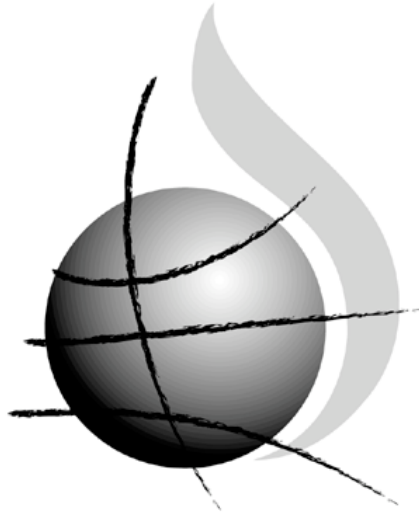


# **Israel's Separation Barrier**

## **Challenges to the rule of law and human rights**



**International Commission of Jurists, Geneva**

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## **Executive summary**

This document summarizes an analysis undertaken by the International Commission of Jurists of Israel's Separation Barrier (hereafter: Barrier) in light of international law, in particular international human rights and humanitarian law.

### **Background of Israel's Separation Barrier**

The construction of the Barrier started in June 2002 following a decision by the Government of Israel to approve its first phase. Further plans for the construction of the Barrier in the West Bank were approved on 1 October 2003. While some parts of the Barrier have already been completed, its construction is a continuous process. The exact route may be subject to changes, but it is planned to stretch to approximately 660 kilometres in length. The Barrier is built largely within the Occupied Territories and a majority of Israeli settlements will be included on the Israeli side of the Barrier.

The Barrier creates Palestinian enclaves within the Occupied Territories and prevents the access by Palestinians to considerable parts of the Occupied Territories. The Barrier separates not only Israelis from Palestinians but also Palestinians from Palestinians. It severely reduces access to land, workplaces and markets, as well as access to education and health institutions within the Occupied Territories, creating harsh repercussions on the wellbeing of the Palestinian population. Israelis, even those not residing in Israel, continue to enjoy their freedom of movement, while Palestinians' access to their land or workplace is limited by a system of gates regulated by a restrictive regime of special permits.

### **Objective of International Commission of Jurists' legal memorandum**

In light of the current public discussion on the Barrier and the arguments raised in the debates in the United Nations General Assembly, Security Council and before the International Court of Justice, the International Commission of Jurists considers it necessary to reiterate some basic principles regarding the scope and applicability of humanitarian law and in particular human rights law. This legal memorandum seeks to place the debate on the legitimacy of the Barrier on a more objective basis, namely that of the rule of law and of international human rights and humanitarian law. It is also motivated by the fact that the Barrier is likely to affect the human rights situation within the Occupied Territories for a significant period of time. The International Commission of Jurists also hopes that its analysis of key legal principles with regard to the Barrier may provide some guidance to the legal community in Israel and the Occupied Territories, where a number of important legal challenges to the construction of the Barrier are pending.

International human rights and humanitarian law both apply in the Occupied Territories. The Barrier in its present route and projection and with the set of rules and regulations that govern its construction and operation constitutes a severe violation of international human rights and humanitarian law. In particular, it interferes disproportionately with a range of fundamental rights and freedoms. In its present form, the Barrier cannot be justified under international law. Israel is therefore under an obligation to cease the construction of the Barrier in the Occupied Territories and to restitute property requisitioned for its construction.

## **Main conclusions and findings**

### ***1. The applicable legal framework includes international human rights law. The respect for human rights and the rule of law is imperative for the legitimacy of the Barrier.***

Contrary to the position taken by the Israeli Government, the international legal framework governing the Barrier includes not only international humanitarian law but also international human rights law. Israel is bound by human rights and humanitarian law obligations found in international treaties and in customary international law.

Obligations under international humanitarian law include the obligations set forth in the Fourth Geneva Convention as well as the 1907 Hague Regulations. Both Conventions apply to the West Bank as well as to East Jerusalem. Israel's obligations under international human rights law are found most relevantly in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

It is well established on universal as well as regional level that human rights treaties apply concurrently with international humanitarian law. While international humanitarian law occasionally provides a more specialized rule that may influence the interpretation of a human rights provision, both sets of law apply in their own right: they are complementary and not mutually exclusive. Furthermore, human rights treaties apply in all places where a state exercises "effective control" – even outside a state's formal territory – as is the case in the territories affected by the Barrier.

The Barrier is a contentious issue that has generated intense political debate. However, it does not exist in a legal vacuum. The Barrier's political legitimacy should flow from its compliance with the rule of law and the international legal obligations that bind Israel. The International Commission of Jurists recognizes Israel's legitimate security concerns. Israel has the right and obligation to protect those under its jurisdiction. However, the Barrier – even though motivated by the need to fight terrorist acts and to protect its citizens - must comply with Israel's fundamental obligations under international human rights and humanitarian law. Counter-terrorism measures should be seen as a response by a state that continues to abide by the rule of law and does not abrogate it. Both sets of law were crafted by states themselves, who were very conscious of the need to balance security risks with respect for individual freedoms. The obligations already take into account security threats, such as terrorist acts.

### ***2. The present Separation Barrier exceeds the limits of a justifiable security response both under human rights as well as under international humanitarian law.***

With its current route through the Occupied Territories, the Barrier causes severe hardship to the protected population and cannot be justified under international law as a legitimate response to the existing security threats that Israel faces. When one takes into account the cumulative impact of the following factors, the Barrier constitutes a disproportionate interference into the human rights of the Palestinian population.

1) The Barrier is not only a structure that separates Israelis from Palestinians; it also separates Palestinian communities from each other. It creates enclaves within the Occupied Territories and destroys the social and economic fabric of society. It is the specific course of the Barrier, which tears apart homogenous communities and infrastructures, that leads to many of the grave repercussions on the Palestinian population.

2) The Israeli Government has decided to route the Barrier largely within the Occupied Territories and to encompass most Israeli settlements. The inclusion of the settlements has largely led to severe restrictions on the movement of Palestinians and to the separation of Palestinian communities from each other. Israel is entitled to take measures to protect all those under its jurisdiction, both Israelis and Palestinians. This could include some short-term measures to protect its settlements. However, as these settlements are illegal under international law, Israel cannot support the interests of the settlements to the sole detriment of the original population. Yet, this is precisely the result of the Barrier system. It restricts the right and freedoms of Palestinians within their own territory, while ensuring that the settlers do enjoy these same rights and freedoms by integrating them on the western side of the Barrier. Whether or not the Barrier is a permanent structure, the timeframe is clearly open-ended and not merely short-term or truly temporary.

3) The Barrier is not simply a “neutral” physical structure. It is characterized by a restrictive legal regime that regulates its operation. This legal regime severely affects property rights, the use of and access to land, and establishes a system of personal and permanent permits for Palestinians for a limited number of specific purposes and subject to various restrictions. The separation from land, workplace and home leads to severe repercussions, in particular on the enjoyment of economic, social and cultural rights in the Occupied Territories.

4) This legal regime is inherently discriminatory. The movement and residence restrictions and permit requirements apply only to Palestinians because of their national origin and not to Israelis, Israeli settlers or those who fall under Israel’s law of return.

International humanitarian law may exceptionally allow for reasonable and proportionate distinctions based on nationality. While the specific context of occupation may enable a state to distinguish between an occupying force and the local population, it does not justify blanket differences in movement restrictions between Israeli and Palestinian residents of the Occupied Territory or between Israelis eligible under the law of return and the local Palestinian population.

5) The Barrier regime’s interference into the rights of the occupied population comes with an element of arbitrariness in the way the project is implemented and with a lack of effective remedy against the orders of the Military Commander. The inability to effectively challenge disproportionate measures exacerbates the arbitrary impact of the Barrier.

6) Finally, it is the severity and the sweeping nature of the restrictions that makes the measure disproportionate. The Barrier severely affects many civil and political as well as economic, social and cultural rights. Aggravated by its long-term and open-ended perspective it has adverse repercussions on all walks of Palestinian life and is likely to severely affect all aspects of Palestinian society. The cumulative impact of the Barrier regime on the rights of the occupied population must lead to the conclusion that the Barrier in its present route is a non-proportionate security response.

The Barrier is equally unjustifiable under the concept of military necessity found in international humanitarian law. The particular course of the Barrier within the Occupied Territories and the deliberate choice to include the majority of settlements results in unnecessary infringements into the rights of the protected population. The severity of the measure and its impact on the social fabric of the protected population render the Barrier excessive.

In conclusion, it is the route of the Barrier as well as the legal regime that regulates its operation that renders the Barrier disproportionate and discriminatory. A different Barrier with a different route and with a different set of legal rules and regulations accompanying its

operation may be justifiable under international law. In its present form, however, it constitutes a violation of international human rights and humanitarian law.

### ***3. Individual rights and obligations violated by the Separation Barrier***

The Barrier affects many human rights and humanitarian law provisions. The scope of the rights affected illustrates the magnitude of the interference. The main human rights concerns are the following:

#### *Freedom of movement*

The Barrier and its restrictive movement regime violate the right to liberty of movement and the right to residence, guaranteed under article 12, para. 1 ICCPR.

The Barrier also violates freedom of movement guarantees under international humanitarian law, as its severe impact is not justified under article 27 Fourth Geneva Convention.

#### *Movement related prohibitions*

The Barrier and its movement regulations will also constitute a violation of freedom of movement related prohibitions under international humanitarian law if they change the demographic composition of the Occupied Territories. This would violate the prohibition of forced transfer of the protected population in article 49 of the Fourth Geneva Convention. This would especially be the case if Palestinians were forced to leave their place of residence as a result of the Barrier and arbitrary denials of permanent permits.

The Barrier also helps to maintain and perpetuate the existence of illegal settlements and may facilitate further population transfer into those parts of the Occupied Territories that are located on the western side of the Barrier. This contradicts article 49, para. 6 Fourth Geneva Convention, which prohibits the transfer of foreign populations into occupied territory.

#### *Property confiscation and requisition*

The so-called “requisition” of private property constitutes for the most part an unlawful *de facto* confiscation of private property in violation of Israel’s obligations as Occupying Power under article 46 Hague Regulations. Even in the absence of a formal act of expropriation, the taking of property for the construction of the Barrier dispossesses the property owner of any meaningful perspective to use the “substance” of the right to property in any foreseeable future.

Contrary to the Israeli position private property requisition cannot be justified by reference to article 23 (g) Hague Regulations. This provision would allow for the confiscation of property only in the context of armed fighting to the extent justified on the basis of military necessity. It is not applicable to the present situation of occupation, nor are the private property requisitions for this Barrier “absolutely necessary as a result of war”.

The requisition of public land also violates article 55 Hague Regulations, which requires the Occupying Power to administer Palestinian land in the interest of the protected population as so-called usufruct. The destruction of property, such as buildings, dwellings, olive trees and alike may violate article 53 Fourth Geneva Convention.

#### *Right to privacy, family life*

The Barrier also violates a range of other human rights provisions, including the right to family life and freedom from arbitrary interference into one’s home and family life (articles 17, 23 ICCPR, article 10 ICESCR). Again, it is the course of the Barrier that

separates communities from each other and subjects any contact to a restrictive movement regime.

### *Economic, social and cultural rights*

The Barrier, its severe restrictions on the freedom of movement and the confiscation of land and property prevent the enjoyment of economic, social and cultural rights, including the right to work (article 6 ICESCR), the right to an adequate standard of living, including the right to food, water and housing (article 11 ICESCR), the right to the highest attainable standard of physical and mental health (article 12 ICESCR), the right to education (article 13 ICESCR) and the right to family life (article 10 ICESCR). As a State Party to the ICESCR, Israel is responsible for its implementation in the Occupied Territories. At the very least, Israel is obliged not to interfere in the enjoyment of the rights guaranteed in the Covenant. The Barrier has led to a severe deterioration in the enjoyment of economic, social and cultural rights of the Palestinian people, which would constitute a retrogressive measure in violation of the Covenant.

### *Due process and the rule of law*

Of particular concern is the lack of respect for proper legal and administrative processes and elementary standards of fairness in the application of the legal regime surrounding the Barrier. The Barrier, the process of confiscation of land and the issuance and arbitrary denial of permits raise basic rule of law concerns, in particular with regard to the right to an effective remedy (article 2, para. 3 ICCPR) and the right of access to an independent tribunal in the determination of any dispute affecting a civil right, such as the property title over land (article 14, para. 1 ICCPR). Article 14 ICCPR requires in particular an effective access to an independent court that fully considers both questions of facts and law in the determination of property confiscations. The inability to effectively challenge disproportionate measures exacerbates the arbitrary impact of the Barrier.

### *Non-discrimination*

The Barrier constitutes a discriminatory measure in the application of the rights set forth in both Covenants (article 2, para. 1 common to the ICCPR and the ICESCR), and the general discrimination clause of article 26 ICCPR. The movement and residence restrictions are *de jure* applicable only to Palestinians and not to Israelis, Israeli settlers or other people who fall under Israel's law of return. International law may allow exceptionally for reasonable and proportionate distinctions based on nationality provided that they are based on reasonable grounds and are proportionate. While the specific context of occupation may enable a state to distinguish between an occupying force and the local population, it does not justify blanket distinctions between Israeli and Palestinian residents of the Occupied Territory or between Israelis eligible under the law of return and the local Palestinian population. The application of restrictions exclusively and indiscriminately to all Palestinians as a group and the creation of severe interferences into their rights and lives cannot be regarded as reasonable within the meaning of the above-mentioned non-discrimination clauses.

### *Right to self-determination*

The long-term consequences of the Barrier, the fact that its route lies within the Occupied Territories and departs from the Green Line and that it is constructed with an open-ended perspective, puts the exercise of the right to self-determination as enshrined in article 1, para. 1 common to the ICCPR and the ICESCR of the Palestinian people under threat. The construction of the Barrier will isolate Palestinian people from East Jerusalem, the West

Bank and the Gaza strip. In combination with the restrictive movement regime, it will over time change the demographic structure of parts of the Occupied Territories. Under these circumstances, it may endanger the viability of any future Palestinian state.

#### ***4. The obligation to cease violations of international law***

The Barrier as constructed constitutes a serious violation of international human rights law and international humanitarian law. It constitutes an internationally wrongful act that requires Israel to cease the construction of the Barrier on the Occupied Territories and to dismantle what has been built so far. Moreover, Israel is under an obligation to restitute property and land to the owners in such a state that allows the use of land according to its previous purpose.

Third states are under an obligation not to aid and assist in the commission of this international unlawful act. States Parties to the Fourth Geneva Convention are also under the obligation not only to respect, but also to ensure respect for the provisions of the Convention.

#### ***5. Respect of all parties for the international rule of law***

Finally, the International Commission of Jurists strongly believes that any peaceful solution to the conflict in the Occupied Territories must be firmly based on respect for human rights and the rule of law by all sides. The International Commission of Jurists calls on the International Court of Justice as the principle judicial organ of the United Nations to uphold fully these fundamental principles of international human rights law and international humanitarian law. It also calls on the parties to the conflict to respect the forthcoming Advisory Opinion of the International Court of Justice on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.”

The construction of the Barrier as constructed at present violates human rights law. It undermines efforts to obtain peace in the region through a just and durable solution. Suicide attacks also violate international law and undermine the search for peace and security. The International Commission of Jurists calls on all parties, including third parties facilitating political dialogue, to fully respect human rights and humanitarian law and to base their policies on these standards. Human rights and humanitarian law cannot be selectively invoked by either party and apply even in the fight against terrorist acts.



## **Israel's Separation Barrier**

### **Challenges to the rule of law and human rights**

## **Part I: Introduction**

### **1. Object and purpose of the opinion**

This legal memorandum is prepared by the International Commission of Jurists and analyzes the most pertinent legal issues under human rights and international humanitarian law with respect to the construction of Israel's Separation Barrier.<sup>1</sup> Unless otherwise indicated, it is based on publicly available information about the already completed and projected construction of the Barrier and the legal regulation surrounding its operation.

The present memorandum does not address the political issues underlying the conflict in the Occupied Territories, but analyzes the Barrier exclusively from the perspective of international law. The Barrier is clearly an issue of intense political debate. However, as the then Secretary General of the International Commission of Jurists, Niall MacDermot, stressed in 1979 speaking about the Occupied Territories:

“As a non-governmental organization devoted to the promotion of the rule of law, we are a non-political organisation, though we are well aware that most of what we do or say is likely to have political repercussions. However, we seek to address problems as jurists, from a standpoint of legal norms.”<sup>2</sup>

Any political legitimacy of the Barrier should flow from the respect for the rule of law and in particular from its compliance with human rights law. Israel has justified the construction of the Barrier by the necessity to ensure the security of its citizens and to prevent suicide attacks and other acts of terrorism.<sup>3</sup> The International Commission of Jurists unequivocally condemns attacks against Israeli civilians. Such acts are prohibited under international law. Indeed, Israel has the right and the duty to protect the security of all those under its jurisdiction.

At the same time, the construction of the Barrier, even if undertaken as an anti-terrorism measure, does not exist in a legal vacuum or no man's land. In addition to being a political issue, it is also a legal issue and more specifically a human rights issue of major proportion.

The subject of this analysis is the Barrier as constructed and planned at the moment. It does not seek to analyze under what circumstances Israel may be eligible to build another kind of Barrier with a different route. This memorandum considers the legality of the specific measures taken as response to the security threat. It concentrates on the question of the proportionality and necessity of the Barrier under human rights and humanitarian law. This

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<sup>1</sup> The terminology used in this paper follows the language employed by the United Nations Secretary General in his report to the UN General Assembly, UN Doc. A/ES-10/248, 24 November 2003.

<sup>2</sup> Speech by Niall MacDermot on the occasion of the International Day of Solidarity with the Palestinian People, 29 November 1979, reprinted in: International Commission of Jurists Newsletter No.3, 1979.

<sup>3</sup> See: Ministry of Defence on the Seam Zone, Israel's security fence at <http://www.seamzone.mod.gov.il/Pages/ENG/purpose.htm>. It reads under the heading “purpose”: the sole purpose of the Security Fence, as stated in the Israeli Government decision of July 23rd 2001, is to provide security. The Security Fence is a central component in Israel's response to the horrific wave of terrorism emanating from the West Bank, resulting in suicide bombers who enter into Israel with the sole intention of killing innocent people. See also: 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.

memorandum neither speculates about the specific alternative steps, especially short-term security measures, Israel could take to protect its citizens in the Occupied Territories.

## 2. Basic features of the Separation Barrier

### 2.1. Structure and course of the Separation Barrier

In July 2001, the Israeli Cabinet first approved the Security Fence Programme as well as the establishment of a “Seam Zone Administration”.<sup>4</sup> The construction of the Barrier started in June 2002 following a decision of the Government of Israel<sup>5</sup> to approve its first phase. Further plans for the construction of the Barrier in the West Bank were approved on 1 October 2003.<sup>6</sup> While considerable parts of the Barrier have already been completed, the erection of the Barrier is ongoing.<sup>7</sup>

In rural areas it consists of layers of razor wire, military patrol roads and sand paths to trace footprints, ditches, surveillance cameras and a three-meter high fence with sensors to warn of any incursion. The Barrier is approximately 50-100 meters wide. Palestinians are prohibited from entering this zone, which contains trenches, cameras and sensors and is patrolled by the Israeli military. Additional plans foresee the construction of so-called “depth barriers” of 150 meters in length, to be erected a few kilometers east of the Barrier itself. These barriers have been described as “barriers without a fence designed to direct movement to a number of security control points”.<sup>8</sup> In urban areas, such as Qalqiliya and East Jerusalem, the Barrier is partly constructed of eight-meter high concrete walls with watchtowers.

The exact trajectory may be subject to changes, but it is planned to stretch to approximately 660 kilometers in length.<sup>9</sup> According to the United Nations, the course of the Barrier runs for 90 % within the Occupied Territories, east of the Green Line.<sup>10</sup> This would affect 943,000 dunams<sup>11</sup> of land according to recent data published by B’TSELEM.<sup>12</sup> Its route and planned route indents into the Occupied Territories and would, if fully implemented, encompass 54 Israeli settlements on the West Bank. For example, plans show that it will

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<sup>4</sup> See <http://www.securityfence.mod.gov.il/Pages/ENG/purpose.htm> and Government Decision 64/B of 14 April 2002.

<sup>5</sup> Cabinet Decision 2077 of 23 June 2002.

<sup>6</sup> Cabinet Decision 883 of 1<sup>st</sup> October 2003.

<sup>7</sup> See also the overview on the approved and completed sections of the Barrier provided by B’TSELEM at [http://www.btselem.org/english/Separation\\_Barrier/Statistics.asp](http://www.btselem.org/english/Separation_Barrier/Statistics.asp).

<sup>8</sup> Israeli Ministry of Defence, “Israeli Ministry of Defence, Questions and Answer”, at [www.seamzone.mod.gov.il](http://www.seamzone.mod.gov.il).

<sup>9</sup> Figures about the exact length differ. According to the approved route the main Barrier would have a length of 569 km and of 91 km for a secondary Barrier.

See B’TSELEM at [http://www.btselem.org/english/Separation\\_Barrier/Statistics.asp](http://www.btselem.org/english/Separation_Barrier/Statistics.asp) The UN Office for the Coordination of Humanitarian Affairs, Preliminary analysis reveals that the planned route to complete the Barrier will have severe humanitarian consequences for hundreds of thousands of Palestinians in the West Bank, January 2004 update refers to a total length of 638 km. The UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967, E/CN.4/2004/6/Add.1, 27 February 2004, p 7, estimates a total length of 687 kilometres.

<sup>10</sup> See Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13, 24 November 2003, A/ES-10/2/248.

<sup>11</sup> 4 dunams = 1 acre.

<sup>12</sup> B’TSELEM as of March 2004, see [http://www.btselem.org/english/Separation\\_Barrier/Statistics.asp](http://www.btselem.org/english/Separation_Barrier/Statistics.asp).

reach into the Occupied Territories for up to 22 km to include the settlement of Ariel.<sup>13</sup> Reports estimate that up to 320,000 Israelis, including in East Jerusalem, would be living on the western side of the Barrier.<sup>14</sup>

Some stages of the Barrier have already been built, whereas others have only been approved and may still be modified. On rare occasions, Israel has officially announced and dismantled part of an already erected piece of the Barrier.<sup>15</sup> Press reports in Israel indicate that the route might be further modified, including as a result of court challenges, though this has not been officially announced.<sup>16</sup> A number of earlier changes were also reported, but no information is available as to whether these were official decisions and whether, when and how they will be implemented.<sup>17</sup>

The Barrier physically separates parts of the Occupied Territories and isolates its inhabitants from the rest of the West Bank. It creates Palestinian enclaves within the territory between the Barrier and the Green Line. The route also turns cities and villages into enclaves that are almost entirely encircled by the Barrier. While figures on the affected land and population vary, partly because the construction is continuing and the route may change, estimates indicate that approximately 13.5% of West Bank land (not including East Jerusalem) will be separated from other parts of the West Bank<sup>18</sup>, including some important fertile land with water resources. Estimates further indicate that around 13,500 Palestinians are located between the Barrier and the Green Line in the areas where the Barrier has been built so far, while 50,000 inhabitants find themselves encircled by the Barrier.<sup>19</sup> By virtue

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<sup>13</sup> See Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13, 24 November 2003, A/ES-10/2/248, at 3. According to the estimates of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967, E/CN.4/2004/6/Add.1, 27 February 2004, p 3., there will be 54 settlements and 142,000 settlers included on the Israeli side of Barrier.

<sup>14</sup> See Amnesty International, *Israel and the Occupied Territories: The place of the fence/wall in international law*, February 2004, p 4; also B'TSELEM according to whom this would include 143,200 settlers of the West Bank and an additional 12 settlements with 179,000 inhabitants in East Jerusalem, see [http://www.btselem.org/english/Separation\\_Barrier/Statistics.asp](http://www.btselem.org/english/Separation_Barrier/Statistics.asp).

<sup>15</sup> <http://www.securityfence.mod.gov.il/Pages/ENG/news.htm#news16>. According to the Ministry of Defence it started to dismantle the fence on the eastern side of Baka al Sharqiya, 22/02/2004.

<sup>16</sup> See Haaretz Daily on 11 May 2004, "High Court will stop separation fence, defense officials fear".

<sup>17</sup> See B'TSELEM at [http://www.btselem.org/English/Separation\\_Barrier/Route\\_Changes.asp](http://www.btselem.org/English/Separation_Barrier/Route_Changes.asp).

<sup>18</sup> Figures differ, see UN OCHA January update, Preliminary analysis reveals that the planned route to complete the Barrier will have severe humanitarian consequences for hundreds of thousands of Palestinians in the West Bank, January 2004 update, <http://www.reliefweb.int/hic-opt/>. The report mentions that these figures are based on Israeli Government projections. B'TSELEM has referred to 16.8% of the land, including the land expropriated for the construction of the Barrier and land between the municipal boundaries of East Jerusalem and the Green Line, see at [http://www.btselem.org/english/Separation\\_Barrier/Statistics.asp](http://www.btselem.org/english/Separation_Barrier/Statistics.asp).

<sup>19</sup> For reference see: United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *The West Bank Wall*, July 2003, available at <http://www.reliefweb.int/hic-opt/wall/report/wall.htm>; United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *West Bank Barrier, Humanitarian Access and the Jerusalem Barrier*, December 2003, available at <http://www.reliefweb.int/hic-opt/wall/jm/index.htm>; United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Humanitarian Implications of the New Barrier Projections - Jan 2004 update*, available at [http://www.reliefweb.int/hic-opt/docs/UN/OCHA/Barrierprojections\\_Jan04\\_25Feb04\\_eng.pdf](http://www.reliefweb.int/hic-opt/docs/UN/OCHA/Barrierprojections_Jan04_25Feb04_eng.pdf).

The United Nations Relief and Works Agency for Palestine Refugees (UNRWA), *The West Bank Barrier*, available at <http://www.un.org/unrwa/emergency/Barrier/index.html> (including "Impact of the First Phase of the Barrier on the Qalqiliya, Tulkarm and Jenin districts"; "Special report on the West Bank Barrier" and "The Impact of the First Phase of Barrier on UNRWA-Registered Refugees" at <http://www.un.org/unrwa/emergency/Barrier/f-phase.html>); 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*,

of the Barrier, they are separated to varying degrees from essential services, such as health care, education, water resources and in particular their farmland and workplace. A World Bank monitoring report suggests that the completed sections alone already directly or indirectly affect 170,000 people in 38 cities, towns and villages because they are either living in enclaves, are encircled by the Barrier, or have their land on the other side of the Barrier.<sup>20</sup> The construction of depth barriers would create additional encirclements. The United Nations Secretary General Report of November 2003 estimated that another 160,000 Palestinians would be affected if the Barrier was to be implemented according to plans, because they would then live in enclaves or in almost encircled cities or tracts of land.<sup>21</sup>

The construction of the Barrier in the Occupied Territories has led to the seizure of considerable amounts of land, including fertile agricultural land. It has been accompanied by the destruction of olive and fruit trees, irrigated agricultural lands, water networks and agricultural roads.<sup>22</sup> Palestinians in the enclaves, the encircled cities and villages and those living close to the Barrier are frequently separated from their land, jobs, and health and educational services. Movement through the Barrier is - subject to permissions and opening hours – only possible through a selected number of gates, including agricultural gates that are meant to facilitate the access of farmers and landowners to their land.

## **2.2. The legal regime of the Separation Barrier**

As a physical structure the Barrier divides communities from each other. However, it must also be understood as a legal regime accompanied by a range of restrictions on the fundamental freedoms of the population in the Occupied Territories. The construction and operation of the Barrier is determined by a set of regulations and orders that affect property rights, use of and access to land, remedies, residency status and the freedom of movement of people and goods across the Barrier for various purposes.

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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>20</sup> See World Bank, 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, at 5.

<sup>21</sup> See Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13, 24 November 2003, A/ES-10/2/248, at 3. OCHA estimated in its January update that 20,000 Palestinians would be living in closed areas and 169,000 in enclaves. B'TSELEM estimates that 263,200 people would be surrounded by the Barrier (i.e. main Barrier, secondary Barrier or a combination of the two), with another 210,000 affected in East Jerusalem. It estimates further that up to 402,400 people would be affected in 102 communities lying immediately east of the Barrier, see at [http://www.btselem.org/english/Separation\\_Barrier/Statistics.asp](http://www.btselem.org/english/Separation_Barrier/Statistics.asp).

<sup>22</sup> World Bank, The Impact of Israel's Separation Barrier on Affected West Bank Communities, Follow-up Report of 4 May 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, at 33; para. I-23. B'TSELEM refers to 28,000 dunams (7000 acres) as expropriated land so far. See [http://www.btselem.org/english/Separation\\_Barrier/Statistics.asp](http://www.btselem.org/english/Separation_Barrier/Statistics.asp).

The territory between the Barrier and the Green Line – also called the “Seam Area/Zone” - has been declared a “closed military zone” by a Military Order dated 2 October 2003.<sup>23</sup> The order stipulates, that “*no person will enter the seam area and no one will remain there*”.<sup>24</sup> The order, however, exempts Israelis including Israeli settlers from its application *ratione personae*.<sup>25</sup> The regulation will not apply to Israelis, whereby an Israeli is defined as a citizen of the State of Israel, a resident of the State of Israel registered in the population registry in accordance with the Population Registry Law and anyone who is eligible to emigrate to Israel in accordance with the Law of Return.<sup>26</sup>

Palestinians residing in the closed zone, on the other hand, are allowed to enter and remain in the closed zone if they possess a written permit, which can authorize permanent residence.<sup>27</sup> Palestinians who are not resident in the “Seam Zone” can apply for personal permits if they have a specific reason to enter the closed area, such as to access their farmlands. Palestinians wishing to cross the Barrier have to apply for permits in advance. There are 12 different categories of personal permits defined by the purpose of the stay, including for farmers, employees, business owners and employees of the Palestinian Authority. The regulations do not, however, specify the criteria for accepting or refusing personal permits. Permit holders have to apply for special permission if they wish to travel by automobile, bring in merchandise or wish to stay overnight in the “Seam Area”. Even for permit holders (permanent and personal), movement through the Barrier is limited to the single gate specified in the permit. Personal permits granted, for example for farmers to access their land, are often only valid for a limited period. Access to the closed military zone for permit holders is further limited by the specific operating regimes of the gate in question. These procedures may differ from gate to gate, in particular in their opening hours, and are not always entirely predictable.<sup>28</sup>

In order to construct the Barrier, property is seized by Military Orders (requisition orders for military needs) in the West Bank, and by the Ministry of Defence in East Jerusalem. Requisition orders are temporary (usually for a period of three years), but can be renewed without limit. Requisition orders become valid the day they are signed, and remain valid even if they are not personally delivered to the affected owner.<sup>29</sup> While the Palestinian District Coordination Office is requested to deliver copies to the owners, there have been frequent reports that orders are not delivered personally, but simply left on the land

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<sup>23</sup> IDF – Order Concerning Security Directives (Judea and Samaria) (number 378), 1970, Declaration Concerning the Closure of Area Number s/2/03 (Seam Area), available in English translation at <http://domino.un.org/unispal.nsf/0/c6114997e0ba34c885256ddc0077146a?OpenDocument>

<sup>24</sup> See supra note 23, para. 3 (a).

<sup>25</sup> See supra note 23, article 4 (a).

<sup>26</sup> See supra note 23, para. 1 (a).

<sup>27</sup> Subsequent regulations by the head of the Civil Administration deal with requests for permanent residence permits as well as for personal permits to enter and stay in the “Seam Area”, see IDF – Order Regarding Defense Regulations (Judea and Samaria) (No.378), 5730-1970 Regulations Regarding Permanent Resident in the Seam Area Permit; IDF – Order Regarding Defense Regulations (Judea and Samaria) (No.378), 5730-1970, Regulations Regarding Permits to Enter and Stay in the Seam Area; IDF – Order Regarding Defense Regulations (Judea and Samaria) (No.378), 5730-1970, Regulations Regarding Crossing in the Seam Area, available at <http://www.hamoked.org.il/>.

<sup>28</sup> See B’TSELEM, Not All It Seems – Preventing Palestinians Access to their Lands West of the Separation Barrier in the Tulkarm-Qalqilia Area, June 2004.

<sup>29</sup> See for a description, World Bank, The Impact of Israel’s Separation Barrier on Affected West Bank Communities, Follow-up Report of 4 May 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, at 16; para. I-23.

concerned.<sup>30</sup> Persons affected by such orders have two weeks to file an objection to the Legal Advisor of the Military Commander of the West Bank, who submits the petition to an Israeli Defense Forces (IDF) Appeals Committee. If the petition is made within the first week, there is a stay of execution. Later petitions may still be considered, but do not result in a stay of execution. The decisions of the Appeal Committee are, however, not binding on the Commander of the West Bank.<sup>31</sup>

Appeals can also be lodged with the Israeli Supreme Court sitting as High Court in the Occupied Territories.<sup>32</sup> A number of current appeals are challenging the specific route of parts of the Barrier and in one major petition leading Israeli human rights organizations are challenging the overall legality of the route east of the Green Line.<sup>33</sup> Some requisition orders also indicate the possibility to apply for usage fees or compensation for the land on which the Barrier is constructed. It does not, however, extend to land from which Palestinian landowners are separated by the Barrier, even if access to this land is prevented by the denial of the relevant personal permits.

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<sup>30</sup> See for above, at 16; para. I-23.

<sup>31</sup> World Bank, *The Impact of Israel's Separation Barrier on Affected West Bank Communities*, Follow-up Report of 4 May 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*, at 18 according to which the Military Commander has the authority to reverse this decision.

<sup>32</sup> See Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13, 24 November 2003, A/ES-10/2/248. The legal regime differs, however, in East Jerusalem, where property requisitions are apparently based on the Emergency Requisition of Land Law, 5710 –1949, reference from B'TSELEM, *Behind the Barrier*, Human rights violations as a result of Israel's Separation Barrier, at 17 March 2003; On the Supreme Court sitting as High Court in the Occupied Territories, its jurisdiction and jurisprudence, see David Kretzmer, *The Occupation of Justice*, 2002.

<sup>33</sup> See HaMoked - Center for the Defence of the Individual - versus the Government of Israel, HCJ 9961/03, briefs are available at [http://www.hamoked.org.il/news\\_main\\_en.asp?id=25](http://www.hamoked.org.il/news_main_en.asp?id=25).

## **Part II: Sources and scope of applicable international law**

The Barrier and the regime that it establishes are subject to the norms and standards of international law applicable to the Occupied Territories. This includes in particular international humanitarian law and human rights law.

### **1. International humanitarian law**

Israel is bound as a High Contracting Party by the Geneva Conventions of 1949, most notably the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>34</sup> Israel is also bound by the international humanitarian law that has become customary international law. The 1907 Hague Regulations, the Geneva Conventions, and to a large extent the Additional Protocols to the Geneva Conventions all reflect norms that are now recognized as customary international law.

#### **1.1. Obligations as State Party to the Geneva Conventions**

Israel contests the *de jure* applicability of the Geneva Conventions to the Occupied Territories. It refers in particular to the lack of a recognized sovereign over the Occupied Territories prior to its annexation by Jordan and Egypt, and considers it, therefore, not to be a territory of a High Contracting Party as required by the four Geneva Conventions.<sup>35</sup> The International Commission of Jurists has consistently rejected this position.<sup>36</sup> Common article 2 of the four Geneva Conventions sets out the scope of application in the following way:

“In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

(...)”

The drafting history and the authoritative Commentary of the International Committee of the Red Cross (ICRC) reflects that the Geneva Conventions apply to armed conflicts between High Contracting Parties, including occupation of territory following armed conflict (article 2 para. 1), as well as to occupation not preceded by an international armed conflict (article 2, para. 2).<sup>37</sup> The occupation of the West Bank and East Jerusalem were

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<sup>34</sup> Ratification on 6 July 1951.

<sup>35</sup> See on this position: Summary of legal position of the Government of Israel, Report of the Secretary General prepared pursuant to General Assembly Resolution ES-10/13, Annex 1.

<sup>36</sup> See among others, International Commission of Jurists, *The Review*, 1977, No.19, Israel’s Settlements in the Occupied Areas, at 34.

<sup>37</sup> See J. Pictet (ed.), *IV Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, International Committee of the Red Cross, Geneva, 1958, pp. 21-22, Commentaries to the Geneva Conventions, ICRC, on article 2 para. 2 stating: “(...) the fact that the territory of one or another of the belligerents is later occupied in the course of hostilities does not in any way affect this; the inhabitants of the Occupied Territories simply become protected persons as they fall into the hands of the Occupying



clearly preceded by an armed conflict with Jordan and Egypt, both High Contracting Parties to the Geneva Conventions. Moreover, an interpretation that excludes the applicability of the Conventions because there was no sovereign title over the territory, would also contradict the object and purpose of the Fourth Geneva Convention, which is to protect the civilian population subjected to a foreign power. Whether the Geneva Conventions apply is determined by the factual test of whether there has been an armed conflict or occupation, rather than on the legitimacy of the conflict, the goals pursued or on legal titles. The Geneva Conventions reaffirm that their object and purpose is to protect civilians from any foreign power, expressed, among others, in common article 1, according to which, States Parties “undertake to respect and to ensure respect for the present Convention in all circumstances” (emphasis added). By the same token, article 4 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”.

Articles 1, 2 and 4 Fourth Geneva Convention read together reaffirm the *de jure* applicability of the Fourth Geneva Convention to the Occupied Territories. Palestinian civilians in the Occupied Territories, who are not taking part in the hostilities, are thus “protected persons” under article 4.

The *de jure* applicability of the Fourth Geneva Convention to the Occupied Territories, including East Jerusalem, has specifically been the subject of a Conference of all High Contracting Parties to the Geneva Conventions in 2001. The Conference was convened on the basis of the obligation of High Contracting Parties, expressed in common article 1, not only “to respect” but also “to ensure respect” for the Geneva Conventions.<sup>38</sup> The Conference adopted a declaration that reconfirmed the *de jure* applicability of the four Geneva Conventions to the Occupied Territories.<sup>39</sup> This declaration by the High Contracting Parties represents an authentic interpretation of the meaning of articles 1, 2 and 4 of the Geneva Conventions.<sup>40</sup>

The same position has also been consistently expressed by the international community as a whole through numerous resolutions of the United Nations Security Council and the

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Power. The sense in which the paragraph under consideration should be understood is thus quite clear. It does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared (that is in accordance with article 2, para. 1 – emphasis added). The paragraph only refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances. The wording of the paragraph [p.22] is not very clear, the text adopted by the Government Experts being more explicit (6). Nevertheless, a simultaneous examination of paras. 1 and 2 leaves no doubt as to the latter's sense: it was intended to fill the gap left by para. 1.(...)”.

<sup>38</sup> Common article 1 of the four Geneva Conventions requires States Parties to “respect” and to “ensure respect” for the obligations under the Conventions.

<sup>39</sup> Conference of High Contracting Parties to the Fourth Geneva Convention Geneva, Declaration, 5 December 2001, para. 3, “Taking into account art. 1 of the Fourth Geneva Convention of 1949 and bearing in mind the United Nations' General Assembly Resolution ES-10/7, the participating High Contracting Parties reaffirm the applicability of the Convention to the Occupied Palestinian Territory, including East Jerusalem and reiterate the need for full respect for the provisions of the said Convention in that Territory. Through the present Declaration, they recall in particular the respective obligations under the Convention of all High Contracting Parties (para. 4-7), of the parties to the conflict (para. 8-11) and of the State of Israel as the Occupying Power (para. 12-15)”;

See <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList325/D86C9E662022D64E41256C6800366D55#1>

<sup>40</sup> In line with article 31, para. 3 (b) of the Vienna Convention on the Law of Treaties of 1969.

General Assembly,<sup>41</sup> the Commission on Human Rights,<sup>42</sup> as well as by the ICRC - which is entrusted with a special role in the supervision of the proper application of international humanitarian law, especially of the Geneva Conventions.<sup>43</sup>

There can be no reasonable doubt that the four Geneva Conventions, and in particular the Fourth Geneva Convention, is *de jure* applicable to the Occupied Territories. The construction of the Barrier and the legal regime established to govern its operation must comply with the provisions of the Geneva Conventions.

## 1.2. Humanitarian law reflecting international customary law

Israel is also bound by customary international law. It is generally accepted that the provisions of the Hague Regulations annexed to Hague Convention IV on the Customs of War on Land, as well as the Geneva Conventions, in particular the Fourth Geneva Convention, have become an expression of customary international law. The International Court of Justice stated in its advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons (1996)*<sup>44</sup> that the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulation annexed to it, as well as the Geneva Conventions, have enjoyed broad accession and that these fundamental rules must be

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<sup>41</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 446 (1979) of 22 March 1979; 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; 54/77 of 6 December 1999; 55/50, 1 December 2001; 55/131 of 8 December 2000; 56/60 of 10 December 2001; 57/125 of 11 December 2002 . 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>42</sup> For the most recent resolutions: United Nations Commission on Human Rights, Resolution 2003/6 “Question of the violation of human rights in the occupied Arab territories, including Palestine” of 15 April 2003; Resolution 2003/7 “Israeli settlements in the occupied Arab territories” of 15 April 2003,; Resolution 2002/7 “Israeli settlements in the occupied Arab territories” of 12 April 2002, Commission on Human Rights Resolution 2002/8 “Question of the violation of human rights in the occupied Arab territories, including Palestine” of 15 April 2002, Commission on Human Rights Resolution 2001/8 “Israeli settlements in the occupied Arab territories” of 18 April 2001; Commission on Human Rights Resolution 2001/7 “Question of the violation of human rights in the occupied Arab territories, including Palestine” of 18 April 2001; Commission on Human Rights Resolution 2000/8 “Israeli settlements in the occupied Arab territories” of 17 April 2000, pp 2; Commission on Human Rights Resolution 2000/6 “Question of the violation of human rights in the occupied Arab territories, including Palestine” of 17 April 2000, pp 3 and 4.

<sup>43</sup> Conference of High Contracting Parties to the Fourth Geneva Convention: Statement by the International Committee of the Red Cross, Geneva, 5 December 2001, para. 2 available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwplList325/D86C9E662022D64E41256C6800366D55#2>.

<sup>44</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 256-259, para. 75-84, especially para. 79. See also *Corfu Channel, Merits, Judgement, I.C.J. Reports 1949*, p 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986*, p 112, pp 113-114, paras. 215 and 218-220.

observed by all States, whether or not they had ratified the conventions that contain them, because they “constituted intransgressible principles of international customary law”.<sup>45</sup>

The customary nature of international humanitarian law, and in particular the Geneva Conventions, has recently been recognized in a decision of the Israeli Supreme Court sitting as High Court in the Occupied territories. It stated in its case *HCI 7015/02 Ajuri v IDF Commander* of September 2002:

“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>46</sup>

Moreover, customary international law is to a considerable extent reflected in the two Additional Protocols to the four Geneva Conventions.<sup>47</sup>

### 1.3. Application to the West Bank and East Jerusalem

The Barrier is built predominantly on occupied territory as defined under international law. It should be emphasized that under article 42 Hague Regulations, a territory “is considered occupied when it is actually placed under the authority of the hostile army” and that “the occupation extends only to the territory where such authority has been established and can be exercised”.

The Israeli occupation did not end with the Oslo process. While it has been argued that the transfer of authority in certain areas to the Palestinian Authority might have limited the scope of obligations of Israel as Occupying Power, consensus existed even prior to the recent Intifada, that such transfer of authority may at best have reduced, but not extinguished Israel’s obligations as Occupying Power.<sup>48</sup> The law on occupation does not require the exercise of complete control over all parts of a territory at all times. Recent developments suggest that Israel has taken effective control over areas under Palestinian authority or demonstrated its capacity to exercise such effective control at any moment.<sup>49</sup> At the very least, it exercises control over the territory in which it constructs the Barrier irrespective of the existence of the Palestinian Authority and its formal mandate. The law governing occupation applies therefore to the construction of the Barrier, irrespective of the division of certain responsibilities between the Palestinian Authority and Israel, originally

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<sup>45</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 256-259, paras. 75-84, especially para. 79.

<sup>46</sup> See: *Ajuri v. IDF Commander in West Bank*, Case N° HCI 7015/02 [2002], Israel Law report 1, Supreme Court of Israel, 3 September 2002, paras. 131-133, 138, 144 and 155-162, para. 155.

<sup>47</sup> See in this respect, ICTY, Appeals Chamber, Judgment on 2 October 1995, Prosecutor versus Tadic, IT-94-1, Interlocutory Appeal, para. 117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

<sup>48</sup> For an overview on the argument, see International Humanitarian Law Research Initiative, Briefing Note: IHL in Israel and the Occupied Territories, available at [www.ihlresearch.org/opt/feature.php?a=31](http://www.ihlresearch.org/opt/feature.php?a=31).

<sup>49</sup> See also Oxford Public Interest Lawyers, *Legal Consequences of Israel’s construction of a Separation Barrier in the Occupied Territories*, February 2004, para. 78. Also UN Commission of Inquiry, Commission Resolution S-5/1 of 19 October 2000, Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, E/CN.4/2001/121, 16 March 2001.

set forth in the Oslo Accords, and irrespective of the question of the present status of the Oslo Accords.

It should be emphasized that the application of the law on occupation also extends to East Jerusalem, since international humanitarian law prohibits the change of status of territory by force and annexation. Regarding the legal status of the Israeli presence in East Jerusalem, numerous UN Security Council resolutions have reiterated that Israel's attempts to change the legal status and demographic composition of East Jerusalem "have no legal validity" and are null and void.<sup>50</sup> The General Assembly has consistently confirmed this approach, illustrated again by its recent Resolution requesting an Advisory Opinion of the International Court of Justice.<sup>51</sup> These resolutions have confirmed that the international community regards East Jerusalem as occupied territory to which the Fourth Geneva Convention applies.

## 2. International human rights law

Israel is also bound by international human rights law in the Occupied Territories. It is party to core UN human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>52</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>53</sup> the Convention on the Elimination of all Forms of Racial Discrimination (CERD),<sup>54</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>55</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>56</sup> and the Convention on the Rights of the Child (CRC).<sup>57</sup>

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<sup>50</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.

<sup>51</sup> See General Assembly Resolution concerning the status of Jerusalem (not exhaustive): ES-10/14 of 8 December 2003; 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>52</sup> Israel signed the Covenant on Economic, Social and Cultural Rights on 19 December 1966 and ratified it on 3 October 1991.

<sup>53</sup> Israel signed the International Covenant on Civil and Political Rights on 19 December 1966 and ratified it on 3 October 1991.

<sup>54</sup> Israel signed the Convention on the Elimination of all Forms of Racial Discrimination on 7 March 1966 and ratified it on 3 January 1979. It made a reservation on article 22.

<sup>55</sup> Israel signed the Convention on the Elimination of All Forms of Discrimination against Women on 17 July 1980 and ratified it on 3 October 1991. It made reservations on articles 7(b), 16 and 29, para. 1.

<sup>56</sup> Israel signed the Convention against Torture on 22 October 1986 and ratified it on 3 October 1991. It made reservations on articles 20 and 30, para. 1 the competence of the Committee against Torture and to the competence of the International Court of Justice in case of a dispute concerning the application or interpretation of the Convention.

<sup>57</sup> Israel signed the Convention on the Rights of the Child on 3 July 1990 and ratified it 3 October 1991. In addition, it has signed the *Optional Protocol on the Sale of Children and Optional Protocol on Armed Conflict* on 14 November 2001.

Israel continues to reject, however, that human rights treaties are applicable in the Occupied Territories. The government argues that the protection granted in a conflict situation should be found in humanitarian law, whereas human rights treaties are intended to protect citizens from their own government in times of peace.<sup>58</sup> This position is not supported by international law and practice.

## 2.1. Extraterritorial applicability

There is today ample authority at universal and regional level that human rights treaties apply wherever a state “exercises jurisdiction” and that this determination is based on the test as to whether a state “exercises effective (not necessarily sovereign) control over a territory”. Human rights treaties can therefore apply also extraterritorially.

This has been recognized with regard to all major human rights treaties, including the ICCPR.<sup>59</sup> It would not be compatible with the object and purpose of the Covenant to exclude the applicability of the rights set forth in human rights treaties to situations where the State Party does exercise effective control over a territory or act.

The Human Rights Committee, which authoritatively interprets the ICCPR, has consistently applied the Covenant to acts committed outside the national territory in individual communications such as *López Burgos v. Uruguay*<sup>60</sup>, as well as in a range of Concluding Observations on State Party’s reports.<sup>61</sup> More specifically, it considers the

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<sup>58</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, p 8, para. 4. See also Second Periodic Report of Israel to the Human rights Committee, CCPR/C/ISR/2001/2, 4 December 2001, para. 8.

<sup>59</sup> The more restrictive textual reading of article 2 ICCPR (“within the territory and under the jurisdiction”) in comparison to other human rights treaties (“under its jurisdiction”) has been meant to prevent the application of the Covenant to situations where the State Party has no reasonable influence to guarantee the application of the Covenant, for example the case of the protection of nationals living abroad. In this case the Covenant can naturally not be enforced other than by diplomatic protection. See also Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in: *The International Bill of Rights* (Louis Henkin ed.), 72, at 74, 75 (1981).

<sup>60</sup> Communication No. 52/1979, *CCPR/C/13/D/52/1979*, 29 July 1981, para. 12.3, UN Doc. A/36/40 (1981), which states in para. 12.3 : “Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights “to all individuals within its territory and subject to its jurisdiction”, but it does not imply that the State Party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.”

<sup>61</sup> Concluding Observations of the Human Rights Committee, United States of America, 03/10/95, *CCPR/C/79/Add.50*; *A/50/40*, paras. 266-304. (Concluding Observations/Comments), 284: “(...) The Committee does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State Party even when outside that State's territory.” See also Concluding Observations of the Human Rights Committee: Israel *CCPR/CO/78/ISR* of 21 August 2003, para. 11: “[...] Nor does the applicability of the regime of international humanitarian law preclude accountability of States Parties under article 2, para. 1 of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State Party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.” Likewise, see Concluding Observations of the Human Rights Committee: Israel *CCPR/C/79/ Add.93*, 18 August 1998, para. 10: “The Committee is deeply concerned that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories. In this regard, the Committee points to the long-standing presence of Israel in these territories, Israel’s ambiguous attitude

Covenant applicable to cases of belligerent occupation, as illustrated by the Committee's observations on Iraq, which stated:

“The failure of the report to address events in Kuwait after 2 August 1990, given Iraq's clear responsibility under international law for the observance of human rights during its occupation of that country, was a matter of particular concern to the Committee”.<sup>62</sup>

The UN Commission on Human Rights' Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation, Walter Kälin, similarly held both the ICCPR and ICESCR applicable to the belligerent occupation of Kuwait<sup>63</sup>

The Human Rights Committee could hardly have been clearer when it explained in its most recent General Comment on article 2:

“(...) a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”,

and,

“(...) this principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”<sup>64</sup>

This clear and unambiguous view by the Committee is reflected in its consistent position on Israel. Indeed, both the UN Human Rights Committee<sup>65</sup> and the UN Committee on

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towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein. (...) The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control. The Committee requests the State Party to include in its second periodic report all information relevant to the application of the Covenant in territories which it occupies”; see also UN Committee on Economic, Social and Cultural Rights has adopted an identical interpretation: see Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, E/C.12/1/Add.90, 26 June 2003, para. 15 according to which “The Committee also reiterates its concern about the State Party's position that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction, and that the Covenant is not applicable to populations other than the Israelis in the occupied territories. The Committee further reiterates its regret at the State Party's refusal to report on the occupied territories”, see E/C.12/1/Add.27, para. 11.

<sup>62</sup> CCPR A/46/40 (1991) The Committee considered the third periodic report of Iraq (CCPR/C/64/Add.6) at its 1080<sup>th</sup> to 1082<sup>nd</sup> meetings held on 18 and 19 July 1991 (see CCPR/C/SR.1080-1082). Para. 652.

<sup>63</sup> See Report of the Special Rapporteur on the Situation of Human Rights in Occupied Kuwait, E/CN.4/1992/26 at para. 50-63.

<sup>64</sup> UN Human Rights Committee, General Comment on article 2, The nature of the General Obligation Imposed on States Parties to the Covenant (adopted at 2187<sup>th</sup> meeting on March 2004, CCPR/C/74/CRP.4/Rev.6/ para. 10.

<sup>65</sup> See Concluding Observations of the Human Rights Committee: Israel CCPR/CO/78/ISR of 21 August 2003, para. 11: “[...] Nor does the applicability of the regime of international humanitarian law preclude accountability of States Parties under article 2, para. 1 of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State Party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.” Likewise, see Concluding Observations of the Human Rights Committee: Israel CCPR/C/79/ Add.93, 18 August 1998, para. 10: “The Committee is deeply

Economic, Social and Cultural Rights<sup>66</sup> hold Israel responsible under the Covenants in the Occupied Territories.

The extraterritorial applicability of human rights law is further underlined by jurisprudence of regional human rights systems. The Inter-American Commission on Human Rights has considered that the American Declaration on Human Rights is applicable to acts of foreign forces, for example during the occupation of Grenada<sup>67</sup> or more recently in the context of the detentions in Guantanamo Bay.<sup>68</sup>

Similarly, the European Court of Human Rights has held in a number of judgments that a state is responsible under the European Convention on Human Rights for acts committed outside its territory and, in particular, in cases of occupation, such as in northern Cyprus.<sup>69</sup> The jurisprudence reflects that a state has “jurisdiction” not only within its national territory, but also as a consequence of military action - whether lawful or unlawful. The state has jurisdiction if it exercises effective control in an area outside its national territory, whether directly, through its armed forces, or through a subordinate local administration.<sup>70</sup> This responsibility extends to securing the entire range of substantive rights set out in the Conventions and Additional Protocols ratified by the State Party.<sup>71</sup> Even in its more recent *Bankovic judgment*, dealing with the NATO bombing of Serbia Montenegro, where the Court did not assume responsibility under the European Convention, it nevertheless reaffirmed the principle that extraterritorial jurisdiction applies:

“(...) when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally exercised by the Government.”<sup>72</sup>

In light of the uniform practice of judicial and quasi-judicial bodies, at the universal as well as regional level, it cannot be doubted that the ICCPR and the ICESCR apply extraterritorially, including in the Occupied Territories.

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concerned that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories.”

<sup>66</sup> The UN Committee on Economic, Social and Cultural Rights has adopted an identical interpretation: see Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, E/C.12/1/Add.90, 26 June 2003, para. 15 according to which “The Committee also reiterates its concern about the State Party's position that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction, and that the Covenant is not applicable to populations other than the Israelis in the occupied territories. The Committee further reiterates its regret at the State Party's refusal to report on the occupied territories (E/C.12/1/Add.27, para. 11).”

<sup>67</sup> Inter-American Commission on Human Rights, *Coard et al. v. United States*, Case 10.951, Report N° 109/99, September 29, 1999, Inter-Am.C.H.R., para. 37.

<sup>68</sup> Inter-American Commission on Human Rights, Request for precautionary measures in favour of detainees being held by the United States at Guantanamo Bay, 12 mars 2002, *ILM*, 2002, vol. 41, p 532-535.

<sup>69</sup> See European Court of Human rights, *Case of Loizidou v. Turkey (Preliminary Objections)*, Judgement of 23 March 1995, Series A N° 310, para. 60.

<sup>70</sup> See *supra*, para. 61.

<sup>71</sup> European Court of Human Rights, *Cyprus v. Turkey*, Judgement of 10 May 2001, para. 77. See also the earlier decision by the European Commission on Human Rights following the invasion of Turkish forces in 1974, Application 6780/74, DR 2, 125, 136 et seq..

<sup>72</sup> *Bankovic and Others v. Belgium and 16 other contracting States*, 12 December 2001, para. 71.

## 2.2. Concurrent applicability with humanitarian law

The jurisprudence of human rights bodies mentioned above clearly recognizes, contrary to Israeli Government arguments, that human rights law does not cease to apply in times of armed conflict or occupation. On the contrary, the cases show the applicability and importance of human rights law, especially in a situation of prolonged occupation.

The International Court of Justice has authoritatively affirmed in its *Nuclear Weapons case* that human rights treaties, such as the ICCPR, do apply in times of war. Under certain circumstances the content of a specific right (here the right to life) may, however, have to be interpreted in light of the applicable *lex specialis*, in this case the law of armed conflict which is designed to regulate the conduct of hostilities.<sup>73</sup>

Most recently, the UN Human Rights Committee clarified in its General Comment on article 2, that:

“(...) the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>74</sup>

This is in line with various statements and judgments at the regional level. The European Court of Human Rights has confirmed the applicability of the European Convention on Human Rights and Fundamental Freedoms to situations such as the occupation of northern Cyprus.<sup>75</sup> The Inter-American Commission recently equally characterized the interrelationship of human rights and international humanitarian law as a relationship of complementary and reinforcement, while international humanitarian law may occasionally provide for a more specific rule influencing the interpretation of human rights law.<sup>76</sup>

Both, the UN Human Rights Committee<sup>77</sup> and the UN Committee on Economic, Social and Cultural Rights<sup>78</sup> have reaffirmed this position in recent concluding observations

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<sup>73</sup> See ICJ, Advisory opinion, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1986*, p 240, para. 25; See also General Assembly Resolution 2675 of 1970, on “Basic principles of civilian population in armed conflicts”, which states in para. 1: “Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict”.

<sup>74</sup> General Comment, On the nature of state obligations, CCPR/C/74/CRP.4/Rev.6/ para. 11.

<sup>75</sup> See European Court of Human rights, Case of *Loizidou v. Turkey (Preliminary Objections)*, Judgement of 23 March 1995, Series A N° 310, para. 60;

<sup>76</sup> Inter-American Commission on Human Rights, “Precautionary Measures in Guantanamo Bay, Cuba”, Inter-American Commission on Human Rights, 13 March 2002. It states: “[I]n situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*.”

<sup>77</sup> See Concluding Observations of the Human Rights Committee: Israel CCPR/CO/78/ISR of 21 August 2003, para. 11: “[...] Nor does the applicability of the regime of international humanitarian law preclude accountability of States Parties under article 2, para. 1 of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State Party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel



specifically relating to the Occupied Territories. Both Committees have affirmed not only the extraterritorial applicability of the Covenants but have explicitly rejected Israel's argument that the law of armed conflict supersedes their applicability.

Thus, international practice and jurisprudence clearly indicate that both set of laws apply concurrently in their own right. The relationship is generally one of complementarity and mutual re-enforcement, rather than exclusivity, although international humanitarian law sometimes contains a more special rule that will affect the interpretation of human rights norms.

Finally, this is not only a matter of legal position, but a matter of common sense. Would it make sense to say that human rights law is not applicable and that one must rely completely on international humanitarian law, in a situation of a prolonged occupation of more than 37 years?

It should be borne in mind that the two universal Covenants should in fact be regarded as an expression of a universal *ordre public*. Rather than creating reciprocal relationships between states, they grant rights to people under a State Party's jurisdiction. Refusing the benefit of these rights in an occupation lasting for 37 years would clearly be unsatisfactory. As the UN Human Rights Inquiry Commission noted:

“(...) A prolonged occupation, lasting for more than 30 years, was not envisaged by the drafters of the Fourth Geneva Convention (see art. 6). Commentators have therefore suggested that in the case of the prolonged occupation, the occupying Power is subject to the restraints imposed by international human rights law, as well as the rules of international humanitarian law.”<sup>79</sup>

The Barrier is not just a short-time measure taken during an armed conflict or occupation following a conflict. It has long-term ramifications. It will affect lives and rights of the people in the Occupied Territories for a considerable time to come. International humanitarian law is particularly appropriate to deal with the immediate and acute consequences of conflict and occupation. By itself it is insufficient to regulate the broader and long-term relationship between a people and the authorities that effectively control the territory. The complementary application of human rights treaties in such a case is not only legally required, but also clearly appropriate.

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under the principles of public international law.” Likewise, see Concluding Observations of the Human Rights Committee: Israel CCPR/C/79/ Add.93, 18 August 1998, para. 10: “In response to the arguments presented by the delegation, the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2, para. 1 for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control.”

<sup>78</sup> The UN Committee on Economic, Social and Cultural Rights has adopted an identical interpretation: see Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, E/C.12/1/Add.90, 26 June 2003, para. 15: “In addition, the Committee is deeply concerned at the insistence of the State Party that, given the circumstances in the occupied territories, the law of armed conflict and humanitarian law are considered as the only mode whereby protection may be ensured for all involved, and that this matter is considered to fall outside the sphere of the Committee's responsibility.”

<sup>79</sup> Commission of Inquiry, Commission Resolution S-5/1 of 19 October 2000, Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, E/CN.4/2001/121, 16 March 2001, para. 37.

### 2.3. The fight against terrorist acts and the applicable law

Increasingly, Israel justifies the construction of the Barrier by the necessity to ensure the security of Israeli citizens from terrorism. It argues that the Barrier is fully justified under article 51 of the UN Charter which preserves states' inherent right of self-defence and by Security Council Resolution 1373 which sets out obligations in the fight against terrorist acts.<sup>80</sup>

The International Commission of Jurists unequivocally condemns attacks against Israeli civilians. Such acts are prohibited under international law. Human rights law gives governments both the right and duty to protect the security of the people under their jurisdiction. This derives among others directly from articles 6 and 9 ICCPR.<sup>81</sup>

However, the fight against terrorist acts – even on the basis of Security Council Resolution 1373 – does not suddenly cancel out other aspects of international law. Irrespective of whether the law of self-defence applies and whether Resolution 1373 serves as a legal basis for the construction of the Barrier, Israel remains bound by international human rights and humanitarian law.

UN human rights treaty bodies, such as the UN Human Rights Committee, scrutinizing domestic measures undertaken under Resolution 1373 on its compliance with the Covenant, have reaffirmed the applicability of human rights norms.<sup>82</sup> This is also mirrored in recent work of various thematic experts appointed by the UN Commission on Human

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<sup>80</sup> 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, p 8, para. 6: "According to its statement made before the General Assembly on 20 October 2003, the Government of Israel believes 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). See Statement of Ambassador Gillerman at the General Assembly, A/ES-10/PV.21, 21<sup>st</sup> Meeting, 20 October 2003, p 6

<sup>81</sup> On the duty to protect, see Human Rights Committee, decision of 12 July 1990, *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, UN Doc. CCPR/C/39/D/195/1985, 23 August 1990, para. 5.5. Human Rights Committee, decision of 20 March 2000, *Carlos Dias v. Angola*, Communication N° 711/1996, UN Doc. CCPR/C/68/D/711/1996, 18 April 2000, para. 8.3, Human Rights Committee, decision of 25 October 2000, *Rodger Chongwe v. Zambia*, Communication No. 821/1998, UN Doc. CCPR/C/70/D/821/1998, 9 November 2000. para. 5.3. Regional jurisprudence is along the same line. See European Court Human Rights, *Kiliç v. Turkey*, 28 March 2000, para. 62: "The Court recalls that the first sentence of Article 2 para. 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. the United Kingdom* judgment of 9 June 1998, *Reports* 1998-III, p 1403, para. 36). See also Inter-American Court of Human Rights, *Neira Alegria* Case, Judgment of 19 January 1995, para. 75; Case 11.182, Report N° 49/00, *Carlos Florentino Molero Coca Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Peru*, 13 April 2000, Annual Report of the IACHR 1999, para. 58.

<sup>82</sup> The Human Rights Committee (HRC) has examined national measures undertaken in the context of Resolution 1373 (2001) in respect of their compatibility with the ICCPR. The Committee's observations on the United Kingdom and Northern Ireland (6 December 2001, para. 6, 14 and 19), Sweden (24 April 2002, para. 12), Yemen (26 July 2002, para. 18), Moldova (26 July 2002, para. 8), New Zealand (7 August 2002, para. 11), Egypt (28 November 2002, para. 16), Estonia (3 April 2003, para. 8), Portugal (5 July 2003, para. 15) and Israel (5 August 2003, para. 14); Statement of the Committee against Torture: 22/11/2001. CAT/C/XXVII/Misc.7; Conclusions and recommendations of the Committee against Torture: Sweden. 06/06/2002. CAT/C/CR/28/6, para. 6 (b); Conclusions and recommendations of the Committee against Torture: Russian Federation. 28/05/2002. CAT/C/CR/28/4, para. 4; Statement on Racial Discrimination and Measures to Combat Terrorism: 01/11/2002. A/57/18 (Chapter XI) (C); Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand. 01/11/2002. A/57/18, paras.412-434, para. 429; Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada. 01/11/2002. A/57/18, paras. 315-343, para. 338.

Rights.<sup>83</sup> Notably, on 20 January 2003, the Security Council meeting at the level of Ministers of Foreign Affairs recalled that:

“States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”<sup>84</sup>.

The UN General Assembly<sup>85</sup>, the UN Commission on Human Rights<sup>86</sup> as well as the UN Sub-Commission on the Promotion and Protection of Human Rights<sup>87</sup> have all affirmed the continuing application of international law, including human rights and humanitarian law when fighting terrorist acts.

The Human Rights Committee specifically stressed that Israel has “(...) to ensure that measures designed to counter acts of terrorism, whether adopted in connection with Security Council Resolution 1373 (2001) or in the context of the ongoing armed conflict, are in full conformity with the Covenant.”<sup>88</sup>

The Barrier and the legal regime surrounding it are not put beyond the realm of binding human rights and humanitarian law by asserting that it is a counter-terrorism measure.

International human rights law envisages that states may sometimes have to take exceptional measures and suspend some rights when facing an emergency that threatens the life of the nation. Moreover, limitation clauses allow the taking into account of legitimate security concerns of a State Party such as those posed by terrorist acts. The derogation and limitation provisions in the ICCPR were crafted by states themselves, who obviously had a keen sense of their national security interests and the need to balance these with their human rights obligations. They are a reflection of the fact that a response of a state to a security threat, including terrorist acts, must be an extension of the rule of law, not an abrogation of the rule of law.

Article 4 ICCPR requires that a situation amount to a public emergency, which threatens the life of the nation, and that the State Party has officially proclaimed the state of

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<sup>83</sup> Working Group on Arbitrary Detention, E/CN.4/2003/8 of 16 December 2002; Special Representative of the Secretary General on Human Rights Defenders, E/CN.4/2002/106 of 27 February 2002 and E/CN.4/2003/104 of 3 January 2003; Special Rapporteur on the question of contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E/CN.4/2002/24 of 13 February 2002 and report on the “Situation of Muslim and Arab peoples in various parts of the world in the aftermath of the events of 11 September 2001” E/CN.4/2003/23 of 3 January 2003; Special Rapporteur on the Independence of judges and lawyers, E/CN.4/2003/65 of 10 January 2003; Special Rapporteur on the Rights of Migrants, E/CN.4/2002/94 of 15 February 2002; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, E/CN.4/2002/75 of 30 January 2002 and E/CN.4/2003/67 of 30 December 2002. See also, the joint statement on June 27 June 2003 of the Special Rapporteurs/Representatives, experts and chairpersons of the working groups of the special procedures of the Commission on Human Rights and the chairpersons of human rights treaty bodies, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/newsroom>

<sup>84</sup> Declaration on the issue of combating terrorism adopted by the Security Council Meeting at the level of Ministers for Foreign Affairs on 20 January 2003, para. 6. Annex to Security Council Resolution 1456 (2003) of 20 January 2003, S/RES/1456 (2003).

<sup>85</sup> General Assembly Resolution 57/219 of 18 December 2002; Resolution 58/187 of 22 December 2003.

<sup>86</sup> Commission on Human Rights Resolution 2003/68 of 25 April 2003 on the “Protection of Human Rights and Fundamental Freedoms while countering Terrorism”.

<sup>87</sup> UN Sub-Commission on the Promotion and Protection of Human Rights 2003/15 “Effects of measures to combat terrorism on the enjoyment of human rights” of 13 August 2003.

<sup>88</sup> Concluding Observations of the Human Rights Committee: Israel, CCPR/CO/78/ISR, 21 August 2003, para. 14.

emergency.<sup>89</sup> It also puts a heavy burden on states to justify why every exceptional measure taken is temporary, necessary and proportionate to meet the specific security threat.<sup>90</sup> Even specific measures taken pursuant to a derogation must be shown to be required by the exigencies of the situation. Moreover, a derogation must not be used solely as a discriminatory measure and in violation of the State Party's other obligations under international law, such as humanitarian law.<sup>91</sup> A state is also under an obligation to comply with the procedural obligation under article 4, para. 3 ICCPR to notify the Secretary General of the measures of derogation imposed.<sup>92</sup> These rules are to be applied strictly.

As recently as 2003 the Human Rights Committee reiterated that all provisions of the Covenant apply to the Occupied Territories, including its non-derogable rights.<sup>93</sup> On 3 October 1991 Israel made a Declaration under article 4, para. 3 ICCPR to notify the derogation from some obligations under article 9 (right to be free from arbitrary detention).<sup>94</sup> The Human Rights Committee considered that as such no derogation beyond that of article 9 is allowed given the state of emergency declared by Israel.<sup>95</sup> No other derogation was subsequently made.

Israel has also not contended that the construction of the Barrier would be based on the derogation of human rights treaties.<sup>96</sup> The failure not to notify the Secretary General of the extension of the emergency powers would also constitute a violation of the procedural obligation under article 4, para. 3 ICCPR.<sup>97</sup> Moreover, the Barrier regime would also fail to fulfil the substantive test under article 4, para. 1 ICCPR, as the Barrier regime is not limited in time, but has all the appearance of a long-term and open-ended response to the security threat. This is illustrated not the least in the relevant regulations, such as Order 378

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<sup>89</sup> Human Rights Committee, General Comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11 of 31 August 2001, para. 2.

<sup>90</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>91</sup> Human Rights Committee, General Comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11 of 31 August 2001, in particular para. 8–10.

<sup>92</sup> See article 4, para. 3 ICCPR.

<sup>93</sup> Human Rights Committee, CCCP/CO/78/ISR, para. 11-19.

<sup>94</sup> See Report of the Office of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights decision 1998/108: "Question of human rights and states of emergency - List of States which have proclaimed or continued a state of emergency", E/CN.4/Sub.2/2003/39, 16 June 2003, pp. 3-4. It reads: Israel "The Government of Israel notified that the state of emergency proclaimed in May 1948 has remained in force. As the situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant, the Government found it necessary 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. Insofar as any of these measures are inconsistent with article 9 of the Covenant, Israel derogates from its obligations under that provision. The state of emergency is still in effect." Sources: Notification of the Government to the United Nations Secretary-General, received on 3 October 1991; United Nations Information Service, 27 March 2003.

<sup>95</sup> Concluding Observations of the Human Rights Committee: Israel, CCPR/CO/78/ISR, 21/08/2003: para. 12. See also Concluding Observations of the Human Rights Committee: Israel, CCPR/C/79/Add.93, 18/08/98. para. 4, 10 and 11.

<sup>96</sup> This is in line not only with the Concluding Observations of the UN Human Rights Committee, but also by regional human rights bodies. The Turkish Government had not declared any derogation under the European Convention on Human Rights following its invasion in Cyprus with the effect that the European Convention was unquestionably fully applicable in the Turkish Cypriot territory, see the decision by the European Commission on Human Rights, Application 6780/74, DR 2, 125, 136 et seq.; See also René Provost, *International Human Rights and Humanitarian Law*, 2002, at 270.

<sup>97</sup> Human Rights Committee, General Comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11 of 31 August 2001, para. 17 – the obligation is an immediate one and covers the declaration of an emergency as well as any change in the scope of the existing derogation.

establishing the “Seam Zone” containing no time limit. Moreover, the interference of the Barrier is – as we shall see in the course of this study - of such magnitude that it is not a measure strictly necessary and proportionate to the specific threat. Furthermore, contrary to article 4 ICCPR it is in violation of other international obligations of Israel, including under international humanitarian law. It may also raise concerns for its discriminatory effect.

## **Part III: Violations of human rights and humanitarian law**

### **1. Freedom of movement**

At the core of the human rights concerns raised by the Barrier are the restrictions on the liberty to freedom of movement and the right to residence, guaranteed under article 12, para. 1 ICCPR. Many other human rights violations flow from these movement restrictions which also violate obligations under international humanitarian law.

#### **1.1. Movement restrictions under international human rights law**

##### **1.1.1. Scope of and interference with article 12 ICCPR**

The Barrier and its movement restrictions constitute a disproportionate interference into the right to freedom of movement.

Article 12, para. 1 ICCPR contains two important guarantees affected by the Barrier, namely *liberty of movement* as well as *freedom of residence*. The UN Human Rights Committee has specified in General Comment 27<sup>98</sup> that *liberty of movement* is understood as the right to move unhindered throughout the whole territory of the state and that the enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. The right to *choose one's residence* guaranteed under article 12, para. 1 ICCPR includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory.

The erection of the Barrier interferes with these rights as a considerable part of the territory is effectively sealed off from the population of the Occupied Territories. Access is made dependent on a specific purpose or reason to enter or stay and is subjected to a procedure for prior permission.<sup>99</sup> For a large number of Palestinians this means that liberty of movement and residence is limited in its territorial scope (*ratione loci*) to specific parts of the territory.

Seeking new residence within the “Seam Area” is severely restricted, if possible at all.<sup>100</sup> Most severely affected are those Palestinians living either within “the closed military zone”, who will have to leave their place of residence in case permanent permits are not granted. The situation is also critical for those who live in communities on the eastern side of the Barrier, which are more or less encircled by the Barrier, or for the large number of

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<sup>98</sup> 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 paras. . 4-7.

<sup>99</sup> Some controversy seems to exist as to whether permanent residents would automatically receive a permit or would have to apply for a permanent permit. Irrespective of this, permanent residence is subject to proof of residency.

<sup>100</sup> IDF – Order Regarding Defense Regulations (Judea and Samaria) (No.378), 5730-1970 Regulations Regarding Permanent Resident in the Seam Area Permit, foresees the possibility also for new residency and permanent residence permits. Annex 2 containing the application form for a New Resident, however, seems to link such a request to the permanent residence of family members. It is therefore unclear as to whether other reasons for choosing residence may equally justify taking residence in those areas of the territory.

people who have to cross the Barrier to access their land, property, business, workplace or family. In these cases access is at best possible through the gate system, provided that a personal permit is granted. In light of the limited number of gates available to cross the Barrier, the subjection to the system of permits and operation modalities of gates, internal displacement may result within the Occupied Territories. But even within the communities on the eastern side of the Barrier, movement from one village to another is hampered and complicated through the intertwined route of the Barrier.

### 1.1.2. Violation of article 12 ICCPR

While article 12, para.3, ICCPR allows for restrictions on the liberty of movement and the right to residence, especially if a state is concerned with a security threat such as terrorist acts, any such restriction must be strictly necessary to protect national security in a democratic society and must be non-discriminatory and proportionate.

The protection of the right to life and security of those under the jurisdiction of Israel is clearly a legitimate aim pursued. However, the construction of the Barrier in its current form and course fails the necessity and proportionality test under article 12 ICCPR. This is based on the following main considerations:

#### *Separation of Palestinians from Palestinians*

First, it is the specific course of the Barrier that causes the hardship to the Palestinian population. The route of the Barrier is to a large extent located within the Occupied Territories rather than on the Green Line and departs to different degrees into the Occupied Territories.

As a result of the course, it not merely separates Israelis from Palestinians; it also separates Palestinian communities from each other. In doing so, it tears apart homogenous communities and infrastructures in the Occupied Territories, and causes many severe additional repercussions linked to the lack of freedom of movement.<sup>101</sup> For the purpose of protecting Israel and Israeli civilians it would seem a reasonable and milder means to divert the Barrier into Israel's territory along the Green Line. Should this not be possible for topographical reasons, it may include as a general rule the need to divert the Barrier line into Israeli territory proper.

#### *Deliberate inclusion of settlement communities*

Second, the trajectory as planned shows that the Barrier seeks to protect not only Israel's own security, but in particular the security of its settlements on the West Bank. To the extent that the Barrier route is motivated by this broader objective it is incompatible with the ICCPR. The overwhelming majority of international legal opinion regards Israeli settlements as a violation of international humanitarian law. They violate the prohibition under article 49, para. 6, Fourth Geneva Convention not to transfer population into occupied territory and is contrary to the obligation not to facilitate the demographic change of the population in occupied territory.<sup>102</sup> Relevant Security Council and General Assembly

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<sup>101</sup> See in particular the repercussions on economic, social and cultural rights.

<sup>102</sup> This position has also been consistently taken by the International Commission of Jurists, see but all: International Commission of Jurists, *Israelis Settlements in Occupied Areas, the Review*, No.19, 1977, at 27 et seq.; See also Conference of High Contracting Parties to the Fourth Geneva Convention Geneva, Declaration, 5 December 2001, para.12.

Resolutions confirm this position.<sup>103</sup> The perpetuation of settlements that are illegal under international law cannot constitute a legitimate purpose to restrict freedom of movement under international human rights law.

This does not mean, however, that the population in the settlements is necessarily deprived of any protection under human rights law, especially in respect to the right to life and security under articles 6 and 9 ICCPR.

However, the measure taken would indeed need to be based on a concrete and specific security threat. Extraneous considerations or considerations such as the general quality of life in settlements would be an insufficient reason for the Barrier route as it is. Any genuine security response in this regard should be seen in light of the obligation of Israel to cease settlements and the obligation not to cement and perpetuate their existence. As a consequence, Israel may well take short-term protective measures linked to a specific and concrete security threat. The Barrier, however, is not such a short-term measure. It is important to note that the distinction is not necessarily between temporary and permanent, but between short-term and long-term. Even if the Barrier is not permanent, as Israel repeatedly states, it is still an institutionalized separation scheme of major proportion. By its nature, it is at the very least of long-term and open-ended duration.

The support of Israelis in the Occupied Territories has to keep due regard to the interests of the protected population. It cannot go to the sole detriment of the interests of the original population. This is, however, exactly the approach taken by the Barrier system, which blocks and restricts the movement of Palestinians within their own territory, while providing - if plans are implemented - freedom of movement to a majority of Israel's settlers. The ICCPR provides in article 47 a useful guideline for the interpretation of Covenant rights. It reads:

“Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources”.

Beyond the fact that the Barrier will affect the access to and the utilization of fertile agricultural lands in the West Bank, article 47 ICCPR should be seen as a reflection of a broader principle that diverging interests between communities must not be solved to the sole disadvantage of the original population. This principle must give guidance even more so if the rights of the local population of a territory on the one hand and the interests of the population transferred from outside are concerned. Even a protective measure must safeguard the interests and the functioning of the local population. The Barrier and its movement regime reverse this relationship. It opts for disrupting mainly Palestinian life in creating Palestinian enclaves on their own territory and blocking their freedom of movement to secure the rights of Israelis in the Occupied Territories.

### *Restrictive movement regime*

Third, the Barrier is not merely a “neutral” physical structure. It is characterized by a highly restrictive legal regime, regulating movement through a gate system.

While the operation of gates and agricultural gates are essential in mitigating some of the negative impacts of the Barrier as such, it cannot compensate for the loss of freedom of movement and residence within one's own territory. As the UN Human Rights Committee

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<sup>103</sup> See UN Security Council Resolution 446 (1979), para.1; Security Council Resolution 465 (1980), para.5. This position has also been consistently taken by the International Commission of Jurists, see but all: International Commission of Jurists, *Israelis Settlements in Occupied Areas, the Review*, No.19, 1977, at 27 et seq..



states, restrictions should always be guided by the principle that the relation between right and restriction, between norm and exception, must not be reversed.<sup>104</sup> The movement and residence regulations of the Barrier do indeed reverse this principle, as the prohibition of movement and residence is the rule and not the exception.<sup>105</sup> In addition, the Human Rights Committee stressed that the legal basis authorizing the application of restrictions should use precise criteria and should not confer unfettered discretion on those charged with their execution.<sup>106</sup> The Orders and Regulations do not set out the substantive criteria for approving or refusing permits and therefore leave authorities with too broad and unregulated discretion.<sup>107</sup>

The gate system, while allowing limited access and passage, is in itself a restrictive mechanism, subjecting movement to various forms and degrees of prior permission. It is further linked to various conditions, as well as to opening hours and modes of operation. Information received in the course of this study also indicates that a considerable number of personal permits for farmers and landowners, who are separated from their land, have been denied or not prolonged after an initial period.<sup>108</sup> Moreover, in light of the experience of Israeli occupation and in light of reports on past practices of checkpoints and permit policies, it also carries a serious and inherent risk of arbitrariness and abuse.

The isolation and separation of Palestinian communities through the Barrier, together with this restrictive movement regime may result in involuntary displacement. The Human Rights Committee has made it clear that article 12 ICCPR protects against all forms of forced internal displacement.<sup>109</sup> Moreover, people arbitrarily denied permits could be forcibly evicted, which the Committee considers as a particularly severe form of violation of article 12.<sup>110</sup> House demolitions in the context of the construction of the Barrier would be another aggravating factor. It should be recalled that not only is the forcible transfer of population itself a concern under international law, but as reflected in the Guiding Principles on Internal Displacement also the creation of circumstances that are likely to lead to involuntary displacement.<sup>111</sup>

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<sup>104</sup> 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 paras. . 11-15.

<sup>105</sup> IDF – Order Concerning Security Directives (Judea and Samaria) (number 378), 1970, Declaration Concerning the Closure of Area Number s/2/03 (Seam Area), available in English translation at [www.nad-plo.org/hborders](http://www.nad-plo.org/hborders), para. 3 a : «no one may enter or stay in the seam area».

<sup>106</sup> 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 paras. . 11-15.

<sup>107</sup> IDF – Order Concerning Security Directives (Judea and Samaria) (number 378), 1970, Declaration Concerning the Closure of Area Number s/2/03 (Seam Area), available in English translation at [www.nad-plo.org/hborders](http://www.nad-plo.org/hborders), para. 3 a : «no one may enter or stay in the seam area».

<sup>108</sup> See B’TSELEM, Not All It Seems – Preventing Palestinians Access to their Lands West of the Separation Barrier in the Tulkarm-Qalqilia Area, June 2004.

<sup>109</sup> Human Rights Committee, General Comment No. 27, “Freedom of movement (art.12)”, CCPR/C/21/Rev.1/Add.9 of 02 November 1999, in para. 7.

<sup>110</sup> See Human Rights Committee, General Comment No. 29, *States of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, (2001), which affirmed that forcible transfer cannot be made a lawful derogation under article 4. See also the Concluding Observations, Human Rights Committee, Israel, 18/08/98, CCPR/C/79/Add.93 at para. 12, where the Committee stated: “The Committee considers the demolition of homes to conflict directly with the obligation of the State Party to ensure without discrimination the right not to be subjected to arbitrary interference with one's home (art. 17), the freedom to choose one's residence (art. 12) and equality of all persons before the law and equal protection of the law (art. 26).”

<sup>111</sup> See Principle 5, Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 stating: “All authorities and international actors shall respect and ensure respect for their obligations under

### *Discriminatory nature*

Fourth, the legal regime that the Barrier establishes is inherently discriminatory. Article 2, para. 1 ICCPR prohibits discrimination in the enjoyment of the rights set forth in the Covenant, such as article 12 ICCPR. The Human Rights Committee confirmed, that:

“(…) it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>112</sup>

The Barrier is clearly directed towards Palestinians. Movement and residence restrictions, as described above, apply *de jure* only to Palestinians, whose access, movement and residence in the closed zone are dependent on permanent or personal permits. The movement of Israelis and those living in the settlements on the other hand is not subject to any system of permits. Israeli settlers and all those eligible under Israel’s Law of Return are exempted from any permission and enjoy full freedom of movement and residence.<sup>113</sup> Thus, while an Israeli or even a third state national, eligible under Israel’s Law of Return, can settle and move freely in the closed area, a Palestinian living with his or her family for generations in a neighbouring village will be pre-empted from doing so or will have to rely on the granting of a permit.

Under human rights law, differential treatment may under certain circumstances be justifiable if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>114</sup> Proportionate measures designed to achieve a legitimate objective may be permissible.<sup>115</sup> Arguably, this test must be applied with the specific situation in mind, which includes, for example, logical distinctions between occupying forces and its apparatus and the local population. However, distinctions between the local population and other permanent residents do not a priori fall into the same category.

The distinction is not reasonable and proportionate within the meaning of article 2, para. 1 ICCPR as it establishes an institutionalized system of unequal treatment within the Occupied Territories, as evidenced by the application of movement restrictions *de jure* only for Palestinians. In doing so, it indiscriminately targets the whole group of Palestinians in the Occupied Territories resulting in severe and disproportionate consequences.

### *Sweeping nature and severity*

Finally, it is the severity and the sweeping nature of movement restrictions that make the establishment of the Barrier as planned disproportionate. They apply to a very large number of Palestinians who live close to the Green Line. The restrictions are not only short-term in nature to address a specific threat, but carry at least a long-term and open-ended prospective. It is important to note in this regard, that the right to liberty of movement and residence is a particularly important right, because severe movement

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international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.”

<sup>112</sup> Human Rights Committee, General Comment No. 27, “Freedom of movement (art.12)”, CCPR/C/21/Rev.1/Add.9 of 02 November 1999, in para. 18.

<sup>113</sup> IDF – Order Concerning Security Directives (Judea and Samaria) (number 378), 1970, Declaration Concerning the Closure of Area Number s/2/03 (Seam Area), available in English translation at: <http://domino.un.org/unispal.nsf/0/c6114997e0ba34c885256ddc0077146a?OpenDocument>

<sup>114</sup> Human Rights Committee, General Comment 18, para. 13.

<sup>115</sup> Sarah Joseph et al., The International Covenant on Civil and Political Rights, Article 26, para. 23. 40.

limitations are intrinsically linked to the enjoyment of other rights, such as the right to work, and to an adequate standard of living, including food, water and housing.

It is the sum of the rights and interests affected that renders the interferences disproportionate. The Human Rights Committee consequently concluded that the Barrier and its regime of movement limitations constitute a violation of article 12 ICCPR:

“[...] the Committee is concerned that the construction of the “Seam Zone”, by means of a fence and, in part, of a wall, beyond the Green Line, imposes additional and unjustifiably severe restrictions on the right to freedom of movement of, in particular, Palestinians living in the Occupied Territories. The “Seam Zone” has adverse repercussions on nearly all walks of Palestinian life; in particular, the wide ranging restrictions on freedom of movement disrupt access to health care, including emergency medical services, and access to water. The Committee considers that these restrictions are incompatible with article 12 of the Covenant.”<sup>116</sup>

## **1.2. Freedom of movement under international humanitarian law**

Freedom of movement is equally protected under international humanitarian law. While it does not figure among the “absolute” rights in article 27 Fourth Geneva Convention, it remains protected subject to the general limitations of article 27, which enables the Occupying Power to:

“(...) take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”

This clause and the concept of military necessity give considerable discretion to an Occupying Power to take measures of control and security. The discretion, however, is not unfettered. Limitations placed on freedom of movement must be shown to be necessary not in abstract, but in the particular factual circumstances. There is at least a presumption that the personal freedom of civilians will generally be unimpaired during occupation.<sup>117</sup>

The permissible rationale of movement restrictions derives from the object and purpose of the laws of occupation. The provisions under the Fourth Geneva Convention seek to ensure that an occupying force has the right to ensure its safety and security, of its forces and its property as well as of those involved in the administration of the territory and their lines of communication.<sup>118</sup>

Apart from the legitimate purpose of defending one’s security as Occupying power, it is also meant to allow the Occupying Power to ensure its proper functioning. This is required not the least in order to enable it to fulfil its obligations towards the occupied population. Part of its obligation is the maintenance of public order and security, which in certain circumstance may justify certain movement restrictions.

The Barrier and the open-ended movement restrictions are, however, not a proportionate and legitimate application of these principles. Many of the severe movement repercussions on the protected population are the result of the deliberate choice to keep settlements on the

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<sup>116</sup> Human Rights Committee, Concluding Observations: Israel, CCPR/CO/78/ISR, 21 August 2003, para. 19.

<sup>117</sup> J. Pictet (ed.), IV Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary, International Committee of the Red Cross, Geneva, 1958, pp. 199-207.

<sup>118</sup> See in this regard “Legal consequences of Israel's construction of a Separation Barrier in the Occupied Territories”, by Oxford Public Interest Lawyers for ACRI, February 2004, para. 86, in reference to the rationale expressed in article 64 Fourth Geneva Convention.

western side of the Barrier. Settlements are not part of the forces of the Occupying Power, its administration or lines of communication.

On the contrary, the overwhelming international legal opinion, as mentioned above, considers the settlements as a violation of article 49, para. 6 Fourth Geneva Convention, prohibiting the transfer of population into occupied territory.<sup>119</sup> Under international humanitarian law, the concept of military necessity cannot justify the perpetuation of illegal population transfer.<sup>120</sup>

The obligation to ensure public order and security in the occupied territory cannot lead to a sweeping deprivation of rights of the protected people by a course of the Barrier benefiting settlements. Article 27 Fourth Geneva Convention may therefore not serve as a justification for imposing open-ended movement restrictions on the protected population in its own territory for the benefit of Israeli settlements.<sup>121</sup>

In addition to the reasons already mentioned in discussing article 12 ICCPR, two considerations should be highlighted. First, humanitarian law and the law of occupation follow the idea of enabling an Occupying Power to respond appropriately to an imminent threat in war or in occupation. The rationale is, however, a return to normality as soon as possible. The Barrier has all appearances of a long-term response. It will itself prevent a return to normality of life for the protected people for a long time to come. Second and connected to the possible life expectation of the Barrier, it contradicts one of the fundamental underlying principles of the law of occupation. As stated in Flecks Handbook on International Humanitarian Law:

“[...] the adversary has no right to tear a civilian out of his or her social surroundings through fundamental alteration. (...) The entire law governing occupation by a belligerent is based on the principle that the social order of the occupied territory shall not be altered by the Occupying Power.”(Emphasis added)<sup>122</sup>

The Barrier fundamentally affects this very “social fabric” of the Occupied Territories. The Barrier disrupts communities, splits families and is likely to lead to displacement and residence changes. It affects the protected population in virtually all areas of life. The long-term and open-ended perspective of the measure is likely to reshape Palestinian life in the Occupied Territories and constitutes therefore a disproportionate interference into the lives of the protected population under humanitarian law.

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<sup>119</sup> See UN Security Council Resolution 446 (1979), para.1; Security Council Resolution 465 (1980), para.5. This position has also been consistently taken by the International Commission of Jurists, see but all: International Commission of Jurists, *Israelis Settlements in Occupied Areas, the Review*, No.19, 1977, at 27 et seq..

<sup>120</sup> Article 49, para.2, Fourth Geneva Convention contains a very narrow exception to this principle which does not apply with regard to the case in question, as it authorizes population transfer only as limited temporary evacuation of population, limited to areas of armed fighting and justified by military necessity. See UN Security Council Resolution 446 (1979), para.1; Security Council Resolution 465 (1980), para.5. This position has also been consistently taken by the International Commission of Jurists, see but all: International Commission of Jurists, *Israelis Settlements in Occupied Areas, the Review*, No.19, 1977, at 27 et seq..

<sup>121</sup> See “Legal consequences of Israel’s construction of a Separation Barrier in the Occupied Territories”, by Oxford Public Interest Lawyers for ACRI, February 2004, para. 87 et seq.; this does, however, not mean that Israel would be prevented under international humanitarian law to provide any short-term protection to settlements to prevent attacks.

<sup>122</sup> Gasser in: Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, 1995, p 502, para. 7.

The Barrier therefore not only contradicts the freedom of movement guarantees under human rights law (article 12 ICCPR), but also the obligation to respect freedom of movement under international humanitarian law.

### **1.3. Prohibitions under international humanitarian law affected by movement restrictions**

The severe restrictions on movement and residence created by the Barrier raise concerns with regard to other prohibitions under international humanitarian law.

#### 1.3.1. Forcible transfer of population

The Barrier and its associated legal regime may lead not only to internal displacement and interferences with the right of residence in violation of article 12 ICCPR, but also to a breach of the prohibition of forcible transfers of protected persons, under article 49, para. 1 Fourth Geneva Convention. Forcible transfer of people is also a grave breach under article 147 Fourth Geneva Convention.

While “deportation” refers to expulsions across a state border, “transfer” applies to forcible movement within a state<sup>123</sup> and therefore also to forced transfer within the Occupied Territories.

A recent submission by the Oxford Public Interest Lawyers correctly argues that two scenarios may be particularly critical with regard to article 49 Fourth Geneva Convention.<sup>124</sup> First, the demolition of, and eviction of protected persons from their houses within the context of the building of the Barrier, and second, residence permits within the closed zone can be refused on arbitrary grounds, thus forcing inhabitants involuntarily to leave their place of residence.

A recent report by B'TSLEM documented some of the grave consequences and the acute crisis situation for an isolated village.<sup>125</sup> In this context, it should be borne in mind, that “forcible transfer” does not only take place where there is a formal decision like an expulsion order, nor is it dependent on the use of physical force. This is illustrated by the Elements of Crimes<sup>126</sup>, recently adopted to assist the International Criminal Court in the interpretation and application of the Rome Statute. It clarifies that the term “forcible” is not restricted to physical force, but includes “the threat of force, or coercion, such as duress, detention, psychological oppression or abuse of power against such persons or another person, or by taking advantage of a coercive environment.”

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<sup>123</sup> ICTY Krstic, Trial Chamber, decision of 2 August 2001 (case IT 98-33-T), para. 521 according to which “(...) Both deportation and forcible transfer relate to involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet the two are not synonymous in customary international law. Deportation presumes transfer beyond state borders, whereas forcible transfer relates to displacement within a State.”

<sup>124</sup> “Legal consequences of Israel's construction of a Separation Barrier in the Occupied Territories”, by Oxford Public Interest Lawyers for ACRI, February 2004, para. 133-135.

<sup>125</sup> B'TSLEM, Facing the Abyss: The Isolation of Sheikh Sa'as Village – Before and after the Separation Barrier, Status Report, February 2004, available at [www.btselem.org](http://www.btselem.org)

<sup>126</sup> Assembly of States Parties, Elements of Crimes, ICC-ASP1/3, page 118. The Elements of Crime have been elaborated to guide the International Criminal Court in the application of the ICC Statute, which itself sought to codify customary international law. Although they are not binding as such, they provide a strong indication of *opinio iuris* and customary international law.

These considerations should be taken into account in particular with regard to the determination of the route of the Barrier and the operation of its movement regime. Otherwise, the Barrier is likely to create a coercive environment in which further breaches, even grave breaches, of the Fourth Geneva Convention could occur.

### 1.3.2. Transfer of population into the occupied territories

Article 49, para. 6 Fourth Geneva Convention prohibits the transfer of population into the occupied territory by the Occupying power. The settlements in the West Bank are considered illegal under this provision. The object and purpose of this provision is to prevent demographic change within occupied territories by an Occupying Power and to prevent the transfer of population worsening the economic situation of the local population and endangering their separate existence.<sup>127</sup>

Article 49, para. 6 prohibits not only the original act of transferring a population, but also acts that maintain and perpetuate the existence of this transferred population. Such acts are a form of “continuous violation”.<sup>128</sup> Some elements of the Barrier route reinforce and perpetuate the existence of the settlements. This applies in particular where Palestinian villages and communities are separated or enveloped to allow the integration of settlements on the western side of the Barrier. These settlements are physically very closely connected with the rest of Israel, and Palestinian access to these parts of the territory is limited, leading to a stronger integration of the settlements with Israel.

Reading article 49, para. 6 Fourth Geneva Convention together with the Hague Regulations and the Geneva Conventions as a whole, it is clear that any action aimed at facilitating the movement of one’s people to take permanent residency in occupied territory violates international humanitarian law principles.<sup>129</sup> One of the key purposes of occupation law is to preserve and maintain the demographic and social configuration of the occupied territory. The Barrier may lead to a demographic change both by limiting the access to the land for Palestinians and by facilitating further transfer of Israelis to the territory concerned.

### 1.3.3. Collective punishment

It has also been argued that the building of the Barrier constitutes a form of prohibited collective punishment under article 33 Fourth Geneva Convention. The notion of collective punishment does not envisage punishment under penal law, but penalties of any kind inflicted on groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.<sup>130</sup> In order to qualify as collective punishment it would need to follow a clearly punitive, retributive intention. The Barrier as such does not seem to fulfil this requirement despite its excessive nature in violation of international law. However, it should be underscored that there is a fundamental need to

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<sup>127</sup> ICRC Commentary on article 49, para. 6.

<sup>128</sup> The unlawfulness of the transfer of population under article 49, para. 6, does not cease with the taking of residence in the Occupied Territories, but its maintenance could be seen as a “continuous” violation; see Article 14, para. 3 International Law Commission, Draft Articles on Responsibility for internationally wrongful acts, A/56/10.

<sup>129</sup> See in this respect: International Humanitarian Law Research Initiative: International Humanitarian Law in Israel and the Occupied Territory, The Legal Status of Israeli Settlements under IHL, available at: [www.ihlresearch.org/opt/feature.php?a=32](http://www.ihlresearch.org/opt/feature.php?a=32)

<sup>130</sup> ICRC Commentary, Article 33.

prevent, through the choice of the route and through sufficient and effective procedural safeguards that the Barrier from leading to a possible future strangulation of Palestinian communities in conflict with article 33 Fourth Geneva Conventions.

## **2. Property confiscation, requisition and destruction**

The Barrier constitutes a serious interference into property rights in the Occupied Territories. The main areas of concern in this respect are:

- The seizure by military order of private and public property;
- The destruction of property in order to erect the Barrier (such as dwellings, trees, crops) and the demolition of some houses in the vicinity of the Barrier;
- The future impact on property rights of Palestinian land abandoned as a result of the Barrier and its movement regime.

Property rights are protected under article 17 Universal Declaration of Human Rights and are also recognized in regional human rights instruments.<sup>131</sup> While the ICCPR and the ICESCR do not as such contain a right to property, certain property related elements are protected in article 17 ICCPR (arbitrary interference into one's home) and in article 11 ICESCR (right to housing). International humanitarian law, on the other hand, contains detailed provisions on the use and requisition of private and public property. Important distinctions are based on the qualification of the specific situation (armed conflict or occupation), the kind of property (private or public, real or personal) and the types of use by the Occupying Power.

### **2.1. Confiscation of private and public land and property**

#### 2.1.1. Private property and land

The seizure of private land and property in the Occupied Territories in order to construct the Barrier violates international humanitarian law, article 46, para. 1 Hague Regulations.

#### *The legal basis for seizure and confiscation of private property*

Article 46 para. 1 Hague Regulations recognizes the right to private property during occupation and para. 2 prohibits its confiscation. Israel contends, however, that the legal basis for the seizure of property is to be found in article 23 (g) Hague Regulations, which deals with property in the conduct of actual hostilities. The latter allows the seizure and destruction of enemy property during armed conflict, provided, that the confiscations are “imperatively demanded by the necessities of war”.

For the reasons set out above in the context of the freedom of movement, the barrier cannot be said to be “imperatively demanded by the necessities of war” and fails the test of military necessity in article 23 (g). Moreover, this provision is not applicable since it applies only in the context of armed fighting. The overall situation is one of occupation and not of sustained and protracted organized armed fighting that would as such deprive the occupied population of the protection of the specific provisions of the occupation law

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<sup>131</sup> For example Article 1 of the First Additional Protocol to the European Convention on Human Rights; Article 21 of the American Convention on Human Rights; Article 14 African Charter on Human Rights and Peoples' Rights.

regime.<sup>132</sup> The construction of the Barrier is a project of major proportions that is indeed hardly conceivable without effective and sustained control over the territory in question – typical to occupation.<sup>133</sup>

The interference into private property, including land, must therefore find its justification not in the provisions dealing with hostilities, such as article 23 (g), but in those dealing with belligerent occupation. The legal norm applicable to the seizure of land is more appropriately found in articles 46 or 52 Hague Regulations.

### *The confiscation of property and land under article 46 Hague Regulations*

At the core is the protection of private property in article 46 of the Hague Regulations, which prohibits any confiscation of private property. It is disputed whether the seizure of private land for the construction of the Barrier and its accompanying streets and devices constitutes an act of “confiscation”, prohibited under article 46 Hague Regulations, or whether it is a measure of “temporary requisition”.

The land is officially requisitioned for military needs on a temporary basis until the end of 2005. However, “requisition orders”, while formally temporary, can be renewed indefinitely. Human rights organizations have documented that temporary requisition orders have been abused in the past as a tool for permanent seizure.<sup>134</sup> This has typically been the case when property was seized for the construction of roads or other physical structures within the Occupied Territories. The change of the type and nature of the use of the land has often been an indicator that the measure is intended to be long-term, even permanent, rather than a short-term requisition.

The protection of property under article 46 Hague Regulations would be meaningless if it protected only against “declared” and “formal”, but not also “disguised”, “factual” or “constructive confiscations or expropriations”. Similarly, the prohibition of expropriation/confiscation has been interpreted in human rights jurisprudence to include protection against *de facto* expropriation.<sup>135</sup> Apart from the change of legal title, a confiscation/expropriation is characterized by the deprivation of the essence and substance of the property right. The European Court of Human Rights, for instance, found there to be a *de facto* expropriation in a case where the individual was dispossessed from the territory and could no longer make any use of his property.<sup>136</sup> In that case physical structures and buildings had been erected against the owner’s will on his land. He was not able to access the land and could not change the situation over considerable time. In other words, a factual expropriation occurs if the owner is deprived of any substance of his or her right to property, determined by its use, control and benefit. An equivalent situation may develop with regard to property seized to establish the Barrier, since it factually deprives the owner

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<sup>132</sup> This would not prevent the application of provisions relating to armed hostilities within actual armed fighting, for example in the context of incursions into occupied territory that result in fighting with organized and armed groups.

<sup>133</sup> The nature of the Barrier as a long-term measure to separate communities for security considerations rather than as a result of armed fighting in war is illustrated by the number of years planning. It also requires considerable administrative efforts to be implemented in terms of construction and infrastructure and requires a functioning administrative authority in the territory concerned for the application of the legal regime of permits, regulations and remedies.

<sup>134</sup> See B’TSELEM, *Behind the Barrier, Human rights violations as a result of Israel’s Separation Barrier*, at 18 et seq., March 2003. B’TSELEM, *Land Grab, Israel’s Settlement Policy in the West Bank*, May 2002.

<sup>135</sup> See also, Jacobs and White, *European Convention on Human Rights*, 3<sup>rd</sup> ed., 2002, at 309 et seq.

<sup>136</sup> *Papamichalopoulos and others v. Greece*, Judgment of 24 June 1993, Serie A, No.260-B.



of any meaningful power to dispose of his or her property or of its use. While the requisition order may not immediately change legal title,<sup>137</sup> the owner has in fact no reasonable expectation of accessing or otherwise using the land requisitioned for the Barrier in any foreseeable time.

On a few reported occasions Israel has dismantled parts of the Barrier and changed its route. Equally, media reports have mentioned possible changes of the planned route as a result of court challenges and international pressure. This indicates that changes can occur, especially in the early days of the Barrier. However, these changes can hardly be seen as evidence for an overall short-term philosophy or of a concept of flexible “moving Barriers”. Rather, they appear to be part of a consolidating process of the Barrier route. They are furthermore limited to specific cases and areas. It should be noted in this regard, that a de facto expropriation might be a creeping and sliding process. Especially, once the route is consolidated and legal processes have come to an end, the taking of property risks developing into confiscations prohibited by article 46 Hague Regulations.

Israel also claims that the owner concerned may apply for some usage fee for his or her property. Serious concerns have been raised as to the appropriateness of this fee and the processes connected to it.<sup>138</sup> Usage fees could be seen as an expression of a retaining property right and they may offer the owner some relief. In order to do so, however, they would need to be based on a genuine and accessible process. The abstract existence of such a fee alone cannot solely refute the long-term and indefinite nature of a deprivation of property and its sliding process of confiscation. It should be mentioned in this regard, that the model of requisition orders for military needs with some possibilities of usage fees has been used in the past to confiscate land for settlements and other structures and has in fact not prevented the permanent deprivation of property.<sup>139</sup>

For the most part it seems that the Barrier is meant to stay in place not only as a purely temporary and short-term response. It constitutes a stable structure separating different communities. Especially in those areas where it is separating major Israeli communities on the West Bank from the Occupied Territories, it is not likely to disappear. The possibility that a peace agreement at some point reverses this situation is too uncertain to assume that the requisition of territory for the construction of a Barrier is not a de facto confiscation. The possible right to restitution after a possible peace agreement cannot justify the confiscation of private property now.

It is therefore suggested that the seizure of private land does in large parts constitute an illegal confiscation of property and that in other parts it carries the potential to develop in time into property confiscation.

### *Seizure of property and land under article 52 Hague Regulations*

In past instances, Israel has referred to article 52 Hague Regulations when seizing private land. This provision states that “Requisition in kind and services shall not be demanded by municipalities or inhabitants except for the needs of the army of occupation.” It should be

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<sup>137</sup> The situation is further complicated by the insufficiencies of land registration, whereby many owners in the Occupied Territories are not formally noted in relevant registries and their legal title is dependent of the proof of actual possession over a period of time.

<sup>138</sup> See B'TSELEM, Behind the Barrier, Human rights violations as a result of Israel's Separation Barrier, at 34.

<sup>139</sup> See B'TSELEM, Behind the Barrier, Human rights violations as a result of Israel's Separation Barrier, at 34; see also David Kretzmer, The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories. 2002, 79 et seq., at 83.

noted, however, that article 52 cannot be invoked as an exception to the absolute prohibition in article 46 para. 2 Hague Regulations. To the extent that one regards the seizure of private property as a factual confiscation, it therefore cannot serve as its legal basis.

But even if one considers parts of the seizures as purely temporary, it is doubtful that they could be justified under the terms of article 52. The article speaks of requisition in “kinds and services” and it is very doubtful as to whether large-scale private land seizures, i.e. of real property, for the erection of a Barrier falls under this notion. Moreover, the requisition would need to serve the legitimate “needs of the army of occupation”. The stated motivation of Israel - the protection of individuals within Israel – clearly allows Israel to take security measures, but whether article 52 can serve as a legal basis for the seizure of private property within occupied territory itself, may be doubted. One may also question as to whether the support to settlements that have themselves been created partly in violation of article 52<sup>140</sup>, constitute a “need of the army of occupation”.

### 2.1.2. Seizure of public land and property

As far as the Barrier is constructed on public land, article 55 Hague Regulations requires the Occupying Power to administer public property as a usufructuary. According to this, no change of legal title over the land is permitted. The Occupying Power only acquires control over the “fruit” of the land. It may engage in the use of the land for the benefit of the local population, and may as well use the land to cover the cost of occupation.

The use of public land for the construction of a Barrier conflicts with this role. Even though it does not directly change the legal title over the land, it risks depriving the protected population of its land. It goes therefore beyond the “administration” of public property. Moreover, it is contrary to the interests of the protected population that access to its land is being denied on a long-term and open-ended basis and that it is used to block their right to freedom of movement within considerable parts of Palestinian territory.

## **2.2. Destruction and appropriation of property**

The property destruction in the course of the construction of the Barrier and its adjacent security zones, streets and devices, affects in particular agricultural land in the north-western part of the West Bank. There is some dispute as to the amount of destroyed land and acres, and as to the amount of replanted and destroyed olive trees.<sup>141</sup> The destruction and appropriation of property in occupied territory is regulated in article 53 Fourth Geneva Convention, which provides:

“Any destruction by the Occupying Powers of real or personal property belonging, individually or collectively to private persons, or to the State, or to other public

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<sup>140</sup> See Gasser in Fleck, *Handbook of Humanitarian Law in Armed Conflict* Oxford 2003, at 558.

<sup>141</sup> See B'TSELEM, *Behind the Barrier, Human rights violations as a result of Israel's Separation Barrier*, at 18 -19; World Bank, *The Impact of Israel's Separation Barrier on Affected West Bank Communities, Follow-up Report of 4 May 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*, at 33; para. I-23; The Government claims that 60.000 Olive trees would have been replanted, see Ministry of Defence on the Seam Zone, <http://www.seamzone.mod.gov.il/Pages/ENG/questions.htm>.

authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

This provision is complemented in the grave breaches provisions of article 147 Fourth Geneva Convention which refers to the “*extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly*”<sup>142</sup>

The earlier considerations on the lack of proportionality and military necessity caused by the particular route of the Barrier apply also in respect to the destruction of property and the appropriation of public land. They will for the most part, therefore, not be justifiable by the concept of military necessity entailed in article 53 Fourth Geneva Convention.

### **2.3. Possible future appropriation of land**

A serious concern is the possibility that farmers, who will stop cultivating their land due to the difficulties in accessing their land, might lose legal ownership. Under Ottoman statutes, the possibility exists to confiscate land that has not been registered or cultivated for three years. The above-mentioned provision is said to have been used in the past by Israel to appropriate land in the Occupied Territories.<sup>143</sup>

It should be noted, that many landowners on the West Bank are not formally registered as owners, so that the Barrier regime creates the realistic risk that they could lose their property in the near future if they cannot cultivate the land as a result of the Barrier. The denial of personal permits has been indicated to be a substantial problem. Even where permits were granted for an initial period, they have been sometimes subsequently denied.<sup>144</sup> This situation could over time also develop into to a constructive confiscation of private property under article 46 Hague Regulations, even more so since no compensation is provided in these cases.

But even within the operation of the system of agricultural gates – especially should they operate on the basis of the “back to back” system – there may be substantial problems of accessing and cultivating land. Conditional access through the permit system and agricultural gates will likely affect the future cultivation of land located on the other side of the Barrier. Appropriating land for the lack of cultivation in this situation would be unjustifiable and not proportional, since the abandonment of land is directly or indirectly caused by a deliberate measure of the Occupying Power.<sup>145</sup>

## **3. Freedom from arbitrary interference into home and family life**

The Barrier also leads to violations of the right to privacy and family life. Articles 17 and 23 ICCPR protect against arbitrary or unlawful interference with one’s family or home, and

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<sup>142</sup> See also Rome Statute for the International Criminal Court, article 8, para. II (a).

<sup>143</sup> See in this context: A Follow-up Report 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, 30 November 2003; at 19-20, para. 50-55; See also on this point B’TSELEM, Behind the Barrier, Human rights violations as a result of Israel’s Separation Barrier, at 18 -19;

<sup>144</sup> See B’TSELEM, Not All it Seems – Preventing Palestinians Access to their Lands West of the Separation Barrier in the Tulkarm-Qalqilia Area, June 2004; See also, A Follow-up Report 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, 30 November 2003; at 12.

<sup>145</sup> On the general question of transfer of public land to Israeli settlements, see David Kretzmer, The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories. 2002, at 77.

provide that the family is entitled to protection by the state.<sup>146</sup> This is complemented by article 10 ICESCR requiring the protection of the family as the natural unit of society. International humanitarian law specifically recognizes the protection of the honor and the rights of the family in article 46 Hague Regulations. Moreover, it should be recalled that one of the fundamental principles of the law of occupation is the protection of the social fabric within the territories under foreign control.<sup>147</sup>

### *Scope of article 17 and 23 ICCPR*

The Barrier cuts off previously connected communities and families, subjects any contact to the system of permissions and gates, and therefore severely affects family visits and contacts or decisions to live together as a family.

Moreover, the Barrier interferes into article 17 para. 1 ICCPR, which confers upon individuals the right to home, free from arbitrary or unlawful interference. This provision does not as such guarantee the right to property (see above) – in fact legal ownership is not required under article 17 para. 1<sup>148</sup> –, nor does it necessarily guarantee a right to live in a particular home. Nevertheless it does provide protection against undue interferences into one's home. The Human Rights Committee has considered the term home to mean “*the place where a person resides or carries out his usual occupation*”.<sup>149</sup> It protects against interferences into home in a broader sense, including the physical protection of the home, but extending to a person's place of residence. The Human Rights Committee has in particular found the expulsion of residents and their resettlement in another part of the country to constitute violations of the right to home and family.<sup>150</sup> The Barrier interferes with this right, since residence in the closed zones is subject to permanent residence permits and it would appear that those who do not receive such permits will be forced to leave their homes. While the construction of the Barrier has not led to large-scale house demolition, there have been reports of the destruction of homes, dwellings and building in some areas, such as in Nazlat'Issa.<sup>151</sup> These would also fall under the ambit of article 17 ICCPR.

### *Arbitrary interference*

These interferences into family life and the protection of one's home are arbitrary under the terms of 17 ICCPR. While under Israeli law there may exist a legal basis both for the establishment of the Barrier as well as for the regime of residence permits, these interferences are largely “arbitrary” in the meaning of article 17 ICCPR. The Human Rights Committee has clarified that even those interferences provided for by law should be in accordance with the provision, aim and objectives of the Covenant, and should, in any event, be reasonable in the particular circumstances.<sup>152</sup> The Committee interprets the term

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<sup>146</sup> See for example: A.S. v. Canada, Communication No.68/1980 (31 March 1981), para. 8.2, CCPR/C/12/D/6 (1980).

<sup>147</sup> Gasser in: Fleck (ed.), Handbook of Humanitarian Law in Armed Conflict, 1995, p 502, para. 7.

<sup>148</sup> This also implies that lacking a building permit or recognized ownership does not deprive a person from the protection under article 17 para. 1 ICCPR, See Manfred Nowak, ICCPR Commentary, at 302, 303.

<sup>149</sup> Human Rights Committee, General Comment 16, 32<sup>nd</sup> Session (1988), para. 5.

<sup>150</sup> See Human Rights Committee, Concluding Observations: Uzbekistan, CCPR/CO/71/UZB (2001), para. 16.

<sup>151</sup> B'TSELEM, Behind the Barrier, Human rights violations as a result of Israel's Separation Barrier, at 24, March 2003.

<sup>152</sup> Human Rights Committee, General Comment 16, 32<sup>nd</sup> Session (1988), para. 4 and 8.3.

reasonable to imply that the interference must be proportional to the end sought and necessary in the circumstances of the given case.

The construction of the Barrier within the Occupied Territories causes severe hardship to family life. It should also be noted that the family plays a particularly important role in the Palestinian society as the principle societal structure in the Occupied Territories. As in relation to other violations, it is the present and planned route that results in the separation of families and makes movement for family purposes dependent on a complicated permit system which leads to an arbitrary interference into one's home and family life as protected under articles 17 and 23 ICCPR. The system of gates and permits itself carries a serious potential for arbitrariness and abuse.

To the extent that the Barrier construction is accompanied with interferences into one's home through house demolitions, it should be recalled that the Human Rights Committee has raised its concern in the past over the practice of house demolitions in the Occupied Territories. The Committee considered it to violate article 17 even in the case where the lack of official construction permits served as justification for the demolition of houses.<sup>153</sup>

#### **4. Economic, social and cultural rights**

The Barrier not only affects civil and political rights, but constitutes a severe violation of economic, social and cultural rights in the Occupied Territories.

Particularly affected is the right to work, which includes the right of everyone to the opportunity to gain his or her living by work that he or she freely chooses or accepts (article 6 ICESCR). It also affects the right to the highest attainable standard of physical and mental health (article 12 ICESCR), the right to education (article 13 ICESCR), the right to an adequate standard of living, including the right to food, water and housing (article 11 ICESCR) and the right to take part in cultural life (article 15 ICESCR). In addition, international humanitarian law places additional and very specific obligations on the Occupying Power to ensure the wellbeing of the protected population.<sup>154</sup>

##### **4.1. State responsibility under the ICESCR**

As a State Party to the International Covenant on Economic Social and Cultural Rights (ICESCR), Israel is responsible for its implementation in the Occupied Territories.<sup>155</sup> Under

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<sup>153</sup> Concluding Observations, HRC: Israel, 18/08/98, CCPR/C/79/Add.93 at para. 12, which states: "(...) It also deplores the practice of demolitions, in part or in whole, of "illegally" constructed Arab homes. The Committee notes with regret the difficulties imposed on Palestinian families seeking to obtain legitimate construction permits. The Committee considers the demolition of homes to conflict directly with the obligation of the State Party to ensure without discrimination the right not to be subjected to arbitrary interference with one's home (art. 17), the freedom to choose one's residence (art. 12) and equality of all persons before the law and equal protection of the law (art. 26). Equally, the European Court of Human Rights has held under an equivalent clause in the European Convention on Human Rights that the deliberate destruction of homes and the refusal to allow return to one's home constitutes a gross violation of the respect for one's home. The demolition of houses and the refusal of residence permits is directly linked to the course of the Barrier and constitutes therefore an arbitrary interference into article 17 ICCPR. See Selcuk and Asker v. Turkey, Judgment of 24 April 1998, (1998) 26 European Human Rights Reports 477, para. 86; and Cyprus v. Turkey, Judgment of 10 May 2001.

<sup>154</sup> Such provisions include articles 39 (ensuring the means of existence of protected civilian populations), 50 (care and education of children), 55 and 56 Fourth Geneva Convention (maintaining medical services).

<sup>155</sup> See Committee on Economic, Social and Cultural Rights, Concluding Observations, E/C.12/1/Add.90, 26 June 2003; see also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,

article 2, para. 1 ICESCR states have an obligation to take progressive measures for the realization of the rights set forth in the Covenant. The UN 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.<sup>156</sup> Under this model, States Parties should “respect”, “protect” and “fulfil” the rights embodied in the International Covenant on Economic, Social and Cultural Rights. Moreover, states have the obligation to ensure *minimum core obligations* of economic, social and cultural rights regardless of the circumstances at any time.

*The obligation to respect* requires States Parties to abstain from actions that prevent persons from using available material resources in the way that they deem best to satisfy their basic needs. *The obligation to protect* requires States Parties to implement measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual, including the infringement on his or her material resources. *The obligation to fulfil-facilitate* requires States Parties pro-actively to engage in activities that strengthen access to and the utilization of resources and means to ensure the realization of the *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 realize these rights through the means at their disposal.

#### **4.2. Scope of Israel’s state responsibility in respect to the Occupied Territories**

As an Occupying Power Israel’s obligations are not solely limited to refrain from direct interferences into rights (obligation to respect) but also to ensure compliance with the so-called core obligations. These obligations are similar to some of the obligations under the Fourth Geneva Convention and include also minimum access rights on a non-discriminatory basis.<sup>157</sup>

A situation of occupation over a period of 37 years requires the Occupying Power also to take measures to fulfil and protect. While some responsibilities in respect to economic, social and cultural rights have been transferred to the Palestinian Authority under the Oslo Accords, this does not free Israel from its responsibilities under the Covenant in areas under its effective control, in particular in those areas of the West Bank where Israel has retaken control.<sup>158</sup> Israel has proven its effective control in recent years by entering any territory and area it wishes. In any case, it has control over those areas affected by the Barrier and can therefore not disregard the repercussions on the enjoyment of economic, social and cultural rights for the Palestinian population east of the Barrier.

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para. 17, which states: “The dominating or Occupying Power bears responsibility for violations of economic, social and cultural rights.”

<sup>156</sup> See in particular, Committee on Economic, Social and Cultural Rights, General Comment No.3, The nature of States Parties obligations, UN Doc. HRI/GEN/1/Rev.1.

<sup>157</sup> See for example, Committee on Economic, Social and Cultural Rights, General Comment No. 13, Right to Education, para. 57, E/C.12/1999/10; General Comment No.15, Right to Water, para. 37, E/C.12/2002/11. See also Audrey Chapman, Sage Russell, Core Obligations: Building a Framework for Economic, Social and Cultural Rights, 2002.

<sup>158</sup> The UN Special Rapporteur on the Right to Food recently confirmed that Israel has “the primary obligation to respect, protect and fulfil the right to food”, see Report by the Special Rapporteur, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, para. 31.; See also Physicians for Human Rights, A Legacy of Injustice, A Critique of Israeli Approaches to the Right to Health of Palestinians in the Occupied Territories, Israel, November 2002, at 9, 16.

The Barrier itself primarily affects the *obligation to respect* the various rights set out above. According to this principle, Israel has the obligation to respect economic, social and cultural rights, by *not preventing* persons under its jurisdiction from enjoying their rights set forth in the Covenant.<sup>159</sup> The Barrier violates this obligation mainly by reducing the availability of certain goods, by seizing and destroying land and property, and by preventing access to these rights through movement restrictions.

In addition, Israel may have an obligation to protect and fulfil, especially if the humanitarian impact created by the Barrier deteriorates, requiring Israel to take direct measures to *fulfil (provide)* assistance. A similar obligation exists under the Fourth Geneva Convention requiring the subsistence of food and medical supplies and the obligation of ensuring and maintaining medical services.<sup>160</sup>

Furthermore, Israel also has the *obligation to protect* against interferences by third parties, for example by ensuring that agricultural land, property and water resources located between the Barrier and the Green Line are not appropriated by third parties, such as Israeli settlers.

### 4.3. Violations of economic, social and cultural rights by the Separation Barrier

Numerous monitoring reports have documented and noted the grave humanitarian impact that the Barrier already has and is likely to have if the proposed trajectory is completed.<sup>161</sup> This is also illustrated by a rare statement of the ICRC expressing grave concern about the impact created by the Barrier in those parts already constructed.<sup>162</sup>

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<sup>159</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.

<sup>160</sup> Article 55 states that the Occupying Power has the obligation of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. Article 56 states that the Occupying Power has the obligation of ensuring and maintaining (...) the medical and hospital establishments and services, public health and hygiene in the occupied territory (...) medical personnel of all categories shall be allowed to carry out their duties.

<sup>161</sup> For reference see: United Nations Office for the Coordination of Humanitarian Affairs (OCHA), The West Bank Wall, July 2003, available at <http://www.reliefweb.int/hic-opt/wall/report/wall.htm>; United Nations Office for the Coordination of Humanitarian Affairs (OCHA), West Bank Barrier, Humanitarian Access and the Jerusalem Barrier, December 2003, available at <http://www.reliefweb.int/hic-opt/wall/jm/index.htm>; United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Humanitarian Implications of the New Barrier Projections - Jan 2004 update, available at [http://www.reliefweb.int/hic-opt/docs/UN/OCHA/Barrierprojections\\_Jan04\\_25Feb04\\_eng.pdf](http://www.reliefweb.int/hic-opt/docs/UN/OCHA/Barrierprojections_Jan04_25Feb04_eng.pdf); The United Nations Relief and Works Agency for Palestine Refugees (UNRWA), The West Bank Barrier, available at <http://www.un.org/unrwa/emergency/Barrier/index.html> (including "Impact of the First Phase of the Barrier on the Qalqiliya, Tulkarm and Jenin districts"; "Special report on the West Bank Barrier" and "The Impact of the First Phase of Barrier on UNRWA-Registered Refugees" at <http://www.un.org/unrwa/emergency/Barrier/f-phase.html>); 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>162</sup> International Red Cross, Israel/Occupied and Autonomous Palestinian Territories, West Bank Barrier causes serious humanitarian and legal problems, Press Release, 18 February 2004.

The severe problems in the enjoyment of economic, social and cultural rights are directly linked to the Barrier and the movement regime that it establishes. The main problems are the destruction of land, property and houses and cutting through the lifelines of Palestinian communities in the Occupied Territories. The latter is the result of the complex route that seeks to include the majority of settlements. It creates difficulties in accessing health and educational facilities as well as workplaces, even for some Palestinian communities and cities located east of the Barrier. The effect is even more obvious in those parts where the Barrier separates Palestinian communities from each other. The Barrier by its route slices through previously connected communities, thus affecting access to workplaces, water resources, health facilities, social services and schools and universities.

More specifically, in building the Barrier, agricultural land and water resources are requisitioned and appropriated. This affects the level of agricultural production (availability) and will also deprive Palestinians of an important source of income. This is of particular concern with regard to the northern part of the West Bank where the land is comparatively fertile. Maybe even more important is that movement restrictions affect the viability of economic and agricultural operations. The restrictive gate system with specific opening hours, special permits required to enter with cars, longer passage times to reach land, the back-to-back system - if employed -, will all reduce or even halt the production of food and other essential goods. These restrictions will affect for example the full scope of the right to food, starting from the cultivation of land to the production of food, its transportation across the Barrier and access to markets on either side of the Barrier by both producers and customers.

A central feature of economic, social and cultural rights is their physical and economic *accessibility* in a non-discriminatory manner.<sup>163</sup> Movement restrictions affect the access to various other rights, such as food, water, but also to work, as workers have more difficulty accessing jobs on the other side of the Barrier. The right to education and health is impaired, since not all villages and cities have sufficient educational and medical services at their disposal, which therefore require movement to access such facilities. While the relevant regulations foresee the possibility of personal permits to cross the Barrier for teachers, pupils and medical personnel, access to schools and medical clinics are subject to obtaining such permits and to the operation of the gate system.

A specific concern prevails in respect to the right to housing. The refusal of a permanent permit within the closed zone, or the house demolitions – though limited in numbers - within the context of the construction of the Barrier, may constitute a forced eviction. The Committee on Economic, Social and Cultural Rights has qualified forced evictions as *prima facie* violations of article 11 of the Covenant.<sup>164</sup> In determining the arbitrariness of the eviction, it also considers the appropriateness of remedies and the compliance with rule of law principles – a serious concern in the context of the building of the Barrier (see below).

It should be borne in mind that although the Barrier is not a reversal of a legal right or service previously granted, it is based on a policy that equates to a “deliberate retrogressive measure” in the implementation of the Covenant on Economic, Social and Cultural Rights. The Barrier creates a very acute and severe limitation to economic, social and cultural rights. In fact, the long-term nature of the Barrier threatens any viable *progressive*

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<sup>163</sup> For example, General Comments No.15 (2002), Right to water, E/C.12/2002/11, para. 19; General Comment No.13, Right to Education, E/C.12/1999/10.

<sup>164</sup> General Comment No.4, Right to adequate housing, 13/12/91, para. 18.



*realization*<sup>165</sup> of economic, social and cultural rights in the Occupied Territories for many years to come. The Committee on Economic, Social and Cultural Rights has repeatedly stated, that:

“[...] There is a strong presumption that retrogressive measures taken in relation to a right are not permissible. If any retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources.”<sup>166</sup>

This retrogressive measure is not related to the question of resources of the State of Israel, but is based on security considerations taken in the interest of its own and not the occupied population. Israel has to prove that the massive and long-term implications on the enjoyment of economic, social and cultural rights are fully justified under article 4 ICESCR. Possible justifications have also to be seen against the backdrop of the already difficult living conditions within the Occupied Territories. The magnitude of the impact on various interrelated economic, social and cultural rights in the Occupied Territories is largely the result of the route of the Barrier. Israel will therefore in particular have to justify the deliberate choice of the route.

Israel claims that every effort has been made to alleviate the repercussions in particular through the establishment of gates and agricultural gates.<sup>167</sup> These measures could be a mitigating measure if they functioned in a predictable and fair manner and facilitated access and passage. However, in its present form this system cannot prevent violations of economic, social and cultural rights. The gate system is dependent on permit schemes, the limited number of gates and their sporadic opening hours. Access is further restricted by the obligation to use only the specific gate mentioned in the relevant permit for a specific purpose, and the need to go through bureaucratic administrative procedures to apply for permits in advance. Especially, the process for obtaining personal permits results in frequent denials for people with a legitimate interest to cross the Barrier, such as to cultivate their land.<sup>168</sup> These procedures will therefore not be of sufficiently compensatory nature. In fact, it seems more appropriate to regard this system as part of the restriction regime itself.

The Barrier therefore violates the right to work (article 6 ICESCR), the right to the highest attainable standard of physical and mental health (article 12 ICESCR), the right to education (article 13 ICESCR), the right to an adequate standard of living, including the right to food, water and housing (article 11 ICESCR) and the right to take part in cultural life (article 15 ICESCR).

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<sup>165</sup> See article 2, para. 1 ICESCR.

<sup>166</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties' Obligations, 14 December 1990, para. 9.

<sup>167</sup> Ministry of Defence on the Seam Zone, <http://www.seamzone.mod.gov.il/Pages/ENG/questions.htm>

<sup>168</sup> See B'TSELEM, Not All it Seems – Preventing Palestinians Access to their Lands West of the Separation Barrier in the Tulkarm-Qalqilia Area, June 2004.

## 5. Respect for the rule of law and due process

The construction of the Barrier also raises serious concerns with regard to the lack of respect for proper legal and administrative processes and elementary standards of fairness in the application of the legal regime surrounding the Barrier.<sup>169</sup>

International human rights law guarantees everyone's right to an effective remedy (article 2, para. 3 ICCPR) and to a fair trial in the determination of any dispute affecting a civil right, such as the right to property over land (article 14, para. 1 ICCPR). Moreover, the inability to effectively challenge disproportionate measures exacerbates the arbitrariness of the interferences into fundamental rights.

While the ICESCR does not contain a specific equivalent to article 2, para. 3 ICCPR, the UN Committee on Economic, Social and Cultural Rights has stressed that if there are no effective domestic legal remedies (not necessarily judicial) for violations of economic, social and cultural rights, a government would need to show that such remedies are not "appropriate means" within the terms of article 2, para. 1 ICESCR, or that they are unnecessary.<sup>170</sup> As the Committee notes, this will be difficult to show and the Committee considers that, in many cases, the other means to protect social, economic and cultural rights will be rendered ineffective if they are not reinforced or complemented by a judicial remedy. This is reflected in General Comments to various rights affected by the Barrier that consider the provision of legal remedies to be part of the obligation under the Covenant.<sup>171</sup>

### 5.1. Administrative procedures

The dispossession of land and property is a serious interference into a person's rights. It constitutes a particularly grave interference if the land is used for agricultural cultivation contributing directly to the person's livelihood. The UN Committee on Economic, Social and Cultural Rights in its General Comment on Forced Evictions has therefore placed considerable weight on the availability of appropriate procedural protection, including administrative, for any such interference, in particular with regard to land/housing evictions, which affect a range of rights in both the ICCPR and ICESCR. It has stated:

"(...) The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (...) (g) provision of legal remedies; (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts".<sup>172</sup>

These procedural requirements stand in contrast with the procedures for property and land requisition in the context of the Barrier construction. The procedures do not provide

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<sup>169</sup> See for a description, Follow-up Report of 30 May 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, at 16, para. 34 et seq.

<sup>170</sup> UN Committee on Economic, Social and Cultural Rights, E/C.12/1998/24, General Comment No.9, The domestic application of the Covenant, para. 3.

<sup>171</sup> See for example: CESCR, General Comment 7, The right to adequate housing (art.11.1): forced evictions, 20/05/07, para. 15

<sup>172</sup> CESCR, General Comment 7, The right to adequate housing (art.11.1): forced evictions, 20/05/07, para. 15.

sufficient notice prior to the seizure of land and the start of the construction. In many cases they do not seem to provide for any reasonable consultation that would guarantee that the interests of those affected are genuinely taken into account in the determination of the route. A one-week limit for filing objections to the Legal Advisor of the Military Commander of the West Bank to ensure a halt in the construction is insufficient to access any remedy effectively – especially if proof is not required that the person has effectively received the order. Reports have pointed to the additional difficulty that the land registers are often not updated or are inaccurate, making proof of property difficult or at least a more lengthy process.<sup>173</sup> In a situation of restricted movement within the West Bank this is said to have made it difficult for people to produce necessary documentation on time. Access to lawyers or land surveyors are also complicated.

Even in recognizing Israel's legitimate security concerns, such a significant interference with rights under human rights and humanitarian law must be conducted within and not outside the rule of law. The process of deliberations concerning the Barrier spans several years, as does its construction in different phases. It is therefore not unreasonable to expect, even in a situation of occupation, respect for fairness and due process. The current practice seems also difficult to reconcile with existing administrative law principles of procedural fairness that the Supreme Court of Israel sitting as High Court has in principle recognized to apply also in the Occupied Territories.<sup>174</sup>

## **5.2. Effective remedies and the right to an independent tribunal**

Article 14, para. 1 ICCPR, provides the right for everybody to be heard by an independent and impartial court and tribunal “in the determination of his rights and obligations in a suit of law”. The Human Rights Committee, similar to the European Court of Human Rights, considers that the concept of a suit of law must be based on the nature of the right in question rather than the status of one of the parties (private or public authority).<sup>175</sup>

The right to property is a private and patrimonial right, protected under domestic law and falling under the ambit of article 14 ICCPR. It establishes therefore a right to be heard before an independent and impartial tribunal established by law.

### *Recourse to the military committee*

A person whose property is affected by a requisition order has the right to petition to the Legal Advisor of the Military Commander of the West Bank who submits the claim to a military committee. While lawyers consulted in the course of this study provided different information about the specifics of this process, serious concerns have been raised as to the appropriateness of this remedy in the context of the Barrier construction.

First of all, the deficiencies in the administrative process limit also the effective access to this remedy. This is particularly the case with regard to the lack of personal delivery and the difficulty to provide documents proving the property claim of the owner due to the shortage of time and in light of the existing movement difficulties within the West Bank.

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<sup>173</sup> Follow-up Report of 04 May 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, para. 38; Follow-up Report of 04 May 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, para. 34 et seq.

<sup>174</sup> See, Kretzmer, *The Occupation of Justice*, at 25-26.

<sup>175</sup> *Y.L. versus Canada*, (112/81), para. 9.2.

The prospect of any successful legal challenge is also affected by the fact that the Barrier is justified by the concept of military necessity. The individual concerned, however, has hardly any meaningful access to the information necessary to challenge the assessment made by the army underlying the specific course of the Barrier. An additional element is that the confiscation of property is crafted in the guise of a purely temporary requisition order, while likely to constitute a property confiscation as discussed above. This may well affect the claimant's case, since it reduces the gravity of the interference, which is a potentially important aspect in the determination of an appeal. Reports also indicate that there are hardly any successful petitions, other than those resulting in some modifications on the amount of land seized.<sup>176</sup> This remedy is therefore not an effective remedy.

It also does not comply with the obligations under article 14 para. 1 ICCPR. While it is conceivable in a situation of belligerent occupation that a court is linked to the Military<sup>177</sup>, it is nonetheless required that this body is an independent and impartial tribunal. To ensure independence and impartiality is particularly important since it is the Israeli Defense Force, who hands down the requisition orders and on whose correctness and legality the Commission has to come to a determination. Moreover, decisions are said to be reversible by the Military Commander, which casts serious doubts as to whether this appeal process is at all a judicial or quasi-judicial process.<sup>178</sup> An appeal to the Military Committee does therefore fail to satisfy the requirements under article 14, para. 1 ICCPR.

### *Recourse to the Supreme Court sitting as High Court in the Occupied Territories*

Appeals can, however, be lodged to the Supreme Court of Israel sitting in its function as a High Court in the Occupied Territories. Article 14, para. 1 requires in cases of suit of law involving a civil right only one judicial instance that is independent and impartial. Article 14, para. 1 ICCPR seems not to preclude a state to establish an administrative remedy prior to the access to a court. The Supreme Court is an independent tribunal that may therefore satisfy the requirements under article 14 ICCPR provided, however, it hears cases both on the facts and the law.<sup>179</sup> Moreover, access to the court must be "effective" in order to satisfy the demands of article 14 ICCPR. In light of the shortcomings within the administrative procedures and the ineffective appeal system to the military committees, special efforts will be required to ensure that access to justice is effective. Importantly, this will require the Supreme Court to allow a contradictory procedure in which evidence, also with regard to the military necessity of the particular course of the Barrier, can effectively be challenged.

### **5.3. Effective remedy**

Under the ICCPR, an additional obligation exists in article 2, para. 3 to provide access to an effective remedy for everyone who can claim the plausible violation of a right guaranteed

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<sup>176</sup> See for example Report 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, 4 May 2003; at 17; This information was confirmed by Israeli lawyers consulted in the course of the preparation of this study.

<sup>177</sup> With regard to criminal courts, see article 66 Fourth Geneva Convention.

<sup>178</sup> See Report 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, 4 May 2003; at 18.

<sup>179</sup> The Supreme Court reviews rather the "legality" than the "correctness" of administrative decisions. See Kretzmer, *Occupation of Justice*, at 25. It may, however, interfere also into questions of fact if the decision is clearly unreasonable.

by the ICCPR. Similar obligations exist under Economic, Social and Cultural Rights with regard to the implementation of certain rights, such as the right to housing and the protection against eviction.<sup>180</sup> The Human Rights Committee stressed that the right to an effective remedy is so inherent to the ICCPR as a whole that a state must comply with this fundamental obligation even in a state of emergency.<sup>181</sup>

This requires Israel to ensure, among others, an effective system to challenge the refusal of permanent and personal permits to enter or stay in the “closed zone”. Regulation No. 378 provides that permanent residence permits shall either be approved or transferred to a committee for examination.<sup>182</sup> A similar provision exists with regard to personal permits.<sup>183</sup> The right to be heard prior to a decision does not satisfy the demands of a remedy against the decision itself. No information on remedies was available to us. It would be important, however, to stress that international law would require an effective remedy against the decision of the authorities to refuse a permit.

## 6. Prohibition of discrimination

The Barrier and the legal rules governing its operation violate the prohibition of discrimination on the grounds of national origin contained in common article 2, para. 1 ICCPR and ICECSR, according to which the enjoyment of the rights in the Covenants must be guaranteed on a non-discriminatory basis, as well as the general discrimination clause of article 26 ICCPR. Fundamental non-discrimination principles continue to apply even in times of an emergency.<sup>184</sup>

The Barrier is directed towards Palestinians and neither towards Israelis nor to Israeli settlers present in the Occupied Territories. The Barrier is built primarily on Palestinian private and public land whereas only a small portion of the trajectory is located within Israel. Its route is meant to benefit specifically large parts of the Israeli settler communities. Movement and residence restrictions, as described above, apply *de jure* only to Palestinians and not to Israeli settlers or visiting Israelis, who are exempted *ratione personae* from the relevant regulations.<sup>185</sup> The route and the permit requirements affect first and foremost the enjoyment of economic, social and cultural rights of Palestinians.

Differential treatment based on national origin may be justifiable in exceptional circumstances if the criteria for such distinction are reasonable and if the aim is to achieve

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<sup>180</sup> See UN Committee on Economic, Social and Cultural Rights, E/C.12/1998/24, General Comment No.9, The domestic application of the Covenant, para. 3. While the right to a remedy is not explicitly formulated in the Covenant, the Committee on Economic Social and Cultural Rights derives this obligation from the treaty obligation to take measures to implement economic, social and cultural rights, which require a remedy and in some instances if a judicial remedy.

<sup>181</sup> See UN Human Rights Committee, General Comment No.29, “States of emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14.

<sup>182</sup> IDF – Order Regarding Defense Regulation No 378, 5730-1970, Regulations Regarding Permanent Resident in the Seam Area Permit, para. 4.

<sup>183</sup> IDF – Order Regarding Defense Regulation No 378, 5730-1970, Regulations Regarding Permits to Enter and Stay in the Seam Area, para. 4 B.

<sup>184</sup> See UN Human Rights Committee, General Comment No.29, “States of emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 8.

<sup>185</sup> IDF – Order Concerning Security Directives (Judea and Samaria) (number 378), 1970, Declaration Concerning the Closure of Area Number s/2/03 (Seam Area), available in English translation at: <http://domino.un.org/unispal.nsf/0/c6114997e0ba34c885256ddc0077146a?OpenDocument>

a purpose which is legitimate under the Covenant.<sup>186</sup> Proportionate measures designed to achieve a legitimate objective may be permissible.<sup>187</sup>

Arguably, this test must be applied with the specific situation of occupation in mind, which includes some logical distinctions, for example, between occupying forces and its apparatus and the local population. As mentioned above, however, the distinction between residents who happen to have the nationality of the Occupying Power and residents who are Palestinians do not fall as such in this category.

As much as the Barrier route and regime discriminates for the benefit of the future existence of Israeli settlements in the Occupied Territories it would not constitute a legitimate objective compatible with the Covenant. Upholding a situation that is illegal under international law cannot be a legitimate purpose under human rights law. The protection of life and personal security from terrorist acts, however, constitutes a legitimate objective under article 2 and 26 ICCPR, which may justify differential treatment. It should be recalled in this context that the obligation to protect life and security applies itself without discrimination to all those under the jurisdiction of the state, including Palestinians in the Occupied Territories. Most importantly, measures to protect the security of the inhabitants of Israeli settlements within the Occupied Territories have to be short-term in light of Israel's obligation not to perpetuate the existence of its settlements.<sup>188</sup> The Barrier – even if not meant to be permanent as repeatedly stated by Israel – is not a short-term protective measure, but it establishes an open-ended institutionalized system of unequal treatment of major proportions. Moreover, the Barrier and its legal regime apply indiscriminately to all Palestinians as a group. The route of the Barrier and the disparity in which it affects Palestinians and not Israelis in the Occupied Territories is a further element making the distinction unreasonable (non-proportional).

## **7. The Separation Barrier in light of the right of peoples to self-determination**

The Barrier may impair the Palestinian right to self-determination as affirmed in article 1, para. 1 common to the ICCPR and the ICESCR, which stipulates the right of peoples to “*freely determine their political status and freely pursue their economic, social and cultural development*”. The right to self-determination is equally recognized by the Charter of the United Nations and by important General Assembly Resolutions.<sup>189</sup>

It is generally accepted that the Palestinian people are entitled to the right to self-determination. The UN General Assembly has repeatedly confirmed the right of the Palestinian people to self-determination<sup>190</sup>, and both the Security Council and the General

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<sup>186</sup> Human Rights Committee, General Comment 18, para. 13.

<sup>187</sup> Sarah Joseph et al., *The International Covenant on Civil and Political Rights*, Article 26, para. 23. 40.

<sup>188</sup> See above regarding article 12 ICCPR.

<sup>189</sup> Resolution 1514 (XV) of the United Nations General Assembly: “Declaration on the granting of independence to colonial countries and peoples” of 14 December 1960; Resolution 1541 (XV) of the United Nations General Assembly: “Principles which should guide Members in determining whether or nor an obligation exists to transmit the information called for under Article 73 of the charter” of 15 December 1960; Resolution 2625 (XXV) of the United Nations General Assembly: “Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations” of 24 October 1970.

<sup>190</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

Assembly reaffirmed that it is linked to the right to a state.<sup>191</sup> Both Israel as well as third states have an obligation under the Covenant and general international law to respect and protect the right of the Palestinian people to self-determination. The Human Rights Committee specified<sup>192</sup> that the right to self-determination also imposes specific obligations on States Parties not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise their right to self-determination. Moreover, it stated that the obligations exist irrespective of whether a people entitled to self-determination depend on a State Party to the Covenant or not. It follows that all States Parties to the Covenant should take positive action to facilitate the realization of and respect for the right of peoples to self-determination.<sup>193</sup>

The construction of the Barrier leads to a division of the West Bank in portions. It physically includes a part of the territory into a corpus connected with Israel. The long-term consequences of the Barrier, the fact that its route lies within the Occupied Territories and departs from the Green Line puts the exercise of the right to self-determination by the Palestinian people under menace.<sup>194</sup> In combination with the restrictive movement regime that is established, it may over time well change the demographic structure of parts of the Occupied Territories. Under these circumstances, it may threaten a viable Palestinian state, which would be created as an exercise of the Palestinians right to self-determination.

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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>191</sup> See Security Council Resolution 1397 (2002) of 2 March 2002 (4489<sup>th</sup> meeting): “*Affirming* a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders”; Resolution 672 of 12 October 1990 (2948<sup>th</sup> meeting) “Reaffirming that a just and lasting solution to the Arab-Israeli conflict must be based on its Resolution 242 (1967) of 22 November 1967 and 338 (1973) of 2 October 1973, through an active negotiating process which takes into account the right to security for all States in the region, including Israel, as well as the legitimate political rights of the Palestinian people. See General Assembly resolutions. Resolution 53/136, 9 December 1998 (85<sup>th</sup> Meeting), The right of the Palestinian people to self-determination: “Reaffirms the right of the Palestinian people to self-determination, without excluding the option of a state”; Resolution 54/152, 17 December 1999 (83<sup>rd</sup> meeting), The right of the Palestinian People to self-determination: “Reaffirms the right of the Palestinian People to self-determination including the option of a state”; Resolution 55/87, 4 December 2000, The right of the Palestinian people to self-determination: “Reaffirms the right of the Palestinian people to self-determination, including their right to a State”; Resolution 56/142, 19 December 2001 (88<sup>th</sup> meeting), The Right of the Palestinian people to self-determination: “Reaffirms the right of the Palestinian to self-determination, including their right to an independent State”; 57/198, 18 December 2002, 77<sup>th</sup> plenary meeting, The right of the Palestinian people to self-determination: “Reaffirms the right of the Palestinian people to self-determination, including the right to their independent state”.

<sup>192</sup> Human Rights Committee, General Comment 12: The right to self-determination of peoples (Art. 1): 13 March 1984, paras. 1 and 2.

<sup>193</sup> Human Rights Committee, General Comment 12: The right to self-determination of peoples (Art. 1): 13 March 1984, paras. 1 and 2.

<sup>194</sup> The UN Special Rapporteur on the Occupied Territories has described the risk that the Barrier impedes on the exercise of the right to self-determination in the following way:“(…) 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.” 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, para. 15, available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.6.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.6.En?Opendocument)

## **Part IV: Conclusions**

### **Main conclusions and principle issues of concern:**

#### **I. On the role of the rule of law in the debate on the Separation Barrier**

The Barrier is an issue of intense political debate and the decision to build the Barrier is a political decision. In addition, it is also a legal issue and as such subject to the respect for human rights and international humanitarian law. In the view of the International Commission of Jurists, the Barrier's political legitimacy should flow from its compliance with the rule of law.

The International Commission of Jurists has consistently stressed that any peaceful solution to the conflict in the Occupied Territories must be firmly based on the respect for human rights and the rule of law by all sides. The construction of the Barrier undermines efforts to obtain peace in the region through a just and durable solution. Suicide attacks also undermine the search for peace and security.

The International Commission of Jurists calls on all parties to fully respect human rights and humanitarian law and to base their policies on such law. Human rights and humanitarian law cannot be selectively invoked by either party and apply even in the fight against terrorist acts.

The International Commission of Jurists also calls on the International Court of Justice as the principle judicial organ of the United Nations to uphold the fundamental principles of international human rights law and international humanitarian law.

#### **II. On the applicability of international human rights and international humanitarian law**

The international legal framework governing the legality of the Barrier includes not only international humanitarian law, but also international human rights law.

It is well established that both sets of law apply concurrently. The UN human rights treaty bodies have underscored that both Covenants are applicable to the situation in the Occupied Territories.

The fight against terrorism does not deprive the population in the Occupied Territories of their protection granted by human rights and humanitarian law.

#### **III. On the justification of the Barrier for security reasons**

Israel has the right and duty also under human rights law to protect its security and the security of its citizens. However, it must do so within the rule of law and not as an abrogation of the rule of law.

The Barrier in its current route on the Occupied Territories cannot be justified by the concept of military necessity under international humanitarian law, nor by the concept of legitimate restriction under human rights law and its underlying principle of proportionality.

The main considerations for this determination are:



1) The Barrier is not only a structure that separates Israelis from Palestinians; it also separates Palestinian communities from each other. It creates enclaves and destroys the social and economic fabric of society. It is the course of the Barrier, which tears apart homogenous communities and infrastructures and leads to many of the grave repercussions for the Palestinian population.

2) The Barrier is not simply a “neutral” physical structure. It is characterized by a restrictive legal regime that regulates its operation. This legal regime severely affects property rights, the use of and access to land, and establishes a system of personal and permanent permits for Palestinians for a limited number of specific purposes and subject to various restrictions.

3) This legal regime is inherently discriminatory, since it applies indiscriminately to Palestinians because of their origin. The regulations and orders on the movement of people explicitly say that Israelis and Israeli settlers are exempt from their application.

4) Fourth, the Barrier’s course is largely located within the Occupied Territories and will encompass the majority of Israeli settlements. The inclusion of the settlements has largely led to severe restrictions on the movement of Palestinians and to the separation of Palestinian communities from each other. Israel is entitled to take measures to protect all those under its jurisdiction, both Israelis and Palestinians. This could include some short-term measures to protect inhabitants of its settlements. However, as these settlements are illegal under international law, Israel cannot support the interests of the settlements to the sole detriment of the original population. Yet, this is precisely the result of the Barrier system. It restricts the right and freedoms of Palestinians within their own territory, while ensuring that the settlers do enjoy these same rights and freedoms by integrating them on the western side of the Barrier. Whether or not the Barrier is a permanent structure, the timeframe is clearly open-ended and not merely a short-term or truly temporary measure.

5) The Barrier regime’s interference into the rights of the occupied population is topped with an element of arbitrariness in the way the project is implemented and by the lack of effective remedies against the orders of the Military Commander. The inability to effectively challenge disproportionate measures exacerbates the arbitrary impact of the Barrier.

6) Finally, it is the severity and the sweeping nature of the restrictions that makes the measure disproportionate. In reality, the restrictions will not be short-term but long-term. The Barrier consequently has adverse repercussions on all walks of Palestinian life and is likely to affect severely the whole nature of Palestinian society.

#### **IV. The obligation to cease the violation of international law**

The Barrier as constructed constitutes a serious violation of international human rights law and international humanitarian law. It constitutes an internationally wrongful act that requires Israel to cease the construction of the Barrier on Occupied Territories and to dismantle what has been built so far. Moreover, Israel is under an obligation to restitute property and land to the owners in such a state that allows the use of land according to its previous purpose.

Third states are under an obligation not to aid and assist in the commission of this international unlawful act. States Parties to the Fourth Geneva Convention are also under the obligation not only to respect, but also to ensure respect to the provisions of the Convention.

## V. Individual rights and obligations violated

- *Freedom of Movement*

The Barrier and its restrictive movement regime violate the right to liberty of movement and the right to residence, guaranteed under article 12, para. 1 ICCPR.

The Barrier also violates freedom of movement under international humanitarian law, as its severe interferences are not justified under article 27 Fourth Geneva Convention.

- *Movement related prohibitions*

The Barrier may lead to a change in the demographic composition of the Occupied Territories. It may also lead to a severe violation of movement provisions, namely the prohibition of forced transfer of population, prohibited by article 49 Fourth Geneva Convention, if residents in the closed zone are arbitrarily denied residence permits and are forced to leave their place of residence.

The Barrier may also further facilitate the transfer of population from Israel into those territories included on the western side of the Barrier in violation of article 49, para. 6 Fourth Geneva Convention, and helps to secure and perpetuate the future existence of illegal Israeli settlements.

- *Property confiscation and requisitions*

The requisition of private property constitutes for the most part a permanent or open-ended and long-term deprivation of the substance of the right to property. It constitutes a de facto confiscation in violation of Israel's obligations as Occupying Power under article 46 Hague Regulations. The requisition of public land also violates article 55 Hague Regulations, which requires the Occupying Power to administer Palestinian land in the interest of the protected population as usufruct. The destruction of property during the construction of the Barrier impairs article 53 Fourth Geneva Convention. The property interferences are the result of the route of the Barrier and are not justified under the concept of military necessity.

- *Right to privacy, family life*

The Barrier also violates a range of other human rights provisions, including the right to family life and freedom from arbitrary interference into one's home and family life (articles 17, 23 ICCPR, article 10 ICESCR).

- *Economic, social and cultural rights*

The Barrier, its severe restrictions on the freedom of movement and the confiscation of land and property prevent the enjoyment of economic, social and cultural rights, including the right to work (article 6 ICESCR), the right to an adequate standard of living, including the right to food, water and housing (article 11 ICESCR), the right to the highest attainable standard of physical and mental health (article 12 ICESCR) and the right to education (article 13 ICESCR) and family life (article 10 ICESCR).

As a State Party to the ICESCR, Israel is responsible for its implementation in the Occupied Territories, which includes at the very least its obligation to “respect the rights” guaranteed in the Covenant.

- *Due process and the rule of law*

Of particular concern is the lack of respect for proper legal and administrative processes and elementary standards of fairness in the application of the legal regime surrounding the Barrier. The Barrier, the confiscation of land and the permit system raise concern under rule of law considerations, in particular with regard to the right to an effective remedy (article 2, para. 3 ICCPR) and the right to effective access to an independent tribunal in the determination of any dispute affecting a civil right, such as the right to property over land (article 14, para. 1 ICCPR).

The lack of ability to effectively challenge disproportionate measures exacerbates the arbitrariness of the Barrier.

- *Non-discrimination*

The Barrier constitutes a discriminatory measure in the application of the rights set forth in both Covenants (article 2, para. 1 common to the ICCPR and the ICESCR), and the general discrimination clause of article 26 ICCPR. The movement and residence restrictions are *de jure* applicable only to Palestinians and not to Israelis and Israeli settlers in the Occupied Territories or to other people who fall under Israel’s law of return.

- *Right to self-determination*

The long-term consequences of the Barrier, the fact that its route lies within the Occupied Territories and departs from the Green Line and that it is constructed with a long-term and open-ended perspective, puts the exercise of the right to self-determination as enshrined in article 1, para. 1 common to the ICCPR and the ICESCR by the Palestinian people under threat. The construction of the Barrier may isolate Palestinian people both from East Jerusalem, the West Bank and the Gaza strip. In combination with the movement regime, it may well change the demographic structure of parts of the Occupied Territories. Under these circumstances, it threatens a viable Palestinian state, which would be created as an exercise of the Palestinians’ right to self-determination.