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### **LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY**

#### **(REQUEST FOR ADVISORY OPINION)**

*Position paper presented by  
the International Federation for Human Rights (FIDH) and  
the International Commission of Jurists*

In June 2002, Israeli authorities began constructing what they call a “security fence”. The structure itself, planned to stretch to 687 kilometres in length, varies in different areas. In rural areas, it consists of layers of razor wire, military patrol roads, sand paths to trace footprints, ditches, surveillance cameras and a three-metre high electric fence. This barrier is 60-100 metres wide. An additional buffer zone exists 30-100 metres on each side of the barrier/wall. Palestinians are prohibited from entering this zone, which contains electric fences, trenches, cameras and sensors, and is patrolled by the Israeli military. There are also reported plans for “depth barriers” 150 metres in length, to be erected a few kilometres east of the barrier/wall itself. In urban areas, such as Qalqiliya and East Jerusalem, the barrier/wall is constructed of eight-metre high concrete walls with concrete watchtowers. It is also planned to extend into the Jordan Valley, and will join with the Western section to form two distinct enclosed Palestinian areas to the North and South of Jerusalem. Jericho will be encircled, while East Jerusalem will be isolated from the rest of the West Bank on the one hand and cut in two parts in some areas. A restrictive system of permits and passages through a limited number of gates complements the building of the barrier/wall and applies solely to the Palestinians.

Israel has justified construction of the barrier/wall by claiming it is necessary to ensure the security of Israelis.<sup>1</sup> Israel has the right and the duty to protect the security of its citizens and to defend its territory. However, any security measures must be in strict conformity with Israel's obligations

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<sup>1</sup> See: Summary legal position of the Government of Israel in the Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, UN Doc. A/ES-10/248, 24 November 2003, pp 8-9.

under international law, including international human rights and humanitarian law. It is evident from numerous reports of United Nations agencies,<sup>2</sup> the Special Rapporteur for Human Rights in the Occupied Palestinian Territories<sup>3</sup> and leading international and local human rights NGOs that the construction of such a wall seriously hinders the enjoyment of the most fundamental human rights by the Palestinian population and is in violation of international law.

## **I. Jurisdiction of the International Court of Justice over the issue**

The General Assembly of the United Nations, in accordance with Article 96 paragraph 1 of the UN Charter, decided to request the International Court of Justice, pursuant to article 65 of the Statute of the Court, to render an advisory opinion on the “legal consequences arising from the construction of a wall...”. In view of Article 65, paragraph 1, of the Statute of the Court and of Article 96 of the Charter, the opinion requested must be on a legal question.

Regarding the present case, it has been argued that the question before the Court is an essentially political one. Such an assertion is doubtful as the issue raised before the Court is definitely of legal nature within the meaning of the Statute of the International Court of Justice and the United Nations Charter: it concerns the “*legal* consequences of the construction of the wall...considering *the rules and principles of international law*, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions”.<sup>4</sup> The question put to the Court is “framed in terms of law and raise[s] problems of international law; [...] These questions are by their very nature susceptible of a reply based on law”.<sup>5</sup>

In its advisory opinion about the *Legality of the use by a State of nuclear weapons in an armed conflict* of 8 July 1996, the Court determined that “the question put to the Court [did] in fact constitute a legal question, as in order to rule on the question submitted to it, the Court [had to] identify the obligations of States under the rules of law invoked, and assess whether the behaviour in question conformed to those obligations, thus giving an answer to the question posed based on law”. The International Court of Justice has also very clearly stated in previous decisions that “[t]he fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute” (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, I.C.J. Reports 1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17,*

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<sup>2</sup> See: OCHA, UNRWA. See also Report of 30 April 2003 of the Mission to the Humanitarian and Emergency Policy Group (HEPG) of the Local Aid Coordination Committee (LACC) – The Impact of Israel’s Separation Barrier on Affected West Bank Communities, Follow-up Report of 31 July 2003 to the Humanitarian and Emergency Policy Group (HEPG) and the Local Aid Coordination Committee (LACC) – The Impact of Israel’s Separation Barrier on Affected West Bank Communities, Follow-up Report of 30 September 2003 to the Humanitarian and Emergency Policy Group (HEPG) and the Local Aid Coordination Committee (LACC) – The Impact of Israel’s Separation Barrier on Affected West Bank Communities, Follow-up Report of 30 November 2003 to the Humanitarian and Emergency Policy Group (HEPG) and the Local Aid Coordination Committee (LACC) – The Impact of Israel’s Separation Barrier on Affected West Bank Communities. .

<sup>3</sup> See: Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A, E/CN.4/2004/6, 8 September 2003.

<sup>4</sup> See: General Assembly resolution A/RES/ES-10/14 (A/ES-10/L.16) adopted on 8 December 2003.

<sup>5</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15.

paragraph 2, of the Charter), *Advisory Opinion, I.C.J. Reports 1962*, p. 155)".<sup>6</sup>

The International Court of Justice concluded in its advisory opinion on the *legality of the threat or use of nuclear weapons* that "The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion".<sup>7</sup>

The International Court of Justice, as the main judicial organ of the United Nations, is vested with certain responsibilities regarding international law and its respect by Member States.<sup>8</sup> The Court is especially vested with particular responsibilities regarding the Palestinian Territories. Palestine is a former territory placed under the mandate of the League of Nations and its territory was subjected to a partition plan elaborated by the United Nations General Assembly itself. The non-respect of this plan and the subsequent conflicts has not in any manner altered this specific responsibility. This responsibility has been reinforced by the numerous resolutions pertaining to the Palestinian Question adopted by the General Assembly and the Security Council.

Therefore, it is of greatest importance and interest that the International Court of Justice issues an opinion on the legal consequences arising from the construction of the barrier/wall that is being built by Israel in the Occupied Palestinian Territory, including in and around East Jerusalem.

## **II. Applicable law: both international human rights and humanitarian law apply**

The Gaza Strip and the West Bank, including East Jerusalem, have been under Israeli Military occupation since 1967 and the *de jure* applicability of the Fourth Geneva Convention to these territories has been confirmed by the High Contracting Parties to the Convention,<sup>9</sup> and repeatedly affirmed through resolutions of the United Nations Security Council and General Assembly and by the International Committee of the Red Cross. Furthermore, the international humanitarian law and international human rights law are concurrently applicable, as affirmed *inter alia* by the UN treaty bodies<sup>10</sup> and by the Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territories<sup>11</sup>.

Israel's obligations under international human rights treaties and under customary law are applicable wherever Israel exercises effective control over territory, including non-sovereign Occupied Territory. Israel is a party to the International Covenant on Civil and Political Rights (ICCPR) and to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Israel has made

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<sup>6</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 73-73, para. 15; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 234, para.13 recalling its previous jurisprudence: "Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . ." (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 87, para. 33.)

<sup>7</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 234, para.13.

<sup>8</sup> See: Article 92 of the Charter of the United Nations which states that the International Court of Justice shall be the principal judicial organ of the United Nations.

<sup>9</sup> Conference of High Contracting Parties to the Fourth Geneva Convention Geneva, Declaration, 5 December 2001.

<sup>10</sup> See Human Rights Committee, General Comment No. 29: States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, § 3; Human Rights Committee, Concluding Observations: Israël, CCPR/C/79/Add.3, 18 August 1998, § 10, and CCPR/CO/78/ISR, 21 August 2003, § 11; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, E/C.12/1/Add.90, 23 May 2003, § 15 and 31 and E/C.12/1/Add.69, 31 August 2001, § 11 and 12.

<sup>11</sup> See: Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A, E/CN.4/2004/6, 8 September 2003, § 2.

a declaration under article 4 of the ICPPR to derogate from the ICCPR only in respect of article 9 (arbitrary detention).<sup>12</sup> States are permitted to derogate from, i.e. suspend provisionally, their obligations regarding certain human rights and fundamental liberties.<sup>13</sup> This possibility is strictly limited. General comment No. 29 of the Human Rights Committee is decisive in clarifying the criteria and conditions for recourse to measures of derogation.<sup>14</sup> Derogations are only permissible if the following requirements are met.

- The situation must constitute an exceptional danger to the public that threatens the existence of the nation;
- The State party must have officially declared a state of emergency. This condition is essential for maintaining the principles of legality and the rule of law;
- The derogation measures must be of an exceptional and provisional nature;
- The derogations are only permitted to the extent strictly required by the exigencies of the situation. This condition applies to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency;
- The principle of proportionality must be respected;
- The measures of derogation must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin;
- The measures of derogation must not be inconsistent with the State Party's other obligations under international law, particularly the rules of international humanitarian law;
- There can be no derogation of certain rights qualified as being non-derogable.

Where limitations on human rights are permitted on security grounds, they must be strictly necessary and proportionate to meet the security threat. Thus the International Covenant on Civil and Political Rights accepts restrictions to freedom of movement (article 12), freedom of thought, conscience and religion (article 18), freedom of expression (article 19), freedom of assembly (article 21), freedom of association (article 22) and to political rights (article 25). The Human Rights Committee in its General comments Nos. 10, 22, 27 and 29<sup>15</sup> has specified the conditions under which restrictions to rights are possible.

In light of these elements, the possibility of restricting the exercise of rights is not left to the free judgement of the States. It is subjected to strict conditions:

- The restrictions have to be provided for by law;
- The restrictions have to be necessary in a democratic society to protect national security, public order, public health or morality, or the rights and freedoms of others;
- The restrictions have to be necessary to protect these objectives;
- The restrictions have to be proportionate to the interest to be protected;<sup>16</sup>

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<sup>12</sup> Declaration of 3 October 1991: "The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention. "In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

<sup>13</sup> "The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant." Human Rights Committee, General Comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11 of 31 August 2001, par. 1.

<sup>14</sup> Human Rights Committee, General Comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11 of 31 August 2001.

<sup>15</sup> Human Rights Committee, General comment No. 10, "Freedom of expression (art. 19)", of 29 June 1983, par. 4; Human Rights Committee, General Comment No. 22, "The right to freedom of thought, conscience and religion (art. 18)", 30 July 1993, par. 8; Human Rights Committee, General Comment No. 27, "Freedom of movement (art.12)", CCPR/C/21/Rev.1/Add.9 of 02 November 1999, in particular pars. 11 to 18; and Human Rights Committee, General comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11, 31 August 2001, pars. 4, 7 and 9.

<sup>16</sup> The restrictions must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed. See par. 13 of General comment No. 27, "Freedom of movement (art. 12)", CCPR/C/21/Rev.1/Add.9, 2 November 1999, of the Human Rights Committee.

- The restrictions have to be consistent with all of the other rights recognized in the relevant international instrument.

Regarding the legal status of the Israeli presence in East Jerusalem, numerous UN Security Council resolutions have confirmed that Israeli attempts to change the legal status and demographic composition of East Jerusalem “have no legal validity” and are null and void. The General Assembly has taken a similar approach, once again in its recent resolution ES-10/14 (2003). The resolutions have also confirmed that the international community regards East Jerusalem as occupied territory to which the Fourth Geneva Convention applies.<sup>17</sup>

The territory of concern is those areas within the West Bank where the barrier/wall is constructed. In those and surrounding areas, Israel plainly retains effective military and territorial control and therefore occupation continues.

The Hague Regulations 1907 and the Fourth Geneva Convention 1949 provide the treaty-based law applicable in the Occupied Palestinian Territories. It should be emphasized that under article 42 of the Hague Regulations, a territory “is considered occupied when it is actually placed under the authority of the hostile army” and “the occupation extends only to the territory where such authority has been established and can be exercised”.<sup>18</sup>

The International Federation of Human Rights and the International Commission of Jurists highlight that the international community has made its view on the applicability of the Fourth Geneva Convention to the West bank consistently clear through UN General Assembly and Security Council resolutions. The International Committee of the Red Cross also regards both the Hague Regulations and the Fourth Geneva Convention as applicable.<sup>19</sup>

Furthermore, according to its article 4, the Fourth Geneva Convention, applies to persons “who, at any moment, and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals”. Palestinian civilians in the Occupied Territories, who are not taking part in the hostilities, are thus “protected persons” under article 4.

It is generally accepted that most provisions of The Hague Regulations and the Geneva Conventions are customary law. The International Court of Justice stated in the *Corfu Channel* case of 9 April 1949 that The Hague and Geneva Conventions have enjoyed a broad accession and that these fundamental rules were to be observed by all States whether or not they had ratified the conventions that contained them, because they constituted intransgressible principles of international customary law. The world Court, in its advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons (1996)*, stated that these rules indicated the normal conduct and behaviour expected of

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<sup>17</sup> See: Security Council Resolution 252 (1968) of 21 May 1968 (1426<sup>th</sup> meeting); Security Council resolution 267 (1969) of 3 July 1969 (1485<sup>th</sup> meeting); Security Council Resolution 298 (1971) of 25 September 1971 (1582<sup>th</sup> meeting); Security Council resolution 476 (1980) of 30 June 1980 (2242<sup>nd</sup> meeting); the Security Council resolution 478 (1980) of 20 August 1980 (2245<sup>th</sup> meeting) is of particular relevance. ; see also General Assembly resolution concerning the status of Jerusalem (not exhaustive) 36/120 E of 10 December 1981 ; 37/123 C of 16 December 1982 ; 38/180 C of 19 December 1983 ; 39/146 C of 14 December 1984 ; 40/168 C of 16 December 1985 ; 41/162 C of 4 December 1986 ; 42/209 D of 11 December 1987 ; 43/54 C of 6 December 1988 ; 44/40 C of 4 December 1989 ; 45/83 C of 13 December 1990 ; 46/82 B of 16 December 1991 ; 47/63 B of 11 December 1992 ; 48/59 A of 14 December 1993 ; 49/87 A of 16 December 1994 ; 50/22 A of 4 December 1995 ; 51/27 of 4 December 1996 ; 52/53 of 9 December 1997 ; 53/37 of 2 December 1998 ; 54/37 of 1 December 1999 ; 55/50, 1 December 2001. See also Resolution 2253 (ES-V) of 4 July 1967 (1548<sup>th</sup> plenary meeting), Measures Taken by Israel to Change the Status of the City of Jerusalem.

<sup>18</sup> “Legal consequences of Israel’s construction of a separation barrier in the Occupied Territories”, by Oxford Public Interest Lawyers for ACRI, February 2004.

<sup>19</sup> See: Conference of High Contracting Parties to the Fourth Geneva Convention: Statement by the International Committee of the Red Cross, Geneva, 5 December 2001, available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList325/D86C9E662022D64E41256C6800366D55#2>

States.

The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which has already become customary and which reflected the most universally recognized humanitarian principles.

Israel is therefore bound by customary humanitarian law in the Palestinian Occupied Territories.

It should also be highlighted that the Israeli Supreme Court has accepted the applicability of the Fourth Geneva Convention in its recent decision *HCIJ 7015/02 Ajuri v IDF Commander* in September 2002 in which the Supreme Court of Israel sitting as a High Court stated: “The Court has held that the prohibition on forcible transfer is a rule of international treaty-based law, and thus is not applicable in domestic law unless it is enacted into the domestic law. However, this conception has changed, both in international public law and in the judgments of this court. Now, it is almost undisputed that the Fourth Geneva Convention reflects customary law and binds all states – even those that have not signed it – because it enshrines basic principles accepted by all states.”<sup>20</sup>

### **III. The barrier/ wall in light of international humanitarian law and international human rights law:**

#### **Israeli policies regarding the construction of the barrier/wall gravely breach international humanitarian law**

Article 23(g) of the Hague Regulations prohibits the destruction or seizure of enemy's property, unless it is imperatively demanded by military necessity. But here, the “twisting, invasive and dispossessing” barrier/wall serves no military necessity. International law of war and the law of human rights interprets the term “military necessity” while adopting the legitimate purpose of the use of force determined in the UN charter: the changes in the *jus ad bellum* brought about by the UN charter have added a new dimension to this principle of military necessity. Prior to 1945, once a State was justified in going to war it was invariably entitled to seek the complete submission of its adversary and to employ all force, subject only to constraints of humanitarian law, to achieve that goal. That is no longer permissible. Under the UN Charter, a State which is entitled to exercise the right of self-defence is justified only in seeking to achieve the goals of defending itself and guaranteeing its future security.

In other words, “military necessity” is derived from the right of States to ensure its security, which extends to the defence of the State and obviously, the defence of the fighting force itself. Under no circumstances could the military necessity be extended to the defence of inhabitants living in the occupied territory, because with respect to them there is only the authority to administer «order» and «public life». Nor can military necessity be used, and certainly not with the same degree of force, to defend elements that are foreign to the occupied territory, such as settlers, who most certainly do not have an inherent right under international law to settle in the occupied territory.<sup>21</sup>

International humanitarian law may allow for the requisitioning of property in occupied territories solely if it is for the need of the occupying forces. Article 53 of the Fourth Geneva Convention prohibits any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to

<sup>20</sup> See: *Ajuri v. IDF Commander in West Bank*, Case N° HCIJ 7015/02 [2002], Israel Law report 1, Supreme Court of Israel, September 3, 2002, paragraphs 131-133, 138, 144 and 155-162, para. 155.

<sup>21</sup> High Court of Justice Israel; petition for Order Nisi and Interlocutory Order submitted by Ha'Moked, 2003 (HCIJ 9961/03).

social or cooperative organizations, except where such destruction is rendered *absolutely necessary by military operations*.

Israel's requisition of Palestinian property to construct the barrier/wall violates prohibitions on the confiscation of private property in Occupied Territory and its duties of trusteeship over public lands. Furthermore, by deviating from the 1949 "Green Line" to protect illegal Israeli settlements in the Occupied Territories, the barrier/wall seeks to unlawfully misuse the security powers of humanitarian law.

At the heart of the Fourth Geneva Convention is Article 27, which proclaims the principle of respect for the human person and the inviolable character of the basic rights of individuals. While certain rights may be restricted for security measures "as may be necessary as a result of war," no specifications are made as to what security measures may be considered legitimate actions for a State to take in a time of emergency. This leaves a great deal of discretion to the parties to a conflict to restrict rights. The ICRC Commentary stresses however, that what is essential is that such measures not affect the fundamental rights of the persons concerned.

While Israel is not precluded under international law from placing limited restrictions over Palestinians' freedom of movement, any such restrictions must be justified and must not infringe upon other basic rights. As noted by the ICRC, measures which serve to isolate entire villages are contrary to international humanitarian law, and such restrictions frequently lead to grave breaches of numerous provisions thereof. In particular, measures taken to address security concerns must be in accordance with international humanitarian law, and must allow for a quick return to normal civilian life.

The barrier/wall could amount to a form of prohibited collective punishment of Palestinians and may result in the unlawful forcible transfer of some Palestinians from their homes.

### **The barrier/wall in light of international human rights law**

The impact of the barrier/wall on the enjoyment of human rights by Palestinian people is severe, especially on freedom of movement, right to property, right to privacy, family and home as enshrined in the ICCPR and in customary law. The barrier/wall also undermines the right to work, the right to an adequate standard of living, including the right to food, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the right to education as enshrined in the ICESCR.

The right to freedom of movement within one's own country is set forth in the Universal Declaration of Human Rights (UDHR) and the ICCPR. While this right may be subject to restrictions by law necessary for the protection of national security in a democratic society, any such restrictions must be necessary to protect such objectives, proportionate to the interest to be protected and consistent with other fundamental rights. However, the barrier/wall, a structure which graphically represents the prison-like plight faced daily by Palestinians, cannot be justified as a necessary and proportionate measure to protect national security. It isolates Palestinians not merely from Israelis but from each other. Most significantly, it has been constructed not on Israeli territory, but on the West Bank. The sweeping movement restrictions it imposes are disproportionate and target only Palestinian civilians.

The construction of the barrier/wall is resulting in the destruction of large amount of property and is in violation the right to property has enshrined in article 17 of the Universal Declaration of Human Rights and in customary international law.

The construction of the barrier/wall is neither necessary nor proportionate in response to the threat

to Israel, especially given that the wall is built not to separate Palestinian from Israel territory, but rather to divide Palestinian territory and thereby leave numerous Palestinians on the Western side of the divide.

Restrictions on Palestinians' right to movement have also resulted in further violations of other fundamental rights, including the rights to work, food, health, and education. Palestinians have been unable to access their agricultural land, employment, markets, clinics, schools, and social and religious communities. Israel is a party to the Covenant on Economic Social and Cultural Rights. The Committee on Economic Social Cultural Rights, has employed a "typology of State party obligations" to facilitate understanding with regard to the fulfilment of economic social and cultural rights. Under this model, States parties should "respect", "protect" and "fulfil" the rights embodied in the International Covenant On Economic, Social and Cultural Rights.

*The obligation to respect* requires State parties to abstain from actions that prevent persons from using available material resources in the way that they deem best to satisfy basic needs.

*The obligation to protect* requires States to implement measures necessary to prevent other individuals or groups, from violating the integrity, freedom of action, or other human right of the individual including the infringement on his or her material resources. Here, as far as economic social and cultural rights are concerned, States parties are required to protect individual freedom of action.

*The obligation to fulfil-facilitate* requires States parties to pro-actively engage in activities that strengthen access to and the utilisation of resources and the means to ensure the realisation of Covenant rights. *The obligation to fulfil-provide* requires States parties to take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction whenever they, for reasons beyond their control, are unable to realise these rights through the means at their disposal

What is at stake is the violation by Israel of the obligation not to prevent persons under its jurisdiction from enjoying the rights set forth in the Covenant.<sup>22</sup> By building the barrier/wall, Israel is depriving the Palestinians from enjoying their most basic rights granted by the ICESCR and violates the right to work, the protection accorded to family, the right to an adequate standard of living, including the right to food, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the right to education, all enshrined in the Covenant on Economic, Social and Cultural Rights.

### **The barrier/wall in light of the right of people to self-determination**

The barrier/wall represents a violation of the Palestinian right to self-determination as affirmed in Article 1(1) common to the ICCPR and the ICESCR: "people freely determine their political status and freely pursue their economic, social and cultural development". The International Court of Justice in the East timor case has considered the right of people to self-determination as a obligation *erga omnes*..., meaning that right is opposable to all States in the international community.

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<sup>22</sup> Committee on Economic, Social and Cultural Rights, General comment No. 3, The nature of States parties' obligations (art. 2, para. 1, of the Covenant), 14 December 1990, Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.

The UN General Assembly has repeatedly recognised the right of the Palestinian people to self-determination and condemned “those governments that deny the right to self-determination of the people of Palestine.”<sup>23</sup>

The right to self-determination underlies the Palestinian claims to sovereignty in the Occupied Territories and provides the legal framework for the political settlement sought through the peace process.

The construction of the barrier/wall will pre-empt the successful exercise of the Palestinian right to self-determination by annexing large portions of the West Bank and dividing the remainder into unconnected enclaves. The barrier/wall interferes with the right of Palestinians to freely determine their political status and to freely pursue their economic, social and cultural development.

According to the Special Rapporteur of the UN Commission on Human Rights, “the right to self-determination is closely linked to the notion of territorial sovereignty. A people can only exercise the right of self-determination within a territory. The amputation of Palestinian territory by the “barrier” seriously interferes with the right of self-determination of the Palestinian people as it substantially reduces the size of the self-determination unit within which that right is to be exercised.”

The departure of the barrier/wall from the Green Line could, as already stated by the Council of the European Union, “prejudge future negotiations and make the two-states solution physically impossible to implement”.<sup>24</sup> Although Israel denies the permanence or political significance of the barrier/wall, it has allocated a very large amount of funding for its construction and the route plainly incorporates unlawful Israeli settlements in the Occupied Territories into the Israeli side of the barrier/wall.

### **Conclusion: The barrier/ wall as *de facto* annexation in violation of international human rights and humanitarian law**

The barrier/ wall does not follow the route of the Green Line but rather snakes across the West Bank ensuring that most of the illegal Israeli settlements in the Occupied Palestinian Territory will be on the Israeli side. Approximately 14.5% of the West Bank will therefore be isolated between the barrier/ wall and the Green Line and *de facto* annexed to Israel. Plans for the secondary wall to extend into the Jordan Valley suggest that over 50% of the West Bank would be annexed by the construction of the barrier/ wall. The annexed land includes an extensive amount of Palestinian essential natural resources. The UN Office for the Coordination of Humanitarian Affairs estimates that over 500,000 Palestinians will be trapped between the barrier/wall and the Green Line. Another 250,000 Palestinians in the vicinity of the “Jerusalem Envelope” will find themselves trapped between the Green Line and the barrier/wall in a series of disconnected and isolated enclaves.<sup>25</sup> This will result in the economic and social suffocation of about 750,000 Palestinians, and there is a highest risk of those Palestinians fleeing their homes and / or being transferred.

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<sup>23</sup> For example, General Assembly Resolution 2649 (XXV) of 30 November 1970; Resolution 53/136, 9 December 1998 (85<sup>th</sup> Meeting), The right of the Palestinian people to self-determination; Resolution 54/152, 17 December 1999 (83<sup>rd</sup> meeting), The right of the Palestinian People to self-determination; Resolution 55/87, 4 December 2000, The right of the Palestinian people to self-determination; Resolution 56/142, 19 December 2001 (88<sup>th</sup> meeting), The Right of the Palestinian people to self-determination; 57/198, 18 December 2002, 77<sup>th</sup> plenary meeting, The right of the Palestinian people to self-determination.

<sup>24</sup> Presidency Conclusions, Brussels European Council, 16/17 October 2003. See also Statement by H.E. Ambassador Aldo Mantovani, Deputy Permanent Representative of Italy to the United Nations on behalf of the European Union to the Plenary Session of the General Assembly of the United Nations on the Question of Palestine - Item 38 (New York, 1 December 2003).

<sup>25</sup> “A fence along the settlers’ lines,” Ha’aretz, 3 October 2003.

While the occupation of territory during an armed conflict is not necessarily illegal *per se*, international law is clear that any such occupation must be of a temporary nature. UN Security Council Resolution 242 emphasised the “inadmissibility of the acquisition of territory by war”. The final status of any territory so occupied can only be determined in negotiations between the relevant parties, i.e., the Israeli and Palestinian people.

As noted by the UN Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territory, the barrier/wall must be condemned as,

“an act of unlawful annexation in the language of Security Council resolutions 478 (1980) and 497 (1981) which declare that Israel’s actions aimed at the annexation of East Jerusalem and the Golan Heights are “null and void” and should not be recognized by States”.<sup>26</sup>

The construction of the barrier /wall will isolate Palestinian people both from East Jerusalem and what remains of the West Bank. Coupled with the settlements and Israeli-only by-pass roads, it will prevent the emergence of a viable independent Palestinian State. The “violence of construction” it perpetuates is seen in the demolished homes, isolated villages, separated families and rotting agricultural lands left in its wake. Its construction clearly undermines any effort to obtain peace in the region through a just and durable solution. It is incumbent on the international community to condemn the construction of the barrier/wall and to act to stop and reverse the construction already underway.

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<sup>26</sup> E/CN.4/2004/6, 8 September 2003, § 16.