition, Seizure, and Destruction of Private Property

It is regrettable that military operations during a war will most certainly be accompanied by the seizure and destruction of both private as well as public property.⁸⁰⁵ As Georg Schwarzenberger writes, "to expect property in occupied countries to enjoy the same

801. FRAENKEL, *supra* note 655, at 9.

802. See, e.g., the holding to a similar effect in H.C. 302/72, Sheikh Suleiman Hussein Aoda Abu Hilu v. The Government of Israel, 27(2) P.D. 169, 178 (Isr.); see also H.C. 606, 610/78, Saleiman Tufik Ayoub v. Minister of Defence, 33(2) P.D. 113, 117 (Witkon, J.). Moreover, according to Article 5 of the Fourth Geneva Convention, when a civilian in occupied territory "is detained as a spy or *saboteur*, or as a person under definite suspicion of activity hostile to the security of the Occupying Power . . . [that person] shall, in those cases where absolute military security so requires, be regarded as having *forfeited rights of communication* under the present Convention." Geneva Convention IV, *supra* note 574, art. 5 (emphasis added); see also THE MANUAL, *supra* note 683, at 225, para. 9.19.

803. PICTET, *supra* note 653, at 282 (emphasis added).

804. See Feinstein, *supra* note 299.

805. Even during peacetime, a person may be deprived of his possessions "in the public interest," subject of course "to the conditions provided for by law." Furthermore, it is typical that a state has the right to "control the use of property in accordance with the general interest." For instance, the Protocol to The Convention for the Protection of Human Rights and Fundamental Freedoms stipulates as follows:

protection as foreign nationals are entitled to claim in time of peace would impose more severe restrictions on a belligerent occupant than wartime circumstances make feasible."⁸⁰⁶ The provisions in the Hague Regulations regarding seizure and requisition of private property, continues Schwarzenberger, "are evidence of a desire to assimilate requisition and seizure of private property in occupied territories to expropriation in time of peace. In the nature of things, even the Hague Regulations fall short of peacetime requirements. They are, however, intended to approximate to these standards at least as far as *wartime circumstances permit*."⁸⁰⁷ Consequently, he concludes, "requisition and seizure under the law of belligerent occupation may be viewed as the counterparts to lawful expropriation under the law of peace."⁸⁰⁸

"The guiding principle governing the treatment of enemy property in warfare," explains Greenspan, is "stated in Article 23 . . . of the Hague Regulations, 1907, which forbids the destruction or seizure of enemy property, except where *imperatively demanded by the necessities of war*."⁸⁰⁹ In the language of Article 23(g) of the Hague Regulations, "it is especially forbidden . . . [t]o destroy or seize the enemy's property, *unless such destruction or seizure be imperatively demanded by the necessities of war*."⁸¹⁰

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except *in the public interest* and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems *necessary to control the use of property* in accordance with the *general interest* or to secure the payment of taxes or other contributions or penalties.

Protocol to The Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, art. 1, 213 U.N.T.S. 262 (entered into force May 18, 1954) (emphasis added).

806. SCHWARZENBERGER, *supra* note 755, at 243.

807. *Id.* at 246 (emphasis added).

808. SCHWARZENBERGER, *supra* note 755, at 272. Usually, however, "seizure is surrounded by fewer safeguards in favour of the private owner than requisition." *Id.* at 291.

809. GREENSPAN, *supra* note 675, at 278 (emphasis added).

810. Hague Regulations, *supra* note 583, art. 23(g) (emphasis added). In similar language regarding seizure and destruction, THE LAW OF LAND WARFARE provides that "[i]t is especially forbidden . . . to destroy or seize the enemy's property, unless such *destruction or seizure be imperatively demanded by the necessities of war*." THE LAW OF LAND WARFARE, *supra* note 696, para. 58 (emphasis added). The British law of armed conflict manual likewise stipulates in paragraph 11.75 that "[a]ny destruction of enemy property . . . is prohibited unless the destruction is *absolutely necessitated by military operations*." THE MANUAL, *supra* note 683, at 299, para. 11.75 (emphasis added). Paragraph 56 of THE LAW OF LAND WARFARE describes the amount of permissible damage as follows:

There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. Thus the *rule requiring respect*

Hence, explains Greenspan, "[w]here the operations of war render it *imperatively necessary*, enemy property, public or private, may be seized or destroyed."⁸¹¹ He continues to elucidate further concerning the permissible seizure or destruction of enemy property when "*imperatively demanded by the necessities of war*":

The *imperative necessities of military operations* justify the use or damage of enemy property, real or personal, and neither rent for its use nor compensation for its damage may be claimed . . . *Buildings, fences, woods, and crops may be demolished, cut down or removed to clear a field of fire, to provide material for the construction of bridges and other military works, or to furnish fuel, where required by imperative military necessity.*"⁸¹²

In the language of paragraph 11.78 of the 2004 *Manual of the Law of Armed Conflict* of the United Kingdom:

"[I]and and buildings may be used temporarily for the *needs of the occupying power, even if that use impairs its value*. Military use would include, for example, use for . . . *construction of defensive positions*. . . . If necessary, houses, fences, and woods may be cleared to open up a field of fire or the materials used for bridges, roads, or fuel imperatively needed by the occupying forces. The owner of property used in this way may claim neither rent nor compensation" ⁸¹³

Discussing specifically the necessity required to justify the destruction or seizure of property under Article 23(g) of the Hague Regulations, von Glahn points out that "the necessity has to be very urgent and vital."⁸¹⁴ Within the context of the current armed conflict between Palestinians and Israel, a security barrier, though it will entail the seizure or destruction of some property in the course of its construction, clearly is "very urgent and vital" to the security of Israel and the safety of its citizens, a necessity which thereby justifies property seizure or destruction for this purpose. "[A] real emergency," to borrow the words of von Glahn, has

for private property is not violated through damage resulting from operations, movements, or combat activity of the army; that is, real estate may be used for marches, camp sites, construction of field fortifications, etc. . . . Fences, woods, crops, buildings, etc., may be demolished, cut down, and removed to clear a field of fire, to clear the ground for landing fields, or to furnish building materials or fuel if imperatively needed for the army.

THE LAW OF LAND WARFARE, *supra* note 696, para. 56 (emphasis added).

811. GREENSPAN, *supra* note 675, at 281 (emphasis added). As Schwarzenberger explains, "[s]eizure in a combat area is a right of user [sic] of the property in question to any extent, including destruction, that the necessities of war may make advisable." SCHWARZENBERGER, *supra* note 755, at 293.

812. GREENSPAN, *supra* note 675, at 283 (emphasis added).

813. THE MANUAL, *supra* note 683, at 300, para. 11.78 (emphasis added).

814. VON GLAHN, *supra* note 572, at 227.

forced "an occupant to destroy public or private property."⁸¹⁵ In this particular instance of building a security barrier, and under the present circumstances of incessant terror attack against Israel and Israelis, "destruction of property is legitimate" because, to again borrow from von Glahn, "the evidence shows that necessity existed logically under then prevailing conditions."⁸¹⁶

Beyond its clear application in those instances "where *imperatively demanded by the necessities of war*," Article 23(g) is also considered by scholars as being applicable "directly to all territories under a belligerent's control or, at least, to fighting zones and occupied territories."⁸¹⁷ Hence, explains Georg Schwarzenberger, "a case . . . can be made for the direct application of Article 23(g) to *all* territories under the control of belligerents."⁸¹⁸ He elaborates:

[A]ny part of a territory controlled by a belligerent is a potential fighting zone. Thus, contrary to the typical situation as it existed in 1899 and 1907, the distinction between fighting zones, *occupied enemy territories and unoccupied territories of belligerents is becoming increasingly blurred, and all these areas tend to merge into potential fighting zones.*⁸¹⁹

Article 23(g) may thus be regarded as being applicable not only during actual combat but within occupied territory as well as in times of suppressing hostile activities.⁸²⁰ Consequently, as the British *Manual of Military Law* declares, Article 23(g) "applies to both *occupied and unoccupied territory.*"⁸²¹

Specifically concerning the destruction of enemy property in occupied territory, though, Article 53 of the Fourth Geneva Convention permits occupying forces to carry out such destruction of property situated in occupied territory if "*rendered absolutely necessary by military operations.*" The article stipulates as follows:

815. *Id.*

816. *Id.* at 228.

817. SCHWARZENBERGER, *supra* note 755, at 314. In spite of this, writes Schwarzenberger, "[i]t would be difficult to square either variant with the intention of the Parties to the Hague Conventions." *Id.*

818. *Id.* (emphasis added). Yet, writes Schwarzenberger, this is "hardly one based on the intention of the Parties to the Hague Conventions . . ." *Id.*

819. *Id.* at 314-15 (emphasis added). For further discussion on the difficulty of distinguishing between armed conflict *per se* and belligerent occupation, see *supra* Section V.N., entitled *Occupied Territory as a Combat Zone*.

820. See, e.g., H.C. 302/72, Sheikh Suleiman Hussein Aoda Abu Hilu v. The Government of Israel, 27(2) P.D. 169, 178 (Isr.); H.C. 4219/02, Yusuf Muhammad Gusen v. Commander of IDF Forces in the Gaza Strip (Isr.) (Barak, C.J.), available at <http://62.90.71.124/files/02/190/042/a03/02042190.a03.HTM> (last visited Mar. 8, 2005).

821. THE WAR OFFICE [UK], THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW 163, para. 588, cmt. 1 (1958) (emphasis added); see also THE MANUAL, *supra* note 683, at 299, para. 11.75 (citing Hague Regulation art. 23(g)).

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.*⁸²²

The U.S. Army Field Manual on *The Law of Land Warfare* reiterates this rule allowing the destruction of property in occupied territory "*where such destruction is rendered absolutely necessary by military operations.*"⁸²³ The 2004 British *Manual of the Law of Armed Conflict* similarly provides that destruction of property belonging to the enemy is permitted where "*the destruction is absolutely necessitated by military operations.*"⁸²⁴

Article 53 of the Fourth Geneva Convention thus reinforces the rule embodied in Article 23(g) of the Hague Regulations,⁸²⁵ thereby making Article 53 in essence a rewording of the rule expressed in Article 23(g) of the Hague Regulations. Article 53, explains Greenspan, "is, in effect, a restatement, with particular reference to occupied territories, of the general principle contained in Article 23(g) of the Hague Regulations, 1907, which is *applicable*

822. Geneva Convention IV, *supra* note 574, art. 53 (emphasis added). Though it appears in the section that deals with the treatment of private property located in the territory of a belligerent, Fourth Geneva Convention's Article 46 is nevertheless instructive since it is clear from that article that it is permissible to engage in "[r]estrictive measures affecting [the] property" of civilians. *Id.* art. 46 (emphasis added). In the words of Article 46: "In so far as they have not been previously withdrawn, *restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities. Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.*" *Id.* (emphasis added). THE LAW OF LAND WARFARE contains an identical stipulation. See THE LAW OF LAND WARFARE, *supra* note 696, para. 56. In similar manner, the 2004 MANUAL OF THE LAW OF ARMED CONFLICT stipulates that "[a]ny *restrictive measures* applied to protected persons must be cancelled as soon as possible after the close of hostilities. *Where these measures relate to property, cancellation is to be in accordance with the law of the detaining power.*" THE MANUAL, *supra* note 683, at 231, para. 9.36 (emphasis added).

823. THE LAW OF LAND WARFARE, *supra* note 696, para. 393 (emphasis added). Similarly, as mentioned earlier, the 2004 MANUAL OF THE LAW OF ARMED CONFLICT provides:

Land and buildings may be used temporarily for the *needs of the occupying power, even if that use impairs its value. Military use would include, for example, use for . . . construction of defensive positions. . . . If necessary, houses, fences, and woods may be cleared to open up a field of fire or the materials used for bridges, roads, or fuel imperatively needed by the occupying forces. The owner of property used in this way may claim neither rent nor compensation. . . .*

THE MANUAL, *supra* note 683, at 300, para. 11.78 (emphasis added).

824. THE MANUAL, *supra* note 683, at 299, para. 11.75 (emphasis added); see also *id.* at 22, para. 2.2.3 (quoting The Hostages Trial, *supra* note 685, at 66).

825. See THE WAR OFFICE [UK], THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW 163, para. 588, cmt. 1 (1958); see also THE MANUAL, *supra* note 683, at 299, para. 11.75 n.129.

to warfare in all its aspects"⁸²⁶ and allows the seizure as well as the destruction of enemy property when "imperatively demanded by the necessities of war."⁸²⁷ Moreover, according to Schwarzenberger, "Article 53 must be read together with the general reservations contained in Article 64(2)"—that is, read together with the following: "[penal] provisions which are essential to enable the Occupying Power to fulfill 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"⁸²⁸—with the result being that "the exception clause in Article 53 is less narrow than, on the surface, appears,"⁸²⁹ concludes Schwarzenberger.

As pointed out in an earlier context, "[t]he question in what circumstances a necessity arises cannot be decided by any hard-and-fast rule,"⁸³⁰ writes Greenspan. In the end, he continues, in order to determine if indeed the destruction was permissible "[t]he situation should be judged as it appeared at the time to the commander who made the decision, and not as the facts are viewed in retrospect."⁸³¹ Pictet, as well, explains that "it will be for the Occupying Power to judge the importance of such military requirements" as will

826. GREENSPAN, *supra* note 675, at 287 (emphasis added).

827. *See id.* at 278, 287 (emphasis added).

828. Pursuant to Article 64(2) of the Fourth Geneva Convention, the occupying authority may

subject the population of the occupied territory to [penal] provisions which are essential to enable the Occupying Power to fulfill 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, and likewise of the establishments and lines of communication used by them.

Geneva Convention IV, *supra* note 574, art. 64(2) (emphasis added); see to identical effect THE MANUAL, *supra* note 683, at 294, para. 11.57. This means, according to Jean Pictet, that the occupying authority is

authorized to promulgate penal provisions for its own protection. This power has long been recognized by international law. The provision is sufficiently comprehensive to cover all civilian and military organizations which an Occupying Power normally maintains in occupied territory. The Convention mentions 'the Occupying Power' itself besides referring to the members and property of the occupying forces or administration, so that general activities such as activities on behalf of enemy armed forces are covered. The Occupying Power is entitled to use establishments and lines of communication for its own needs; it is therefore entitled to take appropriate measures to ensure their security.

PICET, *supra* note 653, at 337 (emphasis added). Thus, "[t]he occupying power can create punishable offences in the interests of its security or that of the population in the occupied territory." THE MANUAL, *supra* note 683, at 280, para. 11.15 (emphasis added); see also *id.* at 294, para. 11.57.

829. SCHWARZENBERGER, *supra* note 755, at 315.

830. GREENSPAN, *supra* note 675, at 285.

831. *Id.* at 286 n.37.

justify the destruction of private or public property in occupied territory:

The prohibition of destruction of property situated in occupied territory is subject to an important reservation: it does not apply in cases 'where such destruction is rendered absolutely necessary by military operations'. The occupying forces may therefore undertake the total or partial destruction of certain private or public property in the occupied territory when imperative military requirements so demand. Furthermore, it will be for the Occupying Power to judge the importance of such military requirements. . . . The Occupying Power must . . . try to interpret the clause in a reasonable manner: whenever it is felt essential to resort to destruction, the occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done.⁸³²

Pictet further elucidates that post-World War II courts held admissible in specific instances tactics that included "recourse to a 'scorched earth' policy, i.e. the systematic destruction of whole areas by occupying forces withdrawing before the enemy," when required by military considerations and "carried out in exceptional circumstances purely for legitimate military reasons."⁸³³ These same court decisions, though, rebuked "wanton destruction" or "extensive destruction" and "severely condemned recourse to measures of general devastation whenever they were wanton, excessive or not warranted by military operations."⁸³⁴ As Pictet explains:

Article 6(b) of the Charter of the International Military Tribunal describes "the wanton destruction of cities, towns or villages or devastation not justified by military necessity" as a war crime. Moreover, Article 147 of the Fourth Convention includes among the "grave breaches" liable to penal sanctions under Article 146, "extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly."⁸³⁵

Consequently, concludes Greenspan, "among the war crimes defined by Art. 6(b) of the Charter of the International Military Tribunal, 1945, is 'devastation not justified by military necessity,' which obviously implies that devastation is justified by military necessity."⁸³⁶ *The Hostages Case* in fact actually held that a general

832. PICET, *supra* note 653, at 302 (emphasis added).

833. *Id.*

834. *Id.* (emphasis added).

835. *Id.* (emphasis added). "Wanton destruction and seizure," explains Greenspan, "may be distinguished from that which is necessary by the gross disparity between the extent of the destruction and seizure and any valid reason for it. A belligerent is liable to pay compensation for the destruction and seizure of property not justified by the imperative necessities of war . . ." GREENSPAN, *supra* note 675, at 280 (emphasis added).

836. *Id.* at 286-87 n.37 (emphasis added).

devastation could indeed be justified by urgent military necessity.⁸³⁷

Thus, according to Greenspan, "[t]he accepted opinion appears to be that, 'general devastation of enemy territory is, as a rule, absolutely prohibited, and only permitted very exceptionally, when "it is imperatively demanded by the necessities of war" [Hague Regulations, 23(g)].'"⁸³⁸

Furthermore, in detailing the rights the occupying power has to dispose of private and public property, Pictet notes:

[T]he prohibition only refers to "destruction". Under international law the occupying authorities have a recognized right, under certain circumstances, to dispose of property within the occupied territory—namely the right to requisition private property . . . and the right to administer and enjoy the use of real property belonging to the occupied State.⁸³⁹

As to public land, pursuant to Article 55 of the Hague Regulations, the occupying state has the right to use and enjoy all the advantages and profits of public property.⁸⁴⁰ Article 55 provides:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties,

837. The Hostages Trial, *supra* note 685, at 66; see GREENSPAN, *supra* note 675, at 286 n.37; THE MANUAL, *supra* note 683, at 22, para. 2.2.3.

838. GREENSPAN, *supra* note 675, at 285 (citing Hague Regulations art. 23(g)). Paragraph 56 of THE LAW OF LAND WARFARE describes the amount of permissible damage as follows:

The measure of permissible devastation is found in the strict necessities of war. Devastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army.

THE LAW OF LAND WARFARE, *supra* note 696, para. 56 (emphasis added).

839. PICTET, *supra* note 653, at 301 (emphasis added).

840. Public property, though, must obviously be distinguished from private property. "[T]he Hague Regulations do not define state property or supply a test of state ownership," explains von Glahn, although "[g]eneral practice among modern occupants indicates that if doubt exists concerning the nature of the ownership of property, it is held to be publicly owned until and unless private ownership is established." VON GLAHN, *supra* note 572, at 179. Likewise, Greenspan also points out that questionable property status will result in the property being deemed public unless determined otherwise: "If doubt exists whether property, real or movable, is public or private, it may be considered as public property until the question of ownership has been definitely settled." GREENSPAN, *supra* note 675, at 292. Paragraph 394(c) of THE LAW OF LAND WARFARE also considers the difficulty in determining whether property is public or private if unknown, and deems it public until proven otherwise. "If it is unknown whether certain property is public or private, it should be treated as public property until its ownership is ascertained." THE LAW OF LAND WARFARE, *supra* note 696, para. 394(c). Consequently, the rule "[n]ormally . . . to be applied would be that the occupant should treat all property of unknown ownership as public property . . ." VON GLAHN, *supra* note 572, at 180.

and administer them in accordance with the rules of usufruct.⁸⁴¹

Thus, as Ernst Feilchenfeld writes, "the belligerent occupant may . . . utilize public lands or buildings."⁸⁴² The U.S. Army Field Manual *The Law of Land Warfare* explains how an occupant is entitled to dispose of state public property:

Real property of the enemy State which is essentially of a non-military nature, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged or destroyed unless such destruction is rendered absolutely necessary by military operations The occupant does not have the right of sale or unqualified use of such property. As administrator or usufructuary he should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings.⁸⁴³

Similarly, the 2004 British *Manual of the Law of Armed Conflict* explains that "[t]he occupying power is the administrator, user, and, in a sense, guardian of the property" and that "[i]t must not waste, neglect, or abusively exploit these assets so as to decrease their value."⁸⁴⁴ While "[l]and and buildings that belong to the state but that are essentially civilian or non-military in character . . . may not be damaged or destroyed," the *Manual* specifically points out that they indeed may be destroyed or damaged when "imperatively necessitated by military operations."⁸⁴⁵

"Real property of any character which belongs to the enemy state in the occupied territory," explains Greenspan, "passes into the hands of the occupant for the duration of the occupation He

841. Hague Regulations, *supra* note 583, art. 55 (emphasis added). THE LAW OF LAND WARFARE repeats this right of the occupier to utilize the public property of the State: "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." THE LAW OF LAND WARFARE, *supra* note 696, para. 400 (citing Hague Regulations art. 55). Paragraph 401 continues and stipulates as follows:

Real property of a State which is of direct military use, such as forts, arsenals, dockyards, magazines, barracks, railways, bridges, piers, wharves, airfields, and other military facilities, remains in the hands of the occupant until the close of the war, and may be destroyed or damaged, if deemed necessary to military operations.

Id. para. 401.

842. FEILCHENFELD, *supra* note 682, at 55.

843. THE LAW OF LAND WARFARE, *supra* note 696, para. 402 (emphasis added).

844. THE MANUAL, *supra* note 683, at 303, para. 11.86 (emphasis added).

845. *Id.* at 299, para. 11.75 (emphasis added); see also *id.* at 22, para. 2.2.3 (quoting The Hostages Trial, *supra* note 685, at 66).

. . . has such *rights of possession* as the laws of war confer on him."⁸⁴⁶ Greenspan continues:

[W]hile the occupant is entitled to use the property and enjoy its fruits, or products, for the duration of the occupation, he must preserve the property and not exercise his rights in a wasteful or negligent manner so as to impair its value As fruits of the public land, he may sell its crops, cut and sell its timber and work its mines. Such exploitation must not exceed what is usual or necessary and must not be abusive.⁸⁴⁷

Article 46 of the Hague Regulations stipulates that "private property . . . must be respected" and "cannot be confiscated."⁸⁴⁸ Yet, this Article is also subject to rules of international law enabling the occupying power, for reasons either of public welfare or military necessity, to make use of private property or to limit the owners' use of it. Accordingly, an exception under Article 46 is the expropriation of privately owned land, according to local law procedures, to meet public needs. "During an occupation," Feilchenfeld points out, "the occupant's right and *duty to maintain public order and safety may involve expropriation*. As measures for the benefit of the occupied country they *differ, of course, from requisitions*."⁸⁴⁹ He explains that Article 46's rule against prohibiting the confiscation of private property does not afford protection "against losses incurred through lawful requisitions, contributions, *seizures*, . . . and *expropriation*."⁸⁵⁰ Thus, although Paragraph 406 of the U.S. Army Field Manual *The Law of Land Warfare* indicates in identical fashion as the Hague Regulations' Article 46 that "[p]rivate property cannot be confiscated,"⁸⁵¹ and the subsequent Paragraph 407 stipulates that "[i]mmovable private enemy property may under no circumstances be seized,"⁸⁵² that same Paragraph 407 also provides that enemy property "may, however, be *requisitioned*"⁸⁵³ As the United Kingdom's 2004 *Manual of the Law of Armed Conflict* explains, "[t]he requirement to respect private property is subject to conditions necessitated by armed conflict. For example, military operations inevitably cause damage to private property and occupy-

846. GREENSPAN, *supra* note 675, at 287 (emphasis added).

847. *Id.* at 288.

848. Hague Regulations, *supra* note 583, art. 46.

849. FEILCHENFELD, *supra* note 682, at 50 (emphasis added). "[P]rivate property of enemy aliens found within the territory of a belligerent," as well, "may be subjected to control during hostilities," according to Greenspan. GREENSPAN, *supra* note 675, at 48-49.

850. FEILCHENFELD, *supra* note 682, at 51 (emphasis added).

851. THE LAW OF LAND WARFARE, *supra* note 696, para. 406 (emphasis added).

852. *Id.* para. 407 (emphasis added).

853. THE LAW OF LAND WARFARE, *supra* note 696, para. 407 (emphasis added).

ing forces are *entitled to requisition property for necessary military purposes*."⁸⁵⁴

As the Romanian-German Mixed Arbitral Tribunal decided in *Goldenberg & Sons v. Germany*, "military requisition is a form *sui generis* of expropriation for purposes of public utility. The latter is an accepted exception to the principle of the respect for private property. It is the same with requisition"⁸⁵⁵ Thus, explains Greenspan, although absolute confiscation is at all times forbidden, the obligation to show consideration for private property may not hamper various military operations regarding it, nor the requisitioning of various private property.⁸⁵⁶ Privately-owned land may temporarily be utilized for objectives necessitated by the demands of war, notwithstanding that the property may be damaged or its value lowered due to this use. The owners may claim neither reimbursement for any damage that has accrued thereby or rent for its use.⁸⁵⁷ Nevertheless, Israel, as mentioned previously, has offered to pay Palestinian landowners whose property is required for the security barrier a base fee and a yearly sum for requisitioning their property.⁸⁵⁸

Article 43 of the Hague Regulations also allows for the expropriation of property for the objective of preserving and maintaining public order and safety.⁸⁵⁹ Article 43, to reiterate, provides that

[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter *shall take all the measures in his power* to restore, and *ensure*, as far as possible, *public order and safety*, while respecting, unless absolutely prevented, the laws in force in the country.⁸⁶⁰

An occupier in fact is actually *required* under Article 43 of the Hague Regulations to "take *all the measures*" in its power to "ensure,

854. THE MANUAL, *supra* note 683, at 300, para. 11.76.2 (emphasis added).

855. *Goldenberg & Sons v. Germany* (Rom. v. Germ.), 2 R.I.A.A. 901, 909 (1928).

856. See GREENSPAN, *supra* note 675, at 294.

857. See GREENSPAN, *supra* note 675, at 295. Practically, though, in order to alleviate suffering, rent is indeed frequently paid to the landowners in such cases. See *id.* at 295.

858. See A TEMPORARY MEASURE, *supra* note 301.

859. See *The Krupp Trial, Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, X LAW REPORTS OF TRIALS OF WAR CRIMINALS 135 (1949); GREENSPAN, *supra* note 675, at 296.

860. Hague Regulations, *supra* note 583, art. 43 (emphasis added).

as far as possible, public order and safety,"⁸⁶¹ and seizure of property undoubtedly could be included among these measures.⁸⁶²

Article 52 of the Hague Regulations stipulates:

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.⁸⁶³

"Requisition may . . . be described as an act of State," writes Schwarzenberger, "authorised on conditions laid down by international law, by which a belligerent occupant may deprive a private person or local authority of ownership in movables and possession in immovables."⁸⁶⁴ Because "the wording of Article 52," he points out, "is sufficiently wide to include immovables,"⁸⁶⁵ clearly "a belligerent occupant may deprive a private person or local authority of . . . possession in immovables."⁸⁶⁶

Von Glahn, as well, explains that temporary use of land is permissible when there is military necessity for it: "Under normal circumstances an occupant may not appropriate or seize on a permanent basis any immovable private property, but on the other hand a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity."⁸⁶⁷ Undoubtedly, then, a

861. Article 43 stipulates that "the occupant . . . shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety . . ." Hague Regulations, *supra* note 583, art. 43 (emphasis added); see also GREENSPAN, *supra* note 675, at 295.

862. See, e.g., the holding to a similar effect in H.C. 606, 610/78, Saleiman Tufik Ayoub v. Minister of Defence, 33(2) P.D. 113, 130-31 (Ist.) (Landau, J.); GREENSPAN, *supra* note 675, at 296. The local laws in force will determine the reimbursement for this. See *id.* at 296.

863. Hague Regulations, *supra* note 583, art. 52 (emphasis added). THE LAW OF LAND WARFARE repeats this wording and then goes on to explain what types of items may be requisitioned: "Practically everything may be requisitioned under this article that is necessary for the maintenance of the army, such as fuel, food, clothing, building materials, machinery, tools, vehicles, furnishings for quarters, etc. Billeting of troops in occupied areas is also authorized." THE LAW OF LAND WARFARE, *supra* note 696, para. 412 (emphasis added).

864. SCHWARZENBERGER, *supra* note 755, at 288.

865. *Id.* at 269.

866. *Id.* at 288 (emphasis added); see also *id.* at 246, 276, 282. As mentioned earlier, "requisition and seizure under the law of belligerent occupation may be viewed as the counterparts to lawful expropriation under the law of peace." *Id.* at 272.

867. VON GLAHN, *supra* note 572, at 167, 186 (emphasis added).

security barrier would be one of the "various purposes" permitted for the "military necessity" of defending Israel and Israelis against the onslaught of deadly terrorist attacks. "Land and buildings may be used temporarily for the needs of the occupying power," explains Paragraph 11.78 of the 2004 British *Manual of the Law of Armed Conflict*, as mentioned earlier, and "[m]ilitary use would include, for example, use for . . . construction of defensive positions. . . ."⁸⁶⁸

In accordance with Article 52 of the Hague Regulations, the use of property seized on grounds of military necessity requires payment of compensation. Israel hence offers property owners a yearly rent (usage fee) for the duration of the time during which the barrier will be standing on their property. This is in accord with the general practice in occupied territories, since as Feilchenfeld points out, "almost invariably the occupant merely takes possession and pays for using the land."⁸⁶⁹ It is important to reiterate that Israel's barrier is a temporary measure that can be dismantled when the security situation allows.⁸⁷⁰ The President of Israel, Moshe Katzav, has in fact explicitly stated that "[i]f the Palestinians end terror, Israel must stop building the separation fence."⁸⁷¹ Accordingly, Israel does not appropriate property from the owners; rather, it temporarily seizes the property for the duration of time required. Ownership of the land is in no way changed and, Israel says, it will be returned to the owners once the barrier is removed. In the interim, Israel offers landowners a usage fee according to the value of the land as determined by assessors. Should the landowner feel that the assessment is inaccurate or unfair in any way, as explained earlier, he may object to the assessment and ultimately petition the High Court of Justice.

Even the Protocol I Additional of 1977, which was designed to enhance humanitarian rights beyond those accorded in the Fourth Geneva Convention, specifically permits the occupying authority "where required by imperative military necessity," to "destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for

868. THE MANUAL, *supra* note 683, at 300, para. 11.78 (emphasis added).

869. FEILCHENFELD, *supra* note 682, at 38.

870. See, e.g., A TEMPORARY MEASURE, *supra* note 301. This prospect of removing barriers in fact caused grave concerns in Arafat's office, for instance when Israel would remove most of the barriers and grant permits for Palestinian cars to travel on bypass roads on the basis of agreements between Israelis and regional Palestinian leadership, without Palestinian Authority involvement, in regions in which there were long periods of calm. See Yoaz & Regular, *supra* note 642.

871. Laub, *supra* note 1.

the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works," when "in the defence of . . . national territory against invasion."⁸⁷²

Incontrovertibly, suicide bombers and other terrorists frequently "invade" the national territory of Israel. The First Protocol thus specifically recognizes that in the case of "the defence of its national territory against invasion" (that is, in defence of the territory of Israel), an Occupying Power may engage in measures "within such territory under its own control where required by imperative military necessity" (that is, in occupied territory) otherwise prohibited such as rendering land useless to the local population, say for instance, resulting from the construction of a security fence in those areas as "required by imperative military necessity."⁸⁷³ Reiterating this, the 2004 British *Manual of the Law of Armed Conflict* emphasizes that "[i]n cases of imperative military necessity, a party to the conflict may depart from the prohibition relating to indispensable objects in order to defend its national territory from invasion"⁸⁷⁴

In the relatively recent Israel High Court of Justice decision *Abtasm Muhammad Ibrahim v. Commander of IDF Forces in the West Bank*, Justice Beinisch opines:

There is no doubt that the establishment of the Seam Zone harms the Palestinian residents in the zone. Agricultural land will be seized and was seized in order to construct the obstacle, and the ability of the residents to utilize land in their possession could be significantly undermined, also their access to the land could be impeded. This hindrance is an immediate necessity and is a consequence of the state of warfare prevailing in the Region.⁸⁷⁵

The Israel High Court of Justice was thus of the opinion that "[e]ven though the seizure will cause damage, hardship, and inconvenience to residents, the measures taken are intended as an important component of the IDF's conception of combat, which was decided by those in charge of security"⁸⁷⁶

Since the onset of the most recent Palestinian violence in 2000, it has been the Palestinian leadership itself that has incited, financed, stimulated, encouraged, and promoted terrorism against Israeli targets, and it is the Palestinians who have refused to take

872. Protocol I, *supra* note 688, art. 54 (emphasis added).

873. *Id.* (emphasis added).

874. THE MANUAL, *supra* note 683, at 74, para. 5.27.1 (emphasis added).

875. H.C. 8172, 8532/02, *Abtasm Muhammad Ibrahim v. Commander of IDF Forces in the West Bank* (Beinisch, J.; emphasis added), available at <http://62.90.71.124/files/02/720/081/n05/02081720.n05.HTM> (last visited Mar. 10, 2005).

876. *Id.*

appropriate and effective action against the terrorists, thereby as a consequence forcing Israel to construct the security barrier.⁸⁷⁷ Their actions (and omissions) have even substantially determined its route.⁸⁷⁸

Q. *Summary of the Applicability of the Laws of Warfare and Belligerent Occupation*

The concept behind a security barrier as a vital element in combating terrorists is to create an obstacle between the majority of the Palestinian inhabitants of the disputed territories and the majority of Israelis. Hampering terrorist incursions thereby facilitates the defense of the Israeli civilian population.⁸⁷⁹ At the same time, however, Israel is striving to maintain a proper balance between legitimate security concerns on the one hand and property restrictions and ensuing limitations on free movement on the other. In a situation of armed conflict, just as under a regime of belligerent occupation, it nevertheless is the duty in addition to the right of both the belligerent power and the occupying authority to engage in those military measures necessary to accomplish the purpose of the war, even though the methods employed to realize the war aims may as a matter of course require the limitation of free movement or the limitation of the use of property through its seizure or even destruction.

VI. UNDER CONSIDERATION BY THE UN AND THE ICJ

As the necessary legal and historical background has been addressed, it is now possible to glean an understanding of the implications of the UN's handling and, thereafter, the ICJ's consideration of the barrier.

877. It certainly should be realized, nevertheless, that no fence can provide an ultimate, absolute answer to all forms of violence and terrorism; missiles and mortars are not deterred by it and necessary action undertaken by the Israeli army may even be hindered by the barrier it becomes. See Amidror, *supra* note 590; see also SZYMANSKI, *supra* note 2.

878. Similarly, the first in the list of Basic Objectives of Military Government issued in April 1945 in a directive to the commanding general of the U.S. occupation forces in Germany during World War II was to bring "home to the Germans that Germany's ruthless warfare and the fanatical Nazi resistance have destroyed the German economy and made chaos and suffering inevitable and that the Germans cannot escape responsibility for what they have brought upon themselves." Directive to Commander-in-Chief, *supra* note 737, para. 4(a).

879. See MINISTRY OF DEFENCE, ISRAEL'S SECURITY FENCE: PURPOSE (2004), <http://www.securityfence.mod.gov.il/Pages/ENG/purpose.htm> (last visited Mar. 10, 2005); A LINE OF DEFENSE, *supra* note 623.

A. *The Report by the UN Secretary-General*

On November 24, 2003, Kofi Annan, the Secretary-General of the United Nations, presented a report on the Israeli security barrier to the General Assembly.⁸⁸⁰ This report was triggered by the General Assembly's Resolution ES-10/13 of October 21, 2003,⁸⁸¹ which "demanded that Israel stop and reverse the construction of the wall in Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law."⁸⁸²

The Secretary-General's report, after describing the barrier construction project and its implementation, goes on to address its humanitarian and socioeconomic impact on Palestinian society.⁸⁸³ According to the Palestinian Central Bureau of Statistics, as quoted in the Secretary-General's report, so far the wall has separated thirty localities from health services, twenty-two from schools, eight from primary water sources and three from electricity networks.⁸⁸⁴

In the final section of the report, the Secretary-General renders his own observations. Considering the "scope of construction and the amount of occupied West Bank land that is either being requi-

880. See *Report of the Secretary-General*, *supra* note 397.

881. G.A. Res. ES-10/13, *supra* note 22; see also *Legal Consequences of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J.____, 43 I.L.M. 1009 (July 9) (citing Resolution ES-10/13).

882. See *Report of the Secretary-General*, *supra* note 397.

883. *Id.* Annan claimed that the establishment of "closed areas" was particularly problematic. *Id.* Where the barrier has been completed in the northwestern part of the West Bank, the area between the barrier and the Green Line includes fifteen Palestinian communities, home to 5300 Palestinians. *Id.* These residents must now apply for special permits in order to continue to live there, while Israeli citizens, or individuals who have permanent resident ID cards do not need such permits. The report identifies an important source of difficulty even for those with a special permit, or Israeli ID card—gates that are reportedly open only for fifteen minutes, three times a day, regulate travel into and out of the "closed zone." *Id.* This raises the concern that "if residents are denied regular access to their farmlands, jobs and services . . . Palestinians may leave the area." *Id.* The report further claims the following:

[C]ompleted sections of the Barrier have had a serious impact on agriculture in what is considered as the "breadbasket" of the West Bank Palestinian cultivated land lying on the Barrier's route has been requisitioned and destroyed and tens of thousands of trees have been uprooted. Farmers separated from their land, and often also from their water sources, must cross the Barrier via the controlled gates. Recent harvests from many villages have perished due to the irregular opening times and the apparently arbitrary granting or denial of passage.

Id.

884. *Id.* No mention is made in the Secretary-General's report of Israel's official policy of compensating owners for land that is requisitioned, and for replanting trees that are uprooted. Telephone Interview with Major Gil Limon, Advocate, Legal Advisor's Office Region of Judea and Samaria, IDF (June 10, 2004).

sitioned for its route or that will end up between the Barrier and the Green Line," the Secretary-General questions Israel's repeated statements that the barrier is a temporary measure. He further concludes that

[i]n the midst of the Road Map process, when each party should be making good-faith confidence-building gestures, the Barrier's construction in the West Bank cannot, in this regard, be seen as anything but a deeply counterproductive act. The placing of most of the structure on occupied Palestinian land could impair future negotiations.⁸⁸⁵

Although the Secretary-General acknowledges "Israel's right and duty to protect its people against terrorist attacks," he qualifies this, claiming that Israel may only carry out this duty within the confines of international law, such that it does not "damage the longer-term prospects for peace by making the creation of an independent, viable and contiguous Palestinian State more difficult, or that increases suffering among the Palestinian people."⁸⁸⁶ Not surprisingly, therefore, the perspective of the report reflects the biased political orientation of the General Assembly that requested it.

Its viewpoint parallels the Palestinian perspective, as for example, when it refers to "occupied Palestinian land" rather than disputed land. Omitted from the Secretary-General's report is any description of the effort that Israel is making to address and alleviate the humanitarian and socio-economic difficulties facing the Palestinians as a result of the barrier, including procedures for appealing the placement of barrier to the Israel High Court of Justice, which opponents of the barrier have extensively exploited. Other ameliorative measures include payments for financial losses incurred due to the barrier, the opening of dozens of gates to facilitate transit by Palestinian businessmen, farmers, and others who need to cross the barrier.⁸⁸⁷

The Secretary-General further departs from a stance of balance and objectivity by failing to describe the death and destruction that was the factual antecedent of the barrier, only mentioning that the decision of the government of Israel to build the barrier took place

885. See *Report of the Secretary-General*, *supra* note 397.

886. *Id.* While Annan is free to express a viewpoint regarding the outcome of an inchoate peace process, it is unreasonable for him to limit or condition Israel's sovereign right to protect the lives of its citizens as by constructing the security barrier, particularly at a time when large segments of the Palestinian population remain dedicated to destroying the State of Israel and, to that end, engage in terrorism.

887. These ameliorative measures are well-documented. See, e.g., *WHAT IS THE GOAL*, *supra* note 459. They are noticeably absent from the Secretary-General's report. See *Report of the Secretary-General*, *supra* note 397.

after a sharp rise in Palestinian terror attacks. Nor does the report mention how effective the partially completed barrier has been in decreasing the number of successful terror attacks, even in the early stages of its construction.⁸⁸⁸

B. *The International Court of Justice*

On December 8, 2003, not long after Secretary-General Kofi Annan issued his report, the UN General Assembly, at its resumed Tenth Emergency Special Session, adopted Resolution ES-10/14, entitled *Illegal Israeli Actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territories*.⁸⁸⁹ The Resolution contained a request for the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?⁸⁹⁰

As in the case of the Secretary-General's Report, this request is overtly framed in Palestinian terminology. Indeed, the General Assembly resolution was initially sponsored by twenty-seven Arab, Muslim, and non-aligned nations, which generated the momentum that encouraged ninety nations to approve it.⁸⁹¹ Nearly a hundred nations, however, opposed the submission of the question of Israel's security barrier to the ICJ, and either voted against the issue or abstained when it came to a vote in the General Assembly.⁸⁹² Countries that initially opposed or abstained from adopting

888. See the statistics presented in Section V.D, *supra*, which are also noticeably absent from the Secretary-General's report. See *Report of the Secretary-General*, *supra* note 397.

889. See G.A. Res. ES-10/14, *supra* note 24; see also *Legal Consequences of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. ___, 43 I.L.M. 1009 (July 9) (citing Resolution ES-10/14).

890. G.A. Res. ES-10/14, *supra* note 24.

891. Julie Stahl, *Israel: U.N. Engaged in "Moral Relativism"*, CYBERCAST NEWS SERVICE, Dec. 9, 2003, <http://www.cnsnews.com/ViewForeignBureaus.asp?Page=ForeignBureaus\archive\200312\FOR20031209b.html> (last visited Mar. 10, 2005).

892. See Voting Summary on A/RES/ES-10/14: *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory: Resolution/Adopted by the General Assembly* (indicating that 90 nations voted in favor of the resolution, 8 voted against it, 74 abstained from voting, and 19 did not vote, out of total voting membership of 191 nations), <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=108V0691N26Y9.82&menu=search&aspect=power&npp=50&cipp=20&profile=voting&ri=0index=VM&term=ARESES1014#focus> (last visited Mar. 10, 2005); Stahl, *supra* note 891.

the resolution subsequently joined Israel in submitting written statements against the Court's jurisdiction to rule in the case. Western nations have expressed concerns about the politicization of the ICJ.⁸⁹³ The European Union, which did not support the barrier, nonetheless opposed the hearings at The Hague, because it did not consider the matter to be legal in nature.⁸⁹⁴

In the opinion of some Western legal experts, because the General Assembly has already adopted a formal stance on the issue, condemning the barrier and calling for its dismantling, the advice of the ICJ is legally irrelevant and will merely provide a new platform for politicizing the Palestinian cause.⁸⁹⁵ Alan Dershowitz went

893. See Neugroeschel, *supra* note 3.

894. *Id.* It has recently come to light, however, that government funds from Britain and several other European countries have been used to support legal advisors to the Palestinians in their effort to bring the issue of the fence to the ICJ, despite the official public stance of these countries opposing the Court's jurisdiction. According to a recent study published by the European Institute for Research on the Middle East, the Negotiation Support Project was established in 1998 in Ramallah under the sponsorship of the United Kingdom and several other European countries, with the declared purpose of providing "highly professional legal, policy and communications advice to the [PLO's] Negotiations Affairs Department [and its Negotiations Support Unit, or the NSU] and Palestinian negotiators in preparation for, and during Permanent Status negotiations with Israel." EUROPEAN INSTITUTE FOR RESEARCH ON THE MIDDLE EAST, THE PLO'S NEGOTIATION SUPPORT UNIT (NSU) (2004), http://www.europeaninstitute.info/Negotiation%20Support%20Unit%20v%200_1.pdf (last visited Mar. 10, 2005).

While PA initiatives at the United Nations are being managed officially by the Permanent Observer Mission of Palestine to the United Nations, Palestinians have acknowledged that "members of the legal team of the [PLO's] NSU are involved in preparing the written submission against the fence." *Id.* The study further reports that "[t]wo key Palestinian legal sources have suggested the strategy involves producing material to be presented by, and in co-ordination with different Arab states, and with the Arab League." *Id.* This assistance to the PA in helping to bring the issue of the security fence to the ICJ is in direct contradiction to the established positions of the funding countries, which oppose the involvement of the ICJ.

Furthermore, the study reports that the aim of the Communications Section of the NSU is as follows:

[T]o inform and influence international opinion in support of public Palestinian positions on permanent status issues and interim initiatives, to mobilise local and international civil society organisations to lobby on behalf of those [Palestinian] positions It . . . lobbies editorial boards of international media organisations; builds relationships with Palestinian towns and villages to identify media-relevant issues; monitors an e-mail distribution list, and carries out public speaking tours in the United States, Europe—and even Israel.

Id.

Moreover, "[t]hrough the creation of the Communications Section, the role of the Negotiation Support Unit has shifted from providing legal advice supporting negotiations to an effective Palestinian public relations instrument." *Id.* Critics have questioned "how the provision of funds to create an effective propaganda apparatus, constituted of foreign experts speaking on behalf of the PLO, improves the living conditions of ordinary Palestinians, and makes a negotiated permanent status agreement more likely." *Id.*

895. See Neugroeschel, *supra* note 3.

so far as to call the proceedings "guerilla law fare."⁸⁹⁶ Certainly the history of the General Assembly (and numerous other UN bodies) vis-à-vis Israel and the Palestinians suggests that the backers of Resolution ES-10/14 did not have resolution of the conflict in mind when they cast votes to involve the ICJ in this complex, longstanding, and bitter struggle.

Those who were concerned about the politicization of the ICJ also questioned the objectivity of Egyptian Judge Nabil Elaraby, one of the fifteen judges who heard the security barrier case. The Associated Press reported that Elaraby had commented in an interview with the Egyptian weekly magazine *Al-Ahram al-Arabi* shortly before the hearings began that the justification given by Israel for the security barrier is "feeble," and Israel "could face punishment" if the upcoming opinion of the court comes out against it.⁸⁹⁷ A spokesman for the ICJ, however, denied that Elaraby ever gave the interview in question.⁸⁹⁸ *Al-Ahram*, however, also quoted Elaraby in an interview from August of 2001 as saying that "[i]t has long been very clear that Israel, to gain time, has consistently followed the policy known as 'establishing new facts.' This time factor, with respect to any country, is a tactical element [in negotiations], but for the Israelis it is a strategy."⁸⁹⁹ This, according to Elaraby, is how new problems and new facts are established on the ground.⁹⁰⁰ Thirteen of the ICJ judges nevertheless denied Israel's request to remove Elaraby from the judicial panel,⁹⁰¹ on the basis that, among other things, these remarks did not address the issue of the security barrier, which was the matter before the Court.⁹⁰² The only dissent was that of Thomas Buergenthal—the U.S. judge on the Court.⁹⁰³

It is beyond the scope of this Article to delve in depth into the jurisdictional and other issues that should have caused the ICJ to arrive at a different conclusion regarding the advisability of taking

896. *Id.*

897. *ICJ Denies Judge Criticized Fence*, JERUSALEM POST, Feb. 8, 2004, at 3.

898. *Id.*

899. Aziza Sami, *Nabil Elaraby: A Law for All Nations*, AL-AHRAM WEEKLY ONLINE, Aug. 16–22, 2001, <http://weekly.ahram.org.eg/2001/547/profile.htm> (last visited Mar. 10, 2005).

900. *Id.*; see also Tovah Lazaroff, *Court Won't Remove Egyptian Judge*, JERUSALEM POST, Feb. 4, 2004, <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1075782428060> (last visited Mar. 10, 2005); see also *ICJ Denies Judge Criticized Fence*, *supra* note 897.

901. See Lazaroff, *supra* note 900; *ICJ Denies Judge Criticized Fence*, *supra* note 897.

902. Lazaroff, *supra* note 900.

903. *Id.*

on this controversy that is essentially political rather than legal.⁹⁰⁴ Even if the ICJ has jurisdiction, doubts remain as to the propriety of it rendering an opinion. As the ICJ held in its *Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the Court has the power to decide whether the circumstances of the case are such as should lead it to refuse to consider the request.⁹⁰⁵

The General Assembly's request for an advisory opinion cites the Report of the Secretary-General as having been "received with appreciation."⁹⁰⁶ This report itself states that, "it is primarily based on publicly available research carried out by United Nations offices on the ground. Other materials available to the United Nations, including those in the public domain, were used in the preparation of this report."⁹⁰⁷ Regrettably, however, the Secretary-General's report fails to state the specific sources supporting its findings. Even in the most controversial part of the document—section D—which describes the claimed humanitarian and socio-economic impacts of the barrier, the report of the Secretary-General mentions only three vaguely described sources: "reports by the World Bank and the United Nations," "the Palestinian Central Bureau of Statistics," and "a recent World Food Programme Survey."⁹⁰⁸ Taking into consideration that the factual findings are of a very important nature, as they are supposed to constitute the foundation of the Court's legal pronouncements on state responsibility,

904. The ICJ's authority to render an advisory opinion stems from Article 96, Paragraph 1, of the U.N. Charter and from Article 65, Paragraph 1 of the ICJ Statute. Article 96, Paragraph 1, of the U.N. Charter reads: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." This provision requires that the question forming the subject matter of the request should be a "legal question." Similarly Article 65, Paragraph 1 of the Statute of the Court, states that "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." See *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 66, Preliminary Objections (July 8). For a detailed examination of the advisability of the ICJ rendering advisory opinions on (concrete) political disputes between states, see MICHLA POMERANCE, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N.* ERAS 309 (1973); see also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1950 I.C.J. 65 (Mar. 30) [hereinafter *Interpretation of Peace Treaties*].

905. See *Interpretation of Peace Treaties*, *supra* note 904; cf. *Advisory Opinion on Western Sahara*, 1975 I.C.J. 12 (Oct. 16).

906. See G.A. Res. ES-10/14, *supra* note 24; see also *Legal Consequences of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J.____, 43 I.L.M. 1009 (July 9) (citing Resolution ES-10/14).

907. See *Report of the Secretary-General*, *supra* note 397.

908. *Id.*

their inadequacy and controversial nature undermine the very basis for an advisory opinion.

Awareness of the risks to the ICJ posed by cases such as this is not new. In her 1973 book *The Advisory Function of the International Court in the League and UN Eras*, Michla Pomerance poses serious questions about what she considers the danger of "significant stimulation of the Court's advisory business":

Will the Court increasingly be called upon to add judicial legitimization to the collective legitimization processes of the UN political organs? And, if the Court is used in this manner, how will its prestige be affected in the long run? . . . The crucial questions to be asked before soliciting judicial advice are not simply whether the issues are "legal" or "political," "justiciable" or "nonjusticiable." The multiple connotations enveloping these terms have rendered them virtually meaningless. Rather, more specific questions, along the order of the following, might profitably be posed. How is a judicial pronouncement—regardless of its content—likely to affect the root problem before the organization? Is a Court opinion likely to meet with the acceptance of those organs and states in whose power it lies to implement the opinion? Will a Court opinion aggravate the basic difficulty by unduly rigidifying the stand of one of the disputants? Does the organ seeking the Court's advice sincerely desire judicial clarification, or is it interested merely in obtaining judicial support for a particular position? When the desire of an organ for a *particular* answer is strong and manifest—and perhaps nowhere was it as manifest as in the *Namibia* case, in which the UN (represented by the Secretary-General) assumed the role of a "quasi Applicant" against a member state—then the Court should probably be spared involvement . . . Judicial pronouncements rendered under such circumstances are not only truly "advisory" (as the ICJ has repeatedly insisted its opinions are, in any case), but, far worse, superfluous political baggage.⁹⁰⁹

Therefore, in the circumstances of the security barrier case, even if the jurisdictional doubts are overlooked, as a matter of discretion the ICJ should have refused to render an opinion. The drafters of the ICJ Statute clearly envisaged the possibility of extensive factual inquiries for contentious proceedings rather than advisory cases. The ICJ in fact has expressly referred to the possibility of declining to give an advisory opinion as a matter of discretion—in the absence of consent from the state directly concerned—recognizing that in "certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompat-

909. POMERANCE, *supra* note 904, at 376-77 (emphasis added).

ible with the Court's judicial character,"⁹¹⁰ such as in instances in which "the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."⁹¹¹

For all these reasons, although the ICJ's security barrier decision will stimulate further analysis in the legal literature, and likely serve as an additional political cudgel for the Palestinians, the future role of the ICJ and prospects for a political settlement of the Palestinian-Israeli conflict might well have been better served had the Court declined the case.

The subsequent resolution that the U.N. General Assembly passed calling for the dismantling of the barrier, in response to the ICJ's advisory opinion, further illuminates the political consequences of what was meant to be a legal decision. In his address to the General Assembly, following the Court's decision, Israel's Ambassador to the United Nations, Dan Gillerman, conveyed the dangers of accepting the politicization of the ruling.

With each successive partisan initiative we are left to wonder how can the United Nations contribute to the welfare of both peoples, if it sees the suffering of only one? . . . The path to peace does not lie in The Hague or in New York, it lies in Ramallah and Gaza, from where the terrorism is directed.⁹¹²

VII. CONCLUSION AND OUTLOOK

From the signing of the Declaration of Principles, the first of the Oslo accords, on September 13, 1993, until the commencement in September 2000 of the current terrorist campaign waged against Israel, 256 Israelis (civilians and soldiers) were killed in terror attacks.⁹¹³ Since the initiation of the present violence, the number of terror attacks against Israelis, and the resulting death toll,

910. *E.g.*, Applicability of Article IV, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 194 (Dec. 15).

911. *Id.*

912. Ambassador Dan Gillerman, Statement by U.N. Ambassador Dan Gillerman to the 10th Emergency Special Session of the 58th U.N. General Assembly (July 16, 2004), <http://www.mfa.gov.il> (last visited Mar. 10, 2005). Nasser al-Kidwa, the Palestinian U.N. observer, sought international support for a draft resolution declaring "the illegality of any territorial acquisition resulting from the threat or use of force," and demanding that Israel "comply with its legal obligations as determined in the advisory opinion." *Special: Dan Gillerman's U.N. Speech*, JERUSALEM POST, July 18, 2004, <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1090121776908&apage=1> (last visited Mar. 10, 2005). The Palestinian observer also called for international sanctions to be applied against Israel if it did not follow the ICJ ruling. *Id.*

913. See FATAL TERRORIST ATTACKS, *supra* note 594.

jumped dramatically. Through July 2004 terrorists perpetrated some 1000 strikes in Israel within the pre-1967 "Green Line"⁹¹⁴ alone, and by the beginning of March 2005 had caused roughly 8175 casualties.⁹¹⁵ Of the 1047 killed, 732 were civilians.⁹¹⁶

Israel's early response to these cruel attacks was restrained,⁹¹⁷ and among other methods attempted to deal with them by means of additional checkpoints and roadblocks to check the identity and belongings of incoming Palestinians.⁹¹⁸ This created immediate difficulties for Palestinians to work, to conduct business, and to seek health care both in Israel as well as within the disputed territories.⁹¹⁹ As Palestinian terrorism resulted in an increasing death toll, Israel introduced additional measures to control the spike in terror attacks and casualties. Israel identified local centers of terrorism infrastructure and called upon the IDF to enter PA-ruled areas to arrest terrorists and destroy caches of weapons. Finally, in March of 2002, thirty-seven terrorist attacks in thirty-one days raised the casualty toll to unprecedented heights.⁹²⁰ Israel realized that it had no choice but to order the IDF to enter those parts of the territory under the control of the PA in which it was necessary to fight terrorism until such time as the PA would live up to its responsibility of effectively combating terrorism rather than supporting and encouraging the terrorists. In densely-crowded population centers this sometimes necessitated urban warfare that entailed the risk of causing Palestinian civilian casualties.⁹²¹ After such strikes against

914. See TOTAL OF ATTACKS, *supra* note 591.

915. See CASUALTIES SINCE 29.09.2000, *supra* note 416.

916. See *id.*

917. See e.g., *Violence: The Legal Perspective, Press Briefing by Colonel Daniel Reisner* (Nov. 15, 2000), <http://www.isrinfo.demon.co.uk/artic142.htm> (last visited Mar. 18, 2005); Daniel Williams, *Israel Retaliates for Bombings*, WASH. POST, Mar. 29, 2001, at A1; see also Alexander Safian, *Is Israel Using "Excessive Force" Against Palestinians?*, http://www.israelactivism.com/factsheets/Israel_using_force.asp (last visited Mar. 18, 2005); Ellis Shuman, *Security, IDF Targets Force 17 in Helicopter Attacks*, ISRAEL INSIDER, Apr. 29, 2001 (discussing how Israel attacked only "specific targets associated with the terrorist elements" . . . and were 'carefully selected to avoid civilian injuries'), <http://web.israelinsider.com/Articles/Security/978.htm> (last visited Mar. 10, 2005).

918. Cf. Palestinian Nat'l Authority State Information Service, *B'Tselem: IOF [sic] Erected 608 Checkpoints in West Bank*, Jan. 22, 2004, http://www.ipc.gov.ps/ipc_e/ipc_e-1/e_News/news2004/2004_01/092.html (last visited Mar. 10, 2005).

919. Cf. *id.*

920. See ISRAEL MINISTRY OF FOREIGN AFF., VICTIMS OF PALESTINIAN VIOLENCE AND TERRORISM SINCE SEPTEMBER 2000 (2005), <http://www.mfa.gov.il/mfa/terrorism-%20obstacle%20to%20peace/palestinian%20terror%20since%202000/Victims%20of%20Palestinian%20Violence%20and%20Terrorism%20sinc> (last visited Mar. 10, 2005).

921. See *Report of the Secretary-General, supra* note 397; see also Matt Rees, *The Battle of Jenin: Defiant to the Death*, TIME, Apr. 22, 2002, at 26. Over thirty years ago, lamenting about difficulties, similar to those of Israel, that were at the time faced by the United Kingdom in

the terrorism infrastructure, attacks inside Israel would subside for a while, and then resume, leading security experts to ask the following question: Is there another way to stop the terrorism?

The IDF tried several additional strategies. It carried out pinpoint bombings and guided missile strikes against leaders of terrorist groups, their headquarters, and weapons factories. It was difficult, however, to achieve pinpoint accuracy in striking against targets hiding in the midst of civilian population, and as a result, the strikes killed and wounded Palestinian civilians as well. Furthermore, the image of Israeli helicopters firing missiles, and warplanes dropping laser-guided bombs provoked worldwide criticism.

An alternative strategy in preventing terror attacks was sought to try to thwart terrorist infiltration from the areas under PA control. Mines, for instance, are an integral element in the defenses of both sides in the North Korean-South Korean conflict. Mines are used as well in Kashmir in the Indo-Pakistani conflict, and Morocco has also planted them to defend its territorial claims in Western Sahara. Israel understandably did not adopt such a harsh tactic in attempting to prevent infiltration by terrorists intending to carry out suicide and other violent attacks. It has instead opted to construct an expensive,⁹²² technologically advanced anti-terrorism barrier—a non-violent as well as temporary measure. When the final stage of the barrier is completed, it will be one of the biggest and most costly construction projects in Israel's fifty-seven year history⁹²³—further demonstrating the burden this small country has undertaken in building the barrier.

its battle against terrorism, a report presented by the British Prime Minister to Parliament referred to the complexity and problems in carrying out operations "in the course of urban guerilla warfare in which completely innocent lives are at risk" and exacerbated by "a degree of urgency." Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism, Presented to Parliament by the Prime Minister, at 7 (1972). The report deplored the fact that such "public emergencies . . . though short of war in its ordinary sense, are in many ways worse than war. Guerilla warfare will be taking place within the country; friend and foe will not be identifiable; the rebels may be ruthless men determined to achieve their ends by indiscriminate attacks on innocent persons." *Id.*

922. See, e.g., Machlis, *supra* note 646; SZYMANSKI, *supra* note 2.

923. See John Ward Anderson, *Israel's Fence Mixes Security and Politics*, WASH. POST, Sept. 23, 2003, at A15. The total cost of the security barrier is estimated to reach approximately US\$1.3 billion, which comes out to over US\$3.8 million per mile for its planned 350-mile length. See Ammon Brazili & Moti Basuk, *The Cost of the Required Changes in the Route of the Separation Fence Due to the Decision of the High Court of Justice—80–100 Million Shekels*, HA'ARETZ, Jan. 7, 2005, at 3A (in Hebrew, on file with authors). Alterations in the route of the barrier have resulted in an outlay of some US\$23 million just as a consequence alone of the Israel High Court of Justice decision in *Beit Sourik Village Council*. See *id.*

Examined in a global context, the initiative of building a barrier for protection is not out of the ordinary in many areas, such as the Arabian peninsula, Africa, Asia, Cyprus, northern Ireland, the Indian sub-continent, Europe, North America, as well as the Middle East. When placed in historical context, moreover, the idea of a defensive fortification is hardly unique in the Holy Land. For the past 10,000 years virtually every civilization in the region that has attempted to defend itself from anticipated attacks has erected some form of a barrier. Contemporary Israelis, much like their ancient Israelite ancestors, live in a threatening environment requiring structures designed to enhance their security. The utility of protective barriers had already been proven by their effectiveness in reducing terror attacks emanating from the Gaza Strip and Lebanon, as well as those areas in the disputed territories where they had already been erected. In light of these considerations, some members of the Israeli public began to call for a barrier that would extend far enough, and high enough to block any terrorist entry from the West Bank.⁹²⁴ However, politicians from both the right and left objected.⁹²⁵ As public support for the idea of a security barrier grew, in the year 2002, after almost two years into the current wave of terrorism and the accompanying casualty toll, the Israeli government adopted the concept of the security barrier.

With the commencement of the actual construction, new problems and challenges faced the government of Israel. Most of the Palestinian public, as well as the Israeli left and some of the leading western countries have voiced concerns regarding the route of the barrier, because the construction has created difficulties and economic hardship for many Palestinians trying to reach their schools, workplaces, or agricultural land. In response, the government of Israel adopted measures to alleviate the situation and commenced negotiations with some of the representatives of the Palestinians concerned. There is still a debate about the adequacy of these measures, but the availability of judicial review by the Israel High Court of Justice, and its decisions, demonstrate that humanitarian issues are and will continue to be addressed.

Besides reasonable objections as to the route of the barrier based on the very real difficulties it poses for many ordinary Palestinians, however, some segments of Israeli and Palestinian society, as well as foreign governments and international organizations, tried to involve the question of the barrier in their political agendas. In the

924. Interview with Marc Luria, *supra* note 6.

925. *Id.*

international community, many "non-aligned" and Muslim states have followed the call of the Palestinian political elite to mobilize international political pressure against Israel, voting for General Assembly resolutions criticizing Israel for the construction, and referring the case to the International Court of Justice for an advisory opinion. Western countries and international law experts, however, have warned against the politicization of the ICJ. This view posits that because the General Assembly has already adopted a formal stance condemning the barrier and calling for its dismantling, the advice of the ICJ would be legally irrelevant and would only provide a platform to voice an opinion on political questions that should be solved through negotiations between the parties involved. In these circumstances, the Court should probably have followed the advice of Michla Pomerance in order to save its prestige from further erosion: "When the desire of an organ for a *particular* answer is strong and manifest . . . then the Court should probably be spared involvement Judicial pronouncements rendered under such circumstances are in danger of being . . . superfluous political baggage."⁹²⁶

Despite all the commotion that attends Israel's security barrier, on a comparative basis, it is hardly deserving censure. Other governments that have condemned Israel's construction endeavor are, with striking hypocrisy, building similar barriers themselves. Although criticized for being partially built on disputed land, the same can be said of a number of different barriers around the world. Other barriers in existence for decades cannot claim to be temporary, while Israel's government has insisted that this barrier is intended to be dismantled in the future, and it is indeed physically designed to be taken down quickly and easily under the appropriate security conditions. As Israeli Foreign Minister Silvan Shalom declared, once a peace agreement with the Palestinians is finally achieved, the security barrier will be moved, "just as the fence between Israel and Egypt was moved in the aftermath of a peace accord, the fence between Israel and Jordan was moved following a peace agreement, and the fence between Israel and Lebanon was moved following Israel's withdrawal from Lebanon."⁹²⁷ Certain barriers, in various parts of the world, are longer and/or higher; others are more expensive. Some are much more deadly, both in design and in effect, because they are either mined extensively or electrified, whereas Israel's barrier is passive, using only

926. POMERANCE, *supra* note 904, at 377 (emphasis added).

927. Cashman, *supra* note 461.

high tech sensors. Israel's barrier, like some other barriers, necessitated the temporary use of private property. Finally, others barriers have been built, in whole or in part, to serve national interests far less vital than protecting civilians from death and injury in suicide bombings. Viewed in a global context, Israel's security barrier thus looks positively benign.

Israel's barrier is likewise in compliance with the laws of warfare and belligerent occupation. The government of Israel is obligated to defend all its citizens, including those living in disputed territories, in the best, most effective way possible. There is a substantial Israeli population that is a constant victim of deadly terrorism and that currently lives on the other side of the "Green Line" in the disputed territories, the final status of which, according to international agreements with the Palestinians, is to be negotiated. Until direct negotiations between the parties resolve this final status issue, however, the government of Israel must protect all its citizens from terrorist atrocities, just as would be the case for any government anywhere else in the world. The Oslo agreements gave Israel the responsibility for the overall security of Israelis and the settlements, for the purpose of safeguarding their internal security and public order, and granted Israel all the powers to take the steps necessary to meet this responsibility.

In actuality, most West Bank Palestinian residents are located to the east of the security barrier. Although the barrier obviously restricts some movement—after all, its purpose is to save Israeli lives by keeping out terrorists—Israel endeavors to reduce the inconvenience and to facilitate daily life in the area of the barrier by permitting people and commodities to pass through the many crossing points in the barrier that are arranged for both Palestinians and Israelis. Although the barrier restricts some Palestinians from readily getting from one area to another, this inconvenience does not render the barrier illegal under international humanitarian law. Every armed conflict will necessarily inconvenience people. Anyone who travels through an airport will, perhaps with nostalgia, reflect on how the world has changed since September 11, 2001. This is one of the lamentable aspects of war, and particularly the war on terrorism. These unfortunate consequences of armed conflict were not lost on the drafters of the Hague Regulations and the Fourth Geneva Convention—yet they realized that military necessity, however problematic, may justify certain otherwise prohibited conduct. The right to move about freely is not a protected right during situations of armed conflict, and under

international humanitarian law civilian freedom of movement may be restricted.⁹²⁸ The barrier in fact does restrict the free movement of Palestinians, for instance by making it more difficult for some of them to plow their fields or to tend their olive groves. This is hardly as tragic, however, as allowing terrorists to gain unrestricted access to murder hundreds of innocent people.⁹²⁹

The destruction of property is likewise a predictable, though unfortunate, consequence of war.⁹³⁰ If military necessity requires the building of essential defensive fortifications,⁹³¹ for example, pursuant to Article 23(g) of the Hague Regulations Respecting the Laws and Customs of War on Land, property may be seized and destroyed because it is "imperatively demanded by the necessities of war." Article 53 of the Fourth Geneva Convention also allows the occupying authority to carry out destruction of property in occupied territory where "rendered absolutely necessary by military operations." The Hague Regulations, in Article 43, also require an occupying power to "take *all the measures*" in its power to "ensure, as far as possible, public order and safety."⁹³² Such measures clearly may result in the taking or destruction of enemy property. Israel strives to construct the barrier on public land, yet when this cannot be done and it must nevertheless requisition private land, compensation is tendered for its use. Furthermore, a landowner who objects to the requisitions may file an objection with the Israel High Court of Justice, and High Court decisions have in fact required the IDF to reroute the barrier in a number of cases so as to lessen its harmful consequences for the Palestinian population.

Israel has emphasized repeatedly that the security barrier is an interim measure in an effort to curb the perpetration of deadly terrorist attacks against innocent Israelis. Israel acknowledges that any permanent borders can only be determined directly with the Palestinians through negotiations with them. In the meantime, the security barrier annexes no territory to Israel, nor does it in any way alter the ownership of Palestinian private land or Palestinians' legal status, although international humanitarian law does recog-

928. For further discussion see *supra* Section V.O, entitled *Restrictions on Freedom of Movement*.

929. See Feinstein, *supra* note 299.

930. For further discussion see *supra* Section V.P., entitled *Requisition, Seizure, and Destruction of Private Property*.

931. See, e.g., Yoram Dinstein, *The Laws of Land Warfare*, 13 ISR. Y.B. ON HUMAN RIGHTS 52, 86 (1983).

932. Hague Regulations, *supra* note 583, art. 43 (emphasis added).

nize that Palestinian property may indeed be subject to restrictive measures.

In engaging in a course of action such as building a security barrier, an occupying power must obviously balance between various considerations, selecting from among those options the measures that best correspond to the extent of the danger being confronted while taking into account the probability of it occurring. The choice of which methods to implement, however, remains that of the occupying authority itself. Although the means selected to cope with the danger may bring harm to the inhabitants of occupied territory, the danger to be thwarted and averted, if it is of a magnitude greater than the harm caused in the process, counterbalances the harm caused.⁹³³

Land may consequently be seized for the purpose of constructing a security barrier, in accordance with the laws of war generally as well as during the course of belligerent occupation in order to ensure public order and safety and to protect Israel and Israelis. Israelis desire peace—not a barrier—yet they understandably wish to live free of the relentless threat of terrorism.⁹³⁴ The barrier is a legitimate, temporary,⁹³⁵ and passive means⁹³⁶ that increases their chances of realizing this freedom from terrorism. The barrier does not foreclose negotiations regarding disputed territories. Any inconvenience that the barrier causes—to Palestinians and Israelis alike—is an annoyance, and hopefully it too will prove to be temporary.⁹³⁷ In situations where Israel is entitled to resort to armed force in order to defend its citizens, its right to take less drastic, peaceful measures, such as the building of security installations, is thus indisputable.

Former *New York Times* foreign correspondent Clifford May reasoned, “[w]hat if the barriers, fences, walls—call them what you will—succeed in separating two societies now locked in mortal combat, giving both a chance to calm down, cool off and look

933. See, for example, the holding to a similar effect in H.C. 72/86, Jalab Judi Hassan Zelum, et al. v. Military Commander of the Judea and Samaria Region, 41(1) P.D. 528, 532 (Isr.) (Barak, C.J.).

934. See Feinstein, *supra* note 299.

935. See A TEMPORARY MEASURE, *supra* note 301.

936. In fact, the Secretary-General of the United Nations, Kofi Annan, even appealed to Israel “to use *non-lethal methods* of riot control and to the Palestinians to do all they can to stop the violence.” *Annan Leads Mid-East Peace Drive*, BBC NEWS ONLINE, Nov. 18, 2000, (emphasis added) http://news.bbc.co.uk/1/low/world/middle_east/1029514.stm (last visited Mar. 10, 2005).

937. See Feinstein, *supra* note 299; PROTECTING THE PEACE PROCESS, *supra* note 611; A TEMPORARY MEASURE, *supra* note 301.

squarely into the future?”⁹³⁸ In a similar vein, David Makovsky writes farsightedly:

Israelis and Palestinians will eventually have to sit down together to solve their problems. Since such negotiations are unlikely for the time being, however, a properly constructed fence could serve as an interim measure. Given the traumas both of these peoples have endured, especially over the last [few] years, keeping Israelis and Palestinians apart now is the only way to bring them together in the future.⁹³⁹

938. Clifford D. May, *Mending Fences*, TOWNHALL.COM, Feb. 19, 2004, <http://www.townhall.com/columnists/GuestColumns/May20040219.shtml> (last visited Mar. 10, 2005).

939. David Makovsky, *How to Build a Fence*, FOREIGN AFF., Mar.–Apr. 2004, at 50; see Ross & Makovsky, *supra* note 537; see also SZYMANSKI, *supra* note 2. “The fence,” writes Matti Golan in the Israeli financial newspaper GLOBES, “would be better named the security and peace fence.” He explains as follows:

It should already be obvious that the only chance for a peace agreement with the Palestinians, if there is any chance at all, lies in them being unable to hurt us. So long as they can hurt us, there will be those among them who will try. The harder it becomes for them to kill us, the weaker will be their resistance to an agreement. In other words, the fence will not only enhance security, it will improve the chance for peace. . . . To the Palestinians who claim the fence will harm the peace process, we must tell the truth. The opposite is the case. The fence will only help the Palestinians who truly want peace, by thwarting those who do not want peace.

Matti Golan, *Fence Now: The Separation Fence Gives Peace a Chance, Whatever the US Says*, GLOBES [ONLINE], Sept. 10, 2003, <http://www.globes.co.il/serveen/globes/DocView.asp?did=723091&fid=980> (last visited Mar. 10, 2005); see also SZYMANSKI, *supra* note 2.