Israel Ministry of Foreign Affairs

Unofficial Summary of State of Israel's Response regarding the Security Fence

28 Feb 2005

Background

1. Israeli law provides that any administrative decision of the state is subject to judicial review by the Israel Supreme Court sitting as the High Court of Justice. The court can be petitioned by any affected party, including any Israeli or Palestinian. Many, if not most, of the measures taken by Israel in its fight against terrorism have been challenged before the Court by Palestinians or by Israeli human rights groups. On many occasions the court has required the state to change its policies as a result of such petitions.

2. Since Israel commenced construction of the security fence, in 2002, over 70 petitions have been submitted to the High Court of Justice on the issue. A significant number of these have resulted in changes to the route of the fence, or the humanitarian arrangements accompanying its construction, either as a result of rulings by the court, or as a resulted of arrangements negotiated between the two sides.

3. In one recent petition, relating to building of the security fence in the area of the villages of Boudrus and Shukba, the petitioners made reference to the Advisory Opinion of the International Court of Justice regarding Israel's security fence (*Legal Consequences, Advisory Opinion, ICJ Reports 2004, p. 136*). In making a temporary order in the case, the President of Israel's Supreme Court invited the Government to offer its views on the Advisory Opinion reached by the International Court of Justice.

4. On 23 February 2005, the Government of Israel submitted its Response to the cases, which also analyzed the views of the State regarding the ramifications of the Advisory Opinion and offered a comprehensive legal position regarding the factual and legal basis for the construction of the fence.

Factual and legal background to the construction of the fence

5. The decision to construct the fence was a direct response to the terror attacks against Israel which began in September 2000. These attacks caused the terror to become perceived as a strategic threat upon Israel. For example, in the month of March 2002 alone, 135 Israelis were killed and 721 were injured in terrorist attacks. The response emphasizes that the fence is a temporary security measure is not intended to annex territory or to predetermine the political border of Israel. No changes have, in fact, been made to the political boundaries which remain subject to negotiation between Israel and the Palestinians.

6. The fence has proven to be quite effective. According to a study compiled by the Israel Security Agency (see "Four Years of Conflict"") the fence has deeply effected the ability of terrorists to carry out attacks, thwarted suicide bombings and has led to a dramatic decline in the number of Israeli casualties and wounded, despite the fact that the fence has yet to be completed. For example, in the period between August 2003 through August 2004, there was a dramatic decrease of 84% in the number of Israelis killed by terror attacks as compared with the period between September 2001 through July 2002. The security fence remains important even in the current atmosphere of Israel carrying on a dialogue with the Palestinian Authority.

7. A majority of the route of fence is situated, for security reasons, in the West Bank, but it also runs inside Israel. Israel recognizes that the fence impacts on the residents of the area, both those who have had property requisitioned for the purpose of the construction of the fence, and those who live and work in its proximity. The challenge facing Israel is to find the appropriate balance between the duty to protect the lives of the citizens and residents of Israel from terror, and the duty to limit, as much as is possible, the negative effect upon Palestinian residents as a result of the construction of the fence.

8. In the Response, the State argues that the construction of the fence is consistent both with international law and Israeli domestic law, as interpreted by Israel's High Court of Justice in its most significant case dealing with the fence to date, H.C. 2056/04 Bet Sourik Village Council v. Government of Israel ("Bet Sourik"). It analyses the facts of the two current cases to see if they meet with the tests of Bet Sourik.

9. In the current cases, orders were issued to requisition property in the area near the "Green Line". In both cases the deviation east of the "Green Line" is relatively minor and is necessitated by security considerations alone due to the topographical circumstances in the area. In the area of Boudrus a significant portion of the fence runs through Israel. In order to allow farmers access to tend the few dozen olive trees that remain west of the fence, agricultural gates will be built and access will be permitted. The owners of the land were offered both compensation (use fees) for the land and compensation for the replanting of the trees moved east of the fence. In both cases there will be no Palestinian residents west of the fence and the total land West Bank area remaining west of the fence will be minimal.

10. In the view of the State, the balance struck in the routing of the fence is consistent is consistent with the legal tests regarding military necessity and proportionality as determined in Bet Sourik. These are proportional effects, less than the significant security benefits which would be achieved by the construction of the fence.

Advisory Opinion of the International Court of Justice

11. The second part of the response considers the Advisory Opinion of the International Court of Justice in The Hague. The response argues that the Advisory Opinion is not relevant to the two cases before the Court. This conclusion is based upon a detailed analysis of the Advisory Opinion and its findings.

12. It will be recalled that Israel did not consent to the hearing of this issue before the International Court of Justice. The position of Israel was, and remains, that the issue which the Advisory Opinion deals with was not appropriate for consideration by an international legal forum.

13. Despite its position of principle, and despite the fact that the Advisory Opinion is not binding, and does not create international law, Israel has not ignored the Advisory Opinion, and has carefully considered its impact on a range of issues. This non-binding status of advisory opinions was recognized by the ICJ itself within the Advisory Opinion, by the President of the Court, while speaking at the United Nations and by prominent legal commentators.

14. Israel recognizes that the International Court of Justice is an important international tribunal and the important position that the ICJ has in deciding legal disputes between States. Thus, despite the criticism of the State of Israel towards the conclusions of the Advisory Opinion and the procedures which led to its findings, Israel recognizes that in order to offer a full reply to Israel's High Court of Justice, a detailed consideration of the legal ramifications of the Advisory Opinion, and a consideration of its impacts, is appropriate even if it remains non-binding in nature.

15. The State of Israel's analysis of the findings of the Advisory Opinion falls into two parts: the factual considerations upon which the Advisory Opinion is based and the legal background, for consideration of the status of the fence.

16. The primary factual basis for the writing of the Advisory Opinion was a series of reports written primarily in 2003 by various United Nations officials and special rapporteurs regarding the fence. This factual basis before the Court, and especially the facts upon which the Court chose to reach its conclusions, were general, inexact and unbalanced. Among the crucial omissions, the Response notes that the information offered almost no consideration of the terror attacks against Israel, the military necessity in the construction of the fence, the balancing of considerations taken during the planning of the route or of the obligation to protect the lives of the citizens and residents of the State of Israel from terror attacks.

17. As regards the route of the fence, the Response notes that the information which the Court relied upon did not consider separately the different sections of the route and thus did not allow the Court to balance the various considerations regarding each section of the fence. The Advisory Opinion itself considered the fence as a single entity. As a result, inexact and outdated figures regarding some sections of the fence led to a complete rejection of the entire hundreds of kilometers of the route. It was inappropriate to accept an overarching conclusion regarding the whole route of the fence without a detailed discussion regarding the various sections.

18. The construction of the fence demanded consideration of the balance between the security needs of the citizens of Israel and the negative impact upon the Palestinian residents. The lack of complete information, especially in regard to the military necessity could not allow for a reasonable factual or legal analysis of the circumstances which entailed a conflict between two competing interests.

19. Additionally, the reports that were submitted to the International Court of Justice purported to represent the factual situation on the date of their writing, the period near the end of 2003. Since that time, material changes in the route have been made, including an improvement in the meeting the challenges relating to providing for the fabric of life of residents living near the fence. It should be remembered that the first sections of the fence, on which the Court centered much of its consideration, were built amidst the heat of the conflict, when the need to block terror attacks was especially acute. Now, with the partial limiting of terror attacks and as part of a continuing learning process, significant changes have been made to the existing route and in future routes being planned. These changes have also been implemented on the areas in the route that the ICJ emphasized.

20. An additional factor was the verdict in Bet Sourik, which led to wide changes in the route of the fence and to an improvement in the consideration of the fabric of life of Palestinian residents. Therefore, the factual basis that the International Court of Justice considered is no longer relevant. The changes in the route are exemplified by the Government of Israel's decision of 20 February 2005 which determined a revised routing of the fence. This route is materially different from the route that the Advisory Opinion considered, and it significantly reduces negative impact on the residents of the area. For example, the Palestinian presentation to the ICJ claimed that over 43.5% of the West Bank would be on the Israeli side of the barrier. The ICJ itself determined that 16.6% would be on the Israeli side. In fact, following the recent decision of the Government, less then 8% of the area of the West Bank will be so affected.

21. Following a consideration of the factual background described in the Advisory Opinion, the response considered the legal basis, the areas of international law, considered by the International Court of Justice in the Advisory Opinion. This analysis centered on the Law of Belligerent Occupation and the Law of Armed Conflict, both regarding the law for the beginning of hostilities and the law for conducting of armed conflict. It also considered the various human rights treaties that Israel is a party to and Israel's inherent right of self defense, and its impact on the construction of the fence.

22. An analysis of the legal framework used by the ICJ to reach its ruling regarding the legality of the fence shows that this framework was similar to the framework considered by Israel's High Court of Justice. The matters in which the Advisory Opinion sometimes differed from this framework or the positions reached by Israeli Courts were not relevant to the cases now before the High Court of Justice.

23. It is the position of the State of Israel that the factual background before the Court when it wrote the Advisory Opinion was lacking, inexact and now irrelevant in a manner that precludes its conclusions that the entire route of the fence within the West Bank was in violation of international law from having any application upon the cases before the High Court of Justice. These cases should be decided based upon the factual and normative bases that have been developed by Israel's Supreme Court as exemplified in the Bet Sourik case.