

# The Wall in the West Bank

## *State of Implementation of the International Court of Justice Advisory Opinion*

The purpose of this written brief is to demonstrate the non-implementation of the International Court of Justice's Advisory Opinion of 9 July 2004, more than two years after it was rendered. The brief will recall the Court's authoritative interpretation of international law and its rejection by Israeli authorities, demonstrate the continuing relevance of illegal Israeli settlements in the occupied West Bank for the question of the Wall, show the connection between the Wall and the annexation of Palestinian land, including the "invisible Wall" along the Jordan Valley, and recall the obligations of the international community with regard to the Wall.

### 1. The Continued Construction of the Wall

On 9 July 2004, the International Court of Justice, on the request of the UN General Assembly, delivered its Advisory Opinion (ICJ AO) stating that the construction of the Wall in the Occupied Palestinian Territories (OPT) violates international law.<sup>1</sup> On the Court, 14 out of 15 judges agreed with this conclusion, and the remaining judge disagreed for reasons relating to the admissibility of the case. This lends overwhelming credibility to the commonly held position that the Advisory Opinion, although not formally binding, reflects the correct interpretation and application of binding international law.

In spite of being put on notice for the illegality of the Wall constructed in the OPT, the Israeli authorities rejected the ICJ AO outright,<sup>2</sup> and continued constructing the Wall.<sup>3</sup> The Israeli High Court of Justice also dismissed the ICJ's authoritative interpretation. On 15 September 2005, it issued a judgment which concluded that Israel was entitled to build a Wall on occupied land.<sup>4</sup> The Israeli court attempted to rationalise its position by arguing that the ICJ based its decision on imprecise information and disregarded considerations of security in the construction of the Wall.

According to figures obtained from the United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), on 9 July 2004 when the ICJ AO was issued, approximately 185 kilometres of the Wall had already been constructed. In May 2006, out of a projected total of 703 kilometres, 362 kilometres of the Wall had been constructed and a further 88 kilometres were under construction.<sup>5</sup> Far from fulfilling its obligations under international law, as outlined in the Advisory Opinion, to dismantle the Wall in the OPT, return all lands seized for this purpose and in addition compensate for all material damage, Israel continued constructing the Wall and even attempted to accelerate it.<sup>6</sup>

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<sup>1</sup> International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004.

<sup>2</sup> Israel Ministry of Foreign Affairs, "ICJ Advisory Opinion on Israel's Security Fence - Israeli Statement", 9 July 2004, at <http://tinyurl.com/yzvupn>.

<sup>3</sup> Arnon Regular, "Despite court rulings, fence construction work continues apace", *Ha'aretz*, 11 July 2004.

<sup>4</sup> HCJ 7957/04, *Mara'abe et al. v. the Prime Minister of Israel, et al* (2005).

<sup>5</sup> UN OCHA, "Preliminary Analysis of the Humanitarian Implications of the April 2006 Barrier Projections," 7 July 2006, at [http://www.ochaopt.org/documents/OCHABarrierProj\\_6jul06\\_web.pdf](http://www.ochaopt.org/documents/OCHABarrierProj_6jul06_web.pdf).

<sup>6</sup> Mazal Mualem and Gideon Alon, "Sharon to Knesset: Separation fence will be first priority", *Ha'aretz*, 31 October 2005; Aluf Benn, "Olmert: Separation fence to be completed by end of year", *Ha'aretz*, 14 March 2006.

Only approximately 20% of the current route of the Wall follows the Green Line, which is the 1949 armistice line that today marks the limits of Israeli territory under international law. The route of the Wall traps more than 10% of the territory of the occupied West Bank and more than 60,000 Palestinians between the Green Line and the Wall. Palestinians in such “closed areas” are obliged to obtain Israeli permits, valid for up to a year, in order to keep living in their homes. Many more Palestinians live on the other side of the Wall but need to pass through it to access their land, jobs and family, as well as places of education and health facilities. Palestinians living on either side of the Wall must obtain Israeli permits to cross through specific gates in the Wall. In areas where the construction of the Wall is completed, military orders have created a buffer zone of 150-200 metres on the “Palestinian” side in which new construction is prohibited.<sup>7</sup> Thus, the Wall, itself mainly built on private Palestinian land, and its associated regime, violate multiple human rights of the affected Palestinians, including their freedom of movement, right to health, right to education and right to an adequate standard of living, as confirmed by the ICJ AO.<sup>8</sup>

## 2. The Illegality of Settlements and their Relevance to the Wall

The route of the Wall also includes more than three quarters of Israeli settlers, thereby indicating the link between the Wall and Israeli settlements in the West Bank. These have always been clearly illegal under Article 49(6) of the Fourth Geneva Convention, which provides, “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” Israel has been on notice for this illegality since 1967, when the legal counsel of the Israeli Foreign Ministry, Theodor Meron, wrote in a top secret memo, “My conclusion is that civilian settlement in the administered territories [OPT] contravenes the explicit provisions of the Fourth Geneva Convention.”<sup>9</sup>

The ICJ AO endorsed this legal conclusion, finding that, “Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6.”<sup>10</sup> All judges on the court agreed that, in the words of Judge Buergenthal, “the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law.”<sup>11</sup>

Since then, Israel has unilaterally withdrawn settlers from Gaza and some small areas of the northern West Bank, amounting to around 8,500 settlers or roughly two percent of the entire settler population. Nevertheless, settlers continue to move into the West Bank, which now contains approximately 445,000 settlers, including nearly 200,000 in occupied East Jerusalem,<sup>12</sup> resulting in an increased total number of settlers since July 2004. The Israeli government continues to actively support the construction and expansion of Israeli settlements in the OPT, in areas that it intends to annex to Israel.<sup>13</sup> As stated by then Acting Israeli Prime Minister Ehud Olmert on 4 May 2006, “The

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<sup>7</sup> *Supra* note 5.

<sup>8</sup> *Supra* note 1, at para. 133-134.

<sup>9</sup> Gershon Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements, 1967-1977*, 2006, p. 99.

<sup>10</sup> *Supra* note 1, at para. 120.

<sup>11</sup> *Supra* note 1, declaration of judge Buergenthal, 92, at para. 9.

<sup>12</sup> *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, UN Doc. A/HRC/2/5, 5 September 2006, at para. 49.

<sup>13</sup> Nadav Shragai, Yoav Stern and Akiva Eldar, “Tenders issued for hundreds of homes in W. Bank settlements”, *Ha'aretz*, 4 September 2006; “Israel plans more new homes in W. Bank settlements”, *Reuters*, 21 September 2006.

achievements of the settlement movement in main concentrations will forever be an integral part of the sovereign state of Israel, along with Jerusalem, our united capital.”<sup>14</sup>

The previously mentioned 15 September 2005 judgment of the Israeli High Court concerned a part of the Wall surrounding the Israeli settlement of Alfei Menashe, near the West Bank city of Qalqiliya. Yet, the Israeli court refused to address the issue of the legal status of the Israeli settlements in the OPT, claiming that “the military commander is authorized to construct a separation fence in the area for the purpose of defending the lives and safety of the Israeli settlers in the area. It is not relevant whatsoever to this conclusion to examine whether this settlement activity conforms to international law.”<sup>15</sup>

“Thus the High Court justified the destruction and seizure of the property of Palestinian inhabitants, who are protected persons under the Geneva Convention, by the need to protect persons who do not enjoy such status under the convention and whose very presence in the occupied Palestinian territory violates the convention.”<sup>16</sup> In effect, the Israeli authorities are using one illegal measure, the settlements, to justify another, the Wall. Indeed, the position taken by the Israeli court is not only contrary to the unanimous opinion of all 15 judges of the ICJ, it is also egregiously wrong. The settlements are illegal. The normal remedy under international law is to undo the illegal act. This means dismantling the settlements. If the settlements were dismantled, there could be no conceivable reason to build the Wall *inside* Palestinian territory in order to protect Israelis.

### 3. The Purpose of the Wall – Security or Annexation?

The Israeli authorities officially argue that the Wall is temporary and that its sole purpose is security – preventing Palestinians from carrying out attacks against Israelis. Since the cost of the Wall is estimated to several billion U.S. dollars, it is hardly intended to be temporary. Nor does security seem to be the sole consideration behind a route that leaves tens of thousands of Palestinians on the same side of the Wall as Israel and most Israeli settlers. Rather, as anticipated by the ICJ AO, the Wall has the purpose of illegally annexing Palestinian land:

The Court considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.<sup>17</sup>

In the more than two years since the ICJ made this statement, the Israeli intent to annex the land between the Green Line and the Wall has become apparent. On 8 March 2006, then Acting Israeli Prime Minister Ehud Olmert stated that “the course of the fence - which until now has been a security fence - will be in line with the new course of the permanent border.”<sup>18</sup> Then Justice Minister Tzipi Livni said in November 2005 that the separation fence will serve as “the future border of the state of Israel” and that, “the High

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<sup>14</sup> “Interim PM Olmert: Settler blocs to be part of Israel forever”, *Ha’aretz*, 4 May 2006.

<sup>15</sup> HCJ 7957/04 Mara’abe et al. v. the Prime Minister of Israel, et al.

<sup>16</sup> Alexander Orakhelashvili, “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction”, 11 *Journal of Conflict and Security Law* (2006), pp. 119-139, at 138.

<sup>17</sup> *Supra* note 1, at para. 121. See also para. 87.

<sup>18</sup> Aluf Benn and Yossi Verter, “Ehud Olmert: Permanent borders within four years”, *Ha’aretz*, 9 March 2006.

Court of Justice, in its rulings over the fence, is drawing the country's borders."<sup>19</sup> These clear statements by the two top officials in the current Israeli government demonstrate their intent to bring Israel's border in line with the Wall.

Israeli actions on the ground also testify to this intent, as shown in a recent in-depth study by B'Tselem and Bimkom.<sup>20</sup> In many instances, the route of the Wall chosen by the Israeli authorities is not the best possible route if security were the only goal. Instead, the route often follows the outline of approved or even unapproved settlement expansion plans. On 15 June 2006, the Israeli High Court of Justice issued a judgment rebuking the state of Israel for concealing such non-security related motivations behind the route of the Wall.<sup>21</sup> In several other cases related to the Wall before the same Court, "the state explicitly argued that the route's course was intended to protect not only built-up areas but also planned [settlement] expansions."<sup>22</sup>

Therefore, the true motivations behind the Wall appear to be the inclusion of as much West Bank land and as few Palestinians as possible behind the Wall, in order to preserve land for the further construction of Israeli settlements and enable future Israeli annexation of that land.<sup>23</sup> Such settlement expansion plans moreover defeat the argument that "buffer zones" between settlements and the Wall are needed for security reasons. Once the settlements are expanded according to plans, there will be no such "buffer zones."

The unreasonable difficulties that Palestinians face in accessing the lands between the Green Line and the Wall ("seam zone") also indicate that Israel is trying to progressively make them abandon their land. Firstly, a permit is required to pass through a designated gate in the Wall. According to the UN Special Rapporteur on the OPT, as of September 2006 approximately 40% of the applications were denied.<sup>24</sup> There is an increasing tendency to grant permits only to registered land owners and their direct descendants, thereby excluding most of the workforce in labour-intensive Palestinian agriculture. Those who actually obtain a permit face several further obstacles – the designated gate as indicated on the permit may be far away, have limited and irregular opening hours, and farm vehicles or tools are frequently not allowed to pass. As a result, there is an increasing tendency for land in the seam zone not to be cultivated. Under Ottoman land law applicable in the West Bank, land not registered or cultivated for three consecutive years can be declared 'state land' and ultimately confiscated. Much of the land in the seam zone has already been declared 'state land' by the Israeli authorities.<sup>25</sup>

In short, it is increasingly clear that the purpose of the route of the Wall is not related to security as much as it aims to annex the land in the "seam zone", constituting approximately 10% of the surface area of the West Bank.<sup>26</sup>

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<sup>19</sup> Yuval Yoaz, "Justice minister: West Bank fence is Israel's future border", *Ha'aretz*, 1 December 2005.

<sup>20</sup> Bimkom and B'Tselem, *Under the Guise of Security – Routing the Separation Barrier to Enable the Expansion of Israeli Settlements in the West Bank*, December 2005.

<sup>21</sup> HCJ 2732/05, *the Mayor of Azuun et al. v. the Government of Israel, et al* (2006).

<sup>22</sup> Aeyal M. Gross, "The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation", 19 *Leiden Journal of International Law* (2006), pp 393-440, at 421.

<sup>23</sup> Meron Rapoport, "Lies of the Land", *Ha'aretz*, 25 June 2006.

<sup>24</sup> *Supra* note 12, at para. 40.

<sup>25</sup> UN OCHA, "Humanitarian Impact of the West Bank Barrier – Special Focus – Crossing the Barrier: Palestinian Access to Agricultural Land", January 2006 – Update No. 6, pp. 8-10.

<sup>26</sup> See Akiva Eldar, "Insecurity Fence", *Ha'aretz*, 20 May 2006.

#### 4. The Eastern Wall Project and the Situation in the Jordan Valley

In the early stages of planning the route of the Wall, the Israeli government considered building an 'eastern Wall' to run along the Jordan Valley, separating it from other parts of the West Bank, which would be surrounded on all sides by the Wall. In the words of Israeli journalist Meron Rapoport:

[Head of the Jordan Valley Council David] Levy relates that he met with Sharon and that the prime minister spread out a map and showed him what the route of the fence would be in his region. He says that according to that map, the fence will keep all of the Jordan Valley and the Judean Desert under Israel's control, a 20-30 kilometer wide strip. Just as it appears in maps that Sharon has been showing for years, just as it appears in Prof. Sofer's map. Such a fence, Levy says with satisfaction, is a political statement, a statement of annexing the Jordan Valley under cover of the "security fence."<sup>27</sup>

The plans to build an eastern Wall appear to have been abandoned for the time being,<sup>28</sup> but the intention to annex the Jordan Valley remains. For instance, on 7 February 2006, Olmert referred to the Jordan Valley as "Israel's eastern border."<sup>29</sup> Al-Haq field information shows that the Jordan Valley is submitted to particularly harsh and recently aggravated movement restrictions.<sup>30</sup> Israel has begun to require permits for Palestinians to enter the Jordan Valley and to deny access to Palestinians who are not registered residents therein. Israeli military orders have declared the Jordan Valley a "closed area", a step which in the past has been the first towards land confiscation.

In short, the combination of Israeli statements and actions regarding the Jordan Valley strongly indicate that the eastern Wall project has, at least for the time being, given way to *de facto* annexation by other means. The Jordan Valley constitutes approximately 25% of the West Bank and includes some of its most fertile agricultural areas.

#### 5. Third-Party State Obligations under the ICJ Advisory Opinion

The ICJ AO details three principal obligations of the international community resulting from Israel's unlawful construction of the Annexation Wall:

- 1) No state may recognise the illegal situation resulting from the Wall's construction in the OPT.
- 2) States may provide neither aid nor assistance in maintaining the situation created by its construction.
- 3) All High Contracting Parties to the Fourth Geneva Convention must ensure respect of the Convention in the OPT.<sup>31</sup>

<sup>27</sup> Meron Rapoport, "A Wall in the Heart", *Yedioth Ahronoth*, on 23 May 2003

<sup>28</sup> Israeli Ministry of Defence, "Route of the Security Fence approved by the Israeli Government on February 20th 2005", Map, at <http://www.seamzone.mod.gov.il/Pages/ENG/route.htm>.

<sup>29</sup> Aluf Benn and Lilach Weissman, "Olmert: We Must Separate from Palestinians, draw final borders", *Ha'aretz*, 8 February 2006.

<sup>30</sup> See Al-Haq Affidavits 2827/2006, 2828/2006 and 2829/2006, at <http://asp.alhaq.org/zalhaq/site/eDocs/affidavits.htm>.

See also Ron Bousso, "Palestinians in Jordan Valley feel strangled by Israel", *AFP*, 22 June 2006.

<sup>31</sup> *Supra* note 1, at para. 159.

The first obligation is essentially passive. Concerned citizens could for instance ask their members of Parliament to ensure that their country does not take legal positions that in any way entrench the illegal Wall. The most obvious example of this would be to refuse to recognise any kind of Israeli annexation of the land behind the Wall, whether unilateral or through an agreement with a weak Palestinian partner.<sup>32</sup>

The second obligation is also passive, but more tangible. Concerned citizens could monitor what kind of cooperation their country carries out with Israel in order to make sure that it does not have the effect of maintaining the situation created by the Wall. For instance, any projects to "improve the Wall" (other than moving it outside of occupied territory) would facilitate the maintenance of the Wall and consequently be in breach of this obligation. United States Agency for International Development (USAID) took this into consideration when entering into an agreement with Israel to provide scanners for border crossings. The agreement only covered crossings that are on the Green Line.<sup>33</sup> Similarly, the ICJ AO motivated international donors to reject an Israeli proposal to build new roads and under/overpasses in the West Bank some of which bore apparent relations to the Wall, settlements or by-pass roads disserving the settlements.<sup>34</sup> Although not directly addressed in the ICJ AO, corporations should also be aware of the legal dangers inherent in supplying materials or services, directly or indirectly, for the purpose of constructing and maintaining the Wall.

The third obligation is active. Each state is legally obliged, under common Article 1 of the four Geneva Conventions of 1949, as authoritatively stated by the ICJ, to ensure the removal of the Wall from the OPT. In order to do this, it may use all means allowed under international law. Such means include the use of diplomatic pressure and public denunciation, expulsion of diplomats, non-renewal of trade privileges or agreements, reduction or suspension of aid, restrictions and/or ban on arms trade or military technology, ban on investments, restriction of exports, and freezing of capital.<sup>35</sup> Concerned citizens could for instance initiate questions to their government, in their national parliament, about what it has done to meet its obligation.

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<sup>32</sup> Such an agreement would moreover be void under Article 47 of the Fourth Geneva Convention.

<sup>33</sup> e-mail from Anna-Maija Litvak, USAID, to Shawan Jabarin, Al-Haq, on 16 December 2005.

<sup>34</sup> The World Bank, *Stagnation or Revival? – Israeli Disengagement and Palestinian Economic Prospects*, 1 December 2004, para. 28-30, pages 8-9. See also Amira Hass, "Donor Countries won't fund Israeli-planned separate roads for Palestinians", *Ha'aretz*, 30 November 2004.

<sup>35</sup> U. Palwankar, "Measures Available to States for Fulfilling Their Obligations to Ensure Respect for International Humanitarian Law," *International Review of the Red Cross*, No. 298, January-February 1994, pp. 9-25.