



Sperrmauer Gutachten

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136

Israel begann im Jahr 2002 mit dem Bau einer Sicherheitsmauer an der Grenze zwischen dem israelischen Kernterritorium und dem Westjordanland. Die Mauer befindet sich zum Teil auf palästinensisch selbstverwaltetem Gebiet. Israel rechtfertigt den Mauerbau mit Hinweis auf das völkerrechtliche Selbstverteidigungsrecht gegen Terroranschläge, die aus dem palästinensischen Gebiet ihren Ausgang nehmen. (Quelle: Peters, Völkerrecht, 2.Aufl., 2008)

Auszüge aus dem Gutachten

„138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex 1 to the report of the Secretary-General states that, according to Israel: "the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)". More specifically, Israel's Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that "the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter"; the Security Council resolutions referred to, he continued, "have clearly recognized the right of States to use force in self-defence against terrorist attacks", [...].

139. [...] Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. [...] Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.“

Separate Opinion Judge Buergenthal

“5. Whether Israel's right of self-defence is in play in the instant case depends, in my opinion, on an examination of the nature and scope of the deadly terrorist attacks to which Israel proper is being subjected from across the Green Line and the extent to which the construction of the wall, in whole or in part, is a necessary and proportionate response to these attacks. As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not. But to reach a conclusion either way, one has to examine the facts bearing on that issue with regard to the specific segments of the wall, their defensive needs and related topographical considerations. Since these facts are not before the Court, it is compelled to adopt the to me legally dubious conclusion that the right of legitimate or inherent self-defence is not applicable in the present case. The Court puts the matter as follows: "Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. [...] Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case. (Para. 139.)



6. There are two principal problems with this conclusion. The first is that the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State, leaving aside for the moment the question whether Palestine, for purposes of this case, should not be and is not in fact being assimilated by the Court to a State. Article 51 of the Charter provides that "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 . . ." Moreover, in the resolutions cited by the Court, the Security Council has made clear that "international terrorism constitutes a threat to international peace and security" while "*reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)" [...]. In its resolution 1368 (2001), adopted only one day after the 11 September 2001 attacks on the United States, the Security Council invokes the right of self-defence in calling on the international community to combat terrorism. In neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case. (See Thomas Franck, "Terrorism and the Right of Self-Defense", *American Journal of International Law*, Vol. 95, 2001, pp. 839-840.)

Second, Israel claims that it has a right to defend itself against terrorist attacks to which it is subjected on its territory from across the Green Line and that in doing so it is exercising its inherent right of self-defence. In assessing the legitimacy of this claim, it is irrelevant that Israel is alleged to exercise control in the Occupied Palestinian Territory - whatever the concept of "control" means given the attacks Israel is subjected from that territory - or that the attacks do not originate from outside the territory. For to the extent that the Green Line is accepted by the Court as delimiting the dividing line between Israel and the Occupied Palestinian Territory, to that extent the territory from which the attacks originate is not part of Israel proper. Attacks on Israel coming from across that line must therefore permit Israel to exercise its right of self-defence against such attacks, provided the measures it takes are otherwise consistent with the legitimate exercise of that right. To make that judgment, that is, to determine whether or not the construction of the wall, in whole or in part, by Israel meets that test, all relevant facts bearing on issues of necessity and proportionality must be analysed. The Court's formalistic approach to the right of self-defence enables it to avoid addressing the very issues that are at the heart of this case."