

Separation Barrier, Closures and Checkpoints in “Occupied Palestinian Territories” and Postscript to the International Court of Justice Decision on the Barrier

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This paper provides a factual and legal background for the Israeli Terrorist Security Barrier, Closures and Checkpoints, following a four-week visit to Israel by the author..

The need for this paper was prompted by a number of findings presented by the UK Parliamentary International Development Committee (the “Committee”) in its report on “Development Assistance and the Occupied Palestinian Territories (OPT) and the response by the Department of International Development (“DFID” or “Department”), the UK governmental office responsible for international developmental support. This paper challenges the veracity of a number of those findings, the validity of its conclusions and their uncritical acceptance by the Government. It also points out a number of changes in the manner in which Israel relates to the humanitarian needs of the Palestinian population and which are not reflected in the Report.

1. Findings of Parliamentary Committee and the Response of the Department for International Development.

In its findings, the Parliamentary Committee reported¹ that Israeli control of population movement within the OPT has considerable negative impact on the Palestinian GDP; preventing communication between Palestinian towns; causing delays and harassment of the Palestinian population in their daily occupation.²

As of July 2002 the Palestinians reported 133 permanent checkpoints in the West Bank³ which the Committee concluded were not always justified by security considerations.⁴ The Committee found that the creation of a separation barrier/fence has a serious impact on the quality of life of the Palestinians, affecting their ability to earn income,⁵ separating families, and splitting agricultural land from the homestead resulting in the “confiscation” of Palestinian land.⁶

Certain NGO’s and DFID’s own Palestinian Negotiation Support Unit have asserted that Israel’s motivation in constructing the barrier reflects an ideological orientation aimed at land appropriation, prejudgement of final status negotiations and collective punishment;⁷ the establishment of a political border, “destroying the possibility of a future Palestinian State”;⁸ and placing stress on the Palestinians so as to “bring them to heel.”⁹

Although the Committee stated that although it understood Israel’s security fears, it nevertheless determined that the barrier should be constructed on “Israeli, not Palestinian

¹ House of Commons International Development Committee, Development Assistance and the Palestinian Occupied Territories, vol.1 (HC 230-1) (hereinafter “Committee Report”)

² *ibid*, para 21

³ *ibid* para 22

⁴ *ibid*, para 83

⁵ *ibid* para 27

⁶ *ibid* para 29

⁷ *ibid* para 27

⁸ *ibid* para 33

⁹ *ibid* para 83

land”; that the construction process and the path of the barrier supported Palestinian fears as to Israel’s motivation; and that the barrier destroys the viability of a future Palestinian State.

In general, the Department concurred with most of the Committee’s findings and its recommendations. ¹⁰ DFID acknowledged Israel’s right to take legitimate measures to protect its citizens, and concurred with the Committee that the construction of the barrier on occupied territory was unlawful, as was the confiscation of the land required for its route. In the Department’s opinion, the barrier it would not provide lasting security in that it creates a physical obstacle to the two state solution.

This critique will now attempt to respond to some of the findings, conclusions and recommendations set out above, particularly in relation to the Terrorist Security Barrier (“TSB”). Other points raised above will be dealt with incidentally and tangentially to the main thrust of this paper.

For those readers who have already concluded that Israel’s presence in the West Bank and Gaza is legitimate and its continued occupation is justified, the discussion and argument of the legitimacy of the fence and its construction is continued at page 11, paragraph B below

For those who claim that Israel has no place being on the West Bank and agree that the construction, if at all, of any fence should be on the Green Line, I would remind readers that the major issue of the legality of the TSB must be viewed within a much broader context than that normally presented by government and the media. Paragraph 2 following, attempts to provide this perspective.

2. Construction of the TSB on “Palestinian” Land

It has been argued by some critics of Israel that the construction of a barrier is, in itself, a legitimate and lawful method of self defence provided it is erected on the “Green Line.” However, since its location is on “occupied territory, [it] is unlawful” For many years, the UK’s position has been that the West Bank was either part of Jordan or is now under the jurisdiction of “Palestine” an Arab State in the process of becoming. Whatever the situation, in the UK’s opinion, and in the opinion of the majority of states in the UN, the West Bank area, including East Jerusalem has never been **politically** recognised as part of Israel. While the political position seems clear, the **legal** position is a little less clear.

a. The Green Line: An International Border?

The Israel-Jordan Armistice Agreement 1949 affirmed and recognised the following principles: (i) “no military or political advantage should be gained under the truce ordered by the Security Council;¹⁰ and (ii) no provision of this [Armistice] Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations

Contrary to this Agreement, Jordan unilaterally annexed the West Bank including East Jerusalem in 1950; an act which failed to obtain any international

¹⁰ Article II (1)

recognition apart from Britain and Pakistan. Such claims to sovereignty over the West Bank as Jordan made, were ceded to the PLO, as the Palestinians' representative in July 1988.¹¹

The Green Line was also rejected as international border following the Six Day War, when the UN General Assembly failed to pass four draft resolutions (before passing Resolution 242) two of which called for Israel withdrawal to the 1967 cease fire lines.¹² Lord Carrington,¹³ in subsequent statements regarding the future borders of Israel within the context of UN Resolution 242, rejected the argument that the language of the Resolution required Israel to withdraw to the 1948-1967 ceasefire line as an international border.¹⁴

“It [the line] is where troops had to stop, just where they happened to be that night. That is not a permanent boundary.”

Successive British Foreign Secretaries, Michael Stewart, on November 17, 1969, and George Brown, on January 19, 1970, both confirmed the same position to Parliament.

Britain's recognition of Jordan's annexation of the territory in 1950, has of itself been a contributing factor to the common understanding that the cease-fire line has significance as an international boundary, and indeed DFID is following the traditional policy.¹⁵

b. Historical and Factual Context of Israeli West Bank “Occupation”

Before analysing Israel's legal position in the West Bank, including its right to requisition private land and utilise public land for military purposes, it is important to review briefly the historical factual context within which Israel finds itself in the West Bank.

¹¹ October 26, 1994, Annex I (a) Israel-Jordan International Boundary Delimitation and Demarcation. Para. 7 reads “The orthophoto maps and image maps showing the line separating Jordan from the territory that came under Israeli Military government control in 1967 shall have that line indicated in a different presentation and the legend shall carry on it the following disclaimer:

"This line is the administrative boundary between Jordan and the territory which came under Israeli military government control in 1967. Any treatment of this line shall be without prejudice to the status of the territory."

¹² Yugoslavia introduced GA A/L 522 which called for Israel to withdraw behind the lines established in the General Armistice Agreements [of 1949], while GA Resolution A/L 523, submitted by the Latin-American Nations, required Israel to withdraw “from all the territories.” Neither resolution received the necessary two-thirds majority vote to become effective. However, the text of these drafts indicates that the UN certainly debated and considered the scope of Israel's withdrawal, and ultimately rejected a return to the 1949 Armistice lines

¹³ Beirut Daily Star, June 12, 1974

¹⁴ DFID should be well aware that the sponsors of the resolution, intentionally omitted the significant words “all ” and “the” before the word “territories”, particularly after the rejection of four earlier draft resolutions which were more demanding of Israel. Two of them, in particular, employ language which the Palestinians continue to declare as being the UN's intention, notwithstanding their failure to achieve the necessary majority

¹⁵ See Jonathan Spyer, *An Analytical and Historical Overview of British Policy towards Israel*, 8 Middle East Review of International Affairs, No. 2 June 2004.

(i) Six Day War

Israel's initial presence in the West Bank and Gaza is the result of her being compelled to act in self defence against armed attack in accordance with the Article 51 of the UN Charter.¹⁶

In 1967, Israel took pre-emptive defensive military action against Egypt on June 5, 1967 following (1) Egyptian closure of the Suez Canal to Israeli shipping; (2) unilateral removal by the UN of its peace-keeping forces in Sinai; (3) Russian disinformation passed to and accepted by Egypt that Israel was amassing troops on its northern border ready to attack Syria and (4) the massing of Arab armies in offensive rather than defensive positions on the Lebanese, Syrian, Jordanian and Egyptian borders with Israel.

Again following political pressure and military disinformation, this time from Egyptian President Nasser, to the effect that Israel's air force had been destroyed by Egypt, Jordan unfortunately joined in the war, ignoring an Israeli appeal transmitted through the U.S. State Department, the British Foreign Office and Gen. Odd Bull, UN Commander, at 08.00 hrs. on June 6, that:

“Israel will not, repeat not attack Jordan if Jordan remains quiet. But if Jordan opens hostilities, Israel will respond with all its might.”¹⁷

Although during the previous evening of June 5, small arms fire occasionally burst from Jordanian positions, Israeli troops were under strict orders to ignore them, Israel being unwilling and unable to open a second front. However, on at 10.00 hrs on June 6, Jordanian troops commenced shelling Israeli military outposts and civilian neighbourhoods around Jerusalem, even reaching the suburbs of Tel Aviv. Three Israeli coastal towns were attacked by Jordanian aircraft. Jordanian troops also advanced over the Armistice lines in Jerusalem and occupied the UN compound.

Israel then reacted in self defence and captured the West Bank including Jerusalem from Jordan within 36 hours.

Under contemporary international law, while it is no longer legitimate to acquire territory by military conquest, the law of belligerent occupation, particularly following an action of self defence, does not compel the victor to retreat to its former boundaries until the conflict is settled in a peace agreement or otherwise.¹⁸ Israel's attempt to negotiate a peace in return for its withdrawal from the West Bank was unfortunately rejected by the Arab leadership at the Khartoum Conference¹⁹ during which the three "noes" resolution was passed -no negotiation

¹⁶ UN Charter Article 51 “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”

¹⁷ Michael B. Oren, *Six Days of War*, Penguin Books, 2002 p 184. Oren gives an extended, but very readable, background

¹⁸ Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* The University of Minnesota Press, Minneapolis, 1957, pp. 256 *et seq.* Other methods of ending belligerent occupation, include re-conquest by the forces of the legitimate sovereign, a successful uprising by the inhabitants of the territory. von Glahn also notes that occupation can terminate by annexation of the territory by the occupant under the terms of a peace settlement or after the complete subjugation of the former sovereign. This latter point is, however, subject to gaining international recognition of the action.

¹⁹ September 1967

with Israel; no recognition and no peace with Israel.

(ii) UNSC Resolution 242

After the Six Day War, efforts by the UN Security Council to resolve the conflict between Israel and her neighbours resulted in the passage of Resolution 242 on December 31, 1968. A careful reading of the text does not support DFID's conclusion that Israel need construct the TSB on the Cease Fire Line. In fact the reverse is the case.

Careful drafting, after extended negotiation, piloted by the British delegation at the UN, produced a Resolution which, *inter alia*, called for both the termination of all claims or states of belligerency and withdrawal of Israel armed forces "from territories" occupied in the recent [June 1967] conflict.²⁰ The Resolution intentionally omitted the words "all the" between "from" and "territories" with the obvious implication that Israel is not required to retreat to the boundaries in effect before 1967, namely the Armistice lines determined in 1948, and that territorial adjustments have to be made

It is therefore clear that the temporary location of a fence or other construction within the West Bank, for security purposes and placed other than on the Green Line, is not inconsistent with Resolution 242, particularly since Israel asserts the route of the TSB is not intended to be the permanent boundary.

(iii) Oslo Accords and the Breakdown of Final Negotiations

Following Gulf War I (1990-1) and the collapse of the Soviet Union (1991), the US saw an opportunity to bring peace to the Middle East by sponsoring, jointly with the Soviet Union, the Madrid Conference on October 30, 1991, to which Israel, Syria, Lebanon, Jordan and the Palestinians were invited. For the first time, Israel entered into direct, face-to-face negotiations with Syria, Lebanon, Jordan. Discussions between Israel and the Palestinians were held indirectly through Jordan since Israel refused to negotiate with the terrorist PLO. After two years of negotiation, the talks resulted in the signing of a peace treaty on October 26, 1994 between Jordan and Israel.

Madrid was also the catalyst for the series of secret talks held in Norway between Israel and the Palestinian Arabs that launched the peace process which culminated in the 1993 Oslo Accords,²¹ the most detailed of which, is the Israel-Palestinian Interim Agreement on Self Government in the West Bank and Gaza (Oslo II).²²

²⁰ It should be noted that Resolution 242 makes no reference whatsoever to "Palestine" or to any Palestinian" jurisdiction. It merely requires Israeli withdrawal. It is theoretically conceivable, therefore, that some Jewish populated settlements could remain in the territories under whatever jurisdiction is established (presumably Palestinian) and subject to that law, just as many Arab villages exist peaceably within Israel proper and are subject to Israeli law

²¹ These comprise: (i) Israel-PLO letters on mutual recognition September 9, 1993; (ii) Declaration of Principles on [Palestinian]Interim Self-Government, September 13, 1993; (iii) Agreement on the Gaza Strip and the Jericho Area (Oslo Agreement) May 4, 1994; replaced by the Interim Agreement of 1995, wider in scope and covering the whole of the West Bank and Gaza

²² Signed on September 28, 1995 between Israel and the PLO, the Interim Agreement, including its various annexes, comprises over 300 pages to which are appended seven annexes dealing with: security

Critical to the Oslo Accords was the PLO undertaking to resolve all disputes by negotiation and that violence was to be eschewed. In support of this aim, a major objective of the Interim Agreement was to broaden Palestinian self-government in the West Bank by means of an elected self-governing authority -- the Palestinian Legislative Council-- and to allow the Palestinians to conduct their own internal affairs, to reduce points of friction between Israelis and Palestinians, and to open a new era of cooperation and co-existence based on common interest, dignity and mutual respect.²³

Following the elections and the establishment of the Council, the Israeli military government withdrew and its Civil Administration was dissolved. The Council assumed responsibility for all rights, liabilities, and obligations in over forty spheres of civilian activity which were transferred to it. At the same time Israel retained certain powers and responsibilities not transferred to the Council, particularly in respect of external security.

Israel gradually “redeployed”, withdrawing its troops from the Arab populated areas of the West Bank: Jenin, Nablus, Tulkarem, Kalkilya, Ramallah, Bethlehem, Hebron (where special arrangements applied) and 450 towns and villages. Except for a small number of isolated outposts located at main road junctions, particularly those adjacent to Israeli settlements and in Area “C” (defined below), there was almost no IDF presence in Palestinian population centres until the Palestinian initiated their series of armed attacks in September 2000.²⁴

Under Oslo II, the responsibility for ensuring security and maintaining public order in the West Bank is divided between Israel and the Palestinians, according to the type of security threat and the location of its source.

While Israel retains overall responsibility throughout the West Bank and Gaza for external security and for the security of Israelis and Israeli settlements, it shares with the Palestinian Authority responsibility for internal security and public order. The degree of Israeli involvement in West Bank security matters depends on the Area in which the incident occurs.

The Agreement establishes different arrangements for three types of area:

Area “A” comprises the major Arab cities named earlier, constituting approximately 26% of the Palestinian population. In these areas the Palestinian Council has full responsibility for internal security, public order and civil affairs. The City of Hebron is subject to special arrangements set out in the Interim Agreement and in a special protocol

arrangements, elections, civil affairs (transfer of powers), legal matters, economic relations, Israeli-Palestinian cooperation, and the release of Palestinian prisoners

²³To enable Palestinians in exile to participate in the free election process to be held in the West Bank, PLO leader Arafat and his supporters were allowed to enter Gaza and Jericho under an agreement which preceded Oslo II which contained many of its provisions.

²⁴The Mitchell Report confirmed that although Sharon’s visit to Temple Mount may have been the trigger for the present violence, it was not cause of it.

Area “B” comprises the other Palestinian towns and villages in the West Bank which contain some 70% of the Arab population. Here, the Palestinians have assumed the responsibility for maintaining public order, while Israel retained overriding security responsibility for safeguarding its citizens and to combat terrorism. The Palestinians assumed the full civil authority as they have in Area “A”; and

Area “C” comprises the mainly unpopulated areas of the West Bank, areas of strategic importance to Israel, and the Israeli settlements. In these areas, Israel retains full responsibility for security and public order, and civil responsibility for matters relating to territory (land use planning and zoning, archaeology etc.). The Palestinian Council assumed civil responsibility over all other civilian spheres of activity.

The net effect of Oslo II was to place approximately 95% of the Palestinian population under the jurisdiction of the Palestinian Authority headed by Yassir Arafat, and to transfer to their territorial control just under 50% of the West Bank and Gaza Strip.

Had the Palestinians not walked away from the final status negotiations at Camp David in 2000, and abandoned subsequent negotiations regarding the rights of Palestinian refugees to return to within Israel,²⁵ they could have gained control of approximately 97% of the West Bank territory. The 3% balance could have been resolved subsequently by an equivalent exchange of Israeli territory.

The breakdown of the Camp David talks gave Arafat the impetus to resume the conflict with Israel militarily. The outbreak of the Intifada which followed in September 2000, and the upsurge of suicide bombings in March 2002, compelled Israeli troops to re-enter parts of Areas A and B on a temporary basis in order to prevent terrorist attacks directed at Israeli military personnel and civilians, occurring both in the West Bank and in Israel itself.

Although the United Nations Charter contemplates pacific rather than military means as the preferable method for the settlement of international disputes, the Charter also provides for the retention by member sovereign states of their inherent right of self defence against “armed attack.”

Such is Israel’s situation. In light of the number of terrorist attacks which have taken place since September 2000, there seems little doubt that Israel is entitled to take measures of self defence both under Article 51 of the Charter and under the security provisions of Oslo II

Two separate issues arise at this juncture (A) Israel’s legal right to re-enter West Bank Territory; and (B) having entered, Israel’s entitlement to construct the TSB.

²⁵ The major demand by Arafat that all Palestinian refugees (and their descendants) be permitted to return to their previous places of residence in Israel was unacceptable to Israel. An Israeli controlled partial return of some Palestinians was rejected by Arafat. The demographic effect of accepting Arafat’s demand, together with the presence in Israel of over 1 million Israel Arabs, would have spelt political and cultural suicide of the Jewish state.

c. Legal Basis for IDF Re-Entry into West Bank after September 2000

(i) Interim Agreement (Oslo II) West Bank Re-Entry

Until the commencement of the violence in September 2000, Israel military presence in Palestinian populated West Bank territory was minimal. However, as a result of the failure of the Palestinian Authority's to fulfil its obligations under Oslo II, Israel has under the Agreement, been compelled to re-enter parts of the West Bank which it had previously vacated and to take affirmative and effective action against terrorism

Under the Agreement, Israel retained overall external security responsibility throughout the West Bank and the Gaza Strip, and for the security of Israelis and settlements. The prominent security arrangements set out in the body of Oslo II and supplemented by the Security Appendix are of crucial importance in determining Israel's right to construct the TSB.

The Agreement provided for the establishment of a "strong police force," 12,000 in number, and stipulated that that such body was to constitute the only Palestinian security force.²⁶ The Security Annex specifies the deployment of that force, its approved equipment and modes of operation.

In reality, even before the outbreak of the violence in 2000, the number of police has far exceeded this figure to the extent of over 30,000. Instead of there being one police force, under the control of the Palestinian Authority, the Palestinian leadership divided the security responsibility into at least seven different operating forces in gross violation of Article XIV. This provision unambiguously forbids any armed forces in the West Bank and Gaza other than the IDF and the Palestinian Police Force.

Contrary to their undertakings given in the Security Annex, the Palestinians have encouraged the spread of illegal weapons rather than prohibiting them.²⁷ The above Article XIV stipulates:

Except for the arms, ammunition and equipment of the Palestinian Police Force described in Annex 1, and those of the Israeli Military Forces, no organisation, group, or individual in the West bank or Gaza Strip shall manufacture, sell, acquire, possess, import or otherwise introduce into the West Bank and the Gaza Strip any firearms, ammunition, weapons, explosives, gunpowder or any related equipment, unless otherwise provided for in Annex 1

While security and police accountability and co-ordination became blurred, there is little doubt that Chairman Arafat exercised effective control to a considerable extent over the Palestinian security forces and militants operating in the West Bank and Gaza, and still does today,²⁸

²⁶ Palestinian Police is the only Palestinian Security Authority: It will act systematically against all expressions of violence and terror and will arrest and prosecute individuals suspected of perpetrating acts of violence and terror.

The Council will issue permits in order to legalize the possession and carrying of arms by civilians; any illegal arms will be confiscated by the Palestinian Police

²⁷ IDF Spokesperson, *Weapon Smuggling Tunnel Uncovered on the Israel-Egypt Border*, May 15, 2002, June 17, 2002; July 13, 2002, September 30, 2002; December 10, 2002. IDF Spokesperson, *IDF Strikes Workshop for the Production of Weapons in South East Gaza*, November 11, 2002; Jean-Marc Mojon *Israel Catches Boat ["Karine-A,] Smuggling Weapons Material to Gaza*, Middle East Times May 22, 2004

²⁸ CBC News, *Arafat would control reformed security forces*, 4 Jun 2002; Bertus Hendriks, *Arafat upstages Abbas*, Radio Netherlands, 28 August 2003; AFP, *Palestinian MPs Urge New Government*

notwithstanding recent pressure from the US to share power with others.

From an obligatory perspective, the Security Annex to Oslo II also specified the commitment of Israel and the Palestinian Council to cooperate in the fight against terrorism and to prevent its incitement.²⁹ However, instead of opposing terrorism, the Palestinian leadership has encouraged it, through its official media, its mosques and its schools. Indeed the so called “summer camps” intended for Palestinian children and youth have become military training grounds aimed at gaining skills appropriate for terrorist activity.³⁰ The Interim Agreement specifically declares:³¹

that both the Palestinian Authority and Israel 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 against their property and shall take legal measures against offenders.

It is difficult to find a more blatant breach of the Palestinians obligation to take steps suppress terrorism and to take action to prevent terrorist attacks.³² Instead there is ample evidence to support the claim that the police force has with the knowledge and approval of the Palestinian leadership cooperated with terrorists and even formed part of their number.³³

To ensure Palestinian compliance with their obligations, the Interim Agreement provided in Article XIII that Israel should have the overriding responsibility for internal security [in Areas B and C] for the purpose of protecting Israelis and confronting the threat of terrorism.³⁴ The Article also provides for its implementation by setting out special

OverSecurity, Khaleej Times , 21 July 2004; Matthew Kalman, *Defiant Arafat reasserts grip on power*, The Globe and Mail, July 21, 2004

²⁹ Under Article XXII, the PA is required to abstain from incitement, take legal measures to prevent such incitement and to ensure that their respective educational systems contribute to the peace between the Israeli and Palestinian peoples and to peace in the entire region.

³⁰ The following news item by Emma Hurd which was aired on Sky News, July 13, 2004, has vital elements that were not mentioned in it: The training grounds are at the UNRWA camp of Nusseirat and the Popular Committees are run by Muhammad Dahlan's section of the PA. These two facts are significant for two reasons. Firstly, because the US Congress is investigating as to whether UNRWA is in violation of US law which forbids military training in US funded agencies abroad. Secondly, because Israel is grooming Dahlan to run Gaza.]

Emma Hurd, *Gaza's Killing School* Sky News, July 13, 2004 “Children as young as 10 are being recruited to fight for the Palestinian cause.” Sky's Middle East Correspondent has gained access to a young people's camp in Gaza, where the only lesson taught is how to kill Israelis. She said the camp, at an undisclosed location, had been set up to drill children in the ways of war. The recruits, some of whom are dwarfed by their AK-47 assault rifles, are taught how to carry out ambushes. They are also made to do an obstacle course, crawling under barbed wire and leaping through hoops of fire while their instructors fire live bullets overhead.

Hurd witnessed one training session in which a militant, dressed as a Jewish settler complete with yarmulke skull cap, was ambushed in his car. Gunmen pulled the "settler" from his vehicle and Hurd was told if this had been real he would have been killed.

She spoke to two 10-year-old recruits. One of them, Mustafa, said he wanted to shoot down Israeli aircraft and blow up tanks. The camp is run by a group called the Popular Resistance Committee, which said the next generation of Palestinians needed to know how to fight the Israeli "occupation". The boys even "graduate" at the end of their training, receiving a certificate from the camp commander.

<http://www.sky.com/skynews/article/0,,30200-13154917,00.html>

³¹ Article XV

³² supra note 30

³³ Israel Government Press Office, *Twelve Wanted Terrorists Currently Serve in the Palestinian Police*, November 5, 1998; ZOA *Palestinian Authority Policeman Carried Out Latest Bombing*, January 29, 2004

³⁴

provisions in the Security Annex to the Interim Agreement, Annex 1. Thus, for example, Israel is entitled, for security and safety considerations, to close the crossing points to Israel and to prohibit or limit entry into Israel of persons and of vehicles from the West Bank and the Gaza Strip³⁵

Moreover Article XI of Annex I states that the Israeli military may take “engagement” steps (“immediate response to an act constituting a danger to life or property that is aimed at preventing or terminating such act or apprehending its perpetrators”) even if this occurs “within the territory under the security responsibility of the [Palestinian] Council.”

Whether such engagement steps contemplated the construction of the TSB or even anticipated such a project is open to debate, but it should be noted that nowhere in Oslo II is there any limitation or prohibition regarding the construction of buildings or installations on land within the West Bank and Gaza; neither Israeli nor Arab. What Oslo II does prohibit is any change in the status of such territory which is to be determined in final negotiations.

Until the commencement of the violence in September 2000, Israel military presence in Palestinian populated West Bank territory was minimal. As a result of the failure of the Palestinian Authority’s to fulfil its obligations under Oslo II to take affirmative and effective action against terrorism, Israel has been compelled to re-enter parts of the West Bank which it had previously vacated

Although Israel has extensive powers to take action against security threats,³⁶ it has always recognised the limitations on such action set out in the Hague Regulations and the humanitarian provisions in the Geneva Conventions. IDF compliance with these standards is ensured, in part, both by the IDF’s own code of conduct³⁷ and the supervisory role played by the Israel’s Supreme Court in applying these rules generally to any questionable IDF action, and specific application of the rule of proportionality.³⁸

Oslo was premised solely upon the PLO relinquishing its resort to violence as a means of attaining self-determination. On that basis, Yassir Arafat, accompanied by his militants, was permitted to enter the West Bank and Gaza. The Palestinian Authority, as successor to the PLO, failed to take any steps to suppress terrorism. Israel, having relied on the PLO’s undertakings and changed her position detrimentally, is therefore fully entitled to rely upon those terms of the Interim Agreement which enable her to protect herself against the very harm which Oslo was intended to eliminate.

The British Government’s position that the Green Line should serve as the route for a TSB only rewards the instigators of violence for their action and encourages the Palestinian Authority to disregard its international legal and political undertakings.

Even in the absence of the provisions of Oslo II, it is submitted that the scope of Palestinian terrorism is more than just an occasional breach of the peace or a series of unorchestrated offences against the criminal law. Having obtained a foothold in the West Bank, the scope of operation conducted by Palestinian militant-terrorist groups, tolerated, if not actively supported by the Palestinian leadership constitutes a concerted “armed

³⁵ Article XII of Annex 1

³⁶ Article IX of Annex 1

³⁷ see Amos Guiora, *Balancing IDF Checkpoints and International Law: Teaching the IDF Code of Conduct* Jerusalem Issue Brief Vol 3, No. 8- 20 Novemebr 2003 <http://www.jcpa.org/brief/brief3-8.htm>

³⁸ see *Beit Sureik*, note 62 below and accompanying text

attack” aimed not just at compelling Israel to withdraw from its occupation of the West Bank but has, as its ultimate objective, the replacing of the Jewish State of Israel with a single unitary Palestinian state.³⁹

(ii) Inherent Right of Self Defence Against “Armed Attack”

(1) Generally

Article 51 of the United Nations Charter preserves the right of an individual or collective right to act in self defence “if an armed attack occurs against a member state”⁴⁰ A number of questions arise at this point. (a) Must the perpetrator of the attack be a state? (b) How much damage or injury must be caused to the victim before the harm caused constitutes an armed attacks? (c) If some body or institution less than a State, such as pirates or terrorists to what extent do the characteristics of the perpetrator influence or affect the nature and extent of the defensive response? (d) To what extent do the answers to these questions bear on the application of the 4th Geneva Convention?

a. The Perpetrator of the Attack

The language of Article 51 seems is quite open as against whom the right of self defense may be asserted.

”Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs⁴¹ against a Member of the United Nations...”

³⁹ Abu Mazen, interviewed by 'Al-Sharq Al-Awsat' (Middle East) newspaper stated “The issue [of the occupation] is much deeper than close and far. We have demands that will not be surrendered. When we went to Camp David, we had a vision and we still cling to it. We want the land occupied in 1967 in accordance with UN Resolutions 242 and 338. We want Arab Jerusalem and **want Israel to acknowledge its responsibility for the plight of refugees and guarantee them the right of return.**” The Jerusalem Times (independent Palestinian weekly) 26 December 2002

<http://www.jerusalem-times.net/article/news/details/detail.asp?id=2589>;

[Official] Summary of Palestinian Positions towards Permanent Issues “...Refugees: Every Palestinian refugee has the right to return to his or her home. Every Palestinian refugee also has the right to compensation for their losses arising from their dispossession and displacement.” 31/12/2002

http://www.mopic.gov.ps/news_letter/details.asp?subject_id=250 [An official PA website]

Strategic Forecasting LLC, *The Palestinian Strategy*, 24 June 2002 www.stratfor.com ; Aaron Lerner. Telephonic interview in English with Zuhair Sanduka, Director of International Parliamentary Affairs Department of the Palestine National Council, in Amman, *Amended Palestine Charter Never Published* 23 January 2002

“Palestinian maps show Palestine as filling the entire territory covering all that is now Israel. Their emblems cover Israel with two rifles and a grenade. The real issue is not about Israeli occupation of lands that the Arabs lost in the 1967 war. To assess PA intentions, it is relevant to remember that the Palestine Liberation Organization was formed in 1964-when the West Bank and Gaza were under Arab sovereignty; when there were no settlements on the West Bank, no [Israeli] access to the old city of Jerusalem nor to the holy places critical to Jewish history and identity. It was not the presence of Jews in these places that prompted the terrorist harassment back in those earlier days. It was antipathy to the very existence of Israel.” Mortimer B. Zuckerman, *Israel's righteous Fight*, US News & World Report- Editorial, April 15, 2002

See also Fouad Ajami, *The Dream Palace of the Arabs*, Vintage Books, New York, 1999

⁴⁰ Article 51 states: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain inter- national peace and security....”

⁴¹ The phrase “if an armed attack **occurs**” is strange, because armed attacks by States don’t just “occur” they are planned, financed, organised, controlled and then executed. The definition of “occur” includes the “coming into being” or the “happening” generally unexpectedly. Such happening could be constituted by an act of militant insurgency without State backing

The Article is quite **non** specific in its requirement that a State, claiming the right to act in self defense, must be attacked by another State. However, until 9/11, it was generally assumed that for Article 51 to apply, the aggressor had to be a State, which according to the ICJ in the case of *Nicaragua v. United States*,⁴² must be understood as including

“not merely regular armed forces across an international border, but also the sending by or on behalf of a State, of armed bands groups, irregulars mercenaries which carry out acts of armed force of such gravity as to amount to an actual armed attack conducted by regular forces or its substantial involvement therein.”

In effect, the ICJ adopted the General Assembly definition of “Aggression”⁴³ passed in UNGA Resolution 3314 in December 14, 1974.

Conceptually, the sovereign State is seen as having the exclusive control and jurisdiction over its armed forces, police and other security institution and therefore responsible for their actions. In the event of an any person or group of persons attacking the territorial integrity of another state or its citizens, the perpetrators would be dealt with under the criminal jurisdiction of the State from whence they emanated. If they were not so constrained, and there was evidence of complicity or concurrence by the State with those persons or groups perpetrating, that State would be deemed to be responsible for the aggression emanating from its territory- that is until September 12, 2001.

The international legal understanding of Article 51 was clearly affected by 9/11 if not before⁴⁴. In response to the terrorist attack on the World Trade The UN Security Council passed Resolutions 1368 and 1373. The former condemned the event and the latter provided the international response in a demand for concerted action of UN member states to cut off the stream of finance to the terrorist operatives. However the language of Resolution 1368 is ambiguous in that the operative clause of the Resolution neither refers the Article 51 of the Charter nor to the inherent right of self defence, nor indeed did it characterise 9/11 as an “armed attack.” In the Preamble to the Resolution, the Security Council “*Recogniz[ed] the inherent right of individual or collective self-defence in accordance with the Charter*” but in the operative paragraph, the Council condemned the terrorist attack and “*regards such acts, like any act of international terrorism, as a threat to international peace and security.*”

Strangely, the Council named neither the Compliant nor the Perpetrator. This may be explained by the fact that at the time, the Council did not have sufficient information at its disposal regarding the identity of the perpetrators or the extent of their connection with the responsible State.

⁴² The Republic of Nicaragua v. The United States of America ICJ Reports 1986 p.103

⁴³ United Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression Article 3(g) Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: ... (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

⁴⁴ UNSC Resolution 731, passed on January 1992, affirmed the rights of all States to protect their nationals from acts of international terrorism, that constitute threats to international peace and security.

Notwithstanding the absence of a specific reference to Article 51, in the aftermath of 9/11, many states⁴⁵ have regarded an attack by a terrorist organisation as entitling the victim state to resort to self-defence⁴⁶ At this juncture, the difficulty facing the victim state is to determine against whom to exercise its inherent right of self defense and in what manner.

International recognition of the victim State's right to act in self defence against terrorist action is unjustifiably restrictive if applicable only in circumstances where it can be shown the terrorism is State supported or condoned. When the UN was established and its Charter drafted over 50 years ago, it was never contemplated that terrorists might possess weapons of mass destruction or be capable of operating on a global scale.⁴⁷ In today's world, to restrict a victim State from acting against terrorist action emanating from outside of its territory gives virtual immunity to any such organisation and encourages covert support for its activities by States inimical to the victim.

While it may be difficult in some cases to determine whether terrorist action is or is not state supported, a victim State whose citizens are wantonly killed or injured or whose property is destroyed must be in a position to take self defensive measures against any "armed attack" regardless of who is behind it, otherwise "self-defence" has no meaning.

However, for the sake of argument, if one assumes that Article 51 is restricted only to repelling attacks instigated by another State, is it logical or reasonable to apply this to Palestinian instigated terror? While Palestine may not yet be a fully recognised internationally as a State, it is certainly in the process of becoming one.

- The Palestine Council proclaimed a State of Palestine in December 1988 with UN acknowledgement⁴⁸ (although not recognition); it derives benefit from its current observer membership in the UN, including the right to initiate legal action against Israel in the International Court of Justice;⁴⁹
- The General Assembly, in defining "Aggression" in UNGA Resolution 3314,⁵⁰ "as the use of armed force by a State against the sovereignty... of another State..." noted that "the term "State":..."[i]s used without prejudice *to questions of recognition or to whether a State is a member of the United Nations*

⁴⁵ Shortly after 9/11, NATO adopted a Resolution based on Article 5 of the NATO Statute which provides for the right of collective defense in the case of attack on one of its members

⁴⁶ Antonio Cassese, *Terrorism is also Disrupting Some Crucial Legal Categories of International Law*, European Journal of International Law, The Attack on the World Trade Center: Legal Responses www.ejil.org/forum_WTC/ny-cassese.html ; Geir Ulfstein, *SC resolution 1368 and Self-defence*, October 21, 2001 European Journal of International Law - Discussion Forum on the Attack on the World Trade Center

⁴⁷ William H. Taft, *Old Rules, New Threats: The Legal Basis for Preemption*, Council on Foreign Relations, www.cfr.org/publication.php?id=5250; Thomas Franck, *Iraq and the "Bush Doctrine" of Pre-Emptive Self-Defence*, Crimes of War Project August 20, 2002 www.crimesofwar.org/expert/bush-intro.html

⁴⁸ UN GA Resolution 43/177, 15 December 1988 acknowledged the proclamation of November 15, 1988 by the Palestine National Council declaring the State of Palestine. The Resolution was passed by an affirmative vote of 104 with 2 against and 36 abstentions.

⁴⁹ The UN General Assembly certainly relates to the West Bank and Gaza as if it were the State of Palestine and entitled to almost all the benefits of UN Membership except the right to vote.

⁵⁰ Supra note 48, passed in December 1974, Article 1

- The Palestinian Authority has assumed the responsibilities which a State is expected to undertake, including its adherence to the 4th Geneva Convention and the two Additional Protocols.⁵¹
- Under Oslo II, the Palestinian Authority wields extensive civilian authority over 95% of the Palestinian population, maintains a “strong police force” and undertook to take measures to control terrorism and the spread of illegal weapons.
- In its relationship with Israel, Palestinian territory, population and activities are considered sufficiently “transnational” for its to be considered an international dispute.

In assuming these obligations, the Palestinian Authority cannot disclaim responsibility for the consequences of terrorist action under the guise of not being a State. Neither can its leadership claim to be incapable of asserting its authority and exercise responsibility in controlling terrorism. The Authority in fact supports the terrorist activities of the various organisations sheltering within the OPT.⁵² It encourages Combatants to become indistinguishable from Non-Combatants contrary to the Geneva Convention; it finances and supports terrorist militants under their jurisdiction to commit “Grave Breaches” of the Convention in the intentional killing and injury to non-combatant Israeli civilians. Indeed it is arguable that until the Palestinians do in fact take such responsibility, they should be denied international recognition and status of a fully sovereign State.⁵³

⁵¹ June 21, 1989 the Palestinian Representative at the United Nations notified the Swiss Depository of the Geneva Convention that it was adhering to the Geneva Conventions and the two Additional Protocols. However, “Palestine” does not appear on the ICRC list of States party to the Geneva Conventions and their Additional Protocols, but a note entitled “Palestine”, attached to the list states that on September 13, 1989, the Swiss Federal Department of Foreign Affairs informed the States that it was not in a position to decide whether the letter sent by the Palestinian Observer to the UN constituted an instrument of accession, “due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine”

⁵² Joseph M. Hoeffel, *Arafat's Links to Terrorism*, Middle East Forum Briefing, June 3, 2002 www.meforum.org/article/209; Nir Boms & Erick, *Stakelbeck Mixed Signals A Good Guy Gets Turned Away* National Review, April 6, 2004, www.nationalreview.com/voices/boms_stakelbeck200404060854.asp.

Itamar Marcus, *PA Society's Universal Support for Suicide Bombers*, PMW Bulletin, Sept. 24, 2003 www.pmw.org.il/Palestinian%20society.htm; David Bedein, *A Voice For Killing*, Front Page Magazine May 10, 2004, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=13318>

See also Richard Boucher *Palestinian Authority Needs to Reform As It Reconstructs* Amer.Embsy, May 7, 2002 www.usembassy-israel.org.il/publish/peace/archives/2002/may/050808.html

JNW Staff, *Arafat directly controls al-Aqsa Brigades*, Jerusalem Newswire, 2 March 2004;

Khaled Abu Toameh *Fatah Committed to Aksa Martyrs*, Jerusalem Post, Jun. 20, 2004.

The Palestinian Authority has no plans to dismantle the Aksa Martyrs Brigades, the armed wing of Fatah, Prime Minister Ahmed Qurei announced on Sunday. He acknowledged that the group is part of Fatah and said its gunmen are entitled to play a political role in the future. "We have clearly declared that the Aksa Martyrs Brigades are part of Fatah," Qurei said in an interview with the London-based Asharq al-Awsat newspaper. "We are committed to them and Fatah bears full responsibility for the group." Qurei said his top priority now is to safeguard the security of the Fatah gunmen who are wanted by Israel. He said they would be integrated into Fatah's institutions and would be paid salaries.

PA says it won't disarm terror groups.

Khaled Abu Toameh, *PA says it won't disarm terror groups* The Jerusalem Post, Aug. 14, 2003 The Palestinian Authority has no intention of arresting members of Hamas or Islamic Jihad or confiscating their weapons in the aftermath of Tuesday's suicide bombings, PA officials told leaders of the terrorist groups. Senior security officials conveyed the message to the Islamic groups over the past 48 hours <http://www.jpost.com/servlet/Satellite?pagename=JPost/A/JPArticle/ShowFull&cid=1060741315258>

See also **Itamar Marcus**, *PA Society's Universal Support for Suicide Bombers*, Palestinian Media Watch Bulletin September 24, 2003. reported that Palestinian Authority [PA] social organizations and NGOs [Non- Governmental Organizations] were refusing to sign a US required anti terror clause, which states, that the beneficiary organization will not transfer any money to terrorists or terrorist organizations. ..The

The implications of the intentional blurring by the Palestinians of the distinction between Combatants and Non-Combatants has direct impact on the modality by which Israel seeks its means of defence. While this is discussed in detail below in paragraph 5 a. it should be noted that combatants who do not distinguish themselves from non-combatants lose their special status as prisoners of war. Combatants who commit Grave Breaches are also in theory, supposed to be arrested and brought before the courts having jurisdiction over them, and tried in accordance with penal legislation which a State adhering to the Convention is required to have enacted to cover such offence.

Needless to say, that almost without exception, the Palestinians have ignored Israeli demands that known terrorists be apprehended, tried and incarcerated. In those rare cases where terrorists have been tried by the Palestinian Authority, their "imprisonment" has been of very short duration employing the "revolving door"⁵⁴ and they have been permitted to continue to communicate freely with others of their group. It might be said that such terrorists were taken into protective custody to prevent their being killed or captured by the IDF. What is clear, however, is that there has been complicity between the Palestinian Authority and the terrorist movements.

It is submitted that under these conditions, Israel is entitled to take defensive measures against attacks directed at its civilian population within the framework of Article 51. Not only is there UN Security Council precedent for such action against a non-State, but Israel justification for taking direct self-defensive action against the Palestinian Authority and the terrorist groups operating under its auspices, with its knowledge and consent is even stronger than that taken by the United States against al-Qaeda.

opposition to the US is growing more organized as 26 organizations gathered in Bethlehem to publicly declare they would not sign the US anti terror clause.

There is far reaching significance to this collective refusal in the PA to sign the anti terror clause...It challenges a most fundamental premise regarding PA society. The common premise is that the general PA population rejects the murder of civilians through suicide terrorism, which would isolate suicide bombers on the fringe of PA society. However, when the entire organizational infrastructure, including social workers, psychologists, medical organizations and all social welfare organizations, refuse to sign an anti terror declaration, it points to a PA society unified in their support for suicide bombers. The Aksa Martyrs Brigades will not be dismantled." Qurei said the Palestinians would continue to fight against Israel for as long as the occupation exists. But, he went on, "the resistance is not only an armed struggle."

See **Khaled Abu Toameh**, *PA ignores US warning not to add Hamas to leading body*, The Jerusalem Post April 7, 2004. Palestinian Authority Chairman Yasser Arafat is prepared to include Hamas and Islamic Jihad in a new leadership organization that would function alongside the Palestinian Authority See **Aaron Lerner**, *Background: Brig. Gen. Ziv reveals scandal on "Gaza First" - based on PA security forces known to be terror group*, 18 November 2002 Brigadier General Yisrael Ziv the Gaza Strip Division Commander revealed this morning on Israel Radio that "it has been known for a long time that the Palestinian Authority Preventive Security force has been a terror organization in all respects for the last two and a half years. .. The operation last night [in which IDF forces raiding a Preventive Security camp in the Gaza Strip found Kassam missiles, anti-tank rockets, mortar launchers and mortars, anti-tank grenades, landmines and other weapons in the camp] .simply provides the physical evidence. . . Instead of preventing terror they initiate terror attacks." Ziv said that the Preventive Security force has become the central supplier of weapons and ammunition to all the terror organizations in the Gaza Strip - including both Yasser Arafat's Fatah , Hamas and Islamic Jihad.

⁵³ Michael P. Scharf *Earned Sovereignty: Juridical Underpinnings*, 31 Denver Journal of International Law and Policy (2004) www.law.du.edu/ilj/online_issues_folder/williams.pdf

⁵⁴ Itamar Marcus *PA Arrests Terrorists - then Stages the "Escape"* Palestinian Media Watch Bulletin, July 6, 2003 <http://www.pmw.org.il> ; Aaron Lerner, *Violating Roadmap: Revolving Door In Gaza – Terrorists Released by PA After Talk* : 6 July, 2003

Consider the parallels between the two situations

- 9/11 was a single attack committed by a terrorist organisation against a member of the United Nations and directed at a purely civilian target within its jurisdiction. The same conditions apply when Palestinian suicide bombers attack Israeli civilians within Israel except that Israel has absorbed over 20,000 attacks since September 2000, details of which are set out in section b. below
- The objective of US action appeared to be retributive or punitive and operates retroactively. It did not appear to take into account the “rule of proportionality”, namely that the defeat of the terrorists and their supporters by carpet bombing areas of Afghanistan outweighed the collateral damage caused to innocent non-combatants.

In Israel’s case, the objective in constructing the TSB is prospective and preventative in its operation, and takes into account the proportionality of the benefit to be derived by Israel as against the injurious “cost” to non-combatants affected by the TSB.

- In 9/11, the terrorist attack was perpetrated by a group not claiming to adhere to the Geneva Convention and having a religious rather than nationalistic motivation and support.

In Israel’s situation, the suicide bombers are directly supported and encouraged not by a “non-state”, but by a “State-in-the-Making,” purporting to adhere to the Geneva Convention, but nevertheless intent upon recovering territory not by negotiation, but by aggression contrary to the whole spirit of the UN Charter and by Grave Breaches of the Convention.

b. “Armed Attack” The Scope of Palestinian Terrorism

Terrorist incursions into Israel have not been occasional or sporadic such as to require Israel to absorb the threat to her population without response.⁵⁵ Neither has Israel’s response in constructing the TSB been a “preemptive” act of self defence. On the contrary. Since September 2000 Israel has been involved in what is termed “armed conflict short of war”⁵⁶ in a multitude of attacks initiated and directed by Palestinian unlawful combatants⁵⁷ against Israeli Army outposts and more particularly at Israeli non combatant civilians. As has been shown above, the Palestinian Authority has been supportive of and involved with the terrorist leadership, which has been directly involved in the recruitment, training and dispatching of “homicide bombers.”⁵⁸ While their ultimate political objectives remain unclear, (either

⁵⁵ Ante note 70

⁵⁶ Christian Science Monitor, *No Longer Intifada, Not Quite War*, May 11, 2001 www.wtkg.com/jacor-common/ic/national-story-10.html

⁵⁷ See notes 40 and 42

⁵⁸ Mark Steyn, *Palestinian Death Cult* The Jerusalem Post, October 8, 2003;

Freeman Center For Strategic Studies *Arab Suicide Indoctrination: Results of the Shahada Indoctrination 3* November 2003, Palestinian polls show that 72% - 80% of Palestinian children desire death as Shahids. In games and in conversation, the yearning to die for Allah is an integral component of the Palestinian child’s worldview <http://www.freeman.org>

Itamar Marcus *Palestinian Children Express Yearning for Shahada and Hate of America* Palestinian Media Watch Bulletin, November 13, 2002, reports@pmw.org.il

Reuven Ehrlich, Ph.D *Palestinian Women - Abuse And Terror A Study From The Bethlehem Area (2000 - 2002)* Intelligence and Terrorism Information Center at the Center for Special Studies (C.S.S) <http://www.intelligence.org.il/>

replacing Israel with a Palestinian State having jurisdiction over the whole of the West Bank or a two State Solution, including the return of all Palestinian refugees to within Israel- which amounts to the same thing as the “replacement” objective) their method of attainment is to create fear among the Israeli civilian population, and in the process to cause as much physical⁵⁹ and psychological injury as possible to their victims.⁶⁰

The question which confronts Israel and the international community is whether the nature and scope of the terrorist incursions into Israel constitute “armed attack” taking into consideration (i) the magnitude and scope of the operations,⁶¹ (ii) their commission by persons acting contrary the Hague Regulations⁶² constituting “Grave Breaches” of the 4th Geneva Convention (iii) employing means which result in the indiscriminate and “wilful killing” of innocent civilians, wilfully causing them “great suffering” or “serious injury”.⁶³

Although generally the media and government state that they recognise Israel’s right to defend itself, neither, however, acknowledges the scope of the terror which confronts Israel nor accepts, as being legitimate, the steps which Israel has taken to prevent the terrorist incursions. The scale of these attacks impacts directly on the manner in which Israel is entitled to respond while complying with the rules of combatant-civilian distinction, military necessity and proportionality imposed by international law.⁶⁴ These latter factors bear directly on the validity and veracity of the conclusions contained in the UK Parliamentary and Governmental reports.

It is submitted that no fair and balanced conclusion can be made as to whether Israel is conducting itself properly or otherwise without considering the scale, scope and extent of the danger with which Israel is confronted and the manner in which it is combated.

⁵⁹ The explosives used by suicide killers contain metal shards, screws, nuts and ballbearings. For those who survive, many of them permanently maimed, these metal fragments remain in the bodies of their victims for life.

⁶⁰ See -

<http://www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=22&docid=23457&Pos=2&bScope=False>
For current statistics see in <http://www1.idf.il/dover/site/mainpage.asp?sl=EN&id=22&docid=16703>

⁶¹ Hague Regulations, Article 1. Militants aging war must have the following four characteristics to be protected by the laws of war: (i) In uniform: Wear distinctive clothing making them recognizable as soldiers from a distance. (ii) Openly bearing arms: Carrying guns or small arms and not concealing them. (iii) Under officers: Obedient to a chain of command ending in a political leader or government. (iv) Fighting according to the laws of war: Not committing atrocities or crimes, not deliberately attacking civilians or engaging in terrorism

⁶² Regulation 23 (2) “.. It is especially forbidden... to kill or wound *treacherously* individuals belonging to the hostile nation or army” [emphasis gma] “Treacherously” exists only if the victim possessed an affirmative reason to trust the assailant. The essence of treachery is a breach of confidence” (M.N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17, *State Sponsored Assassination in International and Domestic Law*, 17 Yale J of Int. Law (1992) It relates to a breach of “the rules on good faith [which] prohibit killing or wounding the enemy treacherously, as well as deceiving him by the improper use of the flag of truce, of national emblems or of enemy uniforms, and also by the improper use of the red cross emblem” para 1366, Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁶³ 4th Geneva convention Article 147

⁶⁴ “Since assaults by irregular troops, armed bands or terrorists are typically conducted by small groups, employing hit-and-run pinprick tactics, the question whether they are of 'sufficient gravity' and reach the de facto threshold of an armed attack - or the consensus Definition of Aggression - is clearly apposite... This is not to say that every single incident, considered independently, has to meet the standard of sufficient gravity. **A persuasive argument can be made that, should a distinctive pattern of behaviour emerge, a series of pinprick assaults might be weighed in its totality and count as an armed attack...**” Y. Dinstein, *War, Aggression and Self Defence* (3rd ed.), Cambridge, 2001, at p. 182.

(2) Scale of the Terror

Between the beginning of the current Intifada which started on September 30, 2000, and May 9, 2004 the following incidents of armed attack have occurred: 21,575 Palestinian militant /terrorist attacks have been directed against Israel and her citizens;

- 950 Israelis have been killed of which 672 were civilians.
- 402 of these deaths were caused by suicide bombers; and
- 6,355 people have been injured, of which 4,475 were civilians.⁶⁵

(3) Distortions in Statistics

Significantly, the usual fatality count quoted in news articles presents an inaccurate and distorted picture of the al-Aqsa conflict, exaggerating Israel's responsibility for the death of Palestinian non-combatant civilians. For example, the database compiled by International Policy Institute for Counter-Terrorism⁶⁶ shows, that between September 27, 2000 and May, 2004, a total of 921 Israelis killed, compared to 2806 Palestinians – numbers in general agreement with media reports. But such numbers hide more than they reveal: They lump (a) combatants in with non-combatants, (b) suicide bombers with innocent civilians, and (c) report Palestinian “collaborators” murdered by their own compatriots as if they had been killed by Israel

While Israelis account for 32% percent of the total fatalities as generally reported, they represent 42% of non-combatant victims. If one then analyses the characteristics of the non-combatants, it emerges that

1. in respect of female non combatants killed by the other side, 75.4 % were Israeli (280) in contrast to Palestinian women (91);
2. of non-combatants below the age of 12 years and over the ages 45 years, 70.6% were Israeli; and
3. of “non-combatant” males falling of more or less within the operative combatant age range (12-29 years) and killed by the other side, 75% were Palestinian.(535)

The above analysis shows a clearer picture of the conflict than the “raw data,” and demonstrates that Israeli female civilians and males outside the “combatant” ages are the main victims of the terrorist war, while Palestinian “non-combatants” of combatant age and sex are, contrary to their appellation, very actively involved.⁶⁷ The statistical analysis is likely to become more complicated and indeterminate if Palestinian “non-combatant” women, children and elderly heed the call by the Palestinian Authority to confront Israeli forces in areas where armed battles are being waged with Palestinian terrorists.⁶⁸

(4) Statistical Extrapolation to UK

To appreciate the scale of these attacks even further and the number of fatalities and injuries, one should bear in mind that Israel is the size of Wales and that her

⁶⁵ www.idf.il

⁶⁶ see www.ict.org.il : go to “data basis” then “Arab-Israel Conflict”

⁶⁷ See Don Radlauer, *An Engineered Tragedy Statistical Analysis of Casualties in the Palestinian - Israeli Conflict, September 2000 - September 2002* www.ict.org.il/articles/article_search.cfm?topic=middleeast

⁶⁸ Itamar Marcus and Barbara Crook, *PA called “Women, Children and Elderly to Wednesday’s Battle”* Palestinian Media Watch Bulletin May 20, 2004

population is 1/10th of that of the UK. Therefore, Israel has had to absorb the equivalent, in UK terms, of some 215,000 attacks in the last 3 ½ years, 9,500 deaths and 63,000 injured.

(5) Israeli Reaction to Terrorist Armed Attacks

After having absorbed extensive attacks initiated by Palestinian terrorists with the support of the Palestinian Authority from the inception of the Intifada in September, 2000 and as a consequence of both the Dolphinarium⁶⁹ and Park Hotel Passover massacres,⁷⁰ Israel has been the object of armed attack and is, as the both the Committee and the Department admit entitled to act in self defence.

Israel has elected to respond in two directions. Offensively, it launched a direct military attack Operation Defensive Shield (“Homat Magen”) against terrorists and their places of refuge in the major Palestinian cities in the West Bank and Gaza. Defensively, it has began the construction of a Terrorist Security Barrier (“TSB”), the route of which lies mainly over the “Green Line.”

Between June 29, 2003 and June 3, 2004, during which period Operation “Homat Magen” was executed, and the completion of construction of the initial sections of the TSB, the number of “successful” attacks has dropped dramatically, as have the corresponding number of those killed and injured. According to figures released by the IDF:

- 161 suicide bombings have been thwarted, while 27 have succeeded; 150 Israelis have been killed, of which 102 were civilians; and 782 persons have been injured, of which 535 were civilians.⁷¹

The fact that the media has not reported many “incidents” recently does not mean that the wave of terrorism has subsided: the existence of the TSB and the occasional IDF operations directed towards capturing known terrorists has made it very much harder for them to penetrate Israel.⁷²

The location of the fence beyond the “Green Line” does however raises questions as to whether it unjustifiably affects Palestinian human rights and whether its very location is “illegal” as the UK Government asserts.

Before examining these issues, however, it is appropriate at this stage to examine the nature of the TSB, the manner in which its general route has been determined and the humanitarian and other considerations which the Israel authorities have taken into account before or during its actual construction.

3. The Nature of the TSB and the Factors in Determining its Location

⁶⁹ The “Dolphinarium” massacre on June 1, 2001, in which 15 teenagers were murdered at the entrance to a popular Tel Aviv discotheque also prompted Israel to consider larger scale preventative measures.

⁷⁰ A devastating suicide bombing attack perpetrated by Hamas against Israel during a Passover celebration at the Park Hotel, Natanya on March 27, 2002, in which 29 civilians lost their lives

⁷¹ Again, in UK terms, this would have resulted in over 1000 civilian non combatants killed and 5000 injured within one year

⁷² Qurei: “Racist Wall” Will Not Bring Security: Statistics Show Fence Has Already Saved Countless Israeli Lives, International Christian Embassy Jerusalem, January 12, 2004. According to security service figures issued early in 2004, the number of Israeli deaths from terrorism in 2003 fell by more than 50% from the previous year, from 451 to 213. The overall number of attacks also declined by 30%, with much of the fall attributed to Israeli tactical innovations in the form of the fence project and operational successes beginning with the Operation Defensive Shield counter-terror sweep in April 2002.

a. General Extent, Nature and Purpose of the TSB

The decision by the Israeli Government to establish the Security Fence Area was reluctantly approved⁷³ in July 2001 after other methods to save Israeli citizens from imminent threats to life, personal injury and property damage caused by West Bank Palestinian terrorism had been tried and failed.⁷⁴ After taking the initial decision in principle,⁷⁵ it later became clear that partial sections of fence were unable to contain the terrorist activity and that a contiguous fence was necessary. In June 2002 a further decision was taken to extend the TSB from Beit She'an in northern Israel to Arad in the south.⁷⁶

The construction of the TSB is neither ideologically nor politically motivated; it neither annexes territory nor is it intended to establish a border. Neither does it change the status of the land or its ownership, nor the legal status of the residents of the areas affected.

It is a temporary measure against an immediate threat to Israel's citizens until such time as they and the Palestinians can move towards a peaceful settlement in which an international border can be agreed through negotiations.

Israel's Supreme Court⁷⁷ has already determined that as a means of self-defence, the State is entitled to employ a variety of measures in order to prevent and deter acts of

⁷³ Uzi Landau, *The Security Fence: An Imperative for Israel* Jerusalem Issue Brief, 15, January 2004, www.jcpa.org/brief/brief3-15.htm

⁷⁴ Unlike the Coalition forces in Afghanistan, Israel has **not employed carpet bombing** to eradicate terrorists. It has tried a variety of less drastic measures for which it has still been condemned, such as (i) **targeted killing** of terrorist leaders who are actively involved in both the recruitment of terrorists and of homicide bombers and in the planning, preparation and execution of the terrorist attacks which are contrary to the Hague Rules and 4th Geneva Convention. (ii) **deporting** terrorists; (iii) **demolishing houses** of terrorists and their families who have knowingly participated and assisted in terrorist objectives; (iv) conducting military operations directly in **house to house combat** with terrorists who operate from civilian centres of population (including centres supposedly under the jurisdiction of UNRWA); and finally (vi) the construction of a **terrorist prevention barrier**, the legality of which is supposedly being examined by a politically unbiased bench of judges in the International Court of Justice. It should be noted that any and all of the Israeli responses to terror detailed above, are subject to judicial review proceedings in the Israeli Supreme Court, acting as the High Court of Justice; such proceedings may be – and are - frequently initiated by any Palestinian who feels aggrieved by the IDF or other Israeli government activity.

⁷⁵ The Israeli Cabinet decision of June 23, 2002, specifically provided:
"...(3) In the framework of Stage 1-approval of the security fences and obstacles in the "Seamline Area" and in Greater Jerusalem, for the purpose of preventing the penetration of terrorists from the area of Judea and Samaria into Israel.

(4) The fence, like the other obstacles, is a security measure. **Its construction does not mark a national or any other border** (gma emphasis)

⁷⁶ The first stage of the Anti Terror Fence, 140 km, was completed on July 31st 2003. This included 123 km in the Salem-Elkana area and 17.8 km in the northern and southern sections of Jerusalem. The second stage from Salem towards Bezeq, a total of 42km, is supposed to have been completed by the end of April 2004 and the third stage (the eastern section) consisting of 34km should be completed by the end of August 2004.

Only 8 km of the total 140 km length of the completed sections involves a solid concrete barrier to prevent direct shooting. Most of this occurs around the Trans Israel Highway. Of the total length of the planned 700km, only 20km. (3%) will consist of wall sections. 41 agricultural gates will be created along the route of the TSB to provide Palestinian farmers with access to their farmland inside the Fence; 11 crossing points for pedestrians and vehicles will substitute many of the existing checkpoints and 5 commercial check points for transfer of goods will be built, similar to the Karni Check Point.

All owners of seized land were offered compensation for land and crops.

⁷⁷ *Avtasam Mahamd Ibrahim v. Commanding Officer IDF in the West Bank*, H.Ct.J. 81702/02

terrorism. The TSB is one such preventive measure. The Court has, however, exercised its judicial review powers over governmental and IDF activity to ensure that the Israeli security requirements are balanced against Palestinian humanitarian needs.⁷⁸ These will be discussed below.

b. Character of the TSB

Considerable public rhetoric has been levelled at Israel for its decision to construct the fence. The national and international media has grossly misled the public perception of the nature of the TSB. The pictures which have appeared on the television show it as a high concrete wall and its appellation “the wall” by news commentators and reporters is tendentious. In fact only 5% of its length is made of concrete, resembling highway sound barriers used in the US and Europe. It has been constructed in those areas where Palestinian snipers can, and have, shot at Israeli civilians on roads or in nearby towns.⁷⁹ It is therefore erroneous and misleading to term the barrier as a “wall”.

The media and other public figures have compared the TSB to the “Berlin Wall”.⁸⁰ Any such comparison is false and malicious.

Unlike the Berlin Wall, the TSB is not intended to be a permanent structure. It is neither electrified⁸¹ nor is there any automatic machine gunfire if attempts are made to cross it. It neither seeks to create and maintain the division of single people or to curtail their freedoms. On the contrary, the fence is intended to separate two peoples, differing in culture, political outlook and values, allowing each to go about its normal business without the threat of terrorism until the parties are able to negotiate a settlement.

The vast majority of the TSB in fact consists of chain link fencing. Depending on the topography, engineering and other factors, the fence area covers a 40-60 meters wide strip of land.⁸² At its centre runs a technologically advanced electronic intrusion

⁷⁸ *Beit Sourik Village Council vs. The Government of Israel and Commander of the IDF Forces in the West Bank* HCJ 2056/04, [February 29, 2004; March 11, 2004; March 17, 2004; March 31, 2004; April 16, 2004; April 21, 2004; May 2, 2004] For the full text of the judgment in English see www.court.gov.il. Click on “English”; then Decisions of the Supreme Court. In the “Judgments” dialogue box at the bottom of screen, double click on “case number” and insert “2056”

⁷⁹ See Israel Ministry of Defence, *Israel's Anti Terror Fence: Defending Innocent Civilians from Terror* (undated but containing data during the period between September 29, 2000 and February 18, 2004) www.securityfence.mod.gov.il

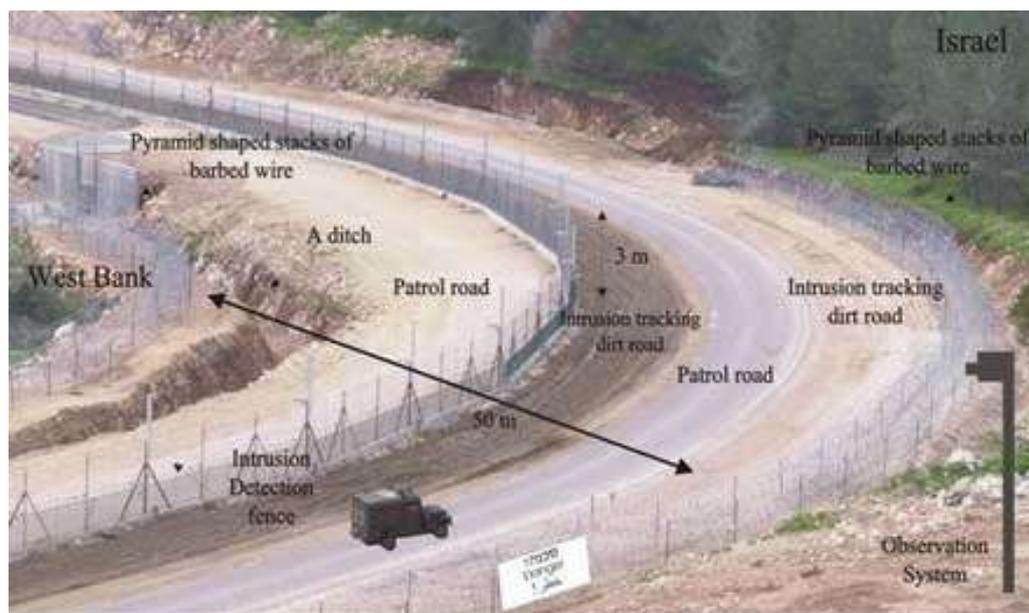
⁸⁰ Nigel Parry *Is it a Fence? Is it a Wall? No, it's a Separation Barrier*, *The Electronic Intifada*, 1 August 2003, electronicintifada.net/v2/article1775.shtml

⁸¹ The fence is **not** electrified. It does, however, have attached to it **electronic sensors** which provide patrol headquarters with information that the fence is being penetrated.

⁸² The Security Fence is a multi layered composite obstacle comprised of several elements: 1. A ditch and a pyramid shaped stack of six coils of barbed wire on the eastern side of the structure, barbed wire only on the western side. 2. A path enabling the patrol of IDF forces on both sides of the structure. 3. An intrusion- detection fence, in the center, with sensors to warn of any incursion. 4. Smoothed strip of sand that runs parallel to the fence, to detect footprints. 5. In certain areas (Bat- Hefer and Matan), the structure consists of a solid wall as opposed to a fence, due to present security risks, and shields drivers on the road in the area of Qalqilia, from the threat of sniper gunfire. The total length of these concrete wall sections is 8.5 Km.

Various observation systems are being installed along the fence alerting authorities, beforehand, to attempted intrusions. IDF and Border Police units will be deployed along the Security Fence under the

detection fence, which is designed to indicate if the fence has been penetrated. A dirt tracking path has been laid on the western side to indicate if the fence has been crossed as has asphalt paths on both sides for vehicular access. Observation systems supply additional warning, while military and border police personnel will patrol along its length to counter any unauthorized attempt to cross into Israel. In a number of places, high ground is chosen as the preferred route in order to prevent sniper fire on population or transportation arteries located lower down. Significantly many of the lower areas where the 1948-67 Armistice line was located were rejected as unsuitable both on engineering grounds and from a security perspective.⁸³



This is the operational plan of the non-cement barrier part of the security fence. (Borrowed from securityfence.mod.gov.il).

While the factors which determine the route of the TSB are multiple: topography, engineering difficulties, population density, and threat assessments, they also take into account humanitarian, archaeological and environmental concerns. The overriding concern, however, is security balanced by humanitarian considerations

At the cost of some of its security, Israel has tried to avoid including Palestinian village agricultural land on the Israeli side of the fence. Attempts have been made to avoid separating landowners from their lands. Where this is unavoidable, some 40 agricultural gates are to be built, manned and operated by the IDF so as to allow farmers to gain access to their lands. The functionality of the gates and the times of their operation are co-ordinated with the local population in each area.

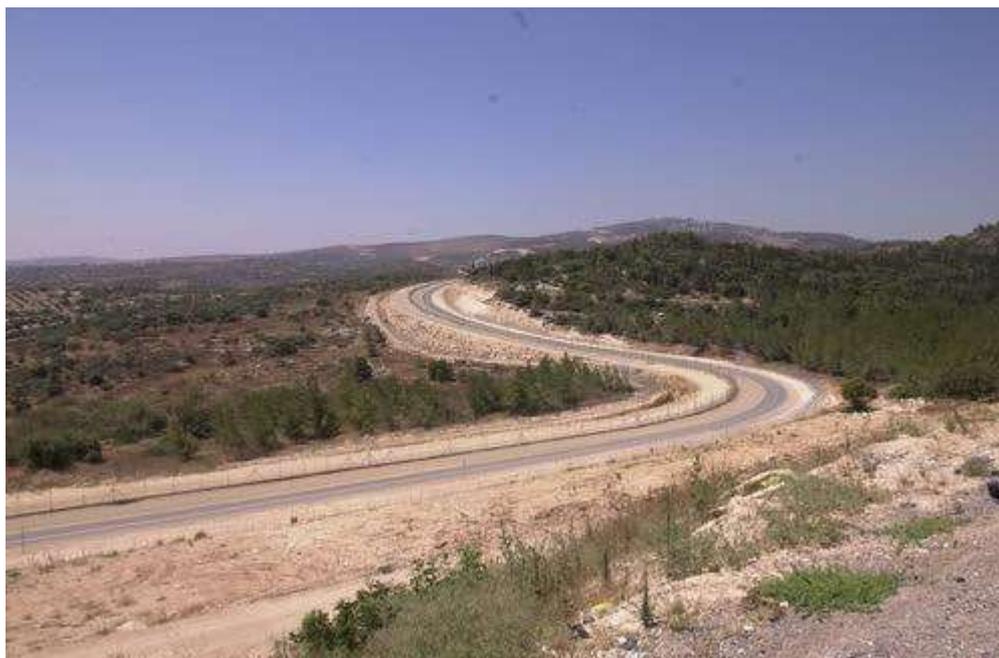
In order to alleviate difficulties imposed on many residents of the OPT who are employed in Israel and to minimize obstruction to trade, the planning and construction of the TSB includes 11 checkpoints allowing two-way pedestrian and vehicular passage. These checkpoints will facilitate inspections of people and goods

command of the IDF. Their deployment requires coordination and cooperation governed by the mutual wish to discover a terror act in its planning stage and thwart it.

⁸³ Information derived from security sources which must remain unidentified.

across the fence, like those present at many international borders. In particular, five commercial checkpoints for the transfer of goods are to be built similar to the Karni check point close to the city of Gaza. Such inspections are necessary for security purposes as experience has shown.

Upon completion of the fence, the present barriers existing between Israel and the West Bank will either be removed or integrated into the TSB. Barriers erected within the Palestine Occupied Territory will be removed with the exception of two.⁸⁴ Consequently, there should be less ground for Palestinian complaint. The elimination of the barriers will permit the free movement of population and goods within the territory and the real GDP of the Palestinians should increase accordingly.



c. Check Points: Transfers of Goods in “Back to Back” Operations

In connection with the commercial checkpoints, the Committee asserted that the “back to back” transfer of goods which are operated at such check points were not always justified by security considerations.

While for those Committee members who observed one check point at Awarta⁸⁵ the back to back transfer may not have appeared to have been security oriented, the alternatives to such a procedure have been considered by security sources. Apart from the option presently in operation, there are three other possibilities: two pose a significant security risk while the third is politically and economically unacceptable: (i) no inspection, (ii) sample inspection or (iii) complete prohibition on import and export of goods. In the circumstances, “back to back” transfer is the only feasible solution at present- and even this has its security risks.

Since the issue of the Committee’s report, Israel has captured the Hamas terrorist dispatcher of two suicide bombers who succeeded in penetrating Ashdod Port on

⁸⁴ Military sources state that the barriers will remain between Bethlehem and Hebron and between Ramallah and Nablus.

⁸⁵ Supra note 1 at page 41

March, 14, 2004, in which 10 civilians were murdered and 12 others were injured. The dispatcher was planning to mount another attack into Israel by smuggling two suicide bombers who were to be hidden under a double floor within a container. Furthermore the Hamas operative was also intending to purchase trucks and establish a company for transporting containers from the Gaza Strip into Israel as cover for smuggling terrorists into Israel.⁸⁶ Consequently the transfer of goods “back to back” from Palestinian to Israel containers and trucks would seem more than justified given the risks, particularly where the potential target is Ashdod Port. Located there, are not only fuel but gas and chemical tanks, which had they exploded, would have caused devastating damage to the whole city of Ashdod as well as to its port facilities.

d. Humanitarian Treatment of Civilian Passage at Check Points

The Committee referred briefly to Israel’s efforts to make the treatment of Palestinians more humane at the check points and noted that cases of harassment and delays continue to be reported.

Before levelling criticism in this direction, the Committee should be aware of the difficulty in finding the balance between security and humane treatment at times when the civilian population movement is high. The writer spent a full day at the Kalandia checkpoint (near Jerusalem) and noted the following points, which while not presenting the full picture, expands and responds to the Committee’s criticism and comments:

- a. The responsibility for the security of the checkpoint is in the hands of young IDF soldiers.⁸⁷ They are assisted by a number of veteran volunteer reservists who check the Palestinians’ credentials and who pay particular attention to family groups, women and children.⁸⁸ The reservists stand at the checkpoints in a non-aggressive posture with their weapons slung over the shoulder and frequently without steel helmets. The volumes of civilians passing the checkpoints are neither small nor steady. At Kalandia, for example, approximately 20,000 people pass daily.⁸⁹ They do not move in a steady stream but come in waves, such that at times, effective control becomes difficult, if not impossible. On such occasions, it is extremely difficult for volunteers to determine whether a group of pedestrians approaching the check-point are reaching into their pockets for identity cards or for weapons. If unfortunately the latter transpires, there is almost no time in which to react.

⁸⁶ Israel Security Sources *Palestinian security officer who dispatched Ashdod Port suicide bombers arrested at Karni Crossing* 22 Jun 2004, Israel Ministry of Foreign Affairs www.mfa.gov.il/Palestinian+security+officer+arrested+22-June-2004.htm

⁸⁷ IDF commanders and conscripts receive training in balancing the performance of their duties with International Law. See Amos Guiora. *Balancing IDF Checkpoints and International Law: Teaching the IDF Code of Conduct*, Jerusalem Issue Brief, No.8 20 November 2003 www.jcpa.org/brief/brief3-8.htm

⁸⁸ IDF Spoksmans Office, *IDF Readjusts to the Needs of the Palestinian Population* 08/07/2004 18:21 www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=7&docid=32567.EN
All trainees of the Military Police Corp include trainees of the newly established Checkpoint Unit whose mission is to establish a security mechanism to prevent the passage of terrorists from PA territory into Israel while maintaining both Israeli and Palestinian daily routine and especially adjusting to the needs of the Palestinian population.

⁸⁹ Joel Leyden, *Israel Sends IDF Humanitarian Officers to Checkpoints April 30, 2004*, www.israelnewsagency.com/israelcheckpointsidfqalandiya126042.html

This inability creates special tension which is heightened when those passing the check point behave in an unruly fashion or act in an intentionally provocative manner.

- b. Palestinian youths often attempt to avoid the check points or to obtain passage without documents. In two cases witnessed by the writer, Palestinian behaviour was intentionally provoking, such as to cause the IDF security personnel to react. Without having first perceived the immediate cause which prompted the IDF response, one might have concluded that the youths were being unjustifiably delayed and harassed.
- c. Journalists and humans rights activists are often to be found present at the checkpoints as observers. This, of itself, is not problematic. Their very presence is a manifestation of the openness with which the IDF performs its functions and is a positive feature of which Israel can be proud. However, the situation often becomes stressful, adding to the burden of the IDF, when volunteer groups, such as Women's for Human Rights "Machsome Watch," become participants and attempt to interfere with soldiers acting in the course of their duty.⁹⁰
- d. A serious problem confronting those who man the checkpoints is identifying and preventing the entry into the West Bank of "agent provocateurs" intent on disrupting Israeli efforts to maintain law and order while acting in a humane manner. Foreign "visitors", under the auspices of NGO's such as the International Solidarity Movement (ISM), purport to assist and support Palestinian opposition to the West Bank occupation in a non-violent fashion. In fact they directly assist terrorists to evade IDF pursuit and intentionally harass Israeli forces preventing them from maintaining peace and order.⁹¹

4. "Human Rights" Distinguished from "Humanitarian" Rights: Not "Policing" but "Armed Conflict"

The nature and extent of the attacks on Israeli citizens set out above demonstrates that Israel is not involved in an excessive or illegal "policing" operation, causing breaches of "human rights." On the contrary, the extent of the terrorism described above clearly demonstrates that Israel is currently engaged in an "armed conflict short of war"⁹² and is acting in self defence within the terms of the UN Charter Article 51.⁹³

It is important to distinguish between illegal violence and intentional or negligent killing during a "policing" action which results in an infringement of human rights from what is apparently similar conduct which occurs as an act of belligerency (warfare) in the course of pursuing a legitimate military objective.

⁹⁰Judy Lash Balint, *Women at War*. www.jewishinternetassociation.org/articles/appelbaum_20may04a.html

⁹¹ Alyssa A. Lappen, *Enemy With A Human Face*, FrontPageMagazine September 2, 2003, FrontPageMagazine.com

Goran Tomasevic, *Peace Protesters in the West Bank*, Atlanta Independent Media Center 17 Jun 2004; Research Team, *Follow up on ISM and the death of Rachel Corrie*, NGO Monitor April 10, 2003; ISM Media Office, *Activist Dragged from House to be Demolished* 17 Aug 2003

⁹² Usrael submission to Sharm El Sheikh Fact Finding committee, para 286; October 2000 Avi Machlis, *Israeli Commander Describes 'Complicated' War*, and related article *Is Israel using 'Excessive Force'?* JTA November 28, 2000; "Op-Ed, *No Longer Intifada, Not Quite War*, Christian Science Monitor, May, 11, 2004

⁹³ see supra notes 45-48 and accompanying text

“Human Rights” in the maintenance of law and order (“policing”) are not coextensive with the “humanitarian principles” set out in the 4th Geneva Convention under which a war is being fought. The difference is seen, for example in the legal process and its consequences arising out of the killing of civilians.

In a policing operation, the details of every killing or injury should be examined in the light of the legislation in force, and the guilt or innocence of the perpetrator is decided in a court of law by due process. This entails: (i) a finding of the facts which constitute the offence, (ii) whether the accused had the necessary intention to commit the offence (iii) a judicial decision with the outcome in either acquittal or conviction, and (iv) release or punishment/sentence.

In a situation of armed conflict, military action which results in killing, bodily injury or other outcome in the prosecution of the war is legitimate; belligerents may respond with force and shoot to kill if attacked. Such conduct is legitimate provided the military action does not contravene the humanitarian principles forming part of the Laws of War expressed in the Hague Regulations and 3rd and 4th Geneva Conventions and extend beyond what is proportional. While the Regulations are primarily concerned with the manner in which war is waged and the rights of non-combatant civilians take a secondary place, in the 4th Geneva Convention, however, humanitarian rights are central.

In determining the legality of the conduct of the occupying forces in prosecuting the war and, while so engaged, their relationship with the civilian non-combatant population, three major principles emerge: (a) occupying forces are required to distinguish between combatants and civilians; (b) their action must be grounded on military necessity and (c) the incidental damage caused to non-combatants by the military operation must not be out of proportion to the military advantage which is gained by that operation.

The application of these three criteria to the TSB will now be examined.

5. Legitimate Military Responses in Armed Conflict

a. Distinguishing between Combatants and Civilian Non-Combatants

In a situation of armed conflict, non-combatants are specially protected. Neither their persons or property may be intentionally injured by an occupying power except in the case of military necessity, nor can they be subject to collective punishment or reprisal. Unfortunately, the distinction between a civilian and combatant in the present conflict is intentionally blurred by the Palestinians. Their militants do not comply with the Hague Regulations.⁹⁴ They lack a defined and responsible command structure. They do not wear uniform or insignia so as to enable themselves to be distinguished from non-combatants. Those involved in suicide bombings do not carry their weapons openly. Furthermore, the manner in which the Palestinians conduct the present conflict is contrary to the laws and customs of war, in that their military opposition to Israel has in the past- even before the occupation- and still is at present, directed to causing terror among Israeli civilian population and utilising weapons designed to cause as much death

⁹⁴ Hague Regulations, Article 1

and personal injury as possible.⁹⁵

Contrary to the Geneva Convention, Palestinian terrorist organisations attempt to use the presence and movements of the civilian population to render themselves and their places of operation immune from Israeli military operations.⁹⁶ Weapons are prepared and manufactured in civilian workshops and garages, while residential buildings are used as vantage points for sniper fire. In Gaza, residential buildings conceal tunnels⁹⁷ in which Palestinian militants smuggle illegal weapons and explosives from Egypt.⁹⁸ Civilians, both women and children, are often used as human shields to accompany the movement of terrorists from place to place thus protecting them from IDF attack or capture.⁹⁹ Women and children are also manipulated by the Palestinian Authority¹⁰⁰ and used to confront Israeli troops in so called civilian disobedience demonstrations¹⁰¹ or are “employed” by Palestinian terrorists as unknowing and unwilling potential suicide bombers.¹⁰² Ambulances together with their drivers¹⁰³

⁹⁵ *ibid*, Articles 23 (2) and (5) which expressly forbid the **treacherous** killing or wounding of individuals belonging to the hostile nation or army; and the employment of arms, projectiles or material calculated to cause unnecessary suffering

⁹⁶ 4th Geneva Convention, Article 28

⁹⁷ On 6/5/2004 an IDF Spokesman stated that since September 2000, IDF forces uncovered on the Israeli Egyptian border over 80 weapons-smuggling tunnels, all used as a main source for weapons used by the terrorist organizations to carry out attacks against Israeli targets. See also www.idf.il Background Material: Rafah Weapon Smuggling Tunnels 10/10/2003.

⁹⁸ Illegal armaments included dozens of RPG rockets and launchers, hundreds of kilograms of explosives to be used for bombings attacks, hundreds of rifles (mainly AK- 47 Kalashnikovs); tens of thousands of bullets and other ammunition to be used in shooting attacks, thousands of cartridges.

⁹⁹ IDF Spokesperson Brigadier General Ruth Yaron, *"The Aim - Capture Palestinian Terrorists Hiding Within the Civilian Population"* Interview Israel RadioIsraeli Television Channel One, 26.01.2003

¹⁰⁰ Khaled Abu Toameh, *Fatah committed to Aksa Martyrs* Jerusalem Post, June. 20, 2004 The Palestinian Authority has no plans to dismantle the Aksa Martyrs Brigades, the armed wing of Fatah, Prime Minister Ahmed Qurei announced. He acknowledged that the group is part of Fatah and said its gunmen are entitled to play a political role in the future.

"We have clearly declared that the Aksa Martyrs Brigades are part of Fatah," Qurei said in an interview with the London-based Asharq al-Awsat newspaper. "We are committed to them and Fatah bears full responsibility for the group."

See also *Arafat Directly controls Al-Aqsa Brigades* Jerusalem News Wire March 2, 2004

www.jnewswire.com

¹⁰¹ Itamar Marcus and Barbara Crook, *PA called "Women, Children and Elderly" to Wednesday's Battle* Palestinian Media Watch Bulletin, May 20, 2004, <http://www.pmw.org.il>

Itamar Marcus & Barbara Crook, *Engineering Civilian Casualties* Jerusalem Post Op-Ed, June 2, 2004:

¹⁰² Abu Mazen, Chairman Arafat's deputy, in an interview published in the Jordanian Newspaper "Al'Rai" (20 June 2002) warned about the terror organizations exploiting the Palestinian children in the Gaza Strip and using them for carrying out terror attacks in Israel. Abu Mazen revealed that the Palestinian terror organizations pay each child five Israeli Shekels (less than £1) for each explosive device they activate against the IDF soldiers.

IDF sources reported that on 17 September 2002, a bomb or grenade exploded about 50 meters from Israeli troops after having been thrown by a child, who was one of a group of 50-80 Palestinian children and teenagers who approached an IDF military installation.

On March 24, 2004, Reuters reported Israeli soldiers questioning an intellectually “challenged” boy caught with a bomb belt at a checkpoint, who had been given 100 shekels (about £12) to blow himself up.

Jerusalem Newswire *10 killed as Terrorists use Human Shields*, May 19, 2004; Justus Weiner, *The Recruitment of Children in Current Palestinian Strategy*, Jerusalem Issue Brief, October 2002; Tsahar Rotem and Amos Harel *Two Palestinian children infiltrate Gaza Settlement*, Ha'aretz

January 12, 2003; Nat Hentoff, *What kind of Palestinian State?* The Washington Times, July 15, 2002

¹⁰³ *Ibid*. Article 20. IDF Spokesperson, *Use of Ambulances and Medical Vehicles by Terrorist*

Organisations, February 14, 2002.; Ellis Shulman, *Palestinians Said Continuing to Use Ambulances to Transport Terrorists*, Israel Insider, May 27, 2004

In October 2001, Nidal Nazal, a Hamas operative in Kalkilya, was arrested by the IDF. As an ambulance

exploit their immunity by conveying terrorist suicide bombers towards their destination and to transporting combatants, their weapons and explosives. The immunity of hospitals¹⁰⁴ and places of worship are also exploited (sometimes with the co-operation of their lawful occupants) to conceal and protect terrorists evading capture.¹⁰⁵

In preventing and suppressing terrorism, Israeli forces are often confronted by what appears to be a “peaceful” non violent demonstration in which crowd control should be maintained by normal policing methods. Unfortunately in such demonstrations, armed Palestinian are often secreted among non-combatants indistinguishable in their dress. What may have commenced as an apparent non-violent protest suddenly becomes an armed confrontation in which policing measures to restore law and order are inappropriate, and military action is demanded. Any resultant Palestinian deaths –civilian or combatant- are improperly condemned as disproportionate Israeli action in response to combatants who themselves have acted contrary to the rules of war.

The result of the intentional blurring of the distinction between non-combatants and what might be termed “unlawful” combatants certainly deprives the latter of any claim to POW status. Such combatants may be killed or injured on sight without liability on the part of Israel. If captured whether they retain any rights of protection apart from trial is unclear. Whether killed or captured, however military action against terrorists may also result in the unintentional killing of

driver for the Palestinian Red Crescent, he exploited the unrestricted travel to serve as a messenger between the Hamas headquarters in several West Bank towns;

In January 2002, Wafa Idris blew herself up on the crowded Jaffa Street in Jerusalem. She was an ambulance driver for the Palestinian Red Crescent, as was Mohammed Hababa, the Tanzim operative who sent her on her mission. She left the West Bank by way of an ambulance (Washington Post, January 31, 2002).

On March 27, 2002, a Tanzim member who worked as a Red Crescent ambulance driver was captured with explosives in his ambulance. A child disguised as a patient was riding in the ambulance along with the child's family. The explosives were found under the stretcher the "sick" child was laying on (Israeli Foreign Ministry).

On May 17, 2002, in a Red Crescent ambulance at a checkpoint near Ramallah an explosive belt and bomb were found (of the same type generally used in suicide bombings) hidden under a gurney on which a sick child was lying. The driver, Islam Jibril, already wanted by the IDF, admitted that this was not the first time that an ambulance had been used to transport explosives or terrorists.

The bomb was removed from the ambulance and detonated in the presence of a representative of the International Committee of the Red Cross. In a statement issued the same day, the ICRC said that it “understands the security concerns of the Israeli authorities, and has always acknowledged their right to check ambulances, provided it does not unduly delay medical evacuations.” (“Bomb found in Red Crescent Ambulance,” (Ha’aretz, June 12, 2002).

On June 30, 2002, Israeli troops found 10 suspected Palestinian terrorists hiding in two ambulances in Ramallah. They were caught when soldiers stopped the vehicles for routine checks (Jewish Telegraphic Agency, June 30, 2002).

In December 2003, Rashed Tarek al-Nimr, who worked as a chemist in hospitals in Nablus and Bethlehem, supplied chemicals from the hospitals to Hamas for use in making bombs and admitted to using ambulances to transport the chemicals. He also said the Hamas commanders would hide in hospitals to avoid arrest. (Margot Dudkevitch, "Palestinian Transported Bomb Materials in Ambulances," Jerusalem Post, December 11, 2003.

¹⁰⁴ *ibid*, Article 19

¹⁰⁵ Ariel Cohen, *War Crimes in Bethlehem Church of the Nativity*, April 24, 02

www.internationalwallofprayer.org/A-019-Church-of-The-Nativity-War-Crimes-Ariel-Cohen.html;

Shark Blog: *Nativity Church Terrorists: Where are they now? Church Terrorists: Where are they now? Do you ever wonder what happened to the assorted thugs who took hostages at the Church of the Nativity in Bethlehem last ...* www.usefulwork.com/shark/archives/000063.html -

genuine non-combatants - a consequence which the terrorists try to bring about for propaganda purposes. The lack of distinction also places Israel in the difficult position of taking preventative action in the form of the TSB, without it being viewed as collective punishment.

The difficulty of distinguishing between combatants and non combatants becomes more complicated if one considers and attempts to apply the provisions of the 1977 Protocols to the 4th Geneva Convention, which Israel and many other nations who have experienced terrorism have not accepted.¹⁰⁶ Indeed Protocol 1, Article 44 now re-defines a “combatant” in a more limited manner while Article 52 expands the protection to which the civilian population is entitled, have substantially changed the Geneva Convention. These provisions in effect exclude from the range of illegal activity the establishing, financing and maintaining a terror group, including the recruitment of new members, their training, and the planning of an operation; in fact all the activities short of directly dispatching the suicide bomber to his/her target. Protocol 1 advances the interests of those intent on establishing their self determination by violence and makes a travesty of the Convention and its objective of safeguarding non-combatant civilians.¹⁰⁷

¹⁰⁶ United States, India, Pakistan, Sudan, Turkey, Singapore, East Timor Thailand, Iraq, Iran, Indonesia. As regards Palestine, on 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto".

On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".

¹⁰⁷ Protocol 1, Article 43 provides inter alia. "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates even if that party is represented by a government or authority not recognised by an adverse party..... "

43(3) Whenever a Party to a conflict **incorporates a paramilitary** or armed law enforcement agency into its armed forces, it shall so notify the other Parties to the conflict.

Article 44 of Protocol , provides that "... combatants are obliged to distinguish themselves from the civilian population **while they are engaged in an attack or in a military operation preparatory to an attack**" The Protocol purports to recognise that there are situations in armed conflicts where owing to the nature of the hostilities an armed combatant cannot so distinguish himself. In such cases the Protocol permits him to retain the status of a lawful combatant provided that he carries his arms openly **during each military engagement** and **during such time as he is visible** to the adversary **while he is engaged in a military deployment preceding the launching of an attack in which he is to participate**. Any combatant who falls into the power of an adverse Party **while not engaged in an attack** or in a military operation preparatory to an attack **shall not forfeit rights** to be a combatant and a prisoner of war by virtue of his prior activities"

Article 51(3) states: "Civilians shall enjoy the protection afforded by this section [i.e. civilians not be the object of attack] unless and for such time as they take a direct part in hostilities"

The fundamental condition for combatants must be that they comply with all the laws of war and other applicable rules of international law under all circumstances. Art. 44 above does not meet those conditions. The need for combatants to distinguish themselves clearly from non-combatants is vital to genuine non-combatants as well as for the protection of combatants themselves who become POWs. By diluting and weakening the requirements for differentiating between combatant and civilian population, Article 44 indirectly, but nevertheless clearly intensifies the danger to life and safety of innocent civilians. Protection given to those who do not fight openly can create an imminent danger to the civilian population as a whole, and achieve adverse results to those intended. This becomes evident when applying Article 51(3) and implies that militants can become combatants for one period of the day and become non-

One scholar of international law¹⁰⁸ has suggested that in the current situation where terrorism is employed as a means of attaining self determination the distinction as set out in the Conventions is not realistic:

"...[T]he law must come to realize that the traditional sharp line between combatants and civilians has been replaced by a continuum of civilian-ness. At the innocent end are those who do not support terrorism in any way. In the middle are those who applaud the terrorism, encourage it, but do not actively facilitate it. At the guilty end are those who help finance it, who make martyrs of the suicide bombers, who help the terrorists hide among them, and who fail to report imminent attacks of which they are aware. The law should recognize this continuum in dealing with those who are complicit, to some degree, in terrorism.
[emphasis gma]

At present, international law does not recognise the suggested continuum of "civilian-ness" and therefore, in order to maintain the balance between military necessity and the humanitarian aspects of the laws of war, it is submitted that there is a complementary obligation which must be maintained. If, contrary to the customary laws of war embodied in the Hague Rules and the Geneva Conventions, Palestinian militants, with the tacit consent, support and co-operation of "non-combatants" and of the Palestinian Authority, prevent Israel from being able to distinguish between combatants and non-combatants, then Israel must be excused from its responsibility for damage caused to non-combatant Palestinians by Israeli military action in general, and the negative impact of the TSB in particular. Any actual injury to genuine non combatants caused by the TSB can be taken into account when applying the rule of proportionality. This considers the collateral damage caused to the civilian population and the extent of their involvement in the conflict when military necessity dictates taking action against combatants, both lawful and unlawful; (the latter being combatants in civilian guise).

b. Military Necessity

Early military conventions concerned themselves with maintaining a balance between the manner in which war was to be waged and the humanitarian considerations of the *combatants*. The rights of non-combatant and their concerns, if recognised, were marginal. However, contemporary conventions

combatants for other periods- changing hats and becoming combatants when actually planning operations and ceasing when they engage in "normal" civilian activities; even then the planning still continues in the mind.

Article 44 does not reflect existing international law. It is an innovation, which all States are free to determine their attitude in accordance with their own interests. The attempt to bring within the scope of the Protocol, non-State elements leads to internal contradiction in the text based on the existence of organised state as subject to international law and **undermines the reciprocity of legal rights and obligations necessary for the satisfactory application of international treaties.**

The relative ease with which any group, claiming to fit within the political criteria of Article 44 may consider itself entitled to the privileges and status under the Protocol, would only serve to facilitate, encourage and licence the activities of terrorists whose methods and objectives- (the indiscriminate violence against innocent victims) - are completely contrary to any notion of humanitarian law and its underlying aims. Diluting the requirements universally accepted in the 3rd Geneva Convention for the enjoyment of PoW status only serves to enhance the dangers of abuse under this Protocol by using it as a shelter for terrorist activity.

¹⁰⁸ Alan M Dershowitz, Rules of War Enable Terror, Baltimore Sun, May 28, 2004, www.baltimoresun.com; www.limbicnutrition.com/blog/archives/025178.html . See also Alan Baker, *The Evolution of International Law and the War on Terrorism*, Jerusalem Issue Brief, Vol2, No.14, 24 December 2002. <http://www.jcpa.org/brief/brief2-14.htm>

place the protection of human rights of non-combatants as their central objective. To the extent that military necessity is recognised, it is expressed as an exception to general rules.¹⁰⁹

Belligerents do not have the unfettered right to overcome the enemy by any means.¹¹⁰ In order to realise a justified and essential military objective, military necessity implies the right to apply

only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with the minimum expenditure of time, life and physical resources.¹¹¹

Reference to the United States Army Manuals indicate that until 1956,¹¹² military necessity justified a resort to all measures which are indispensable for securing the submission of the enemy which are not forbidden by the modern laws and customs of war. This admits of

”all direct destruction of life or limb of armed enemies and of other persons whose destruction is incidentally unavoidable in the armed contests of war; it allows of the capturing of every armed enemy, and of every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever the enemy’s country affords that is necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith, either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist”¹¹³ [verbatim from General Orders 100, art. 151].”

Subsequent to 1956, the definition "military necessity" has been simplified in the form of a general principle as *“that which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible”¹¹⁴*

What military necessity does not permit is the infliction of suffering for the sake of suffering or for revenge nor of the wanton devastation of a district.¹¹⁵

¹⁰⁹ *ibid.* Dershowitz argues that the Geneva conventions are so outdated and are written so broadly that they have become a sword used by terrorists to kill civilians, rather than a shield to protect civilians from terrorists. In Dershowitz’ opinion, these international laws have become part of the problem rather than part of the solution.

¹¹⁰ Military necessity was originally developed to excuse a belligerent from complying with the unwritten customs of conducting warfare. See Openheim’s *International LAW - Lauterpacht*. Longmans, 7th ed. Vol II, p. 231

¹¹¹ United States, Department of the Navy *The Commander’s Handbook on the Law of Naval Operations*, NWP1-14M, Norfolk, Virginia, October 1995, p.5-1 cited in A. Roberts and R. Guelff, *Documents on the Laws of War*, 3rd Ed. Oxford University Press. See also M. Greenspan, *The Modern Law of Land Warfare*, University of California Press, 1059, p 313

¹¹² Donald A. Wells, *The Laws of Land Warfare: A guide to the US Army Manuals*, Greenwood Press, Westport, Conn 1992,

¹¹³ *ibid* at p. 37

¹¹⁴ *ibid* at p. 38

¹¹⁵ The 1956 edition of the new army manual eliminated most of the paragraphs of its predecessors on the subject of military necessity. The matter is now disposed of in a single brief section:

“(a) Prohibitory Effect. The law of war places limits on the exercise of a belligerent’s power in the interests mentioned in paragraph 2 and **requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.**”

A review of the Regulations and the Conventions discloses that some actions are completely prohibited and do not fall within the ambit of military necessity. Actions such as the treacherous killing or wounding of individuals belonging to the hostile nation or army¹¹⁶ or the intentional causing of violence to life and to persons taking no active part in hostilities¹¹⁷ form no part of the IDF philosophy. In contrast, other actions, normally considered illegal, such as the destruction or seizure of enemy property, are permitted if demanded by the necessities of war.¹¹⁸

In respect of Israel's action to erect the barrier, the issue should be viewed from four perspectives: (i) the authority in the Occupying Power to regulate the movement of population; (ii) the use or destruction of property on the grounds of military necessity; (iii) in the circumstances now faced by Israel, whether military necessity dictates use of property for erection of a terrorist security barrier; and (iv) due process in determining the route of the Fence so as to maintain a balance between military necessity in constructing the barrier and the collateral damage to non-combatants caused by the construction.

(i) Regulation of Population Movement for Security Purposes

International law gives a limited right to an occupying power to regulate the movement of population within the territory.

Upon taking control of captured territory, the occupying power is obliged to take all measures to restore and ensure, as far as possible, public order and safety, **while respecting** unless absolutely prevented, ***the laws in force in the country***.¹¹⁹ One such law still in force in the OPT which authorise measures against terrorist action is to be found in the Defence (Emergency) Regulations 1945.¹²⁰ These were promulgated by the British Mandatory Government were neither repealed by Jordan during its occupation of the West Bank nor subsequently by Israel.

Although these Regulations have not been employed by Israel as the legal basis for the construction of the fence, they do provide authority for regulation of population within the "Seam Zone" (i.e. the area between the fence and the 1967 Armistice Lines).

Part XV of the Defence Regulations authorizes its application to any area or areas specified in the Order which is declared by the Military Authorities to be a "Controlled Area."¹²¹ The area of the Seam Zone has so been declared. The legislation authorises the military authorities to control the entry into or exit from a Controlled Area, or to remove from the Area, any person, vehicle, vessel, animal or other thing except with permission granted by or on behalf of the Military Commander.¹²² Since a general prohibition on all persons entering or exiting from a Controlled

¹¹⁶ Hague Regulations Article 23(b)

¹¹⁷ 4th Geneva Convention, Article 3(1)

¹¹⁸ Hague Regulations Article 23(g)

¹¹⁹ *ibid*, Article 43

¹²⁰ Defence (Emergency) Regulations 1945, Palestine Gazette, No.1449, Supplement 2, 27, September 1945.

¹²¹ Hague Regulation 149

¹²² Defence Regulations 155 and 157

Area might be unjustifiable in particular circumstances, the Military Commander is authorised to mitigate the severity of the regulation and to make provision for preventing, removing or mitigating hardship which has arisen or may arise as a result of restrictions imposed in the Controlled Area.¹²³ From a legal perspective, therefore, in reliance on existing legislation in force within the OPT before Israeli occupation, the IDF Authorities have power to declare the area between the fence and “Green Line” as a Controlled Area and to prevent all persons from entering there other than local inhabitants, thereby enabling them to carry on their agricultural, business or social activities.

Unlike the Hague Regulations and the Geneva Convention, the application of these Defence Regulations are not constrained by having to demonstrate “military necessity.” However, Israel has always declared that the humanitarian provisions of the Convention are applied in the territories. Israel may, therefore, as a matter of policy, although not required by law, apply the humanitarian constraints on military action found in the Convention to the Defence Regulations. In this regard Article 27 of the Convention declares that while protected persons are entitled to respect for their persons, honour, their family rights, manners and customs, the parties to the conflict may, however, take *such measures of control and security* in regard to protected persons *as may be necessary as a result of war*.¹²⁴

Until the commencement of the violence in 2000, no border or natural obstacles existed between Israel and the areas controlled by the Palestinian Authority. This absence of control enabled the unhindered entry of potential terrorists into Israel. Experience has shown, however, that a security fence is effective against terrorist incursion. The fence constructed along the Gaza Strip has proven its defensive robustness and the vast majority of infiltration attempts through it have been discovered and thwarted.¹²⁵

¹²³ *ibid* Regulation 152

¹²⁴ Geneva Convention, Article 27 (4)

¹²⁵ Israel Ministry of Foreign Affairs press releases 5 Jul 2004. asserts that the anti-terrorist fence cuts Samaria-based attacks by 90 percent. In the 11 months between the erection of the first segment at the beginning of August 2003 and the end of June 2004, the Samaria-based terrorist groups have succeeded in carrying out only three atrocities within Israel. In contrast, during the 34 months from the beginning of the violence in September 2000 until the construction of the first continuous segment of the anti-terrorist fence at the end of July 2003, between Salem and Elkana in Samaria, Samaria-based terrorists carried out 73 atrocities (suicide bombings, shootings, car bombings) within Israel (including Jerusalem) in which 293 Israelis were killed and 1950 wounded.

While the number of attacks dropped sharply, the number of attempted attacks that were foiled in various stages of

preparation since the erection of the anti-terrorist fence in August 2003 remained high. During this period, the security forces prevented dozens of attacks by Samaria-based terrorist groups in the final stages of preparation. ...The conclusion is inescapable that a major factor in the sharp drop in the number of attacks carried out in Israel by Samaria-based terrorists in the past few months is the effect of the anti-terrorist fence on their operational patterns.

The success of the anti-terrorist fence in Samaria means that the launching point for terrorists has been moved to Judea. In the last few months, Judea (where there is not yet a continuous fence) has become the main base for dispatching terrorists (including Samaria-based terrorists) into Israel. In more than half of the dozens of attacks-in-planning that were foiled since the erection of the anti-terrorist fence, the terrorists intended to infiltrate Israel by way of Judea, usually via Jerusalem and Ramallah.

In these circumstances, and in order to safeguard both Israeli and Palestinian protected persons against terrorist action, there appears to be no legal impediment preventing Israel from regulating population movements in and around the Seam Zone. In the absence of regulation, unlawful combatants, secreted among or disguised as non-combatants, would be able to move about freely in and around the area of the TSB, with the potential of becoming a destabilising factor in the area. In the absence of regulation, Palestinian militants would be in a position to initiate gunfire and conduct other military activity in a manner similar to that which Islamic terrorists used the Christian Arab village of Beit Jalla in November 2000, as a vantage point from which to fire upon the civilian residents of Jerusalem suburb of Gilo.¹²⁶

(ii) Military Necessity in Use of Land

A review of the provisions of Hague Regulations, the 4th Geneva Convention and the Defence (Emergency) Regulations give explicit authorisation for the use of land in occupied territory and for the requisition of private property in cases of military necessity. The provisions also extend to the destruction of such property if such is necessary.

- **Use of Private Land**

From the international legal perspective, while Article 46 of the Hague Regulations states that private property must be respected and cannot be confiscated, Article 52 qualifies this blanket restriction, in that “requisitions in kind... shall not be demanded from... inhabitants *except for the needs of the army of occupation...*”

In addition, the local Palestine Defence (Emergency) Regulations in force since 1945, give broad powers to the competent authority, namely, the Military Commander, to take possession of **any** land (whether private or public), if it appears to him “*necessary or expedient so to do in the interests of the public safety, the defence of Palestine, or the maintenance of public order,*”¹²⁷ and to use it for such purposes and in such manner as he thinks expedient.¹²⁸ It is submitted that suppression of terrorism and prevention of “armed attack” both within the West Bank and beyond it, would fall within the ambit of maintaining public order and reduces the need for control barriers within the West Bank. Even if the argument based on public safety and public order is not sustainable, the Military Commander can resort to and apply other provisions contained in the Defence Regulations which authorise him to use any requisitioned land for military purposes, and to permit any¹²⁹ persons previously entitled to use the land to

Despite their efforts, all of the attempts by Samaria-based terrorists to infiltrate Israel via Judea since the erection

of the anti-terrorist fence have been thwarted by the security forces.

¹²⁶ Kent Swigard *In the heart of Jerusalem* www.aish.com/Israel/articles/In_the_Heart_of_Jerusalem.asp

¹²⁷ Supra note 120, Defence(Emergency) Regulations 1945, Part XI, Regulation 114.

¹²⁸ Ibid, Regulation 114(3)

¹²⁹ Defence Regulations 118 and 158

continue to use it in such manner as he may specify. In such event persons adversely affected by the requisition are entitled to compensation.¹³⁰ Where private property is required for the building of the fence or restrictions are imposed on access to land, compensation is paid both for its present value and future loss of use estimated for a five-year period.

Use of Public and Waste Land

The use of public land by the Occupying Power is specifically authorized by Article 55 of the Hague Regulations and its use is not dependent on military necessity. The Regulations merely state the Occupier acts as the administrator of the property and is required to safeguard the capital of the property and administer it in accordance with the rules of usufruct

Although these rules are not defined,¹³¹ “usufruct” is the right to enjoy property owned by another, and to derive from it all the profit, utility and advantage which it may produce, provided the substance of the thing remains unaltered.

Unlike the extraction of oil by the Occupying Powers in Iraq (which affects the extent and value of a non renewable natural resource) the use of any waste or agricultural land for the purpose of the TSB is an appropriate exercise of the right of usufruct. When the threat of terrorist incursions has been removed, the TSB can be removed and the lands revert to its previous use; crops can be sown again without serious detrimental effect.¹³²

As noted earlier the Defence Regulations also permit the use of public land for the purposes of public safety and order and for military purposes.

- **Destruction of Property**

In general, it is expressly forbidden “to destroy or seize the enemy’s property.” However Article 23(g) of the Regulations permits such destruction or seizure if it “be imperatively demanded by the necessities of war.” Article 53 of the 4th Geneva Convention extends this principle to include the permitted destruction of real or personal property belonging individually or collectively to private persons, to the State or other public authorities if such destruction is rendered absolutely necessary by military operations.

The issue as to whether, without the agreement of the owner, private property may be destroyed for the purpose of constructing the TSB has not been judicially examined tested to the best of the

¹³⁰ *ibid*, Regulation 117

¹³¹ Bouvier's Law Dictionary

¹³² Much of the land upon which the fence has been constructed or designated for construction is stony and unsuitable for agriculture or any other purpose

authors knowledge. There has been only case in which destruction of a residence became necessary for this purpose and the matter was settled amicably. However there is no doubt that where property, such as buildings or trees have been used as cover for sniper fire, the making and storing of explosives or other terrorist activity, the Defence Regulations authorise the destruction of the property.¹³³

(iii) Military Necessity in the Erection of the Barrier

In the current situation, the question is whether the construction of the fence on what is claimed to be Palestinian territory is necessary, militarily, and for what purpose.

Israel's declared and clear purpose is not just to weaken the opposing military forces, while an uninvolved non-combatant population looks on (as was the objective in nineteenth century wars).¹³⁴ Israeli reaction is prompted by two objectives (i) to prevent the direct and intentional killing and bodily attacks directed at its own civilian population and damage to their property (ii) to pursue and eliminate "unlawful combatants," who perpetrate such acts and who, in the process, commit grave breaches of the Conventions and do not comply with the laws of war.

Many other methods of preventing terrorism have been tried and have failed. The proposed means of preventing continuing terror by the construction of the TSB on both private and public land, together with some destruction of crops and trees, has been military assessed as being crucial to achieving that end.¹³⁵

¹³³ Defence Regulation 119

¹³⁴ St. Petersburg Declaration 1868 dictated that the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy but this military objective should not be exceeded by the use of arms which uselessly aggravate the suffering of disabled men or render their death inevitable. This approach creates a balance between the military objectives of the state and the humanitarian considerations for the combatants. It ignores the impact of the war on non-combatants, because for the most part, professional armies owing allegiance to a sovereign conducted wars and for whom non-combatants were not involved. Non-combatants, so the theory went, were really indifferent as to which of the armies won; in either case, they would remain subjects of one sovereign or another

¹³⁵ The sole purpose of the Security Fence, as stated in the Israeli Government decision of July 23rd 2001, is to provide security. The Security Fence is a central component in Israel's response to the horrific wave of terrorism emanating from the West Bank, resulting in suicide bombers who enter into Israel with the sole intention of killing innocent people. Sadly, this abhorrent phenomenon has become common practice since September 2000

The "Security Fence" is a manifestation of Israel's basic commitment to defend its citizens, and once completed, it will improve the ability of the IDF to prevent the infiltration of terrorists and criminal elements into Israel for the purpose of carrying out terrorist attacks or the smuggling of arms and explosives.

At the time of the initial decision of the Israel Cabinet, the fence was perceived as a means to prevent illegal entry into Israel through the seizure, interrogation and arrest of these elements by the police. The barrier itself was designated for three separate areas: Um el Fahem, Tulkarem and Jerusalem, a total of 80 km. In the months that followed it became apparent that the ability of the IDF and the police to stop illegal entry into Israel depended on the existence of a contiguous obstacle. Accordingly, when in April 2002 the responsibility for building the Security Fence was placed with the Ministry of Defence, the original plan underwent modifications based on the principle of continuity. In June 2002 the Defence Cabinet approved, with minor reservations, the plan based on the principle of a contiguous obstacle.

The decision by Israeli military authorities that particular land or buildings are required for military purposes can be challenged before Israel's Supreme Court acting as the High Court of Justice. As will be demonstrated below in the discussion of the recent Supreme Court decision given in *Beit Sourik*,¹³⁶ the judicial arm of the Israeli government has not given carte blanc approval to, and automatically rubber stamps, all actions of the IDF as being covered by military necessity.

In response to the allegations that the construction of the fence was motivated by political considerations and should be erected on the "Green Line" – the armistice line agreed between Israel and Jordan after the War of Independence, the Court stated:¹³⁷

We accept that the military commander cannot order the construction of the Separation Fence if his reasons are political. The Separation Fence cannot be motivated by a desire to "annex" territories to the State of Israel. The purpose of the Separation Fence cannot be to draw a political border. In *Duikat*, at 17, this Court discussed whether it is possible to seize land in order to build a Jewish civilian town, when the purpose of the building of the town is not the security needs and defense of the area (as it was in *Ayoob*), but rather based upon a Zionist perspective of settling the entire Land of Israel. This question was answered by this Court in the negative.

In a similar vein, the Court reiterated its position that a military commander is not permitted to take the national, economic, or social interests of his own country into account. Chief Justice Barak referred to one of his earlier decisions regarding the taking of land to expand a road, in which he stated¹³⁸:

The military administration is not permitted to plan and execute a system of roads in an area held in belligerent occupation, if the objective is only to construct a "service road" for his own country. The planning and execution of a system of roads in an occupied territory can be done for military reasons . . . the planning and execution of a system of roads can be done for reasons of the welfare of the local population. This planning and execution cannot be done in order to serve the occupying country.

The court emphasised that the authority of the military commander is inherently temporary, just as belligerent occupation is inherently temporary, even though the occupation may have continued for many years. The passage of time cannot extend the authority of the military commander so as to allow him to take into account permanent arrangements beyond the proper administration of the area under belligerent occupation.

After considering the Israel Cabinet decisions,¹³⁹ and the extent of damage caused to Israel by terrorist activity, the Court concluded that the Fence did not express a political border, or any other border, "but was motivated by security

The route from Salem to Elkana and in the northern and southern sections of Jerusalem was finally approved in August 2002.

¹³⁶ *Supra* note 54

¹³⁷ *Oara* 27, p. 15 (html form)

¹³⁸ H CJ 393/82 *Jam'iat Ascan Elma'almoon, v Commander of the IDF Forces in the Area of Judea and Samaria.*, p.795

¹³⁹ Decision of June 23, 2002; "The obstacle that will be erected pursuant to this decision, like other segments of the obstacle in the "Seam Area," is a security measure for the prevention of terror attacks and does not mark a national border or any other border." (Decision of October 1, 2003).

concerns alone, designed to contend with the threat of Palestinian terror.”

Specifically, the Court found that the Fence is intended to prevent the unchecked passage of inhabitants of the area into Israel and their infiltration into Israeli towns. In locating its route and determining its position, the Court accepted the military assessment that it was necessary for the fence to pass through territory that topographically controls its surroundings, and in order to allow effective surveillance, its route also had to be as flat as possible. In addition, the Court accepted that a “security zone” would have to be established which would delay any terrorist infiltration into Israel.

In respect of the depth of the security zone, the Court was presented with two competing military assessments. Those responsible for security in the IDF considered that the fence should be located reasonably close to Palestinian lands so as to give enough time and strategic depth to enable IDF patrols to apprehend terrorists who did succeed in infiltrating into Israel before they reached their targets. Expert evidence on behalf of the Petitioners disagreed, arguing that Israeli forces would be more vulnerable to attack if they were required to patrol close to Palestinian land; more passages and tunnels would be required for Palestinians to reach their fields; and the close proximity of the inhabitants to IDF patrols would cause unnecessary friction. Therefore, in the opinion of the Petitioners’ military experts, the fence should be located closer to Israeli settlement.

Although the Court avoided accepting either expert opinion, it decided that more weight should be given to the evidence presented by those persons officially responsible for Israel’s military defence, unless there were overwhelming reasons for rejecting it as not having been made either on the basis of military considerations or in good faith. Chief Justice Barak reasoned that although the Court was not entitled to substitute its opinion for that of the military experts, it was entitled to consider the effect on the humanitarian interests of the civilian population by the military decision. The balance of these competing interests is expressed in the Rule of Proportionality .

c. The Rule of Proportionality

i. The Balancing Process

In the process of waging war, the killing or injuring of innocent civilians is to be avoided- although not prohibited. Military action against a legitimate target must comply with the rule of “proportionality”.¹⁴⁰ In the case of the TSB it must be asked whether the military advantage accruing to Israel by the erection of the fence and the closures outweigh the incidental damage and inconvenience to the civilian population, or, in

¹⁴⁰ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by International Law Commission 2001. Article (1) “An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to **induce that State to comply** with its obligations...” Article 51 (1). Countermeasures must be **commensurate with the injury suffered**, taking into account the gravity of the internationally wrongful act and the rights in question; Article 53 Countermeasures shall be terminated as soon as the responsible State has complied with its obligations...in relation to the internationally wrongful act. Article 55: These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

DFID's terms, has Israel used "excessive force"?

It is not denied that the barrier causes harm and inconvenience, economic and social, to many Palestinians which is difficult to avoid. However, in looking at the harm, DFID must also weigh the benefit to Israel- the effective prevention of deaths to its civilian population and the social and economic dislocation caused by terrorist action.

There is clear evidence that from the commencement of the intifada until the erection of the barrier closest to Palestinian urban centres, the number of homicide bombings was on the increase. From the erection of the barrier until the present, the statistics show a significant decrease in the number of infiltrations into Israeli territory- and those that do succeed encounter greater difficulty than previously.¹⁴¹

In making the evaluation, the assessment must take into account the prevention of irreversible and irrecoverable deaths of close to 1000 innocent Israeli civilians as against the reversible and recoverable economic damage and inconvenience suffered by the Palestinians directly affected by the TSB.

Throughout this discussion, it must be borne in mind that after the failure of the Camp David talks in June 2000, this phase of the Israel-Palestine conflict (Intifada II) was initiated, planned, and executed by the Palestinian Authority with the participation of Hamas and Fatah. They cannot now complain if Israel takes reasonable steps to frustrate terrorist activity which falls far below any accepted and civilised norm of human behaviour.

ii. Objectives and Function of the Response

In applying the Rule of Proportionality, Enzo Cannizzaro has suggested that one must also consider the function which the response plays in bringing the conflict to an end.¹⁴² Proportionality requires not only employing the means appropriate to the aim chosen, but implies, above all, an assessment of the appropriateness of the aim. Such aims conceivably encompass, reciprocity (e.g. if you terrorise my population, I will terrorise yours- an aim which Israel neither pursues nor condones as witnessed by its immediate and unconditional condemnation of the killings perpetrated by Baruch Goldstein) coercion, punishment, compliance, suspension of performance by the aggrieved state (as Israel suspended the redeployment in the 90's in the wake of terrorist bombing) and prevention (such as Israel intends with the construction of the TSB).¹⁴³ Of the four standards suggested by Cannizzaro, the "executive"

¹⁴¹ Supra note 92

¹⁴² Enzo Cannizzaro, Professor of International Law, University of Macerata, *The Roles of Proportionality in the Law of International Countermeasures* 12 *European Journal of International Law*, 889

¹⁴³ *ibid.* Cannizzaro suggests four different standards: (1) a **normative** standard taking into account the equivalence in law between the breach and the response- having the function of re-establishing the normative balances altered by the breach (2) A **retributive** standard aimed at inflicting on the wrongdoer a cost of the injury suffered (3) A **coercive** standard having the function of inducing the wrongdoer to cease the breach and abide by the obligation and finally (4) the **executive** standard where the function is to wipe out the adverse effect produced by the breach and to produce unilaterally the benefits expected from the breached rule

is consistent with Israel's objectives. This standard is intended to eliminate the adverse effect caused by the breach of the Palestinian Oslo undertakings to prevent terrorism, and to produce unilaterally, the benefits which Israel expected from the fulfilment of those obligations.

iii. Due Process in Determining Route of the TSB

Israel's Supreme Court has already dealt with a number of appeals regarding the TSB and has evaluated whether Israel's security authorities have acted reasonably in balancing the conflicting security and humanitarian interests. In making that initial assessment, Israeli administrative bodies are subject to the rules of natural justice and generally comply with the obligation of giving the affected party an opportunity to be heard before making a decision. As regards the issuing of a Requisition Order for land required for the TSB, the security authorities have created a two level administrative process.

At the planning level, a coordinated military position is determined on the location of each segment of the TSB. In each and every case before a requisition of property is ordered, the necessity of the order is examined by a coordinating committee consisting of senior representatives of the military authorities, the Israeli Ministry of Justice and the civilian Liaison and Co-ordination Administration in the Territories. A financial assessment is made of the amount of compensation payable, based on an appraised value of land which is then negotiated with the landowner. The evaluation includes both land value as well as estimated value of future crops lost for a five year period.

The process of planning the route, (before implementation which is commenced by the issuing a Requisition Order), is presently undergoing a change on an experimental basis. Members of the committee visit the site on a fact finding mission, prior to issuing an Order. They initiate discussions with the village headman, other elders and others who are likely to be affected by the potential requisition. After listening to their initial concerns these are taken into account when determining which specific parcels of land are to be acquired.

The process of implementation is then commenced with the issuance of a Requisition Order. A further field visit is then undertaken by members of the Liaison Co-ordination Administration who, together with local inhabitants directly affected by the Order, attempt to solve individual problems.¹⁴⁴ Following such visit, those inhabitants who are still dissatisfied with the outcome, have seven days to submit objections to the military or civil authorities who examine the matter further. If the appeal is rejected, an additional seven days is given to allow the submission of a Petition to Israel's High Court of Justice. No work in the field is initiated while the appeal and Petition process is proceeding.

Incidentally, this process also enables the Palestinian Authority, the local head of a village and others to participate officially in the determination

¹⁴⁴ Isabel Kershner, *The Fence Mender*, The Jerusalem Report, April 19, 2004, pp 20-22

of the location of the fence even where the grounds are weak; with the unarticulated objective of slowing down the construction of the TSB.

Over 50 objections have been filed to appeal committees and 15 appeals have been filed with Israel's High Court of Justice since construction of the fence began. In many cases, both before and after the filing of an appeal, the authorities and the complainants reach agreement regarding alterations to the path of the fence as well as other local factors. Thus, even before a Requisition Order is challenged in Court, a full fact finding process has already be undertaken in which the inhabitants' interests have been taken into consideration.

iv. The *Beit Sourik* Rules of Proportionality

Recently Israel's Supreme Court has given concrete interpretation to its concepts of proportionality in *Beit Sourik Village Council vs. The Government of Israel and the Commander of the IDF Forces in the West Bank*.¹⁴⁵ In this case, the Supreme Court consolidated the appeals against eight requisition orders issued by the competent military authorities. These covered a number of plots of land in Judea and Samaria, the acquisition of which would enable the construction of a 40 km. stretch of the TSB.

After first reviewing the motivation behind the Government's decision to build the fence and the conflicting expert military evidence, the Court went on to discuss generally the legal normative framework within which the fence might be constructed, and in particular the question of proportionality.

Chief Justice Barak asserted¹⁴⁶ that it was insufficient that the route of the fence be motivated solely by security matters, in contrast to political considerations, but as a military commander, who is not the sovereign in occupied territory; his authority must be properly balanced against the rights, needs and interests of the local population.¹⁴⁷

The law of war usually creates a delicate balance between two poles: military necessity on the one hand and humanitarian considerations on the other"¹⁴⁸

In searching for the balance, the liberty of the local inhabitants under belligerent occupation can be limited on the condition that the restriction is proportionate. According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize its governmental objective is of proper proportion.

In the opinion of Barak C.J the general principle of proportionality focuses on the relationship between the objective whose achievement is attempted, (the suppression of terror) and the means used to achieve it (the construction of the fence). The principle, however, requires application which is

¹⁴⁵ supra note 54

¹⁴⁶ p. 18 (html format)

¹⁴⁷ The Court cited extensively from its own precedents in which interests of the military were balanced against the humanitarian interests of the local population.

¹⁴⁸ ibid, quoting Dinstein, *Legislative Authority in the Administered Territories*, 2 *Iyunei Mishpat*, 505, 509 (1973)

expressed in three subtests, all of which have to be satisfied simultaneously:¹⁴⁹ (i) the objective must be rationally related to the means; (ii) the means used must cause the least injury to the inhabitants as possible; and (iii) the damage caused to the individual by the IDF's choice of means in order to achieve its objectives, must be of proper proportion to the benefit to be achieved by that means.

The Court considered that the third test could be expressed in a "relativist" manner by considering whether the damage likely to be caused to the inhabitants could be substantially reduced by a modification to the original IDF proposed route even though the result would provide a somewhat smaller security benefit than before. The Court held:

The original administrative act is disproportionate ... if a certain reduction in the advantage gained by the original act – by employing alternate means, for example – ensures a substantial reduction in the injury caused by the administrative act.

Since there may be a number of ways of satisfying the rule, the Court reasoned that just as there was a zone of "reasonableness" in an administrative decision, so "a zone of proportionality" must be recognized. Any means chosen by the administrative body that is within that zone would be considered as proportionate.

The Court then proceeded to apply each of these tests to those parts of the route of the fence to which objection had been raised, focussing its attention to the extent of the severity of the injury caused to the local inhabitants by the Military Commander's preferred route. At this point, for the Court, the issue was no longer a military one, but one which had to be evaluated in humanitarian terms.

"The question is the proportionality between the military consideration and the humanitarian consideration... [I]s the injury to local inhabitants by the Separation Fence proportionate, or is it possible to satisfy the main security concerns while establishing a Fence route whose injury to the local inhabitants is lesser and, as such, proportionate?"

Inasmuch as the petitions dealt with a forty kilometer stretch of fence, the proportionality of the "benefit" of the fence as compared to the humanitarian "cost" varied according to local conditions. The Court therefore applied its concepts of proportionality to seven different segments of the fence affected by the military requisition orders.

In analyzing in each instance the effect of the relevant order, the Court took into consideration humanitarian factors such as: the number of farmers involved, the damage caused by their being separated from their lands, the amount of land area involved and the manner of its division, the difficulties, inconvenience and restriction on gaining access to the land; the number of trees to be uprooted or replanted; the impact of the fence on the general life of the village affected and the difficulties of children getting to school. In each case, the damage was measured in proportion to the military benefit gained by the location of the fence at one point and the loss to security by

¹⁴⁹ *ibid* at p.24, para.41

repositioning the fence where less damage to the inhabitants would be caused.

Of note, during the extended hearing of the applications, the military authorities introduced a considerable number of changes in the designated route of the fence in the light of specific objections submitted by the inhabitants. Also of interest was the judicial criticism leveled at the State for failing to consider the possibility of a land exchange where land had been requisitioned for the fence. Whether in fact appropriate land was available and acceptable was not investigated.¹⁵⁰

In sum, the court considered the impact of the fence on the lives of some 35,000 local inhabitants, living in eight villages, the requisition of 4000 dunams of land (1 dunam = ¼ acre) taken for the fence itself and its injurious effect on some other 30,000 dunams.. The Court's investigation resulted in the acceptance of seven out of the eight petitions submitted against the military requisition orders. These were nullified as causing disproportionate harm to the local inhabitants. In so doing, the Court admitted that the job of the military commander was not easy. It commended him for his willingness to change the original plan in order to reach a more proportionate solution and required him to renew his examination of the route in accordance with the standards laid down by the Court.

6. Conclusion

In the light of the decisions of Israel's Supreme Court and their implementation by the State of Israel, there is no justification for the claims made by some of the NGO's¹⁵¹ and supported by the opinion of DFID's Negotiating Unit,¹⁵² that the

¹⁵⁰ In fact all the agricultural land in the area was privately owned and the available state land was rocky and incapable of being worked.

¹⁵¹ Supra notes 8 and 9 and accompanying text.

¹⁵² In response to a request by the Palestinian Negotiations Affairs Department seeking technical assistance in its preparations for Permanent Status talks with Israel, DFID financed the establishment of Palestine Negotiation Support Unit (PNSU) in 1998. The declared purpose of the Unit was to provide highly professional legal, policy and communications advice to the Palestinian negotiators. Following the collapse of formal negotiations at the outset of 2001, an additional purpose of the project was to encourage the resumption of Permanent Status negotiations by contributing to a variety of diplomatic initiatives aimed at bringing the two sides together. The Unit comprises of two sections: legal and policy-oriented staffed by some 20 full-time Palestinian specialists, many recruited internationally.

Within the Unit there also exists a Communications Section which aims to 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 positions, and even to address the Israeli public to influence its perceptions of Palestinian goals and intentions towards Israel. In theory, the Section publicises Western media-oriented Palestinian negotiating positions to create an atmosphere that will enhance the conditions for negotiations. In practice it performs a different function.

With 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.** Notwithstanding that the funding for Communications Section formed an integral part of financing of the NSU, it is questionable whether the allocation and appropriation of funds by DFID supports negotiation between Israel and the Palestinians towards a two state solution. **Rather it appears**

construction of the TSB is intended as a political and punitive step with the objective of grabbing more territory and bringing the Palestinians “to heel” in doglike subjugation.

Israeli action in building the fence has been motivated solely by security concerns. The action of the IDF has not been permitted to go unchallenged. The independent judicial arm of the Israeli government has rigorously examined, in accordance with the prevailing norms of international law, both the legal process and justification for the decision by the Executive arm of Government to erect a terrorist security barrier, and the manner in which that decision has been implemented by the IDF, taking into consideration the humanitarian needs of the affected Palestinian population.

The failure of the Parliamentary Committee and the Department to examine and then subsequently to accept, reject or comment specifically the assertions of the NGO’s and DFID’s Negotiating Team undermines the integrity of the Committee’s findings. By merely looking to the consequences to the Palestinians flowing from the erection of the TSB, the Committee and the Department impliedly adopt and accept that Israel’s true objective is political and punitive. Neither the Committee itself nor the Department expressly consider the main objective of the TSB and the motivation for its construction. It is submitted that the political and punitive motives imputed to Israel are unjustifiable, fallacious and unsupported by the evidence.

If Israel had wanted to grab territory by means of erecting a fence or wall, it could have been done much sooner; the route of the TSB would have been totally different and much cheaper. Furthermore, the humanitarian concerns for the Palestinian population which Israel takes into consideration in determining the route of the TSB, would have been totally unnecessary and irrelevant if Israel had wanted to subjugate and humiliate the Palestinians. The Negotiating Unit and DFID’s Draft Country Assistance Plan for Palestinians¹⁵³ both fail to give any weight to the deterrent and more importantly the “preventative” functions which the barrier serves.

The Israeli Government’s decision to construct the TSB- costly as it is- is intended to reduce, if not prevent entirely, the number of terrorist incursions into Israel and to lessen the degree of confrontation between the IDF and the Palestinian population- an obligation undertaken by the Palestinians under Oslo II. The fence will also ease many of the restrictions which Israel currently imposes with reluctance on the civilian Palestinian population. It will enable the IDF to remove almost all of the internal checkpoints¹⁵⁴ and improve Palestinian civilian mobility within the Occupied Palestinian Territory. Unfortunately the fence does have a negative impact on the daily life of the local Palestinian inhabitant and on their property rights. However in taking steps to defend the lives and rights of Israel’s own population, Israel has also tried to give effect to the humanitarian concerns of the Palestinians.

Israel’s sole objective is the prevention of the horrific killing and maiming of Israeli civilians caused directly by grave breaches of the 4th Geneva Convention by Palestinian terrorists in circumstances where the Palestinian Authority – not being a “High Contracting Party” to the

that the funds are being utilised to create an effective propaganda apparatus, constituted of foreign experts speaking on behalf of the PLO, without improving the living conditions of ordinary Palestinians, and advancing a negotiated permanent status agreement more likely.

¹⁵³ Draft for Consultation, issued March 2004, para. C12.

¹⁵⁴ According to IDF sources during the month of June 2004, some 50 internal barriers have been removed so far.

Convention, evades political responsibility and may claim to be absolved from liability.¹⁵⁵ In considering how best to render aid to the Palestinians, the Committee's emphasis on the effect of the closures and of the fence alone, without a positive reference to Israel's efforts to mitigate the effect of terrorism on both the Israeli and Palestinian populations, results in a biased analysis of only one-side of what is clearly a two or even multi-faceted issue- if one takes into account the role of UNRWA and other NGO's in the conflict.

Gerald M. Adler, LLM, JSD Hove, July 9, 2004

13.July 2004

Postscript: The International Court of Justice Decision on the Barrier

Since completing this critique, the International Court of Justice has published its advisory opinion on the legal consequences of the "the Wall." It is therefore more than appropriate to make a brief comment on some of the major issues raised in that opinion.

1. Israel's Motivation in Constructing the Fence

The Court, in its opinion, nowhere referred to the scope and extent of the damage to Israeli citizens and their property caused by terror, which is the motivating factor for the construction of the fence.

The Court assumed that the primary motivation was annexation of land because the fence encompassed most of the Jewish settlements. This latter fact is also consistent with Israel's declared motivation that the fence was constructed as a defensive measure against terrorist activity which commenced in 2000. Under Oslo, Settlements are a matter for final status negotiation.

2. Palestinians Intentional Breach of Hague Regulations and 4th Geneva Convention: Assimilation of Combatants with Non-Combatants

Of significance was the Court's failure to refer to the intentional Palestinian blurring of the distinction between combatant-militants and non-combatants- a distinction which is crucial in the laws of war and the humanitarian provisions of the Regulations and the Convention and underlies the military necessity for the fence. The leadership of the Palestinian Authority has encouraged its masses to become involved in the militant struggle against Israel. Its children are being inculcated with hatred and manipulated to become "shahid" martyrs for the cause; its young people, both male and female, are encouraged to participate in terrorist activity against Israel. In so doing, both the Palestinian Authority and the militants themselves fail to maintain the distinction between combatants and non-combatants contrary to the Hague Regulations and the Geneva Convention. The Court ignores this fact and its implications.

Israel's position is exacerbated by the Palestinian commission of "grave

¹⁵⁵ The Geneva Convention imposes obligations on the Governments of all the States involved in the conflict. In particular, Article 146 declares that **each** High Contracting Party shall be under an obligation to search for persons alleged to have committed, or to have ordered to be committed "Grave Breaches" [as defined later] and to bring such persons before its own courts... or it may hand them over to another High Contracting Party, if the latter has made out a prima face case. "Grave Breaches" if committed against persons or property protected by the Convention are defined in Article 147 and include "wilful killing... wilfully causing great suffering or serious injury to body or health." A High Contracting Party is not allowed to absolve itself or any other High Contracting Party of any liability incurred by itself in respect of such breaches (Article 148)

breaches” in the Geneva Convention: the wilful killing and maiming of Israeli non combatants by terrorist militants who not only fail to distinguish themselves as combatants, but who also abuse the protected status and inviolability of medical and religious facilities intended for humanitarian purposes. These factors have a direct bearing on Israel’s efforts and responsibility for protecting both its citizens, and for as long as they are there, its settlements and constitute the military necessity for the construction of the fence.

3. Tendentious Terminology

In passing, it should be noted that the Court’s continual reference to the construction of the terrorist barrier as a “wall” is of itself tendentious. A chain-linked fence constitutes 95% the construction complained of. The fact that the Court adopted the term because it was used by the General Assembly contrary to factual reality does not excuse the Court from adopting an expression that portrays the true facts.

4. Palestine Mandate

In its historical review of the context, the Court is very selective in its choice of relevant facts and documents. In referring to the Palestine Mandate for example, it noted that more advanced nations were to provide guidance to a less politically advanced population in its quest for self determination until it was able to assume such responsibility among civilised nations. By implication, the Court was referring to Palestinian self determination- but it forgot, just as the British Administration “forgot” that the main objective of the Palestinian Mandate was as a homeland for the Jewish people who have maintained a centuries old connection with the Land. A major objective in the Mandate was the encouragement of Jewish settlement on public and wasteland. Such rights as were given to the population under a Mandate were preserved when Britain surrendered it back to the United Nations.

5. Resolution 181

The Court refers to the General Assembly’ Resolution 181 which recommends the division of the Palestine into a Jewish and an Arab State, a recommendation which was accepted by the Jews but rejected by the Arabs who immediately commenced an military invasion. The end result of that invasion was that Jordan retained control but not sovereignty over the West Bank as expressed in the Armistice Agreement. It is strange that the Court did not determine that Jordan’s subsequent annexation of the West Bank in 1950 was both contrary to the Armistice Agreement and principle that territory could not be acquired by conquest.

6. 1948 Armistice Agreement.

The Court acknowledged that the armistice line did not constitute a waiver of the respective rights of the parties, and that no military action over such line was permitted. However, notwithstanding that Jordan itself breached the Armistice Agreement by annexing the West Bank in 1950 (which Britain herself condoned by recognising Jordan’s illegal action) the ICJ nevertheless condemned Israel for its breach of the Armistice Agreement during the Six Day War. After ignoring

Israel's appeal not to become involved in the conflict initiated by Egypt and Syria, Jordan commenced shelling Israeli territory while its troops took control of the demilitarised UN headquarters located beyond the Armistice lines. The Court ignored that it was Jordan, which was the first to open hostilities against Israel in breach of the Armistice, and that Israel's occupation of the West Bank is a result of defensive military action.

7. UNSC Resolution 242

The Court referred only to the first operative clause of Resolution 242, which called for Israel's withdrawal "from territories" captured in the Six Day War. It ignored completely the second clause which required withdrawal "to secure and recognized boundaries free from threats or acts of force." The two provisions were drafted conjunctively, (the word "both" being expressed in the text). UNSC Resolution 338, passed after the 1973 War, confirmed this package deal in calling upon the parties to implement Resolution 242 "in all of its parts." The two operative clauses in Resolution 242, when read together, clearly do not contemplate that the 1948 lines are the permanent ones.

The ICJ totally omitted the ultimate goal of UN Resolution 242, expressed in paragraph 3, as the achievement of a "peaceful and accepted settlement." This has to be by way of negotiation, not by way terrorism or even conventional warfare. Accordingly the Court was wrong in implying that Israel to take her defensive measures against terrorism on the "Green" 1948 lines.

8. Oslo Peace Process

The Court barely mentioned the Oslo Peace Process and the failure of the Palestinian Authority to fulfil its obligations to fight terrorism given in the Oslo II Agreement (1994), and in the subsequent Wye River (1998) and Sharm el-Sheikh (1999) Memoranda. The obligations included the apprehension and punishment of all persons involved in acts of violence and terror, collection of all Palestinian illegal weapons and the reduction in the number of Palestinian "police." The breach of these undertakings justified Israel's right, under Oslo II, to re-enter territory from which she had withdrawn her troops and to take such action as might be necessary. Such action could reasonably include the construction of the fence.

The Court also ignored the Oslo undertakings by the Palestinians to resolve their dispute with Israel by negotiation and appeared blind to the fact that these commitments were the cornerstone for Israel's recognition of the PLO as the representative of the Palestine people and for permitting its leadership to enter the West Bank from its exile in Tunisia. Had such not been the case, Israel, as the Occupying Power, would not have had to contend with the degree of militancy and terror against her population such as to cause her to construct the fence in the first place.

The Court ignored the fact that Israel found no necessity to construct a terrorist barrier between 1967 and 2001, and that it was the planned and calculated decision of the Palestinian leadership to initiate the war of terror which demanded Israeli reaction.

9. Inapplicability of UN Charter Article 51, and Hague Regulations Article 23(g)

The Court denies the applicability of the right of self defence provided under Article 51 of the UN Charter on the grounds that the armed attack is not caused by one state against another. The conclusion of the Court is preposterous. Article 51 declares that nothing in the Charter impairs the right of self defence “if armed attack occurs against a Member state.” There is no requirement in the Article that the aggression must be State instigated. The Courts decision implies that a state may not defend itself against terrorism emanating beyond its jurisdiction. The Court ignores the fact that the Palestinians, although generally not recognised as constituting a State, have taken upon themselves the obligations imposed on States under the Geneva Convention. The implications flowing from the Court’s holding, creates serious ramifications in the application of the Hague Regulations and Geneva Conventions and the general war against terrorism.

The Court disallowed the applicability Article 23(g) of the Hague Regulations. This article permits the destruction or seizure of the enemy's property, if such be imperatively demanded by the necessities of war. The Court’s refusal to apply this Article was grounded on the argument that Article 23(g) applies only during hostilities and that since hostilities have ceased, the only Regulations which continue to apply, are those relating to the obligation of the Occupying Power to restore, and ensure, as far as possible, public order and safety. This conclusion is fallacious.

The Court blinds itself to the realities on the ground! While formal hostilities may have ceased following the 1967 War and for some time thereafter, since September 2000, hostilities created by wide scale terrorism have resumed, such that Israel was compelled to instigate special military action in self defence (“Operation Defensive Shield”). If one takes to its logical conclusion, the Court’s holding that “Hostilities” section in the Regulations has ceased to apply, then no restriction is placed on any of the means by which belligerents [Palestinian terrorists] may injure the enemy [Israel]. The terrorists are therefore free, and do in fact, “kill or wound treacherously individuals belonging to the hostile nation”; “employ arms, projectiles, or material calculated to cause unnecessary suffering”; “make improper use of ..the military uniform of the enemy and... the distinctive badges of the Geneva Convention,” as well as failing to distinguish themselves as belligerents and identifiable from civilian non-combatants.

10. Israeli Human Rights

In referring to the various international human rights instruments which accord the Palestinians the freedom of movement, the rights to work, to health and to a standard of living, the Court completely ignores that those same instruments also accord Israelis the same rights. More importantly those instruments accord the right to life- a right which Palestinians terrorists deny Israeli citizens and which Israel respects in the Palestinians.

11. Conclusion

The Court in accepting jurisdiction has allowed itself to be drawn into what is clearly a political issue that must be settled by negotiation. Having accepted the reference, the Court clearly failed to give weight to the many counter arguments that justify the construction of security barrier against terrorism. By its decision, the International Court of Justice has done irreparable harm to its reputation as

an independent judicial institution and to the advancement of international law
as an acceptable means of conflict resolution.

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