

# Legal Consequences of Israel's Construction of a Separation Barrier in the Occupied Territories

## International Law Opinion

by **Oxford Public Interest Lawyers (OXPIIL)**  
for the Association for Civil Rights in Israel (ACRI)

University of Oxford, February 2004

*Before I built a wall I'd ask to know  
What I was walling in or walling out,  
And to whom I was like to give offence.*

**Robert Frost, *Mending Wall***

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## INTRODUCTION

Oxford Public Interest Lawyers is a non-profit organization which undertakes pro bono legal work on issues of public importance. It is affiliated with the Faculty of Law at the University of Oxford, United Kingdom, and its members include Faculty staff and postgraduate students.

Oxford Public Interest Lawyers has been asked by the Association for Civil Rights in Israel (ACRI) to provide an opinion on the international legal consequences arising from Israel's construction of a separation barrier ('Barrier') in the Israeli Occupied Territories.<sup>1</sup> This opinion focuses on the extent to which the Barrier conforms with Israel's obligations under international humanitarian law and international human rights law.<sup>2</sup>

## EXECUTIVE SUMMARY

1. Israel is entitled to defend its territory, and its military and administrative functions in the Occupied Territories, from militant or terrorist attacks. However, any security measures must be in strict conformity with Israel's obligations under international law. As Chief Justice Barak of the Israeli Supreme Court stated in the *Ajuri* case, 'Israel is fighting a difficult war against terror. It is a war carried out within the law and with the tools that the law makes available'.<sup>3</sup>
2. Israeli activities in the Occupied Territories are subject to both international humanitarian law and international human rights law, including customary law.

### A INTERNATIONAL HUMANITARIAN LAW

3. Israel is bound by the Hague Regulations 1907, the Fourth Geneva Convention 1949 and customary international humanitarian law in the Occupied Territories. The West Bank, the Gaza Strip, the Golan Heights and East Jerusalem constitute Occupied Territories under international humanitarian law. No derogation is permissible from humanitarian law, even in times of public emergency.

### Security Measures

4. The existing and planned route of the Barrier, the operation of its gates, and the adjacent closed military zones (between the Barrier and the 1949 Armistice Line ('Green Line')) are not necessary or proportionate measures of control and security under Article 27 of the Fourth Geneva Convention. The severe impacts of the Barrier on Palestinians outweigh the security objectives it seeks to serve, which could be achieved through alternative, less detrimental means.

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<sup>1</sup> UNGA Res A/RES/ES-10/14 (8 Dec 2003) requested the International Court of Justice to urgently render an advisory opinion (under the ICJ Statute, Art 95 and UN Charter, Art 96) on the question: 'What are the legal consequences arising from the construction of the Barrier being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?'

<sup>2</sup> This Opinion does not consider the admissibility of the UN General Assembly's request for an advisory opinion from the International Court of Justice.

<sup>3</sup> *Ajuri v IDF Commander*, HCJ 7015/02 (Barak CJ).

5. The route of the Barrier deviates from the Green Line to protect Israeli settlements in the Occupied Territories, separating Palestinian communities on either side of the Barrier. Israeli civilian settlements in the Occupied Territories violate Article 49(6) of the Fourth Geneva Convention, as well as numerous UN Security Council resolutions and customary law. Israel may not lawfully use the security powers of the Fourth Geneva Convention to protect unlawful Israeli settlements.

### **Property**

6. Israel's requisition of Palestinian property to construct the Barrier violates the prohibition on the confiscation of private property in Occupied Territory (Hague Regulations, Reg 46). A state of hostilities does not currently exist which would permit Israel to destroy or seize property for imperative military reasons in war (Hague Regulations, Reg 23(g)).
7. Where the Barrier is constructed on appropriated public land, it violates Article 55 of the Fourth Geneva Convention, which requires an Occupying Power to deal with public land on trust for the occupied population (the Palestinians).

### **Civilian Population**

8. The Barrier violates Israel's international obligations to ensure the general welfare of the civilian population in Occupied Territory (Hague Regulations, Reg 43), as well as to ensure medical treatment and public health (Arts 16, 17, 20, 21, 22, 23, 55 and 56), employment (Arts 39 and 52), the care and education of children (Art 50), food supplies (Art 55) and relief schemes (Arts 59-62).

### **Collective Punishment**

9. By deliberately separating Palestinian communities and subjecting them to unprecedented measures of physical control and criminal suspicion, the Barrier exhibits the characteristics of collective punishment, contrary to Regulation 50 of the Hague Regulations and Article 33 of the Fourth Geneva Convention.

### **Forcible Transfers**

10. The seizure of Palestinian property and demolition of houses, arbitrary refusals of residency permits in closed military zones, and irregular gate openings may result in the direct or constructive forcible transfer of Palestinians, contrary to Article 49 of the Fourth Geneva Convention and potentially amounting to a war crime (or grave breach) under Article 147 of the Convention.

## **B INTERNATIONAL HUMAN RIGHTS LAW**

11. Israel's obligations under international human rights treaties, and under customary law, are engaged wherever Israel exercises effective control over territory, including over non-sovereign Occupied Territory.
12. Although the Interim Agreement of 1995 between Israel and the Palestinian Authority transferred some legal authority over parts of Palestine, Israel continues to exercise effective de facto control over the areas affected by and adjacent to the Barrier. The Interim Agreement specifically states that Israel's human rights obligations persist in accordance with international law (Art XIX).

13. Israel has not notified other States of any relevant *derogations* from its human rights obligations in the Occupied Territories. Where *limitations* on human rights are permitted on security grounds, they must be strictly necessary and proportionate to meet the security threat. The construction of a Barrier chiefly inside the Occupied Territories is neither necessary nor proportionate in response to the threat to Israel.
14. Given the already severely degraded state of the Palestinian economy, any restrictions on the human rights of Palestinians require a stronger justification than comparable restrictions in a regularly functioning economy. The economic crisis is partially due to existing Israeli restrictions on Palestinian freedom of movement.

#### **Civil and Political Rights (ICCPR)**

15. There is strong evidence that the Barrier unjustifiably violates Palestinian human rights to: freedom of movement (Art 12); freedom from arbitrary or unlawful Interference with privacy, family and home (Art 17); freedom of peaceful assembly (Art 21) and association (Art 22); freedom of religion (Art 18); rights of minorities (Art 27); and rights of due process (Art 14).
16. The Barrier may increase the likelihood of unjustifiable violations of the right to liberty and security of person and freedom from arbitrary detention (Art 9), as well as freedom from cruel, inhuman or degrading treatment (ICCPR, Art 4; Torture Convention).
17. Israeli military tribunals and domestic courts do not provide effective remedies to Palestinians for violations of rights (Art 2) resulting from the construction of the Barrier, property requisition orders, permits in closed military zones, and the establishment of Israeli settlements in the Occupied Territories.

#### **Economic, Social and Cultural Rights (ICESCR)**

18. There is strong evidence that the Barrier unjustifiably violates Palestinian human rights to: work and make a living (Art 6); an adequate standard of living, food and housing (Art 11); physical and mental health (Art 12); education (Art 13); and participation in cultural life (Art 15).

#### **Common Rights (ICCPR and ICESCR)**

19. The Barrier is inconsistent with the right of Palestinians to self-determination (ICCPR and ICESCR, Art 1). In this regard, the Barrier is inconsistent with Israel's obligations as usufructuary in Occupied Territories under humanitarian law (Hague Regulations, Reg 55). The barrier violates Israel's duty under the Interim Agreement 1995 to preserve the 'integrity and status' of the West Bank and the Gaza Strip as 'a single territorial unit', pending final status (Arts XI(1) and XXXI(8)).
20. The Barrier discriminates against Palestinians on prohibited grounds (ICCPR, Art 2(1) and ICESCR, Art 2(2)), and may amount to a violation of the international customary prohibition on apartheid, as an aggravated form of racial discrimination.
21. The Barrier unjustifiably interferes with Palestinian family life (ICCPR, Art 23 and ICESCR, Art 10).



<b>OXPIIL PROJECT TEAM</b>
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**Co-ordinators:** Amir Fuchs, Gyorgy Lissauer and Ben Saul

**Project Members:** Ilana Avital, Seema Baquer, Megan Bradley, Mangesh Dhume, Veronika Fikfak, David Fontana, Laura John, Nikhil Majithia, Sarah McCosker, Kirsty Mclean, Viviana Mollica, Rahul Rao, Flor de Maria Valdez-Arroyo, Murray Wesson, Anonymous (3)

**Address:** Oxford Public Interest Lawyers  
Centre for Socio-Legal Studies,  
Wolfson College, Oxford OX2 6UD  
United Kingdom

**Contact:** [ben.saul@law.ox.ac.uk](mailto:ben.saul@law.ox.ac.uk)

