

January 28, 2004

Honorable United States Senator Hillary Clinton  
United States Senate  
Washington, DC 20510

Dear Senator Clinton,

The matter of the position of the United States with regard to the International Court of Justice and the security fence is urgent. It is of great concern to me and the entire Jewish community. I am writing to lay out some of the reasons why the ICJ should refuse the request that it render an advisory opinion on the Israeli security fence.

These proceedings were in response to a Palestinian sponsored General Assembly resolution calling on the Court to issue an advisory opinion on the subject. Two issues are before the Court: the legality of the fence as such; and, preliminary to that, whether, as Israel urges, the political nature of the dispute renders it unfit for judicial resolution—what American lawyers call a political question.

It is no secret that the referral of this question to the Court by the General Assembly was a Palestinian effort to mobilize world opinion against Israel. It was designed to generate show-trial with Israel alone in the dock. The Court, if it is to be a detached and respected arbiter of international law, must not allow itself to be recruited as a participant in a propaganda campaign at the behest of those whose hands are unclean, literally dripping with the blood of innocents.

However one views the idea of international justice, no good can come of this reference to the ICJ. First, it is noteworthy that the ICJ, as an instrument of the United Nations (the very organization which not so long ago labeled Zionism as a form of racism), reflects the fundamental anti-Israel biases of that body.

No Israeli national has ever been elected to serve on that Court. Moreover, until recently when Israel was fully admitted to the Western European and Other group (not the Middle East group, where it belongs), Israel was not a member of a regional grouping eligible to nominate candidates to the Court.

Second, the question referred to the International Court by the General Assembly was so one-sided as to preclude any credible judicial response. The security fence is a measured response to a persistent pattern of terrorism sponsored by the Palestinian Authority, and terrorist bands of thugs such as Hamas and Islamic Jihad. None of these groups' actions are before the Court. The one-sided nature of the inquiry demonstrates that the reference is not about interpreting international law, but propaganda masquerading as law. If the Court

accepts the General Assembly's reference, and the United States stands mutely by, then not only is international law discredited, but, with American acquiescence, it becomes a weapon in the hands of terrorists, and their state sponsors.

In an ordinary litigation, a court can order all the parties to comply with their respective and reciprocal legal obligations. In the reference to the ICJ, the General Assembly has so skewed the dispute as to make a just result impossible. The UN General Assembly did not ask, and did not put before the Court, whether the Palestinian Authority has breached its legal obligations under the international law by funding or encouraging (in fact, actually engaging in) terrorism. It did not ask, and did not put before the Court, whether the Palestinian Authority was in breach of its duty—under both international law and the Oslo Accords—to suppress terrorism. It ask did not ask, and did not put before the Court, questions about possible remedies for these Palestinian violations.

Of course, it is absurd to think of terrorists abiding by a judgment of the ICJ. But it is precisely the one-sided nature of the proceeding which makes it unsuitable for a court. Any decision about the legality of the security fence which does not address the murderous acts which generated it would be legally unsatisfactory, morally reprehensible, and an immovable barrier to progress toward Middle East peace.

Third, the decision of the General Assembly to refer the matter of Israel's security fence to the ICJ was far from unanimous. The European countries all abstained—precisely because they were concerned that the reference threatened to convert every diplomatic dispute into a legal one. With the growth of international law, particularly to the extent that it includes the views of the so-called “best writers” on international law, it is difficult to conceive of any pending dispute that could not plausibly be transformed into a legal one.

Lawyers and law have a place in diplomacy, but not a leading one. The creative solutions to the deep seated conflict in the Middle East will come through diplomacy and negotiation, not from a procrustean bed of general rules of international law.

Fourth, the same Third World majority which sent the fence issue to the ICJ could do the same for American actions in Iraq taken in defense of our troops and innocent Iraqi civilians. (We note that it has been widely reported that the United States has modeled many of its anti-terror tactics that Israel has in dealing with Palestinian terrorism).

Fifth, when asked to deliver an advisory opinion—in those jurisdictions which permit this somewhat unusual device—a court always retains the discretion not to comply with the requested opinion for prudential reasons,

including the need to avoid the court being seen as a partisan institution. That is the course which we believe most appropriate here. Indeed, it appears as if the International Court of Justice has, by its order of December 19, 2003, invited briefing of this very subject.

Sixth, the pendency of the issue before the ICJ offers the Palestinians a further excuse for not negotiating with the Israelis. They certainly will not make any concession so long as they can harbor the illusion that the ICJ will render a verdict, which will hand them a victory. The Palestinians need to negotiate, not litigate, with the Israelis. The United States should say so.

We note that the position we urge—that the question before the Court is a non-justifiable political question—is fully in keeping with American practice. Our courts from the Supreme Court on down, uniformly refuse to adjudicate disputes about the proper course of foreign policy—whether the Viet Nam war, the Panama Canal treaty, the status of Taiwan, the status of the West Bank, or the legality of the recent war in Iraq—on the grounds that they are political questions best determined elsewhere in the government. This Administration, like its predecessors, has vigorously opposed efforts to involve the courts in foreign policy.

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The barrier, and its route, may be a good idea or not. We do not now solicit the United States' support for the barrier and the route it follows. We recognize that is a controversial issue, dividing, for example, Israelis themselves. There are ample diplomatic *fora* to consider and debate this barrier. Israel has shown itself willing to consider the views of the United States with regard to the fence's location and its impact on Palestinians. It has asserted repeatedly that the route of the fence has no larger political meaning with regard to an ultimate Israel-Palestine border.

The barrier is overwhelmingly a measure designed to thwart murder for political ends. Every state owes its citizens a duty of protection against terrorist attack. The Court will make a far larger contribution to the cause of peace—and the war on terrorism—if it simply abstains from this case, and leaves it to the parties, and interested nations, to reach a settlement in the Middle East. The United States can and must urge that course on the Court.

I hope all this proves helpful.

Sincerely,

Jack Rosen  
President  
American Jewish Congress