

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)

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*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.¹ This opinion focuses on the extent to which the Barrier conforms with Israel's obligations under international humanitarian law and international human rights law.²

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'.³
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.

¹ 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?'

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

³ *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).



LEGAL OPINION ON THE BARRIER

A SCOPE OF THE SEPARATION BARRIER

22. On 14 April 2002, Israel announced that 'fences and other physical obstacles' would be constructed to prevent Palestinians crossing into Israel. 'Buffer zones' were to be created in three areas along the Green Line, the post-1948 demarcation line between Israel and the West Bank. Israeli officials refer to the Barrier as a 'Security Fence', with adjacent 'Seam Zones' (closed military areas) in some places. Details of the origins of the Barrier and its scope are provided by the UN Secretary-General.⁴
23. The Israeli Ministry of Defence states that the Barrier 'is a defensive measure that is being built in order to eliminate terrorist attacks on Israeli citizens. As such military and operational considerations dictate its route and not political considerations'.⁵ It is modelled on the existing security fence between Israel and the Gaza Strip, which Israel states claims has thwarted most attempts by militants to infiltrate Israel.
24. The first phase of the separation Barrier was completed in July 2003. It runs approximately 180 kilometres through the north-west of the West Bank. It occupies a footprint of 2,875 acres (11.5 square km)⁶ and has left 58,860 acres (238.3 square km) of West Bank land between the Barrier and the Green Line and
25. Two more phases are under construction: one in the north-east of the West Bank, and another near East Jerusalem and Bethlehem. The route of a fourth phase is still under negotiation. The entire Barrier is projected to extend 680 kilometres,⁷ with an average width of 60 metres.⁸ The UN Office for the Coordination of Humanitarian Affairs (OCHA) estimates that the completed Barrier will result in around 15 per cent of West Bank land being between the Barrier and the Green Line (excluding East Jerusalem and the Jordan Valley areas).⁹
26. The final route of the Barrier has not yet been determined. The Israeli Prime Minister announced on 19 January 2004 that 'minor' modifications to the route of the Barrier and the manner of its operation might be made, to reduce the impact on Palestinian civilians.¹⁰ The physical nature of the Barrier is detailed elsewhere.¹¹ Israel proposes to construct five main gates and 26 agricultural crossings.

⁴ UN General Assembly, Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13, 24 Nov 2003, UN Doc A/ES-10/248.

⁵ Israeli Ministry of Defence, 'Cabinet approves the route of the Security Fence', 8 Oct 2003, www.securityfence.mod.gov.il/Pages/ENG/news.htm#news15; see also www.seamzone.mod.gov.il.

⁶ 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', Mission Report, 4 May 2003 ('LACC Report'), 18.

⁷ OCHA, Occupied Palestinian Territory, 'New Barrier Projections': www.reliefweb.int/hic-opt/ ('OCHA Report'), p. 1.

⁸ Palestinian Independent Commission for Citizens' Rights, 'Creeping Annexation: The Israeli Separation Wall and its Impact on the West Bank', June 2003 ('PICCR Report'), 5.

⁹ UNRWA, 'Emergency Appeal, Jan-Dec 2004', Dec 2003 ('UNRWA Appeal'), 7.

¹⁰ G Myre, 'Sharon Hints Israel May Alter Route of Barrier', *New York Times*, 18 Jan 2004.

¹¹ UN Commission on Human Rights (60th Session), Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, 8 Sept 2003 ('UN Special Rapporteur Dugard Report'), UN Doc E/CN.4/2004/6.

27. Estimates vary as to the number of Palestinians affected by the Barrier:
- (a) B'Tselem states that 210,000 Palestinians in 67 cities, towns and villages have suffered direct harm,¹² while the UN Special Rapporteur similarly states that 210,000 Palestinians will be 'seriously affected';¹³
 - (b) The Palestinian Independent Commission for Citizens' Rights (PICCR) reports that the Barrier has directly impacted on the lives of 227,000 Palestinians (11 per cent of the West Bank population);¹⁴
 - (c) OCHA and PICCR estimate that almost 680,000 people (30 per cent of Palestinians in the West Bank) will be directly harmed.¹⁵
28. Although these figures vary, even the lowest figures indicate that the Barrier has a very significant impact on the lives of a large number of Palestinians. In particular:
- (a) Around 95,000 Palestinians (almost 5 per cent of the West Bank population) will live in enclaves west of the Barrier;¹⁶
 - (b) About 200,000 Palestinians in East Jerusalem will be separated from the West Bank;
 - (c) 367,000 residents on the eastern side of the Barrier will face restrictions on accessing the western side and some will be separated from farmland.
29. Palestinian refugees falling within the mandate of UNRWA are particularly affected by the Barrier. Of the 200,000 people affected by the first phase of the Barrier, refugees comprise over 88,000 individuals from almost 18,000 families (40 per cent of the total affected population.¹⁷ Over 3,000 refugees are among the more than 13,000 Palestinians isolated between the Barrier and the Green Line, separated from the rest of the Occupied Territories.¹⁸
30. UNRWA estimates that up to 140,000 Palestinians will find themselves between the Barrier and the Green Line, of whom about 75,000 are refugees. Restrictions on refugee movement are, or may become, acute in Qalqilya, Tulkarm, Rumane, Taibe and Anin,¹⁹ as well as for up to 70,000 refugees near Jerusalem and Bethlehem.²⁰



¹² B'Tselem, 'Behind the Barrier: Human Rights Violations as a Result of Israel's Separation Barrier', March 2003 ('B'Tselem Report'): www.btselem.org/Download/2003_Behind_The_Barrier_Eng.pdf, 3.

¹³ UN Special Rapporteur Dugard Report, op cit, summary.

¹⁴ PICCR Report, op cit, 9.

¹⁵ Ibid, 5; OCHA, Occupied Palestinian Territory, 'Preliminary Analysis of Wall Impact', 15 Dec 2003.

¹⁶ LACC Report, op cit, 5.

¹⁷ UNRWA Appeal, op cit, 6.

¹⁸ Ibid.

¹⁹ Ibid, 7.

²⁰ Ibid.

B LEGAL STATUS OF THE OCCUPIED TERRITORIES**Legal Status of the West Bank and the Gaza Strip²¹**

31. The West Bank and Gaza Strip are the last remaining territories in the Middle East that have not acquired final status. Until the end of the First World War, the West Bank and Gaza Strip were formally part of the Ottoman Empire.
32. The first formal agreement, the Sykes-Picot Agreement, on the future of the region was signed in 1916 between Britain and France.²² It created four zones of influence and direct control under France and Britain. It also proposed a fifth zone to be placed under international administration after negotiations with other allies.²³
33. Negotiations were to continue on the establishment of an independent Arab state or states within the boundaries of the four zones of French and British influence, following the exchange of letters in 1915 between Sir Henry McMahon, the British High Commissioner in Egypt, and Sharif Hussein. In another exchange of letters in 1917, the British Foreign Secretary, AJ Balfour, pledged to Lord Rothschild the 'establishment of a National Home for the Jews' in Palestine.²⁴
34. The Sykes-Picot Agreement was superseded by the 1919 Paris Peace Conference, which envisaged the establishment of mandates for territories which, as a result of the War, had ceased to be under the administration of States that previously governed them.²⁵ On 24 July 1922 the Council of the League of Nations adopted the Palestine Mandate, which came into effect on 29 September 1922 with Britain as the Mandatory power.²⁶
35. The Mandate, in its Preamble, recognised and encouraged the establishment of a 'national home for the Jewish people' in Palestine and made this a purpose of its administration.²⁷ The Mandatory, with the consent of the Council of the League of Nations, was entitled to make different arrangements from those envisaged in the Mandate, for the territory lying east of the Jordan River, with the exception of the non-discriminatory clauses.²⁸
36. In 1923 an Anglo-Transjordan Treaty created an autonomous administration of the territory East of the River Jordan, separating it from rest of the British Mandate.

²¹ See generally I Brownlie and G Goodwin-Gill, 'Opinion: The protection afforded by international humanitarian law to the indigenous population of the West Bank and Gaza Strip and to the foreign citizens therein, with particular reference to the application of the 1949 Fourth Geneva Convention', 18 Sept 2003: www.publicinterestlawyers.co.uk/legaldocs/ISM.pdf.

²² Text available at: www.yale.edu/lawweb/avalon/mideast/sykes.htm.

²³ Maps indicating the zones are available at www.us-israel.org/jsource/History/sykesmap1.html; www.stanford.edu/class/history187b/sykespicotmap.htm and www.arab2.com/biography/conflict/Sykes-Picot-Map.htm. The proposed international zone was approximately equivalent to today's Israel, West Bank and Gaza Strip, less a triangle connecting the Red Sea, the southern tip of the Gaza Strip and the northern tip of the Red Sea.

²⁴ A translation of the Hussein-McMahon Correspondence is available at www.us-israel.org/jsource/History/hussmac1.html and the Balfour Declaration at www.yale.edu/lawweb/avalon/mideast/balfour.htm.

²⁵ Treaty of Versailles (28 June 1919), Part I, Art 22.

²⁶ Text of the Mandate available at: www.yale.edu/lawweb/avalon/mideast/palmanda.htm.

²⁷ Palestine Mandate, Art 2.

²⁸ Palestine Mandate, Art 25. A map of the Mandate territory is available at: www.mfa.gov.il/mfa/go.asp?MFAH0dt00.

This, in line with Article 25 of the Mandate, was ratified by a Resolution of the Council of the League of Nations on 16 September 1922. On 22 March 1946 a second Anglo-Transjordan Treaty was signed, recognising Transjordan independence.

37. In 1947, at the request of the British Government, the First Special Session of the General Assembly was convened to establish a Special Committee "to make recommendations ... concerning the future Government of Palestine".²⁹ The Committee reported to the next regular session of the General Assembly³⁰ which adopted Resolution 181 (II) (29 November 1947) on the 'Future Government of Palestine'. The Resolution, with minor amendments, accepted the Committee's majority recommendation of a 'Partition with Economic Union'.³¹
38. The British Government set 15 May 1948 as the end of the Palestine Mandate. The Partition Plan adopted by the General Assembly anticipated a UN Commission to take temporary control of the two territories until independent governments in accordance with the Plan were established. Due to Arab resistance to the partition of the Palestine Mandate, and the refusal of Palestinian leaders to cooperate with the UN Commission, the Commission was unable to fulfil the role entrusted to it.
39. On 14 May 1948 an assembled 'People's Council' declared the State of Israel. While the declaration did not establish the borders of the new State, it did indicate willingness to work with the UN to implement General Assembly Resolution 181.
40. While violence during the Mandate was frequent, as Britain completed its withdrawal, hostilities turned into the first Arab-Israeli war. The Security Council called for a ceasefire on 29 May 1948, but armistice agreements between Israel and neighbouring countries were not signed until between February and July 1949.³²
41. At the time of the armistice much of the former Mandate territory was under Israeli control, with the exception of the West Bank and Gaza Strip, which came under Jordan and Egyptian control respectively.³³ On 11 May 1949 Israel was accepted as a new member of the United Nations. Israel's membership was pursuant to its pledge to honour General Assembly Resolutions 181 and 194 and to accept its obligations under the UN Charter.³⁴
42. In September 1948 Israel extended its domestic jurisdiction to all areas under its control.³⁵ In April 1950 Jordan unified the West Bank with the East Bank of the Hashemite Kingdom.³⁶ The Arab League opposed the unification and Jordan subsequently declared that the unification did not intend to prejudice a final

²⁹ UNGA Doc A/286 cited in *Origins and Evaluation of the Palestinian Problem: 1917-1988 Part II*: domino.un.org/UNISPAL.NSF/561c6ee353d740fb8525607d00581829/d442111e70e417e3802564740045a309!OpenDocument, text to fn 1; UNGA Res A/RES/106 (1947).

³⁰ UNGA Doc A/364.

³¹ Map of the Partition Plan is available at: domino.un.org/unispal.nsf/cf02d057b04d356385256ddb006dc02f/164333b501ca09e785256cc5005470c3!OpenDocument.

³² *Origins and Evaluation of the Palestinian Problem: 1917-1988 Part II*, op cit, text above fn 81 and 85.

³³ Map of 1949 Armistice line is available at: domino.un.org/unispal.nsf/cf02d057b04d356385256ddb006dc02f/e55f901779c1f8e485256b9800714cef!OpenDocument.

³⁴ UNGA Res A/RES/273 (1949).

³⁵ *The Origins and Evaluation of the Palestinian Problem: 1917-1988 Part II*, op cit, text to fn 88.

³⁶ See www.kinghussein.gov.jo/his_palestine.html.

settlement of the Palestinian question. Jordan was admitted to the United Nations as a new member on 14 December 1955. Egypt, with Arab League approval, administered the Gaza Strip without making any sovereignty claims over the territory.

43. As a result of the 1967 Arab-Israeli war, Israel occupied both the West Bank and the Gaza Strip. In Resolution 242 the Security Council declared inadmissible 'the acquisition of territory by war' and called on Israel to withdraw its 'armed forces from territories occupied in the recent conflict'. Israel did not incorporate into its domestic jurisdiction the territories occupied in 1967, as it had done in 1948.
44. In October 1974 the Arab League recognised the Palestinian Liberation Organisation (PLO) as the sole representative of the Palestinian people and under whose leadership a Palestinian national authority could be set up on any 'liberated Palestinian land'. In its concurrent session, the General Assembly affirmed the Palestinian peoples' 'inalienable right to... self-determination' and 'national independence and sovereignty'.³⁷ The Assembly invited the PLO to take part in plenary meetings addressing the question of Palestine and accorded observer status to it.³⁸
45. In July 1988 Jordan relinquished its constitutional ties with the West Bank, stating its continued support for the establishment of a Palestinian state in the territory.³⁹
46. The Peace Process, beginning with the Madrid Conference in October 1991 has solidified the position of the West Bank and the Gaza Strip as territory marked out for Palestinian self-determination. This is confirmed by subsequent Security Council resolutions.⁴⁰
47. Since the end of the First World War and the collapse of the Ottoman Empire, the West Bank has been under International control. Until 1946 this amounted to administrative control under the League of Nations mandate system. From the end of the Ottoman rule, or at least from the start of the Palestine Mandate, the future and final status of the territory has been for the International community to determine.
48. Transjordan gained full independence in 1946 and the remainder of the Palestine Mandate, west of the River Jordan, was recognised by the international community as the territory for Jewish and Palestinian self-determination. The establishment of the State of Israel in 1946 fulfilled the former. Israeli claims of jurisdiction and Security Council Resolutions indicate the 1967 Armistice Line as the border of Israel.
49. The remaining territory, the West Bank and Gaza Strip, remains 'international' in character and the territorial unit for Palestinian self-determination. In order for these territories to gain final status and fulfil the international right of the Palestinians to self-determination, a negotiated settlement between the parties and subsequent recognition by the international community through the United Nations is required.

³⁷ UNGA Res A/RES/3236 (XXIX) (1974).

³⁸ UNGA Res A/RES/3210 (XXIX) (1974) and UNGA Res A/RES/3237 (XXIX) (1974) respectively.

³⁹ *The Origins and Evaluation of the Palestinian Problem: 1917-1988 Part IV*, available at: domino.un.org/UNISPAL.NSF/561c6ee353d740fb8525607d00581829/40af4c8615bc9837802564740046f767!OpenDocument, text to fn 74.

⁴⁰ In particular, UNSC Res 1515 (2003) on the implementation of a Permanent Two State Solution to the Israel-Palestine Conflict.

Legal Status of the Israeli Presence in the Occupied Territories

50. Israel occupied the West Bank during the 1967 Arab-Israeli war. The act was recognised as 'occupation' by Security Council Resolution 242 (1967).⁴¹ At the time this was occupation from Jordan, which exercised sovereign control of the territory prior to the war fought between Israel and its Arab neighbours. In the opinion of the Legal Adviser of the US Department of State in 1978:

Israeli armed forces entered Gaza, the West Bank, Sinai and the Golan Heights in June, 1967, in the course of an armed conflict. Those areas had not previously been part of Israel's sovereign territory nor otherwise under its administration. By reason of such entry of its armed forces, Israel established control and began to exercise authority over these territories; and under international law, Israel thus became a belligerent occupant of these territories.⁴²

51. The question arises whether the length of time Israel has controlled the West Bank, and the lack of an alternative or enemy sovereign, has altered the status of the Israeli presence.
52. Occupation occurs when a territory comes under the control of a hostile State as a result of the use of force in an international armed conflict.
53. The international legal status of the West Bank as a territory of international concern dedicated to Palestinian self-determination marks any conflict in or related to the territory as international. The conclusion of hostilities between Israel and Jordan and Jordan's renunciation of its constitutional ties with the West Bank does not alter the status of Israel as an occupying power. The peace treaty between Israel and Jordan did not attempt to change the status of the West Bank and Israel has not claimed annexation of the territory.
54. Since the territory is recognised as subject to Palestinian self-determination, from the perspective of the local population Israel remains a hostile state. The military nature of Israel's control of the territory underlines its presence as a belligerent occupant.
55. It is possible to argue that the hand-over of civilian administration to the Palestinian Authority changes the status of the territories from belligerent occupation *stricto sensu*. However, for the purposes of this opinion, the territory of concern is those areas within the West Bank where the separation Barrier is constructed. In those and surrounding areas, Israel plainly retains effective military control and therefore occupation continues. To the extent that the separation Barrier affects areas administered by the Palestinian Authority under transitional peace agreements, the construction of the Barrier in those areas may violate the peace agreements.
56. Occupation is not conditional on continued armed conflict or an active state of hostilities. This is because 'occupation' as an *act* is an act of war itself and therefore subject to international humanitarian law, and because it is a description of *status* of a territory with correlative internationally enforceable rights and obligations of the Occupying Power. Israel remains the Occupying Power as long as it exercises effective territorial control, notwithstanding the existence of guerrilla activities or low-level, sporadic violence.

⁴¹ UNSC Res 242 (1967), para 1(i).

⁴² Opinion of the Legal Adviser of the Department of State to the US Congress on 21 April 1978.

57. The West Bank, as a territory subject to Palestinian self-determination and currently under the control of a foreign power, is also, in international law, a *non-self-governing territory*. The recognition of the territory and the Palestinian people as a unit of national self-determination makes a foreign administration susceptible to the provisions of Chapter XI of the UN Charter ('Declaration Regarding Non-Self-Governing Territories').
58. Having formally been part of the Mandate of Palestine and not having attained final status, the West Bank falls within the definition of Article 73 of the UN Charter as a '[territory] whose peoples have not yet attained a full measure of self-government'. The West Bank's status as a Non-Self-Governing Territory imposes obligations on the administering power beyond those of international humanitarian law.

Legal Status of the Israeli Presence in East Jerusalem

59. Israel purports to have annexed East Jerusalem as sovereign territory. The international community has consistently rejected this claim as an unlawful attempt to acquire title to territory by force, prohibited by the UN Charter 1945, the Kellogg-Briand Pact 1928, the Declaration on Friendly Relations 1970 and the Definition of Aggression 1974.
60. Numerous Security Council resolutions have confirmed that Israeli attempts to change the legal status and demographic composition of East Jerusalem 'have no legal validity' and are null and void.⁴³ The General Assembly has taken a similar approach.⁴⁴ The resolutions have also confirmed that the international community regards East Jerusalem as Occupied Territory to which the Fourth Geneva Convention applies.⁴⁵



⁴³ UNSC Resolutions 252 (1968); 267 (1969); 298 (1971); 446 (1979); 452 (1979); 465 (1980); 476 (1980); 478 (1980); 605 (1987).

⁴⁴ Most recently, see UNGA Resolution ES-10/14 (2003).

⁴⁵ This position is shared by the International Committee of the Red Cross ('ICRC'): ICRC, Official Statement, Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 Dec 2001, para 2.

C APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO THE OCUPIED TERRITORIES
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Hague Regulations and the Fourth Geneva Convention

61. The Hague Regulations 1907⁴⁶ and the Fourth Geneva Convention 1949⁴⁷ provide the treaty-based law applicable in Occupied Territories. Under Article 42 of the Hague Regulations, '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army' and '[t]he occupation extends only to the territory where such authority has been established and can be exercised'.
62. While Israel is a party to the Geneva Conventions, it has consistently claimed that it does not regard the Fourth Geneva Convention as applicable in the West Bank. Israel bases its argument on Article 2 of the Convention, which states that its provisions are applicable between Contracting Parties. Israel has never regarded Jordan as the legitimate sovereign in the West Bank and Jordan surrendered its claim in 1988. On this view, if sovereignty over the West Bank does not rest with a Contracting Party, the Convention cannot apply.
63. Israel's textual objection is misleading. Article 2 defines the circumstances that trigger the application of the Convention. Israel's argument relies on Art 2(2), which states that '[t]he 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'. Art 2(2) was intended to ensure that the Convention applies to occupation occurring outside a 'state of war', filling a gap left by Art 2(1).⁴⁸
64. Art 2(1) states that the 'Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties'. The West Bank was occupied during the 1967 conflict, which can only be categorised as an 'armed conflict' between Contracting Parties (Israel, Jordan and Egypt). The Convention applied to the armed conflict during which the West Bank was occupied.
65. The Convention is unclear on its application where the territory occupied during an armed conflict is not part of the territory of a belligerent State. Presumably such a situation would fall under Article 2(2). In the present case however, the occupation of the West Bank was directly connected to the conflict and the armistice agreement that concluded military hostilities.
66. The purpose of Article 2 is to ensure reciprocity in the application of the Convention. The purpose of the Convention is to protect civilians in times of war and from the consequences of war. Acceptance of the Israeli position would deny protection to the Palestinian people through no fault of their own. Articles 1, 2 and 3, taken together, clearly demonstrate the High Contracting Parties' intention to ensure the applicability of the Geneva Conventions in all circumstances of armed

⁴⁶ Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, adopted 18 Oct 1907, entered into force 26 Jan 1910.

⁴⁷ Convention IV Relative to the Protection of Civilian Persons in Time of War, Geneva, adopted 12 Aug 1949, entered into force 21 Oct 1950, 75 *UNTS* 287 ('Fourth Geneva Convention').

⁴⁸ ICRC Commentary on Article 2 of the Fourth Geneva Convention.

conflict and military occupation. It would be inconsistent to recognise the West Bank as 'occupied territory', yet refuse to recognise international humanitarian law as applicable to Occupied Territories.

67. Demanding reciprocity where no reciprocity can be forthcoming runs against the object and purpose of the Convention. The obligation to observe the Convention is not reliant on reciprocity. In Article 1, '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. The International Committee of the Red Cross (ICRC) Commentary describes the undertaking of the Parties as a 'series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties'.⁴⁹ Given that there are 191 'other Contracting Parties',⁵⁰ the obligation is owed to the international community as a whole.
68. The international community has made its views on the applicability of the Fourth Geneva Convention to the West Bank consistently clear through UN General Assembly⁵¹ and Security Council⁵² resolutions.⁵³ The ICRC also regards both the Hague Regulations and the Fourth Geneva Convention as applicable.⁵⁴ The international community regards Israel's obligations under the Geneva Conventions as binding vis-à-vis the United Nations as a whole. The resolutions do not countenance any applicability gap in the law in relation to the occupied territories.
69. Widely supported General Assembly resolutions can be an expression of State practice and *opinio juris*, creating customary law.⁵⁵ Security Council resolutions directed at the 'maintenance of international peace and security' are, under Articles 24 and 25 of the UN Charter, binding on Member States.⁵⁶
70. The Fourth Geneva Convention applies to persons 'who at any given 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' (Art 4). Palestinian civilians in the Occupied Territories, who are not taking part in hostilities, are 'protected persons' under Article 4.
71. Under Article 6 of the Fourth Geneva Convention, the Convention ceases to apply to occupied territory 'one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by' numerous specified Articles of the Convention.⁵⁷
72. The Israeli Supreme Court (sitting as the High Court of Justice) has accepted the applicability of the Fourth Geneva Convention in recent decisions.⁵⁸

⁴⁹ ICRC Commentary on Article 1 of the Fourth Geneva Convention.

⁵⁰ Status of ratifications available at: www.icrc.org/eng/party_gc#a7.

⁵¹ UNGA Res 54/77 (1999); UNGA Res 55/131 (2000); UNGA Res 56/60 (2001); UNGA Res 57/125 (2002); Brownlie and Goodwin-Gill Opinion, op cit, para 96.

⁵² UNSC Presidential Statement S/PV.1922 (26 May 1976); UNSC Res. 446 (1979); UNSC Res 465 (1980); UNSC Res. 469 (1980); UNSC Res 476 (1980); UNSC Res 478 (1980); UNSC Res 605 (1987); UNSC Res. 636 (1989); UNSC Res. 904 (1994); UNSC Res. 1322 (2000).

⁵³ For a detailed analysis of resolutions, see Brownlie and Goodwin-Gill Opinion, op cit, paras 85-99.

⁵⁴ ICRC Official Statement, op cit, para 2.

⁵⁵ Brownlie and Goodwin-Gill Opinion, op cit, para 93.

⁵⁶ Ibid, paras 86-87.

⁵⁷ Arts 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77 and 143.

⁵⁸ See, eg, *Ajuri v IDF Commander*, H CJ 7015/02.

Customary Humanitarian Law

73. It is generally accepted that most provisions of the Hague Regulations and the Geneva Conventions either reflect customary international law, or have emerged as custom since coming into force.⁵⁹ The International Court of Justice has stated:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*ICJ Reports* 1949, p22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.⁶⁰

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

Application of Protocol I of 1977

75. Additional Protocol I of 1977 to the Geneva Conventions 1949 recognizes that an 'international armed conflict', for the purposes of triggering the application of humanitarian law, may extend to 'armed conflicts in which peoples fight against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination' (Art 1(4)).⁶¹
76. While Protocol I was controversial at the time of its drafting,⁶² over time it has gained general acceptance and as of June 2003, there were 161 State parties.⁶³ Parts of Protocol I can be regarded as reflecting customary law, particularly the minimum standards of humane treatment embodied in Article 75.
77. Protocol I applies in occupied territory.⁶⁴ This includes where a State occupies territory belonging to a self-determination group within the meaning of Article 4(1) of Protocol I, notwithstanding the absence of a Contracting State whose territory is occupied. The General Assembly has recognized the applicability of Protocol I to the Occupied Palestinian Territories.⁶⁵

⁵⁹ D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (OUP, Oxford, 1999) 23-25.

⁶⁰ *ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226, paras 79 and 82 respectively, available at: www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm.

⁶¹ Protocol I Additional to the Geneva Conventions 1949 and Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, entered into force 7 Dec 1978, 1125 UNTS 3 ('Protocol I').

⁶² See, eg, A Sofaer, 'The US Decision Not to Ratify Protocol I' (1988) 82 AJIL 784; C Greenwood, 'Terrorism and Humanitarian Law: The Debate over Additional Protocol I' (1989) 19 IYHR 187.

⁶³ ICRC, States party to the Geneva Conventions and their Additional Protocols, 3 June 2003: www.icrc.org/Web/Eng/siteeng0.nsf/iwpList444/77EA1BDEE20B4CCDC1256B6600595596.

⁶⁴ See, eg, Protocol I, Arts 1(4), 3, 4, 5, 14, 15, 17, 18, 33, 34, 45, 46, 59, 63, 67, 69, 70, 78, 85 and 99.

⁶⁵ See, eg, UNGA Res ES-10/14 (2003).

Effect of the Interim Agreement of 1995

78. Although the Interim Agreement of 1995 transferred some powers and responsibilities to the Palestinian Authority, Israel remains the Occupying Power, at the very least, in areas affected by and adjacent to the separation Barrier.

79. Further, as one commentator notes,

For an occupation to be effective the legitimate authority must be unable to exercise its functions publicly, but the presence of isolated areas in which that authority is still functioning does not affect the reality of the occupation if those areas are effectively cut off from the rest of the occupied territory.⁶⁶

80. This position applies analogously to situations where the legitimate sovereign authority is the nascent process of being established, rather than in the process of dissolution.

Conclusion

81. International humanitarian law, particularly the Hague Regulations and the Fourth Geneva Convention, applies to the conduct of Israel in the West Bank. Israel is also bound by parallel customary norms. Israel also owes obligations to the inhabitants of the West Bank and to the international community in relation to the right of the Palestinian people to self-determination. As a Member of the United Nations, Israel must observe and implement relevant Security Council resolutions, which require Israel to implement the Fourth Geneva Convention in the Occupied Territories.



⁶⁶ L Green, *The Contemporary Law of Armed Conflict* (MUP, Manchester, 2000) 258.

D VIOLATIONS OF HUMANITARIAN LAW

Security Measures in Occupied Territory

82. In Occupied Territory, the Occupying Power 'may take such measures of control and security in regard to protected persons as may be necessary as a result of the war' (Fourth Geneva Convention, Art 27). The ICRC Commentary notes that 'a great many measures' of control and security are permissible, including 'harsher' provisions 'such as a prohibition on any change in place of residence without permission, prohibition of access to certain areas, restrictions of movement, or even assigned residence and internment'.⁶⁷
83. States have a wide discretion as to the choice of security measures.⁶⁸ Nonetheless, any measures 'should not affect the fundamental rights of the persons concerned'.⁶⁹ These include respect for the person, honour and family rights, religious convictions and practices, and manners and customs.⁷⁰ Protected persons must also be treated 'humanely' at all times.⁷¹
84. In contrast to these absolute rights, restrictions on liberty and freedom of movement are permissible if necessary in the circumstances.⁷² However, liberty and freedom of movement cannot be suspended 'in a general manner' and there is a presumption that the personal freedom of civilians will remain generally 'unimpaired'.⁷³
85. In principle, the construction of physical barriers for security purposes in Occupied Territory is permissible to protect the Occupying Power, its forces and civil administration. Permissible barriers might include localized barriers which protect particular military installations or transport or communications corridors, or a border Barrier which separates Occupied Territory from the sovereign territory of the Occupying Power.
86. The Fourth Geneva Convention does not expressly specify the objects of protection under Article 27, which refers only to measures of control or security necessary as a result of the war. However, Article 64 of the Fourth Geneva Convention allows the Occupying Power to
- subject the population of the Occupied Territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, *and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.* [emphasis added]
87. While this provision relates to penal law in Occupied Territory, it suggests that security measures generally must be directed towards the protection of the Occupying Power, members and property of the occupying forces or administration,

⁶⁷ ICRC Commentary on Article 27 of the Fourth Geneva Convention.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Fourth Geneva Convention, Art 27.

⁷¹ Fourth Geneva Convention, Art 27.

⁷² ICRC Commentary on Article 27 of the Fourth Geneva Convention.

⁷³ Ibid.

and lines of communication. Such security measures 'must not under any circumstances serve as a means of oppressing the population'.⁷⁴

88. In contrast, the route followed by Israel's Barrier in the Occupied Territories indicates that it is not necessary or proportionate to achieving these security objectives. The Israeli Government claims that the separation Barrier is designed to protect Israel from incursions by militants crossing from the Occupied Territories.
89. However, the separation Barrier does not follow the 1949 Armistice Line between Israel and the Occupied Territories (the 'Green Line'). Only 11 per cent of the proposed Barrier follows the Green Line⁷⁵ and the proposed route deviates substantially inside the Occupied Territories to encircle major Israeli settlements. (The unlawfulness of these settlements is established in the next section.)
90. In the West Bank, 54 Israeli settlements with a population of 142,000 settlers (or 63 per cent of the Israeli settler population in the West Bank) will fall within the area between the Barrier and the Green Line.⁷⁶ The proposed Barrier deviates as much as 22 kilometres to envelope the Israeli settlement of Ariel.⁷⁷ As a result, up to 72,000 Palestinians in 36 communities lie to the east of the Barrier, separated from property and services on the western side of the Barrier.⁷⁸
91. Such deviation is not necessary or proportionate to the objective of preventing militant attacks within Israel, or attacks on the forces or administration of the Occupying Power. The Barrier is plainly designed to also shield Israeli civilian settlements in the Occupied Territories from attack. Under Article 27 of the Fourth Geneva Convention, any security measures taken must be *as a result of the war*, not as a result of subsequent unlawful Israeli settlement activity in the Occupied Territories. The security powers under Article 27 may not, therefore, be used as a basis for protecting settlements.
92. The Barrier is premised on the assumption that suicide bombers enter Israel through the open areas between checkpoints and not through the checkpoints themselves. This assumption was faulted by a July 2002 report of the Israel State Comptroller (an independent audit body that reports to the Knesset), which stated that '[IDF] documents indicate that most of the suicide terrorists and the car bombs crossed the seam area into Israel through the checkpoints, where they underwent faulty and even shoddy checks'.⁷⁹ Accordingly, the Barrier is neither necessary nor proportionate to address Israel's security concerns.
93. The construction of the Gaza Barrier and consequent decline in the number of suicide attacks originating from that area is cited as evidence of the potential effectiveness of the Barrier. Yet the Gaza Barrier has been successful only because of hermetic sealing. The West Bank Barrier would be successful only if its gates were completely closed to Palestinians – something Israel has promised not to do, in proceedings before the Israeli High Court of Justice.⁸⁰

⁷⁴ ICRC Commentary on Article 64 of the Fourth Geneva Convention.

⁷⁵ OCHA Preliminary Analysis, op cit, 2.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ B'Tselem Report, op cit, 3.

⁷⁹ Cited in B'Tselem Report, ibid, 26.

⁸⁰ P Troop, 'The Reality and Legality of Israel's Wall', Electronic Intifada, 24 Nov 2003: electronicintifada.net/v2/article2207.shtml.

94. If the Barrier is meant to prevent suicide bombings, it is unclear why Israel is apparently unconcerned about the hundreds of thousands of Palestinians who will end up on the Israeli side of the Barrier (between the Barrier and the Green Line) – unless it is ultimately planning to remove them.⁸¹ Amnesty International has expressed doubt about Israel's justification for the Barrier, arguing that this is not borne out by the proposed route for the Barrier.⁸²
95. Moreover, Israel has not demonstrated that less intrusive or restrictive measures would have failed to effectively address its security concerns. In July 2002, the Israeli State Comptroller strongly criticized the inadequacy of checkpoint procedures and the lack of army deployment in border areas.⁸³ Before resorting to a measure as severe as the Barrier, Israel should have improved and exhausted the use of these measures.
96. Israel should also have refrained from inflaming the security situation through poorly targeted military operations causing high civilian casualties, such as the attack on Jenin in 2002; as well as ending its harassment of Palestinian civilians through house demolitions, arbitrary restrictions on freedom of movement (curfews, checkpoints, road closures).
97. The Barrier is neither necessary nor proportionate in protecting Israel's security needs. As the UN Special Co-ordinator observes:

Israel has a legitimate right to defend itself against terror attacks against civilians. But no one will benefit if it does so in a manner that causes serious deprivation for millions of Palestinians. In a neighbourhood of approximately 10 million people living in a very confined space, the security system for two-thirds cannot possibly be durable if it is at the expense of deepening social and economic security for the other one third. Despair and lack of vested interest in peace and stability can only play into the hands of those who advocate violence.⁸⁴

Unlawfulness of Israeli Settlements in the Occupied Territories

98. There are about 200 Israeli settlements in the Occupied Territories with a population of over 400,000 people.⁸⁵ There are around 120 settlements in the West Bank containing 230,000 settlers, 16 settlements in the Gaza Strip with 7,000 settlers, and 180,000 settlers in East Jerusalem.⁸⁶ About 50 per cent of settlers in the West Bank live in eight settlements.⁸⁷
99. The balance of international legal opinion holds that the Israeli settlements constructed inside the Occupied Territories are unlawful. Article 49(6) of the Fourth

⁸¹ Ibid.

⁸² Amnesty International, 'Israel must immediately stop the construction of Barrier', Press Release, 7 Nov 2003: web.amnesty.org/library/Index/ENGMDE150992003?open&of=ENG-ISR. Because the Barrier is being constructed inside the Occupied Territories, the real purpose of the Barrier seems to be 'to isolate Palestinians away from Israeli settlements illegally built in the Occupied Territories'.

⁸³ Human Rights Watch, 'Israel: West Bank Barrier Endangers Basic Rights', Letter to US President, New York, 1 Oct 2003.

⁸⁴ UN Special Co-ordinator, 'The Impact of Closure and Other Mobility Restrictions on Palestinian Productive Activities 1 Jan 2002–30 June 2002', Oct 2002, i.

⁸⁵ UN Special Rapporteur Dugard Report, op cit, para 37.

⁸⁶ Ibid.

⁸⁷ Foundation for Middle East Peace, Report on Israeli Settlement in the Occupied Territories: www.fmep.org.

Geneva Convention states that '[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'.

100. In contrast to deportations, the 'transfer' of an Occupying Power's civilian population need not be forcible or compulsory, and encompasses the encouragement or toleration of migration and settlement designed to alter the demographic balance of Occupied Territory. Israel has long encouraged, funded and militarily supported the establishment of settlements, and in 2003 the government allocated 1.9 billion new Israeli shekels for settlements.⁸⁸
101. The Rome Statute of the International Criminal Court 1998 defines 'the transfer *directly or indirectly* by the Occupying Power of parts of its own civilian population into the territory it occupies' as a war crime [emphasis added]. Israel is a signatory to the Rome Statute, and although it has not yet ratified it, under international law it is still bound to refrain from committing acts which would defeat the object and purpose of the treaty.⁸⁹ This obligation would plainly include a duty to refrain from committing war crimes after the entry into force of the Rome Statute.
102. UN Security Council resolutions have found that the Israeli settlements breach international law. Resolutions 446 (1979), 452 (1979) and 465 (1980) stated that the settlements 'have no legal validity'.⁹⁰ Resolution 452 (1979) also called on Israel to urgently cease building settlements.⁹¹ Resolution 465 (1980) deplored the Israeli settlements, called for their dismantling, and asked Member States not to assist the settlement programme. Resolution 465 (1980) determined that
- Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention... and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East...⁹²
103. In October 2003, the Council of the European Union called on Israel to reverse its settlement policy and to dismantle settlements built after March 2001.⁹³ The ICRC has also repeatedly criticized the transfer of Israeli settlers into the Occupied Territories as a breach of humanitarian law.⁹⁴
104. In the opinion of the Legal Adviser of the US Department of State:
- the civilian settlements in the territories occupied by Israel do not appear to be consistent with these limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to provide orderly government of the territories and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation.⁹⁵

⁸⁸ UN Special Rapporteur Dugard Report, op cit, para 37.

⁸⁹ Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 Jan 1980, 1155 UNTS 331, Art 18.

⁹⁰ UNSC Res 446 (1979), para 1; UNSC Res 452 (1979), preamble; UNSC Res 465 (1980), para 5.

⁹¹ UNSC Res 452 (1979), para 3.

⁹² UNSC Res 465 (1980), para 5.

⁹³ EU Presidency, Conclusions, Brussels European Council, 16-17 Oct 2003, EU DOC/03/4.

⁹⁴ ICRC Official Statement, op cit, para 5.

⁹⁵ Opinion of the Legal Adviser of the US Department of State, to the US Congress on 21 April 1978.

105. IHL only permits security measures to be taken which are designed to protect the security of the Occupying Power, including its military installations. The route of the Barrier indicates that it is designed to protect Israeli civilian settlements in the Occupied Territories from security threats. Protecting unlawful Israeli civilian settlements is an illegal use of the security powers under IHL, which are only available to protect the Occupying Power and its forces.
106. In defending the settlements, Israel argues that bilateral agreements between Israel and the Palestinians since 1993 do not prohibit the building or expansion of settlements, do not give the Palestinian Authority jurisdiction or control over settlements or Israelis, and that the issue of settlements is reserved for permanent status negotiations during peace talks.⁹⁶
107. However, Article 47 of the Fourth Geneva Convention explicitly states that the rights of protected persons may not be bargained away:
- Protected persons who are in Occupied Territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, *nor by any agreement concluded between the authorities of the Occupied Territories and the Occupying Power*, nor by any annexation by the latter of the whole or part of the Occupied Territory. [emphasis added]
108. Israel also argues that settlements have only been built on public land, not on private property requisitioned from Palestinians. Thus it is argued that Palestinians have not been displaced by voluntary Israeli migration to ancestral or historic Jewish lands. However, Article 55 of the Hague Regulations clearly states that an Occupying Power
- shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.
109. By allowing Palestinian public lands to be converted into the private property of Israeli settlers, Israel has violated its obligation to act only as usufructuary or trustee of public lands on behalf of Palestinians as a self-determination unit. Furthermore, by permitting large-scale Israeli migration and settlement, Israel has unlawfully modified the demographic composition of the Occupied Territories, violating its usufructuary obligations. A similar violation exists in relation to Israel's appropriation of water supplies for the benefit of Israeli settlers.
110. Israel also argues that settlement activity is supervised by the Supreme Court of Israel (sitting as the High Court of Justice), which provides Palestinians with a remedy against unlawful settlement. However, the Court itself has deliberately refrained from considering the problem of civilian settlement in Occupied Territory, on the basis that it is a sensitive and controversial matter of international policy and negotiation between States.⁹⁷

⁹⁶ Israeli Ministry of Foreign Affairs: www.mfa.gov.il/mfa/go.asp?MFAH0i9o0#territories.

⁹⁷ *Awib v Minister of Defence* HCJ 606/78, 128-129 (Landau J); followed in *Gavriel Bargil v Government of Israel* HCJ 4481/91, 9 (Goldberg J).

111. Further, as the ICRC has stated, '[c]ertain practices which contravene the Fourth Geneva Convention have been incorporated into laws and administrative guidelines and have been sanctioned by the highest judicial authorities'.⁹⁸ One leading Israeli jurist has shown how Palestinians have had little success in the Israeli courts.⁹⁹
112. In addition, the Israeli courts principally apply domestic law, which takes priority over inconsistent norms of international law, so that review does not provide an effective remedy against *internationally* unlawful settlement.

Confiscation of Property and Compensation

113. In the West Bank, Israel has seized control of the land on which the Barrier is being built by issuing military requisition orders signed by the Military Commander of the West Bank, accompanied by an entitlement to compensation for use of the land.¹⁰⁰ Legal title does not formally pass from the owner to the Israeli authorities. (In Jerusalem, which Israel claims to have annexed, land is obtained under the Land Seizure Act in Emergency Time of 1949.) Israel argues that violence in the Occupied Territories has produced a state of hostilities rather than occupation, which permits Israel to construct the Barrier as a defensive measure.
114. The Hague Regulations establish separate regimes governing the treatment of property depending on whether a state of hostilities or an occupation exists. During *hostilities*, Article 23(g) prohibits the destruction or seizure of enemy property, 'unless such destruction or seizure be imperatively demanded by the necessities of war'. In contrast, during *occupation*, Article 46 requires respect for private property and prohibits its confiscation.
115. The present level of violence in the Occupied Territories does not cross the threshold of gravity necessary for a state of hostilities to exist. Violence is low-level, isolated and sporadic and does not amount to widespread, organized, military resistance against the Israeli occupation. The fact that Israel is confiscating property through a legal process demonstrates that it exercises effective control over the Occupied Territories, without being unduly disrupted by guerrilla activity. As such, an occupation exists for the purposes of applying the provisions protecting private property under the Hague Regulations. Consequently, the Hague Regulations do not permit the confiscation of private property in the present circumstances.
116. Israel further asserts that property is merely seized and not confiscated, with legal title remaining vested in the property owner despite Israeli possession of the land.

⁹⁸ ICRC, Official Statement, Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 Dec 2001, para 5.

⁹⁹ Professor Kretzmer writes that the Israeli courts have handed down hundreds of judgments relating to the West Bank and Gaza since 1967, particularly during the two intifadas. The Israeli courts have approved, *inter alia*, the establishment of civilian settlements, changes to local laws, the building of bypass roads, land confiscations, deportations, house demolitions and administrative detentions. As a result, Kretzmer writes that '[t]he court has rationalized virtually all controversial actions of the Israeli authorities, especially those most problematic under principles of international humanitarian law': D Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY Press, NY, 2002).

¹⁰⁰ Formally, these orders apply until either 2003 or 2005: Order Concerning Confiscation of Land Number T/09/02 (Judea and Samaria region); Order Concerning Confiscation of Land Number T/23/02 (Judea and Samaria region). However, it is highly likely that these orders will be extended for as long as required. Directive (S14/2003) of 9 Feb 2003 states that 14 dunams (3.5 acres) of land shall be seized until 31 Dec 2005 for military needs, in light of the present security circumstances, and is necessary to prevent 'terrorist attacks'. Military orders can be repeatedly renewed, with no time limits.

However, the apparent permanence of the Barrier and its large cost,¹⁰¹ and the possibility of indefinite renewal once the temporary seizure order expires on 31 December 2005, all clearly suggest that the requisition orders amount to constructive confiscation in practice. This is so notwithstanding the artificial legal characterization of the orders as non-confiscatory.

117. Moreover, to the extent that the Barrier is being constructed on public land in the Occupied Territories, Article 55 of the Hague Regulations requires the Occupying Power act 'only as administrator and usufructuary' of the public property of the occupied country. Constructing the Barrier on public land, including forests and agricultural land, extends beyond the limits of the authority granted to Israel as usufructuary, since it is not a function being performed on behalf of, or in the interests of, the Palestinian people to whom the land belongs.
118. Furthermore, Article 53 of the Fourth Geneva Convention prohibits
- Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations... except where such destruction is rendered absolutely necessary by military operations.
119. The provision deals only with the destruction of property and is silent on its appropriation. However, Article 147 of the Fourth Geneva Convention establishes as a 'grave breach' of the Convention the 'extensive destruction *and appropriation* of property, not justified by military necessity and carried out unlawfully and wantonly' [emphasis added]. Appropriation differs from destruction in that it requires the existence of an occupation, so that the relevant property is within the power of the Occupying Power.¹⁰² Appropriation must be extensive and not isolated to constitute a grave breach.¹⁰³
120. Israel's implementation of requisition orders and the procedure for review are both manifestly deficient. On receiving a notice, landowners have one week in which to file an appeal with the Legal Advisor to the Military Commander for review by a military Appeals Committee. An additional period of seven days to appeal to Israel's High Court of Justice is allowed where the initial appeal is rejected, staying the planned work. Israel notes that it has reached agreement with some complainants to modify the impact of the Barrier.¹⁰⁴
121. However, requisition orders become valid on the date they are signed – even if they are not delivered to the property owner – and may be issued retroactively after the seizure has taken place. According to many property owners and human rights organizations, in practice orders are rarely delivered directly to property owners.
122. On review, the military Appeals Committee is a part of the same entity (the IDF) which issues the requisition orders, so that review cannot be regarded as independent. This is underlined by the fact that every appeal to date (numbering in the hundreds) has been rejected by the Appeals Committee,¹⁰⁵ although in some

¹⁰¹ B'Tselem Report, op cit, 18; LACC Report, op cit, 2; OCHA Report, op cit, 1; C Cook, 'Final Status in the Shape of a Barrier', Middle East Research and Information Project, 3 Sept 2003: stopthewall.org/analysisandfeatures/23.shtml

¹⁰² ICRC Commentary on Art 147 of the Fourth Geneva Convention.

¹⁰³ Ibid.

¹⁰⁴ Israeli Ministry of Defence: www.securityfence.mod.gov.il/Pages/ENG/execution.htm.

¹⁰⁵ LACC Report, op cit, 18.

cases the amount of land requisitioned has been reduced. While the Military Commander has the authority to reverse a recommendation of the Appeals Committee, thus far this has not occurred. The few appeals by property owners to the Israeli High Court have also failed.¹⁰⁶

123. While land owners are entitled to demand compensation, the vast majority have not done so (on the urging of the Palestinian Authority), so as not to legitimise the Israeli seizure.¹⁰⁷ In any case, the amount of compensation offered has been well below the real value of the land. In Qalqiliya, the amount offered was only 10 per cent of the actual value.¹⁰⁸

Livelihood of Civilians in Occupied Territories

124. Under Article 43 of the Hague Regulations 1907, the Occupying Power must 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.
125. Israel also has obligations under the Fourth Geneva Convention to ensure medical treatment, public health and the work of hospitals and medical personnel (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). Israel is responsible for any breaches of these provisions by its agents (Art 29, Fourth Geneva Convention), which includes the private contractors building the Barrier on Israel's behalf.
126. The construction of the Barrier to date has had significant detrimental impacts on Palestinians in respect of these provisions, beyond what is reasonably necessary to ensure Israel's security. The specific impacts on Palestinian health, education and employment are considered in Part B, in connection with violations of correlative human rights resulting from the Barrier.
127. It is sufficient to note here that numerous international organizations and non-governmental agencies have complained that Israeli restrictions on freedom of movement in the Occupied Territories (including the Barrier, curfews, checkpoints and closures) have heavily interfered with the delivery of humanitarian relief programmes to Palestinians.¹⁰⁹ UNRWA, for example, reports that it lost 2,061 workdays lost in the West Bank during the first nine months of 2003,¹¹⁰ largely as a result of restrictions on movement. UN staff have also been killed, fired on, and had their physical infrastructure destroyed,¹¹¹ eroding relief capability. Further restraints on freedom of movement resulting from the Barrier are likely to exacerbate the difficulties involved in delivering relief to Palestinians, particularly refugees.

Prohibition on Collective Punishment

128. Regulation 50 of the Hague Regulations and Article 33 of the Fourth Geneva Convention prohibit collective punishment. These prohibitions are not limited to

¹⁰⁶ Ibid.

¹⁰⁷ B'Tselem Report, op cit, 17.

¹⁰⁸ OCHA Report, op cit, 4.

¹⁰⁹ ICRC Official Statement, op cit, para 5; UNRWA Appeal, op cit, 7.

¹¹⁰ UNRWA Appeal, op cit, 13.

¹¹¹ UNRWA, Report of the Commissioner-General, 1 July 2002–30 June 2003, 25 Sept 2003, UN Doc A/58/13, Supp No 13 ('UNRWA Report'), paras 7, 9.

criminal punishment for offences, but rather encompasses any form of penalty imposed on a collective basis.

129. The UN Human Rights Committee has found that the demolition of houses and property by Israel in the Occupied Territories was 'partly punitive', implemented against families 'whose members were or are suspected of involvement in terrorist activities or suicide bombings'.¹¹² As such, it amounts to a form of prohibited collective punishment under humanitarian law.
130. Further, the construction of the Barrier is arguably a type of collective punishment of Palestinians, since by separating Israel from most of the Occupied Territories it casts suspicion of terrorist activity on the entire Palestinian population. It also interferes with numerous fundamental human rights to which Palestinians are entitled, in a manner which is neither necessary nor proportionate to Israel's security objectives. Consequently, the Barrier serves as a means of punishing and deterring the Palestinian population as a whole for the prior and anticipated terrorist acts of a very small number of Palestinians.
131. Collective punishment is also incompatible with the structure of the Fourth Geneva Convention. The Convention allows a State Party to derogate, under strict conditions, from its obligations to certain protected persons in occupied territory,¹¹³ if a person is definitely suspected of activity hostile to the security of the occupier.¹¹⁴ Persons must be *definitely* suspected of such activities, so that even reasonable suspicion will be insufficient.
132. As the ICRC Commentary notes, 'suspicion must not rest on a whole class of people; collective measures cannot be taken under this Article; there must be grounds justifying action in each individual case'.¹¹⁵ The security provision should be interpreted restrictively because of the potential for abuse.¹¹⁶

Prohibition on Forcible Transfers

133. Article 49 of the Fourth Geneva Convention prohibits individual or mass forcible transfers of protected persons in Occupied Territory, except where total or partial evacuation of an area is necessary for the security of the population or imperative military reasons. In the latter case, evacuees must be transferred back to their homes as soon as hostilities have ceased.
134. Forcible transfers are also recognized as a war crime and a crime against humanity in certain circumstances. Article 147 of the Fourth Geneva Convention establishes that the 'unlawful deportation or transfer or unlawful confinement of a protected person' is a grave breach of the Convention. Article 7(2)(d) of the Rome Statute establishes as a crime against humanity the 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'.
135. Palestinians whose property is seized and homes demolished to build the Barrier may be victims of prohibited forcible transfers, since the transfers are not for the

¹¹² UN Human Rights Committee, Concluding Observations: Israel, 21 Aug 2003, UN Doc CCPR/CO/78/ISR, para 16.

¹¹³ Fourth Geneva Convention, Art 5.

¹¹⁴ Ibid.

¹¹⁵ ICRC Commentary on Article 5 of the Fourth Geneva Convention.

¹¹⁶ Ibid.

security of Palestinians themselves and the route of the Barrier is not dictated by imperative military reasons. Further, in the closed military zones adjacent to the Barrier, an arbitrary or punitive refusal to issue permits to Palestinian residents may constitute prohibited transfer or displacement of protected persons.

136. Under a military order of 2 October 2003, the Israeli military commander may decide who has the right to remain in a closed military zone, and under what conditions. The order does not state the criteria for obtaining the permit except that a resident provide evidence that he or she resides in the place 'to the satisfaction' of the Civil Administration, which appears to have a very wide discretion to grant or deny permits.
137. The lack of clear criteria makes it possible that decisions will be made arbitrarily and on the basis of extraneous considerations, such as collective punishment. The order makes it clear that not all residents will be granted permission to stay in the area, as security reasons may permit a commander to refuse an application. This would mean constructive expulsion from home and livelihood without due process.



E APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW IN THE OCCUPIED TERRITORIES

Israel's International Human Rights Law Obligations

138. Israel has ratified all of the six major multilateral human rights treaties: ICCPR, ICESCR, CRC, CEDAW, CERD and the Torture Convention.¹¹⁷
139. Israel has lodged no reservations to the ICCPR, ICESCR or CRC. It has lodged reservations to the CERD and CAT stating that Israel is not bound by the dispute settlement provisions of those conventions.¹¹⁸ Israel has lodged a reservation to the CEDAW in relation to certain religious matters, and does not recognize the competence of the Committee against Torture under the CAT. None of these reservations affect Israel's obligations to guarantee human rights to Palestinians in the Occupied Territories.

Derogation from Human Rights Obligations

140. Israel notified its derogation from Article 9 of the ICCPR (the right to liberty and security of the person and freedom from arbitrary arrest or detention) upon ratification.
141. Israel has not notified other States, through the UN Secretary-General, of derogation from any other human rights obligations, as required under Article 4(3) of the ICCPR. Notification is not a mere procedural formality, but is essential to the validity of derogation. Notification ensures international supervision of measures of derogation, to prevent such measures exceeding the lawful limits of derogation.
142. Although a state of emergency has been declared in Israel since May 1948, the UN Human Rights Committee has criticized Israel for taking measures derogating from ICCPR rights other than Article 9.¹¹⁹ The Committee states that 'these derogations extend beyond what would be permissible under those provisions of the Covenant which allow for the limitation of rights', such as Articles 12(3), 19(3) and 21 (3).
143. The Committee has also stated that certain Israeli measures derogating from Article 9 exceed the permissible limits on derogation under Article 4. In particular, the Committee is concerned about administrative detention of Palestinians with restricted access to counsel and the provision of reasons for detention, which limit judicial review and endanger the protection against torture and other prohibited ill-treatment under Article 7.
144. Derogation is only permitted in response to a proclaimed public emergency *threatening the life of the nation* (ICCPR, Art 4(1)). The existence of a public

¹¹⁷ International Covenant on Civil and Political Rights (ICCPR) 1966 (Israel ratified on 3 Jan 1992); International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 (Israel ratified on 3 Jan 1992); Convention on the Rights of the Child (CRC) 1989 (Israel ratified on 3 Oct 1991); International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979 (Israel ratified on 2 Nov 1991); Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965 (Israel ratified on 2 Feb 1979); International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) 1984 (Israel ratified on 3 Oct 1991).

¹¹⁸ CERD, Art 22; CAT, Art 30.

¹¹⁹ UN Human Rights Committee, Concluding Observations: Israel (2003), op cit, para 12.

emergency threatening the life of the nation cannot be lightly assumed.¹²⁰ An emergency must be actual or imminent, not merely anticipated. It must involve the whole population and threaten the physical existence of the nation, such as its physical or territorial integrity, or the functioning of State organs. As the ECHR stated in the *Lawless* case, a public emergency is a

situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question.¹²¹

145. An emergency must, therefore, be of a particular gravity. In the *Greek* case, political instability preceding a coup, and bomb incidents, acts of sabotage and the formation of illegal organizations were not considered by the ECHR to threaten the life of the nation and warrant derogation, despite the margin of appreciation accorded to Greece in its assessment.¹²²
146. The proclamation of an emergency is a measure of last resort, after less exceptional measures (including domestic law and permissible limitations on rights) have failed.¹²³ It is also a temporary measure and cannot be used to justify a 'permanent state of emergency', which regularizes or normalizes the exception.
147. Measures of derogation must also be 'strictly required by the exigencies of the situation' (ICCPR, Art 4(1)), or 'proportionate to the need of defending the higher interest of society'.¹²⁴ While States have a wide margin of appreciation in determining the measures necessary to address an emergency, they do not possess an unfettered discretion.
148. There must be a necessary and proportional link between the threat and the measures taken in responses.¹²⁵ The existence of alternative, less prejudicial measures may render a measure disproportionate. The principle of proportionality applies both to the measure and to the manner of its application, including its duration. Since states of emergency are temporary, measures of derogation must terminate once the emergency no longer exists.¹²⁶ Measures cannot be inconsistent with a State's other international obligations, particularly rules of jus cogens and international humanitarian law.
149. Israel has declared a continuous public emergency since 1950, irrespective of considerable fluctuations in the level of the threat faced by Israel. Israel has drawn no distinction between the threat experienced during the wars of 1948, 1967 and 1973 and the lesser threats experienced at other times. Even according a wide margin of appreciation to Israel, it is difficult to accept that the very existence of Israel has been objectively threatened on a continuous basis since 1950. It is also doubtful whether the level of violence directed against Israel at present threatens Israel's very existence as a State, as opposed to threatening human lives in Israel.

¹²⁰ UN HR Committee, *Landinelli*, Comm No R 8/34, Adoption of Views: 8 Apr 1981, UN Doc A/36/40, 132-3: 'a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant'.

¹²¹ ECHR, *Lawless*, 1 July 1961, Ser B: Report of the Commission, No 90, 82.

¹²² ECHR, *Greek case*, Report of the European Commission, (1969) YBECHR 12.

¹²³ *Lawless*, op cit, para 36.

¹²⁴ J Oraa, *Human Rights in States of Emergency in International Law* (1992) 142.

¹²⁵ Ibid.

¹²⁶ EComHR, *De Becker*, 8 Jan 1960, Ser B: Report of the Commission, 133.

150. Even in a duly proclaimed and notified state of emergency, Israel cannot derogate from certain rights (ICCPR, Art 4(2)): the right to life, freedom from torture and ill-treatment, freedom from slavery, unjust imprisonment, the recognition of legal personality, the principle of legality and of non-retroactivity of penal laws, and freedom of thought, conscience and religion.¹²⁷ Further, the provisions of international humanitarian law are non-derogable.
151. In addition to explicitly non-derogable rights, provisions related to the exercise of non-derogable rights (effective remedy, right to enjoy those rights without discrimination when applied to non-derogable rights), provisions which contain general exceptions (prohibition of acts aim at destroying or limiting the rights) and provisions related to the machinery of implementation are also non-derogable.
152. Measures of derogation may not involve discrimination solely on the grounds of race, colour, sex, language, religion or social or ethnic origin (ICCPR, Art 4(1)). In contrast, the drafters of the ICCPR felt that restrictions on the grounds of national origin, political opinion, property and birth may be legitimately imposed in some circumstances.
153. However, measures that make a distinction on racial grounds are only legitimate 'when they have not been taken exclusively on these grounds, but because the measures were necessary and reasonable in the circumstances, and proportionate to the emergency'.¹²⁸ The Barrier is an impermissible discriminatory measure because it is directed solely towards Palestinians as a racial group.

Permissible Limitations on Human Rights

154. The ICESCR allows States to limit rights only where limitations are prescribed by law, compatible with the nature of the rights, and 'solely for the purpose of promoting the general welfare in a democratic society' (ICESCR, Art 4). In addition, certain rights may be limited on more extensive grounds, including the right to form, join or participate in a union (Art 8). Economic, social and cultural rights must, however, be guaranteed without discrimination and in full equality (ICESCR, Art 2(2) and Art 3).
155. In contrast, the ICCPR contains no general provision on the limitation of rights. Instead, only certain rights can be limited and in specified ways. These ICCPR rights include respect for private life, family, home and correspondence (Art 17), and freedoms of religion (Art 18), expression (Art 18), association and assembly (Art 22), and movement (Art 12).
156. Limitations on these specific rights must pursue a legitimate aim or purpose. While there is variation in the language used in relation to particular rights, legitimate aims are essentially the protection of public security, order, health or public morality, and securing the rights and freedoms of others. Any restrictions must also be 'necessary in a democratic society'.
157. States are entitled to a margin of appreciation in evaluating the necessity of a restriction. Nonetheless, States seeking to limit rights on the above grounds must

¹²⁷ ICCPR, Art 4(2) prohibits derogation from Arts 6, 7, 8(1)-(2), 11, 15, 16 and 18.

¹²⁸ Oraa, *op cit*, 175.

specify the precise nature of the threat¹²⁹ and the reasons for the limitation must be 'pertinent and sufficient'.¹³⁰

158. Any limitation on a right must also be proportional to the legitimate aim. There must be a balancing of general and individual interests, and the margin of appreciation is reduced where intimate rights are the object of restriction.¹³¹ Restrictions may only be imposed if alternative or less restrictive measures could have been taken to achieve the same goal.
159. The requirement of proportionality is relevant to both the existence of a measure of limitation, as well as the manner of its operation. Thus the physical route and nature of the separation Barrier, as well as the operation of its gates and adjacent closed military zones, must be proportionate to the security objectives.
160. It is highly significant that restrictions on ICESCR and ICCPR rights must be 'necessary in a democratic society'. Although Israel itself is a democracy, the Palestinian population of the Occupied Territories do not enjoy political rights of participation, including voting, in Israel. Palestinians are excluded from Israeli political life and are not part of 'democratic society'.
161. As a result, restrictions on rights imposed on Palestinians have not been adopted through democratic processes and, in the case of the ICESCR, are not directed towards the 'general welfare' – as opposed to the welfare of Israelis and Israeli settlers. The threshold of justification for imposing restrictions should consequently be considered higher where an Occupying Power is restricting the rights of non-citizens in Occupied Territory.

Customary Human Rights Law

162. Many of the provisions in these conventions have passed into parallel rules of customary international law which are also binding on Israel. Israel automatically incorporates international law into domestic law, unless there is express legislation to the contrary.¹³²

Territorial Scope of Israel's Human Rights Obligations

163. Israel asserts that its human rights treaty obligations only apply within its own sovereign territory and do not extend to the Occupied Territories, which Israel claims to merely 'administer'. Israel further asserts that the Palestinian Authority is responsible for human rights protection in the Occupied Territories.
164. International jurisprudence clearly supports the contrary view that human rights obligations apply to persons within the territory or jurisdiction of a State, including where a State exercises control over persons outside its territory. Although the 'scope *ratione loci* of human rights treaties is not delineated with optimal clarity in

¹²⁹ UN Human Rights Committee, No 518/1992, *Jong-Kyu Sohn v Korean Republic*, 19 July 1995, A/50/40, vol II, 104, para 10.4.

¹³⁰ ECHR, *Olsson*, 24 Mar 1988, A.130, *Grand Chamber*, No 29, para 68.

¹³¹ ECHR, *Dudgeon*, 23 Oct 1981, A.45, *Grand Chamber*, No 19.

¹³² R Lapidot, 'International Law within the Israeli Legal System' (1990) 24 *Israeli Law Review* 451, 452.

- the texts',¹³³ there is considerable agreement arising out of State practice and judicial interpretation.
165. Under the ICCPR, States must respect and ensure human rights to all individuals 'within its territory and subject to its jurisdiction'.¹³⁴ In interpreting this provision, the UN Human Rights Committee states that the ICCPR applies where ever a State exercises 'effective control' over a person, including outside the State's territory.¹³⁵
166. In *López Burgos v Uruguay*, the Committee held a State 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'.¹³⁶ The Committee believes it would be 'unconscionable' to preclude the application of human rights obligations to such extraterritorial activities by States.¹³⁷
167. While the ICESCR contains no comparable provision on the scope of its application, Article 14 refers to obligations in relation to the right to education extending to a State's 'metropolitan territory or other territories under its jurisdiction'. The obligation to ensure other ICESCR rights arguably shares this extraterritorial scope.
168. In 2003, the UN Committee on Economic, Social and Cultural Rights expressly rejected Israel's contention that ICESCR rights do not apply to areas not subject to Israel's sovereign territory and jurisdiction, including 'populations other than the Israelis in occupied territories'.¹³⁸ The Committee reaffirmed 'that the State party's obligations under the Covenant apply to all territories and populations under its effective control'.¹³⁹
169. The Torture Convention requires State Parties to take effective measures to prevent torture 'in any territory under its jurisdiction' (Art 2(1)). The CRC requires State Parties to respect and ensure rights 'to each child within their jurisdiction' (Art 2(1)). The CERD requires State Parties to 'assure to everyone within their jurisdiction effective protection and remedies' against racial discrimination (Art 6), and to prevent, prohibit and eradicate racial segregation and apartheid (Art 3).
170. There is a presumption that a State's human rights obligations are engaged wherever the State or its agents (military or civilian) 'exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory'.¹⁴⁰ The presumption may only be rebutted 'when the nature and the content of a particular right or treaty language suggest otherwise'.¹⁴¹

¹³³ J Fitzpatrick, 'Speaking Law to Power: The War against Terrorism and Human Rights' (2003) 14 EJIL 241, 252.

¹³⁴ ICCPR, Art 2(1); see also American Declaration of the Rights and Duties of Man, Arts XXV-XXVI.

¹³⁵ UN Human Rights Committee, 63rd Session, 1998, UN Doc CCPR/C/79/Add.93, para 10.

¹³⁶ *López Burgos v Uruguay*, Comm No 52/1979, Views of the UN Human Rights Committee, 329 July 1981, 36 UN GAOR Supp No 40, UN Doc CCPR/C/13/D/52/1979, at 182, para 12.3; see also *Casariago v Uruguay*, No 56/1979, Views of the UN Human Rights Committee, 29 July 1981, UN Doc CCPR/C/13/D/56/1979, paras 10.1-10.3.

¹³⁷ *López Burgos*, *ibid*, para 12.3.

¹³⁸ UN Committee on Economic, Social and Cultural Rights, Concluding Observations: Israel, 23 May 2003, UN Doc E/C.12/1/Add.90, para 15.

¹³⁹ *Ibid*, para 31.

¹⁴⁰ T Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78, 80-81.

¹⁴¹ *Ibid*.

171. The ordinary rules of State responsibility apply when attributing the conduct of unofficial actors, which violates human rights, to a responsible State.¹⁴² States will be responsible for the 'conduct of persons or entities exercising elements of governmental authority, or acting on the instructions of, or under the direction or control of, that State'.¹⁴³
172. The scope of application of human rights treaties is clarified by the Universal Declaration of Human Rights (UDHR) which, although not a binding treaty, has largely passed into customary law. The preamble refers to securing the 'universal and effective recognition and observance' of human rights 'both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'.
173. Further, Article 2 of the UDHR states that 'no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'. Human rights can hardly be universal and protect all people if a vacuum of obligation is allowed to exist within a State's non-sovereign territory.
174. This approach is confirmed by UN General Assembly resolutions. UNGA Resolution 48/121 (1993) endorsed the 'Vienna Declaration and Action Plan' from the World Conference on Human Rights, which reinforced the international community's understanding of the scope of human rights obligations:
- Effective international measures to guarantee and monitor the implementation of human rights standards should be taken *in respect of people under foreign occupation*, and effective legal protection against the violation of their human rights should be provided, in accordance with human rights norms and international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 14 August 1949, and other applicable norms of humanitarian law.¹⁴⁴
175. UN General Assembly resolutions have also specifically affirmed the international community's belief that Israel owes human rights obligations to Palestinians in the Occupied Territories. UNGA Resolution 53/56 (1998) demanded 'that Israel, the occupying Power, cease all practices and actions which violate the human rights of the Palestinian people' and called 'for complete respect by Israel, the occupying Power, of all fundamental freedoms of the Palestinian people'.¹⁴⁵ The Special Rapporteur of the UN Commission on Human Rights has consistently maintained that Israel's human rights obligations apply in the Occupied Territories.¹⁴⁶
176. Similarly, UN Security Council resolutions have stated that human rights law applies in the Occupied Territories.¹⁴⁷

¹⁴² The customary rules are reflected in the International Law Commission's Articles on State Responsibility (2001), Arts 4 to 11.

¹⁴³ International Bar Association, Amicus Brief in the US Supreme Court case of *Al-Odah v US*, Oct 2004, 13.

¹⁴⁴ See UNGA Resolution 48/121 (1993).

¹⁴⁵ UNGA Resolution 53/56 (1998), paras 2 and 5 respectively.

¹⁴⁶ UN Special Rapporteur Dugard Report, op cit, para 2; see also Special Rapporteur Jean Ziegler, UN Human Rights Commission, Report of 31 Oct 2003, para 23.

¹⁴⁷ See UNSC Res 237 (1967).

177. Regional jurisprudence on comparable treaty provisions in the European and Inter-American human rights systems support the view that human rights obligations apply to outside a State's territory.¹⁴⁸ In *Cyprus v Turkey*, the European Court of Human Rights (ECHR) found that States are 'bound to secure the rights of all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad'.¹⁴⁹
178. Further, in *Loizidou v Turkey*, the ECHR held that States are responsible for acts or omissions 'which produce effects outside their own territory'.¹⁵⁰ This includes where a State exercises effective control of an area outside its own national territory as a result of military action, and extends to control exercised directly by the State's military forces or through subordinate local actors.¹⁵¹
179. Similarly, in the Inter-American human rights system, 'a state's human rights obligations are not dependent upon a person's nationality or presence within a particular geographic area, but rather extend to all persons subject to that state's authority and control'.¹⁵² Thus a State owes human rights obligations towards 'individuals interdicted on the high seas, shot down in international airspace, injured in invasions by the respondent state, or attacked by agents of the respondent state in another country'.¹⁵³
180. According to the Inter-American Commission on Human Rights, human rights protections extend beyond a State's sovereign territory because they 'are derived from the attributes of an individual's personality and by virtue of the fact that he or she is a human being, and not because he or she is the citizen of a particular state'.¹⁵⁴
181. Domestic courts have also recognized that human rights apply extraterritorially. In *Gherebi v Bush and Rumsfeld*,¹⁵⁵ the US Court of Appeals for the Ninth Circuit found that the existence of 'territorial jurisdiction', rather than 'sovereignty', was sufficient to support jurisdiction over a habeas corpus petition in relation to a detainee at Guantanamo Bay, Cuba. Although that decision arose under US domestic law, habeas corpus petitions are equivalent to the international freedom from arbitrary or unlawful detention.

¹⁴⁸ In Europe, see: *Cyprus v Turkey*, App No 8007/77, (1975) 18 YB ECHR 83, 118; (1977) 13 DR 85; and *Cyprus v Turkey* (10 May 2001); *Loizidou v Turkey*, App No 14318/89, (1996) 23 EHRR 513; (1995) Ser A, No 310, paras 59-64; and *Loizidou v Turkey* (1998), para 52; *Bankovic v Belgium*, App No 52207/99, 12 Dec 2001, 11 BHRC 435; (2002) 41 ILM 517; *Ocalan v Turkey*, App No 46221/99, (2003) 37 EHRR 10.

¹⁴⁹ *Cyprus v Turkey*, *ibid.*

¹⁵⁰ *Loizidou v Turkey* (1998), *op cit*, para 52.

¹⁵¹ *Ibid.*

¹⁵² Inter-American Commission, Report on Human Rights and Terrorism (2002), para 44; see also Case 9903, Report No 51/01, *Ferrer-Mazorra et al* (US), Annual Report of the IACHR 2000, para 178, citing, *inter alia*, Advisory Opinion OC-2/82, para 29; Report No 38/99, *Saldaño Case* (Argentina), Annual Report of the IACHR 1998, paras 15-20; *Coard et al Case*, para 37, citing IACHR, Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, Doc 17, 1985; Second Report on the Situation of Human Rights in Suriname, OEA/Ser.L/V/II.66, Doc 21, Rev 1, 1985.

¹⁵³ Inter-American Commission on Human Rights, quoted in Lyons and Rottman, 'The Inter-American Mechanisms', in J Fitzpatrick (ed), *Human Rights Protection for Refugees, Asylum Seekers, and Internally Displaced Persons* (2002) 439, 453.

¹⁵⁴ Inter-American Commission, Report on Human Rights and Terrorism (2002), para 44.

¹⁵⁵ *Gherebi v Bush and Rumsfeld*, No 03-55785 District Court No V-03-01267-AHM. On 13 May 2003, the US District Court for the Central District of California had earlier dismissed Gherebi's petition for lack of jurisdiction: *Gherebi v Bush*, No CV 03-1267-AHM (JTL). The appeal involved the interpretation of the early case of *Johnson v Eisentrager*, 339 US 763 (1950).

182. Although the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip transferred some governmental functions to the Palestinian Authority, it did not transfer exclusive responsibility for human rights protection to the Palestinian Authority.
183. Article XIX of the Interim Agreement provides only that 'Israel and the Council shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law'. Thus Israel's obligations, as described above, persist as long as it continues to exercise – or reacquires during the course of military operations – effective territorial control.
184. It is clear from Israel's construction of the Barrier, the issuance of property requisition orders, and the establishment of closed military zones involving residency permits that Israel exercises effective control over (at least) those parts of the Occupied Territories affected by and adjacent to the Barrier. This includes any part of Occupied Territory lying between the Green Line and the Barrier.

Relationship between Human Rights Law and Humanitarian Law

185. International human rights law applies in times of both peace and armed conflict. International humanitarian law, though *lex specialis* in armed conflict, does not displace human rights law, which complements the protections of IHL.¹⁵⁶
186. The protections of human rights law and humanitarian law overlap in a number of areas, including provisions on humane treatment, fair trial and due process, and civilian detention. Some human rights are not included in humanitarian law because they are perceived as being of less relevance to the protection of persons from the particular dangers of armed conflict, such as, for example, the right of association and political rights.
187. In its *Nuclear Weapons* advisory opinion, the International Court of Justice held that the ICCPR continues to apply during armed conflict, except to the extent that there exists lawful derogation in a time of national emergency.¹⁵⁷ Even the right not to be arbitrarily deprived of life applies in hostilities, although under international humanitarian law (the *lex specialis* in armed conflict), some deprivations of life may not be considered arbitrary.¹⁵⁸
188. In August 2003, the UN Human Rights Committee reiterated its view that 'the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application' of the ICCPR, nor does it preclude the accountability of States for official action outside their territories – including in occupied territories.¹⁵⁹ The Committee stated that

¹⁵⁶ ICRC Report, 'Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law', Geneva, 2002, 6; C Greenwood, 'Scope and Application of Humanitarian Law', in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP, Oxford, 1995) 36, 40; Y Dinstein, 'Belligerent Occupation and Human Rights' (1978) 8 IYBHR 113.

¹⁵⁷ *Nuclear Weapons Advisory Opinion*, op cit, 240.

¹⁵⁸ Ibid.

¹⁵⁹ UN Human Rights Committee, Concluding Observations: Israel (2003), op cit, para 11; see also UN Human Rights Committee, Concluding Observations: Israel, 18 Aug 1998, UN DocCCPR/C/79/Add.93.

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.¹⁶⁰

189. Similarly, in 2003 the UN Committee on Economic, Social and Cultural Rights repeated its view that 'even in a situation of armed conflict, fundamental human rights must be respected'.¹⁶¹ The Committee noted further that 'basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law'.¹⁶² In the Committee's view, the application of humanitarian law does not impede the application of the ICESCR.¹⁶³



¹⁶⁰ UN Human Rights Committee, Concluding Observations: Israel (2003), op cit, para 11.

¹⁶¹ UN Committee on Economic, Social and Cultural Rights, Concluding Observations: Israel (2003), para 31.

¹⁶² Ibid.

¹⁶³ Ibid.

F VIOLATIONS OF HUMAN RIGHTS LAW: CIVIL AND POLITICAL RIGHTS

Freedom of Movement

190. Palestinians have an international right to freedom of movement which includes liberty of movement and freedom to choose their residence; the freedom to leave any country, including their own; and freedom from arbitrary exclusion from their own country (ICCPR, Art 12).¹⁶⁴
191. The only permissible restrictions on freedom of movement are those provided by law which are 'necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights'.¹⁶⁵ Any restrictions must not 'nullify' the right, must not be discriminatory or arbitrary, and must be necessary proportionate to the purpose underlying the restriction.¹⁶⁶
192. The physical existence of the Barrier, the adjacent closed military zones and permit system, and irregular and unpredictable closures of the Barrier's gates by Israeli soldiers impose very significant restrictions on the freedom of movement of Palestinians. The UN Human Rights Committee has criticized the Barrier's impact on freedom of movement as an 'unjustifiably severe restriction' which is incompatible with the ICCPR.¹⁶⁷
193. Israel announced that 5 terminal gates and 26 agricultural crossings were planned in the Barrier. Yet some of the planned gates have not been constructed, others have remained closed, and yet others have opened only sporadically and for short periods. ACRI notes that in three regions near Kalkilya and Tulkarm, gates were not opened three times daily as announced by the IDF. Instead, people were forced to wait many hours for gates to open, and at times gates were not opened at all. One gate near Jbara was not opened for over a month.
194. ACRI reports that during the Jewish holiday period of two weeks, the gates were not opened at all, while at other times the IDF refused to allow residents over 38 years of age to pass. Human Rights Watch confirms that men between certain ages have been absolutely forbidden to enter certain areas.¹⁶⁸
195. These examples are illustrative of the operation of the Barrier in various other areas. Israel has supplied little evidence suggesting that specific gate and checkpoint closures correlate with particular or specific security threats. Such a correlation would be necessary to support the argument that the Barrier and its operation are a proportionate response to the security threat.
196. The failure to open gates may also reflect staffing shortfalls in the IDF, particularly during Jewish holiday periods, rather than genuine security needs. ACRI correctly

¹⁶⁴ See also Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (Strasbourg, 16.IX.1963), Art 2; American Convention on Human Rights 1969, Art 22; African Charter on Human and Peoples' Rights 1981, Art 12.

¹⁶⁵ ICCPR, Art 12(3).

¹⁶⁶ UN Human Rights Committee, General Comment No 27 (1999), paras 2, 15, 18.

¹⁶⁷ UN Human Rights Committee, Concluding Observations: Israel (2003), op cit, para 19.

¹⁶⁸ Human Rights Watch, op cit.

argues that the gates should be open at all times, with appropriate security searches and supervision by the IDF, in order to minimize the impact on Palestinian civilians.

197. According to the UN Human Rights Committee, the right to choose one's place of residence includes 'protection against all forms of forced internal displacement' and against 'preventing the entry or stay of persons in a defined part of the territory'.¹⁶⁹ The Guiding Principles on Internal Displacement further recognize that persons have the right to be protected against arbitrary displacement from their home or place of habitual residence (Principle 6(1)).
198. In closed military zones, the arbitrary denial of residency permits may forcibly displace some Palestinians from their homes or land. The closure of gates in the Barrier may prevent the entry or stay of many Palestinians in parts of the Occupied Territories, as well as inhibiting the entry of Palestinians from Israel back into the Occupied Territories. The impact of the Barrier on access to employment and markets, and on the economy generally, may force some Palestinians to move away from their homes to find work.
199. The UN Human Rights Committee notes that restrictions on freedom of movement arising from the Barrier have disrupted other fundamental rights.¹⁷⁰ As discussed below, these include a wide range of other rights, including freedom from arbitrary or unlawful interference with privacy, family and the home; freedom of assembly and association; freedom of religion; minority rights; due process; and rights to work, health, education, culture and an adequate standard of living.
200. The restrictions on freedom of movement arising from the Barrier also compound the already severe restrictions on movement resulting from other Israel security measures, such as curfews, checkpoints and closures of roads, towns and villages. By affecting large sections of the Palestinian civilian population, they are neither necessary nor proportionate to meet the threat posed by small numbers of suspected Palestinian militants or terrorists.

Arbitrary or Unlawful Interference with Privacy, Family and Home

201. Palestinians are entitled to be free from arbitrary or unlawful interference with their privacy, family and home (ICCPR, Art 17).¹⁷¹ The UN Human Rights Committee takes a broad view of the notion of 'family', which is culture specific and comprises all family members as understood in the local society.¹⁷² Restrictions imposed by law must not be arbitrary and must be reasonable.¹⁷³ This right is a reconstitution of the right to property and not to be arbitrarily deprived of property found in Article 17 of the UDHR.
202. Plainly, the requisition of property and the demolition of houses to construct the Barrier, as described in Part A, both interfere with the privacy, family and homes of Palestinians. The unlawfulness of interference is judged according to international law, not merely domestic law. Since the Barrier is not a necessary or proportionate security measures under international humanitarian law or human rights law, requisition and demolition amounts to an unlawful interference. Moreover, to the

¹⁶⁹ UN Human Rights Committee, General Comment No 27 (1999), para 7.

¹⁷⁰ UN Human Rights Committee, Concluding Observations: Israel (2003), op cit, para 19.

¹⁷¹ ICCPR, Art 17(1); see also European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 8; American Convention on Human Rights 1969, Art 11.

¹⁷² UN Human Rights Committee, General Comment No 16 (1988), para 5.

¹⁷³ Ibid, paras 3-4.

extent that requisition and demolition are punitive measures in individual cases, they may also constitute arbitrary interference.

203. The erratic opening of gates in the Barrier, and the subjective issuance of permits for closed military zones, also amount to arbitrary interference, by denying Palestinians access, when they so choose, to their families and homes. Procedures at the gates themselves may constitute arbitrary interference, where the honour, reputation or dignity of Palestinians is impugned by mistreatment, humiliation or denigration at the hands of some Israeli soldiers.¹⁷⁴ The permits themselves may further interfere with the right to privacy and residency.

Freedoms of Assembly and Association

204. The human rights of peaceful assembly (ICCPR, Art 21) and free association (ICCPR, Art 22) may only be restricted 'in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others'.¹⁷⁵ Restrictions should be a last resort and should not be unreasonable.¹⁷⁶ These rights are inextricably connected to other rights of free expression and freedom of movement.
205. The separation Barrier has evidently affects the rights of peaceful assembly and association of Palestinians in the Occupied Territories. Transit restrictions hinder the holding of public or private meetings or organizations and associations, as well as peaceful demonstrations. In a period of political transition, these restrictions have a particularly serious affect on the capacity of Palestinians to build and strengthen embryonic political institutions, particularly political parties, civil society groups and the Palestinian Authority itself. The ability to hold elections is also severely jeopardized in the absence of free assembly and association.
206. These restrictions are neither necessary nor proportionate to meet threats to Israel's security. Indeed, they may be counterproductive, since further restrictive security measures such as the Barrier – particularly those affecting political participation – are likely to exacerbate rather than pacify security threats to Israel.

Freedom of Religion

207. Freedom of religion is a particularly important manifestation of freedoms of assembly and association. Palestinians are entitled to freedom of thought, conscience and religion, and specifically to the 'freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching' (ICCPR, Art 18).
208. Freedom of religion may only be limited by law if 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.¹⁷⁷ Restrictions on any other grounds – including national security – are not

¹⁷⁴ UN Special Rapporteur Dugard Report, op cit, para 20.

¹⁷⁵ See also Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No 11 and Protocols 1, 4, 6, 7, 12. and 13), Art 11; American Convention on Human Rights, Arts 15-16; African Charter on Human and Peoples' Rights, Arts 10-11.

¹⁷⁶ UN Human Rights Committee, Concluding Observations: Togo, 28 Nov 2002, para 18; European Court of Human Rights, *Djavit An vs Turkey*, Judgement of 20 Feb 2003, para 57.

¹⁷⁷ ICCPR, Art 18(3).

permitted.¹⁷⁸ Restrictions must be 'directly related and proportionate to the specific need on which they are predicated' and 'may not be imposed for discriminatory purposes or applied in a discriminatory manner'.¹⁷⁹ The right is so fundamental that no derogation is permitted, even during public emergency.¹⁸⁰

209. By isolating Palestinians on the western side of the Barrier and limiting their free movement to the eastern side of the Barrier, Israel limits access to holy sites, places of worship and spiritual communities, through which Palestinians manifest their religion and beliefs.
210. At the same time, Palestinian rights sacrificed to secure the religious needs of Israelis. B'Tselem notes that Israeli amended the Barrier's route to annex Rachel's Tomb into northern Jerusalem, preventing over 400 local Palestinians from entering Jerusalem and accessing vital social services.¹⁸¹ While balancing competing rights is an essential part of human rights law, balancing must be based on proportionality and necessity. The likely harm suffered by Palestinians excluded from basic services possibly outweighs Jewish religious needs.

Rights of Minorities

211. Ethnic, religious or linguistic minorities within a State – including non-citizens¹⁸² – are entitled to enjoy their own culture, profess and practise their own religion, and use their own language (ICCPR, Art 27). A minority's enjoyment of its culture 'may consist in a way of life which is closely associated with territory and use of its resources'.¹⁸³ While Israel could derogate from this obligation in times of emergency or armed conflict, it has not notified any such derogation. Further, the ICCPR does not specify any permissible limitations on the right.
212. Arab Israeli citizens living in Israeli territory constitute a demographic minority within Israel. By hampering free movement between Israel and the Occupied Territories, the Barrier limits the right of Arab Israelis to enjoy their own culture with other members of their broader social group – Palestinians living on the eastern side of the Barrier. It also separates them from close association with the territory closely associated with Arab culture and religion, particularly in relation to sacred Islamic sites located in the Occupied Territories.

Due Process or Procedural Fairness

(a) Requisition of Property

213. Under Article 14(1) of the ICCPR, all persons are entitled to a fair and public hearing by a competent, independent and impartial tribunal, in the determination of a criminal charge or of rights and obligations in a suit at law. The UN Human Rights Committee notes that '[i]n general, the reports of States parties fail to recognize that Article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law'.¹⁸⁴

¹⁷⁸ UN Human Rights Committee, General Comment No 22 (1993), para 8.

¹⁷⁹ *Ibid.*

¹⁸⁰ ICCPR, Art 4(2); see also UN Human Rights Committee, General Comment No 22 (1993).

¹⁸¹ B'Tselem Report, *op cit*, 32.

¹⁸² UN Human Rights Committee, General Comment No 23 (1994), para 5.1

¹⁸³ *Ibid.*, para 3.2.

¹⁸⁴ UN Human Rights Committee, General Comment No 13 (1984), para 2.

214. The Israeli Defence Force issues the orders requisitioning Palestinian property to construct the separation Barrier and administers the military appeals committee which hears objections to requisition notices.¹⁸⁵ There is a one week deadline for filing appeals. Requisition proceedings before the military appeals committee constitute a 'suit at law' within the meaning of Article 14 of the ICCPR. As such, the committee is required by international law to be 'competent, independent and impartial'.
215. The military appeals committee does not satisfy these requirements of Article 14. The military appeals committee is part of the same institution, the Israeli Defence Force, which issues requisition notices and cannot be regarded as 'independent and impartial'. As of May 2003, every appeal against a requisition order by a Palestinian landowner had been rejected by the military appeals committee.¹⁸⁶
216. The UN Human Rights Committee has warned that the criminal prosecution of civilians in military courts 'could present serious problems as far as the equitable, impartial and independent administration of justice is concerned'.¹⁸⁷ The Committee stated that such use of military courts must be 'very exceptional' and fully guarantee the protections of Article 14.¹⁸⁸ By analogy, the Committee's concerns about military courts in relation to criminal charges are similarly applicable to a 'suit at law', including property requisition proceedings.
217. Further, there is evidence that the manner of notifying landowners of property requisition is arbitrary in practice. District Coordination Office requires that requisition orders be delivered to the landowner whenever feasible. However, orders are sometimes left on the property or given to village representatives and are rarely delivered directly to property owners. Many landowners became aware of requisition orders only after construction has begun, at which point the one week deadline for filing an objection may have passed. The one week deadline itself is an unnecessarily short time frame which fails to guarantee procedural fairness to those affected by requisition orders.
218. Cases involving land requisitioned prior to issuance of retroactive military orders are particularly troublesome, as the property could become irreparably damaged prior to the owner being given a hearing. Elementary principles of justice raise a presumption against the issuance of retrospective laws, rebuttable only in the most exceptional circumstances. Considering the detailed long-term planning of the separation Barrier by Israel, it is difficult to sustain an argument that retrospective requisition orders are justifiable by weightier interests.
219. Filing appeals may also prove expensive, requiring the hiring of lawyers and in some cases land surveyors (to draft a map to attach to the appeal). Lawyers and surveyors themselves are hampered by restrictions on freedom of movement within the West Bank, making it difficult to meet the one week deadline, especially since most lawyers and licensed surveyors are located within cities.¹⁸⁹ There is no evidence of Israel providing legal representation or aid.

¹⁸⁵ LACC Report, op cit, 17.

¹⁸⁶ Ibid, 18.

¹⁸⁷ UN Human Rights Committee, General Comment 13 (1984), para 4.

¹⁸⁸ Ibid.

¹⁸⁹ LACC Report, op cit, 17.

220. While land owners are entitled to demand compensation, the vast majority have not done so (on the urging of the Palestinian Authority), so as not to legitimise the Israeli seizure.¹⁹⁰ In any case, the amount of compensation offered has been well below the real value of the land. In Qalqiliya, the amount offered was only 10 per cent of the actual value.¹⁹¹

(b) Issuing of Permits

221. The directives regulating closed military zones ('seam zones') and the issuing of permits are not strictly 'suits at law' within the meaning of Article 14 of the ICCPR, although the process of an appeal to a military committee is certainly a 'suit at law'.

222. One commentator argues strongly that the protection of Article 14 should be extended to administrative decisions.¹⁹² Courts in many jurisdictions have recognized that administrative action is subject in domestic law to minimum standards of procedural fairness. In the European Court of Human Rights, deportations have been made subject to review on procedural fairness grounds.¹⁹³

223. Additionally, the primary rules of State responsibility on the treatment of aliens have long imposed minimum international standards on the administration of justice. While many Palestinians are technically stateless,¹⁹⁴ as a people with a recognized right of self-determination, the Palestinian Authority is equivalent to a State for the limited purposes of diplomatic protection. While Palestine has not yet attained the full attributes of statehood, Israel is nonetheless bound to properly administer justice in relation to Palestinians.

224. The orders regulating closed military zones require all Palestinians over the age of twelve who live in the seam area to obtain a 'permanent resident permit' from the Civil Administration, to enable them to continue living in their homes. Palestinian residents whose request for a permit is rejected may argue their case before a military committee. If the committee denies the appeal, they must then leave their homes.

225. The criteria for obtaining the permit are not stated, except for the requirement that the resident provide evidence that he or she resides in the place 'to the satisfaction' of the Civil Administration. The kind of evidence necessary is unclear and in effect the Civil Administration has almost complete discretion to refuse permits. Although veiled in legality, the process risks being completely arbitrary. The process does not appear to satisfy minimum international standards of procedural fairness.

(c) Appeals to Israeli Civilian Courts

226. Further appeals to the Israeli civilian courts are unlikely to satisfy Articles 2 and 14 of the ICCPR. Article 2(2)(a) of the ICCPR requires States to ensure that persons whose rights or freedoms are violated 'have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'.

227. While organizationally independent of the Israeli military, the Israeli civilian courts cannot be regarded as providing an opportunity for an *effective* remedy, in an

¹⁹⁰ B'Tselem Report, op cit, 17.

¹⁹¹ OCHA Status report, p. 4.

¹⁹² M Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 IJRL 251.

¹⁹³ *Chahal v UK* (1996) 23 EHRR 413.

¹⁹⁴ G Goodwin-Gill, *The Refugee in International Law* (Clarendon, Oxford, 1996) 241-246.

impartial and substantively independent setting, for Palestinians. The difficulties faced by Palestinians seeking remedies in the Israeli courts were described earlier.¹⁹⁵

228. Given this context, the continuing occupation of Palestinian territory and the denial of their right of self-determination, Palestinians cannot have confidence that the Israeli civilian courts offer the prospect of an effective remedy in an independent and impartial setting.

Cruel, Inhuman or Degrading Treatment

229. The operation of the separation Barrier may result in the cruel, inhuman or degrading treatment or punishment of some Palestinians, contrary to Article 7 of the ICCPR and the Convention Against Torture. No derogation is permitted from these prohibitions, even in times of public emergency (ICCPR, Art 4).

230. Firstly, the arbitrary closure of military checkpoints and the manner of body searching Palestinians at checkpoints may amount to degrading treatment. There is evidence that Israeli soldiers at checkpoints sometimes verbally or physically mistreat Palestinian civilians, and the increased restrictions imposed by the separation Barrier are likely to increase mistreatment. As the Special Rapporteur for the UN Commission on Human Rights states,

Accounts of rudeness, humiliation and brutality at the checkpoints are legion. Ambulances are often delayed and women give birth to children at checkpoints. Checkpoints are not so much a security measure for ensuring that would-be suicide bombers do not enter Israel, but rather the institutionalization of the humiliation of the Palestinian people.¹⁹⁶

231. Secondly, the current system of military checkpoints already makes it extremely difficult for many Palestinian families to visit Israeli detention centres holding imprisoned relatives. This problem is likely to increase as the Barrier hampers Palestinians' freedom of movement. Lack of access to detainees by family members erodes an important check against the use of torture or other forms of ill-treatment in detention.

232. A 155 km stretch of the Barrier is expected to continue from Elqana settlement to Ofer military detention centre.¹⁹⁷ Although the precise impact on detainees at Ofer is presently unknown, the Barrier may decrease prompt and regular access to Ofer by doctors, lawyers and family members from the eastern side of the Barrier.

Personal Liberty and Security and Freedom from Arbitrary Detention

233. Palestinians are entitled to liberty and security of person and freedom from arbitrary arrest or detention (ICCPR, Art 9(1)). By bringing more Palestinians within the close physical control and surveillance of Israeli forces, the operation of the separation Barrier, its checkpoints and permit system will increase the opportunities for Palestinians to be arbitrarily detained. Prolonged arbitrary detention is a well-documented feature of the Israeli occupation.¹⁹⁸



¹⁹⁵ See footnotes 98-99 above.

¹⁹⁶ UN Special Rapporteur Dugard Report, *op cit*, para 17; see also para 20.

¹⁹⁷ OCHA, 'The West Bank Barrier, Humanitarian Status Report', July 2003, 11.

¹⁹⁸ UN Human Rights Committee, *Concluding Observations: Israel (2003)*, *op cit*, paras 12-13.

**G VIOLATIONS OF HUMAN RIGHTS LAW:
ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

234. Israel has not lodged any reservation to its acceptance of the ICESCR, nor has it notified any derogation, arising from a proclaimed public emergency, from its obligations under the Convention. Although Israel may impose limitations on ICESCR rights to achieve certain legitimate objectives, the restrictions imposed on ICESCR rights by the Barrier are neither necessary nor proportionate to achieving any permissible objectives.

Progressive Realization and Resource Constraints

235. As a State party to the International Covenant on Economic, Social and Cultural Rights, Israel is required to take steps to progressively realize the rights in that Covenant, to the maximum of its available resources (ICESCR, Art 2(1)). Non-fulfilment of the economic, social and cultural rights of Palestinians in the Occupied Territories is not a result of a lack of State resources, but due to the deliberate interference caused by the separation Barrier.

Right to Work and Make a Living

236. Palestinians are entitled to the right to work and to make a living by work which they freely choose or accept (ICESCR, Art 6; UDHR, Art 23). Given the already severely degraded state of the Palestinian economy,¹⁹⁹ any restrictions affecting these rights require a stronger justification than comparable restrictions in a regularly functioning economy.

237. The unemployment level in Palestine is already 60 per cent.²⁰⁰ Prior to the most recent conflict, more than 100,000 Palestinians worked in Israel. The World Bank reported in May 2003 that 92,000 Palestinians had lost their jobs in Israel and the Israeli settlements since the beginning of the second intifadah, while another 105,000 jobs had been lost in the Occupied Territories. Recent estimates of unemployment in the Occupied Territories range from 30 per cent (World Bank) to 50 per cent (UN Special Co-ordinator).²⁰¹ The Palestinian Ministry of Agriculture estimates that between September 2000 and June 2002, losses to the agricultural sector as a result of the intifadah were greater than \$700 million.²⁰²

238. In this context, the first phase of the Barrier has had a number of interrelated negative impacts on the right of Palestinians to work and make a living. Each of these is detailed below.

(a) Confiscation and Destruction of Agricultural Land

239. The confiscation of property, particularly in the West Bank, has deprived some Palestinian farmers of the agricultural land on which their livelihood depends. B'Tselem estimates that the first phase of the Barrier involved the requisition of

¹⁹⁹ LACC Report, op cit; UN Special Rapporteur Report, op cit; UN Special Co-ordinator Report, op cit; UN Secretary-General Report, op cit; OCHA Report, op cit.

²⁰⁰ UN Special Co-ordinator Report, op cit, i.

²⁰¹ Ibid.

²⁰² Palestinian Environmental NGOs Network, 'The Apartheid Barrier Campaign: Report No 1', Jerusalem, Nov 2002 ('Pengen Report'), 16.

2,850 acres of land.²⁰³ The Palestinian Environmental NGOs Network (Pengon) reported the slightly higher figure of 3670 acres seized up to April 2003.²⁰⁴ During the second phase of construction, OCHA reported in January 2004 that more than 1,500 acres of land has been confiscated in the Ramallah area alone (Qatanna (787 acres), Qibya (500–625 acres) and Beitunia (390 acres)).²⁰⁵

240. Much of the land seized during the first phase of construction constitutes some of the most fertile land in the West Bank, intensifying the economic impact. As the Humanitarian and Emergency Policy Group report illustrates, the three governorates of Jenin, Tulkarm, and Qalqiliya account for 45 per cent of total agricultural output in the West Bank; land is used for agriculture in those areas at twice the rate of usage in the West Bank overall; and output in those areas is 41 per cent greater per square kilometre than in the rest of the West Bank.²⁰⁶
241. In these areas alone, direct damage due to the construction of the Barrier up to December 2002 included the destruction of 83,000 olive and fruit trees, 154 acres of irrigated land (including greenhouses), 37 km of water networks and 15 km of agricultural roads.²⁰⁷
242. The Palestinian Environmental NGOs Network (Pengon) estimates that 102,000 trees have been uprooted during the construction of the Barrier, compounding the more than 1 million trees uprooted between 2000 and 2002 during the second intifadah.²⁰⁸ The Palestinian Agricultural Relief Committees (PARC) estimates the total losses incurred by the uprooting of trees during the intifada at \$150 million. Pengon notes that the uprooting of trees for the Barrier is likely to cause wider environmental damage in relation to air and water quality, climate, soil erosion and wildlife diversity.²⁰⁹ It should be noted, however, that Israel has replanted an unknown number of trees, and replaced others which have been destroyed.

(b) Restricted Access to Agricultural Land

243. The Barrier has restricted the freedom of movement of Palestinian farmers and labourers to access agricultural land on the other side of the Barrier. Prior to the intifadah, it was estimated that 20 per cent of the Palestinian labour force was engaged in agriculture,²¹⁰ so restrictions on the movement of workers resulting from the Barrier have a large impact on the economy.
244. B'Tselem has identified 36 Palestinian communities, with a total population of 72,200 people, which will be most affected by separation from farmland.²¹¹ The existence of the Barrier, the unpredictable opening of its gates and crossings (including total closures), and the arbitrary withholding of permits to enter the Seam Zone (particularly for those on Israeli security lists) prevent farmers and labourers from accessing agricultural land. Bringing vehicles into, or staying overnight in, the Seam Zone also requires special permission, creating further difficulties. The

²⁰³ B'Tselem Report, op cit, 18; LACC Report, op cit, summary.

²⁰⁴ Pengon: www.pengon.org/wall/fact-may-2003.pdf.

²⁰⁵ OCHA, Humanitarian Update, 16 Dec-19 Jan 2004, 1.

²⁰⁶ LACC Report, op cit, para 24.

²⁰⁷ Ibid, para 26.

²⁰⁸ Pengon Report, op cit, 16.

²⁰⁹ Ibid, 19-20.

²¹⁰ Ibid, 17.

²¹¹ B'Tselem Report, op cit, 10.

Barrier has also significantly increased travelling time to reach agricultural land, since people have to travel much greater distances to reach gates in the Barrier.

245. In one illustrative example of these restrictions, the Palestinian Centre for Human Rights reports that 70 male farmers from Jayyous (Qalqiliya governorate), who crossed the Barrier on 5 October 2003 to gather crops from land on the other side of the Barrier, were denied permission to cross back for nine days.²¹² Entire villages have been issued permits to farm that give them as little as two days outside the Barrier for the entire year.²¹³
246. Field visits by the Palestinian Independent Commission for Citizens' Rights (PICCR) found few, if any, of the planned Barrier crossings had actually been constructed. The Israeli Defence Minister stated in the Knesset that 'at this time there is no budget for the farm crossings' and the head of the Seam Area Administration admitted that the 2003 budget does not provide for the five main crossings.²¹⁴ Farmers have been forced to covertly cross incomplete parts of the Barrier or travel for more than two hours to reach their land.²¹⁵
247. The consequence of these restrictions is a decline in agricultural productivity and food production, as land, crops and orchards remain untended and uncultivated. Pengon estimates that the first phase of construction in the West Bank resulted in the loss of 2,200 tons of olive oil per season, 50 tons of fruit, and over 100,000 tons of vegetables.²¹⁶ Around 10,000 grazing animals will lose access to grazing lands.²¹⁷

(c) Restricted Access to Water

248. The construction of the Barrier has destroyed, closed or appropriated to the Israeli side of the Barrier a number of wells on which Palestinian agricultural production depends. Several Palestinian villages have been cut off from their main sources of water and some villages from their only sources of water. Wells have also been closed, affecting the supply and availability of water. It also raises costs, as the alternative is water supplied by tankers.²¹⁸
249. The Palestinian Central Bureau of Statistics reports that the Barrier has separated 8 localities from primary water sources.²¹⁹ The Palestinian Hydrology Group (PHG) lists 30 groundwater wells that will be lost in the first phase of the Barrier, with a total discharge of 4 million cubic meters of water per year.²²⁰ These wells were drilled before 1967 and account for 18 per cent of Palestinians' share of the Western Groundwater Basin.²²¹ The construction of the Barrier has also destroyed 35 km of water pipelines used by Palestinians for irrigation or household use.²²²
250. The denial of access to water caused by the Barrier aggravates the already precarious and unequal access to water by Palestinians. Under the Oslo agreement,

²¹² Troop, *op cit*.

²¹³ J Brooks, 'Fence or Machine of War', ZNet, 17 Nov 2003: www.zmag.org/content/print_article.cfm?itemID=4514§ionID=22.

²¹⁴ PICCR Report, *op cit*, 14.

²¹⁵ *Ibid*.

²¹⁶ Pengon: www.pengon.org/wall/fact-may-2003.pdf.

²¹⁷ *Ibid*.

²¹⁸ LACC Report, *op cit*, para 30.

²¹⁹ UN Secretary-General Report, *op cit*, para 23.

²²⁰ Pengon Report, *op cit*, 5.

²²¹ *Ibid*, 19 and Table I.

²²² Pengon: www.pengon.org/wall/fact-may-2003.pdf.

Israel retains overall control of West Bank water. Over 80 per cent of this water is drawn by Israel, while Palestinians receive only 18 per cent.²²³ Israeli settlers in the Occupied Territories use more than ten times as much water per capita as Palestinians. Palestinians in the West Bank are allocated the same total (not per capita) quantity of groundwater as in 1967.²²⁴

251. While the international minimum water usage is 150 units per person per day, Palestinians receive less than 60 units while Israeli domestic use varies between 300 and 800 units. In Gaza, water is often not potable, leading to health problems such as joint and kidney disease.

(d) Restricted Access to Markets

252. The Barrier restricts the access of Palestinian farmers to markets for selling their agricultural products. Some of the principal cities in which such products are sold are separated from production areas by the Barrier. The Humanitarian and Emergency Policy Group states that the Barrier 'may severely constrain... commercial exchange, raising transaction costs and dampening investment' and preventing the movement of goods.²²⁵

(e) Restricted Access to Other Employment

253. The impact of the Barrier on agricultural land has flow on effects on other Palestinians who are directly or indirectly dependent on the agricultural sector, as well as other workers for whom freedom of movement is essential to reach workplaces. It is reported that between 600 and 700 shops and enterprises have closed in Qalqiliya alone due to the construction of the Barrier.²²⁶ A further 110 businesses in Nazlat 'Issa and Barta'a al-Sharqiya were destroyed.²²⁷
254. The Barrier also undermines the right of everyone to gain their living by work which they freely choose or accept, since an increasing number of Palestinians are forced to seek work outside the Occupied Territories and inside Israel itself. Ultimately it may also force Palestinians to migrate from their homes and villages to find work elsewhere. The PICCR reports that between 6,000 and 8,000 residents of Qalqiliya have left in search of work.²²⁸ One estimate suggests that 6,500 jobs will be lost due to the Barrier,²²⁹ although it is difficult to quantify projected losses.
255. Increases in unemployment have a particularly serious effect because of the size of Palestinian families and number of young dependants. Palestinian households in Gaza have an average of 6 to 7 persons, and in the West Bank 5 to 6 persons.²³⁰ Around 47 per cent of the population of the West Bank and Gaza is 14 years old or younger, while 57 per cent is 19 years old or below.²³¹ Population growth is around 4.7 per cent per year in the West Bank and 5.4 per cent in Gaza.²³² Job losses therefore affect a relatively large number of persons.

²²³ 'Deadly Thirst', *The Guardian*, 13 Jan 2004.

²²⁴ Pengon Report, op cit, 19.

²²⁵ LACC Report, op cit, para 23.

²²⁶ UN Special Rapporteur Dugard Report, op cit, para 10; PICCR Report, op cit, 17.

²²⁷ PICCR Report, op cit, 11.

²²⁸ Ibid, 17.

²²⁹ Pengon: www.pengon.org/wall/fact-may-2003.pdf.

²³⁰ UN Development Programme, 'Programme of Assistance to the Palestinian People': www.undp.org.

²³¹ Ibid.

²³² Ibid.

256. The severe impact of the Barrier on the right to work are not justifiable on security grounds, considering the extremely depressed state of the Palestinian economy.

Right to an Adequate Standard of Living, Food, Clothing and Housing

257. Israel has a duty to recognize and realize the right of Palestinians 'to an adequate standard of living... including adequate food, clothing and housing, and to the continuous improvement of living conditions' (ICESCR, Art 11(1); see also UDHR Art 25). It has a further duty to ensure freedom from hunger, including by improving the 'production, conservation and distribution of food... to achieve the most efficient development and utilization of natural resources' (ICESCR, Art 11(2)). The UN Committee on Economic, Social and Cultural Rights states that

a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.²³³

(a) Standard of Living

258. The Barrier has heavily affected on the standard of living of many Palestinians, arising from the interrelated impacts of the Barrier on freedom of movement, property rights and housing, health, education and employment. The World Bank predicts the dire effects that the Barrier will have on the Palestinian economy, due to the heavy reliance on the more prosperous Israeli labour market and the inaccessibility of agricultural lands and water.²³⁴ The Barrier will also severely constrain the delivery of basic social services and medical care.²³⁵
259. The Barrier is aggravating existing pressures on the standard of living of Palestinians. The Human Development Report states that the poverty rate in the Occupied Territories increased from 20 per cent in 1998 to 60 per cent in 2001,²³⁶ with almost 2.5 million people living on less than US\$2 per day.²³⁷ Unemployment was around 50 percent.²³⁸
260. In October 2002, the UN Special Co-ordinator reported that the Palestinian economy was in severe depression, with only international aid stemming total breakdown.²³⁹ Closure policies caused economic losses of US\$1.1 billion (double annual aid). Internal and external trade had contracted, investment was negligible and Palestinian businesses were collapsing. Consumption and income levels had declined dramatically. Real gross national income shrank by 38 per cent from its 1999 level at the end of 2002. Real per capita income fell by 46 per cent, and total investment declined by approximately 90 per cent during that same period.
261. Given the severely degraded state of the Palestinian economy, any restrictions on the right to an adequate standard of living in the Occupied Territories require a

²³³ UN Committee on Economic, Social and Cultural Rights, General Comment No 4 (1991), UN Doc E/1992/23, para 11.

²³⁴ LACC Report, op cit, 10-11.

²³⁵ Ibid, 37-40; B'Tselem Report, op cit, 17.

²³⁶ Human Development Report 2002, Human Development Indicators, West Bank & Gaza Strip, 158; UNRWA Report, op cit, para 6.

²³⁷ OCHA, UN Consolidated Appeal, Occupied Palestinian Territories, 18 Nov 2003.

²³⁸ UN Special Co-ordinator Report, op cit, i.

²³⁹ Ibid.

stronger justification than comparable restrictions in a regularly functioning economy. Israel has not demonstrated that the Barrier is a necessary and proportionate measure in response to its security needs.

(b) Food

262. The confiscation and destruction of agricultural land, restrictions on agricultural labour and access to water and markets have all combined to produce a serious deterioration in food security. The World Food Programme estimates that completed sections of the Barrier in the West Bank have generated 25,000 new recipients of food assistance,²⁴⁰ in addition to the hundreds of thousands of Palestinians already dependent on food assistance.²⁴¹
263. The construction of the Barrier, by impacting on agricultural production, access to markets, transport of goods, and the movement of humanitarian relief, is likely to magnify the existing food insecurity in the Occupied Territories. An assessment of food security by the Food and Agriculture Organization and WFP in 2003 found that 40 per cent of the population of the Occupied Territories is 'food insecure', with a further 30 per cent at risk of insecurity.²⁴²
264. The World Food Programme reports that '[c]oping mechanisms are exhausted and poor families are selling vital assets such as jewellery, livestock and even land in order to purchase food and basic necessities'.²⁴³ Moreover, poverty has forced Palestinian families 'to change their dietary habits, consuming cheaper and less protein-rich foods'.²⁴⁴
265. The Office of the UN Special Co-ordinator reports that economic hardship caused by Israeli security measures have resulted in malnutrition and anaemia.²⁴⁵ UNICEF reports that such conditions particularly affect Palestinian children, with a survey showing that 38 per cent of children between six and 59 months are anaemic, 3.5 per cent are underweight, 2.5 per cent suffer wasting and nine per cent are affected by stunting.²⁴⁶ Malnutrition is at 'emergency levels', with moderate to severe malnutrition affecting 13.3 per cent of children under five years of age in the Gaza Strip and 4.3 per cent in the West Bank, while chronic malnutrition affects 17.5 per cent of children in the Gaza Strip and 7.9 per cent in the West Bank.²⁴⁷ Severe and moderate anaemia among infants have increased by over 50 per cent.²⁴⁸
266. WFP, like most other humanitarian organizations, states that Israeli security measures make its operations in the Occupied Territories extremely difficult.²⁴⁹

(c) Housing

267. The right to housing is essential to realizing the right to an adequate standard of living, since it affects employment, education, health and cultural life.²⁵⁰ Israel

²⁴⁰ UN Secretary-General Report, op cit, para 25.

²⁴¹ UN Special Co-ordinator Report, op cit, i.

²⁴² UNRWA Appeal, op cit, 8.

²⁴³ World Food Programme, News Release, 11 June 2003.

²⁴⁴ Ibid.

²⁴⁵ UN Special Co-ordinator Report, op cit, i.

²⁴⁶ UNICEF, 'At a Glance: Occupied Palestinian Territory': www.unicef.org.

²⁴⁷ UNRWA Appeal, op cit, 8.

²⁴⁸ Ibid.

²⁴⁹ World Food Programme, News Release, 11 June 2003; WFP, Emergency Report No 2: Palestinian Territories, 9 Jan 2004, para (a).

claims that during the first phase of construction, '[n]o houses were destroyed'.²⁵¹ In contrast, B'Tselem has documented at least 280 demolition orders which were issued in communities near the Barrier,²⁵² ostensibly on the basis that the structures lacked building permission. Pengon has counted 100 buildings already demolished, including important storehouses, as well as demolition orders pending for a further 174 stores, 20 factories, 16 homes and 1 primary school.²⁵³

268. It is highly likely that more houses will be demolished as further stages of the Barrier are constructed. Many more Palestinians have been indirectly – or constructively – expelled from their houses as a result of the Barrier's impact on access to employment and food.
269. House demolition connected to the construction of the Barrier are part of a more widespread and systematic Israeli practice across the Occupied Territories, aggravating the uncertainty of the right of Palestinians to permanent housing. UNRWA notes that at the end of May 2003, 1,134 homes had been demolished by Israel in the Gaza Strip alone, creating 10,000 homeless persons.²⁵⁴ The rate of demolition doubled in 2003, with an average of 73 homes demolished per month in the first half of 2003.²⁵⁵ Since 2000, the homes of more than 15,000 refugees in the West Bank and Gaza had been destroyed, with 2,150 refugee shelters destroyed and 16,000 shelters damaged.²⁵⁶
270. The UN Human Rights Committee stated in August 2003 that the demolition of houses and property in the Occupied Territories was 'partly punitive', implemented against families 'whose members were or are suspected of involvement in terrorist activities or suicide bombings'.²⁵⁷ As such, it also amounts to a form of prohibited collective punishment under international humanitarian law. The Committee notes that demolitions are an arbitrary interference in the home, as well as a violation of the freedom to choose a residence, equality before and equal protection of the law, and freedom from cruel or inhuman treatment.²⁵⁸

Right to Physical and Mental Health

271. Palestinians are entitled to enjoy 'the highest attainable standard of physical and mental health' (ICESCR, Art 12(1)), including 'conditions which would assure to all medical service and medical attention in the event of sickness (ICESCR, Art 12(2)(d)). The UN Human Rights Committee notes that the right to health

embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water

²⁵⁰ UN Committee on Economic, Social and Cultural Rights, General Comment No 4, op cit, para 1.

²⁵¹ Israeli Ministry of Defence, 'Facts and Figures', 13 Aug 2003:

www.securityfence.mod.gov.il/Pages/ENG/news.htm.

²⁵² B'Tselem Report, op cit, 26.

²⁵³ Pengon: www.pengon.org/wall/fact-may-2003.pdf.

²⁵⁴ UN Special Rapporteur Dugard Report, op cit, para 34; UNRWA Report, op cit, viii.

²⁵⁵ UNRWA Appeal, op cit, 19; UNRWA, 'USD 193m in emergency relief needed for refugees in the West Bank and Gaza in 2004', News Release, 12 Dec 2003.

²⁵⁶ Ibid.

²⁵⁷ UN Human Rights Committee, Concluding Observations: Israel (2003), op cit, para 16.

²⁵⁸ Ibid.

and adequate sanitation, safe and healthy working conditions, and a healthy environment.²⁵⁹

272. The right to health is fundamental to securing other human rights and is dependent on the fulfilment of other rights. Thus restrictions on the right to work and to an adequate standard of living, food and housing may directly contribute to a decline in the health of the affected population, particularly for vulnerable groups such as children, mothers and the elderly. The right to health includes non-discriminatory and equitable access to health facilities, goods and services.²⁶⁰ The right to health is non-derogable, even in times of public emergency.
273. The separation Barrier has had a number of interrelated direct impacts on Palestinian health, including denial or reduction of physical access to health facilities such as clinics, doctors and hospitals; delay or denial or access by emergency services such as ambulances; restrictions on the movement of medical supplies; and restrictions on the movement of medical professionals, including international relief agencies.²⁶¹ The Palestinian Central Bureau of Statistics reports that the Barrier has already separated 30 localities from health services.²⁶²
274. The restrictions resulting from the Barrier magnify the existing restrictions on the right to health experienced by Palestinians, as a result of Israeli security measures. High unemployment due to restrictions on free movement and resultant impoverishment has produced 'serious deterioration' in the health of Palestinians.²⁶³
275. For example, medical consultations at UNRWA clinics have increased by 61 per cent in the Gaza Strip and almost 36 per cent in the West Bank compared to 2000.²⁶⁴ These figures understate the magnitude of the deterioration in Palestinian health, because restrictions on freedom of movement have prevented many refugees from reaching UNRWA hospitals.²⁶⁵ Those who do reach hospital are often unable to pay for treatment, so that 20 per cent of patients are curtailing their time in hospital.²⁶⁶ The problems of malnutrition and food security have already been noted. Curfews and closures in the West Bank has resulted in a 35 per cent decrease in the immunization rate for infants under six months old between 2000 and 2002.²⁶⁷ The health of women and children has deteriorated, and home births have increased.²⁶⁸
276. Similarly, UN Special Coordinator notes that the mental health of people isolated by restrictions on freedom of movement (in both rural and urban areas) has been notably affected.²⁶⁹ Adolescent males particularly are experiencing long term psychological consequences as a result of the lack of work, hope and future prospects.²⁷⁰ An UNRWA study also found that 93 per cent of Palestinian children

²⁵⁹ UN Committee on Economic, Social and Cultural Rights, General Comment No 14 (2000), UN Doc E/C.12/2000/4, para 4.

²⁶⁰ *Ibid.*

²⁶¹ UNRWA Report, *op cit*, para 9.

²⁶² UN Secretary-General Report, *op cit*, para 23.

²⁶³ UNRWA Report, *op cit*, para 242.

²⁶⁴ *Ibid.*

²⁶⁵ UNRWA Appeal, *op cit*, 14.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*, 13.

²⁶⁸ *Ibid.*; UNRWA Appeal, *op cit*; UNRWA News Release, *op cit*.

²⁶⁹ UN Special Co-ordinator Report *op cit*, i.

²⁷⁰ *Ibid.*

reported feeling unsafe, and 90 per cent of patents reported symptomatic traumatic behaviour or psychosocial distress in their children.²⁷¹

277. In the West Bank, UNRWA reports that Israeli restrictions on movement have created 'serious difficulties' for the agency in the provision of health services. Such restrictions included limits on travel permits issued to staff and patients, border closures, curfews and travel restrictions between Gaza and the West Bank.²⁷² UNRWA health centres experience 'abnormally high workloads', with an average of 100 consultations per doctor per day.²⁷³

Right to Education

278. Palestinians have a right to education (ICESCR, Art 13), which is 'directed to the full development of the human personality and the sense of its dignity'.²⁷⁴ States must ensure the physical accessibility of education, without discrimination, at all levels, and particularly for the vulnerable.²⁷⁵ As an empowerment right, the right to education is indispensable for the realisation of other human rights.²⁷⁶ States must also continuously improve the material conditions of teaching staff,²⁷⁷ since teaching has a direct effect on the quality of education.²⁷⁸
279. The UN Committee on Economic, Social and Cultural Rights states that 'there is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education'.²⁷⁹ Any retrogressive measures must be 'fully justified' and may only be taken 'after the most careful consideration of all alternatives'.²⁸⁰ States must also 'avoid measures that hinder or prevent the enjoyment of the right', and 'take positive measures that enable and assist individuals and communities to enjoy the right'.²⁸¹
280. The separation Barrier has impacted heavily on the right to education, particularly on its physical accessibility and the conditions of work of teaching staff. The Palestinian Central Bureau of Statistics reports that the Barrier has separated 22 localities from schools.²⁸² Students and staff in some areas must now travel long distances to reach schools, and may need permits to enter the area. The arbitrary opening and closing of gates is extremely disruptive. These measures are discriminatory because they do not affect Israeli settler children.
281. The Barrier compounds the educational difficulties already suffered by Palestinian children as a result of Israeli security measures since 2000. UNICEF reports that almost 1,300 schools have been disrupted by curfews, sieges and closures.²⁸³

²⁷¹ UNRWA Appeal, op cit, 16; see also UNICEF.

²⁷² UNRWA Report, op cit, para 242.

²⁷³ UNRWA Report, op cit, para 21.

²⁷⁴ ICESCR, Art 13(1); see also UDHR, Art 26.

²⁷⁵ ICESCR, Art 13(2); UN Committee on Economic, Social and Cultural Rights, General Comment 13.

²⁷⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No 13 (1999), UN Doc E/C.12/1999/10, para 1.

²⁷⁷ ICESCR, Art 13(2)(e).

²⁷⁸ UN Committee on Economic, Social and Cultural Rights, General Comment No 13 (1999), op cit, para 27.

²⁷⁹ Ibid, para 45.

²⁸⁰ Ibid.

²⁸¹ Ibid, para 47.

²⁸² UN Secretary-General Report, op cit, para 23.

²⁸³ UNICEF, op cit.

UNRWA reports that its educational operations were particularly affected by 'the pervasive movement restrictions imposed by Israeli authorities, including curfews and closures'.²⁸⁴ UNRWA states that 34,940 teacher days were lost in its West Bank schools in 2002-03, and 24,596 days were lost in the Gaza Strip.²⁸⁵ In the West Bank, UNRWA schools lost 1,372 school days between September 2002 and March 2003.²⁸⁶ Examination pass rates also declined in 2002-03.²⁸⁷ Israeli military action tragically left 40 pupils dead and 85 injured in the same period,²⁸⁸ while there was also extensive damage to, or interference with, school infrastructure and property.²⁸⁹

Participation in Cultural Life

282. Palestinians have a right to take part in cultural life and Israel is required to help realize this right by taking steps to conserve, develop and diffuse science and culture (ICESCR, Art 15(1) and 15(2); see also UDHR Arts 22 and 27). Enjoyment of culture is 'fundamental' to 'equality of treatment, freedom of expression, the right to receive and impart information, and the right to the full development of the human personality'.²⁹⁰
283. The Barrier separates Palestinian communities on different sides of the Barrier within the Occupied Territories, as well as separating Palestinians from Israeli Arabs in the Israel itself. Consequently, the Barrier, the opening of its gates, and the permit system make it more difficult for Palestinians to take part in cultural activities among members of their group. The Barrier contributes to the isolation and fragmentation of Palestinians, at a time when a strengthening cultural identity is an important part of the peace process leading to the establishment of a Palestinian State.
284. The deprivation of social and cultural life resulting from the Barrier is not necessary or proportionate to meet the security needs of Israel, which would be adequately served by a border Barrier following the Green Line and not separating Palestinians from each other within the Occupied Territories.



²⁸⁴ UNRWA Report, op cit, paras 238, 9.

²⁸⁵ UNRWA Appeal, op cit, 17. In the West Bank, UNRWA schools lost 31,874 teacher days between September 2002 and March 2003: UNRWA Report, op cit, para 238.

²⁸⁶ UNRWA Report, op cit, para 238.

²⁸⁷ Ibid, para 20.

²⁸⁸ Ibid.

²⁸⁹ Ibid, para 9.

²⁹⁰ UN Committee on Economic, Social and Cultural Rights, Fact Sheet No 16 (Rev 1) (1991): www.unhchr.ch/html/menu6/2/fs16.htm.

**H VIOLATIONS OF HUMAN RIGHTS LAW:
RIGHTS COMMON TO THE ICCPR AND ICESCR**

The Right of Self-Determination

285. Common Article 1 of the ICCPR and the ICESCR recognize the right of self-determination of all peoples, by which ‘they freely determine their political status and freely pursue their economic, social and cultural development’ (ICCPR, Art 1(1)). Peoples may ‘freely dispose of their natural wealth and resources’ and may not be deprived of their means of subsistence (ICCPR, Art 1(2)). States must respect the right and promote its realization (ICCPR, Art 1(3)).
286. The right of self-determination of the Palestinian people is widely accepted, including by Israel itself. The right underlies the Palestinian claims to sovereignty in the Occupied Territories and provides the legal framework for the political settlement sought through the peace process and the proposed two-State solution. It also underpins the obligation of Occupying Powers under international humanitarian law to administer Occupied Territory on trust for the local people.
287. At a minimum, the separation Barrier interferes with the right of Palestinians to freely determine their political status and to freely pursue their economic, social and cultural development, including by managing their natural wealth and resources and means of subsistence. The impact of the Barrier on Palestinian employment, health, education and standard of living has already been detailed.
288. Restrictions on freedom of movement also make it impossible for Palestinian elections to be held in a free and fair manner, since the organization of voting and campaigning is severely disrupted. The UN Special Co-ordinator notes that ‘[t]he complex process of elections can hardly be planned when people cannot move’.²⁹¹ The ‘credibility of reform and the prospects of a democratic, accountable Palestinian state are likely to recede’ due to continuing restrictions on movement, and consequent limitations on freedom of assembly and association.
289. The Special Rapporteur of the UN Commission on Human Rights takes a wider view of the impact of the Barrier on Palestinian self-determination:
- 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 (already small) within which that right is to be exercised.²⁹²
290. The Council of the European Union shares a similar view, stating that the departure of the Barrier from the Green Line ‘could prejudice future negotiations and make the two-State solution physically impossible to implement’.²⁹³ Although Israel denies the permanence or political significance of the Barrier, it has allocated a very large amount of funding for its construction and the route plainly incorporates unlawful Israeli settlements in the Occupied Territories into the Israeli side of the Barrier.

²⁹¹ UN Special Co-ordinator Report, op cit, i.

²⁹² UN Special Rapporteur Dugard Report, op cit, para 15.

²⁹³ EU Presidency Conclusions, op cit.

291. It is the view of the UN Special Rapporteur that 'Israel is determined to create facts on the ground amounting to de facto annexation'.²⁹⁴ Such an objective violates Articles XI(1) and XXXI(8) of the Interim Agreement 1995, which requires Israel to view the West Bank and Gaza Strip 'as a single territorial unit, the integrity and status of which will be preserved during the interim period'.
292. Further, Israel routinely criticizes the Palestinian Authority for failing to prevent attacks and ensure security, yet Israel has constantly degraded the institutional and structural capacity of the PA to respond to security threats. The Barrier is a further example of Israel arrogating to itself a function which should be devolved to and exercised by the representative self-determination unit – the PA.

Non-Discrimination

293. The principle of non-discrimination pervades both international human rights law and international humanitarian law.²⁹⁵ States are required to guarantee rights to individuals 'without distinction' (ICCPR, Art 2(1)) and 'without discrimination' (ICESCR, Art 2(2)) 'of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (ICCPR, Art 2(1); ICESCR, Art 2(2)).²⁹⁶ All persons are also equal before the law and entitled to equal legal protection without discrimination, and against discrimination, based on any of these grounds (ICCPR, Art 26).
294. The separation Barrier is a discriminatory measure because it is targeted solely at the Palestinian people as a group, regardless of the threat posed by particular individuals. Human rights law only permits differential treatment of persons on reasonable, objective and legitimate grounds, such as protecting public order or rights of citizenship. In contrast, the Barrier imposes unreasonable and disproportionate restrictions on Palestinians alone, amounting to impermissible discrimination. It compounds the discriminatory application of curfews and road transport restrictions also solely imposed on Palestinians.
295. The discriminatory nature of the separation Barrier is expressly entrenched in an Israeli Defence Force Order declaring a closed area (or 'Seam Zone') on the Israeli side of the separation Barrier, in the Judea and Samaria regions. The order does not permit any person to enter the Seam Zone or stay in it, and persons within the zone are obliged to exit the area immediately.²⁹⁷ However, the order expressly does not apply to Israelis²⁹⁸ and is plainly discriminatory on the basis of national or social origin, or race.²⁹⁹ The regime of permanent residency permits³⁰⁰ under that order is similarly inapplicable to Israelis living within the Seam Zone.
296. Further, the separation Barrier is purportedly designed to prevent Palestinian incursions into Israeli territory and attacks on Israeli military installations in the Occupied Territories. Yet militant Israeli settlers also threaten the security of Israel

²⁹⁴ UN Special Rapporteur Dugard Report, op cit, summary.

²⁹⁵ Fourth Geneva Convention, Arts 3 and 13; Protocol I, Arts 69 and 75.

²⁹⁶ See also ICESCR, Art 2;

²⁹⁷ Israel Defense Force, Order Regarding Security Regulations (Judea and Samaria) (No. 378), 5730-1970, Declaration Concerning Closing an Area no. S/2/03 (Seam Zone), 2 Oct 2003, para 3(a)-(b).

²⁹⁸ Ibid, para 4(a)(1). An 'Israeli' is defined as a person who is either a citizen of Israel, resident of Israel, or otherwise entitled to citizenship pursuant to the Law of Return.

²⁹⁹ HaMoked (Centre for the Defence of the Individual), Petition at the Supreme Court in Jerusalem (sitting as the High Court of Justice), HCJ 9961/03, 2003, 20.

³⁰⁰ Israel Defense Force Order 378, op cit, para 5.

and its military forces in the occupied territories. Extremist settlers have launched offensive or retaliatory attacks on Palestinians in the Occupied Territories, destabilizing the security situation. Israeli settlers have also clashed directly with Israeli soldiers over the dismantling of settlements.

297. Israel has failed to control settler violence against the Palestinian population, in violation of its obligations to protect the civilian population of Occupied Territory under humanitarian law.³⁰¹ UN Security Council Resolution 904 (1994) called on Israel, as 'the occupying power',

to continue to take and implement measures, including, *inter alia*, confiscation of arms, with the aim of preventing illegal acts of violence by Israeli settlers and calls for measures to be taken to guarantee the safety and protection of the Palestinian civilians throughout the occupied territory.

298. The targeting of the Barrier solely against Palestinian threats, and regardless of the threats posed by militant Israeli settlers, is consequently discriminatory.

Customary Law Prohibition on Apartheid

299. Apartheid is an aggravated, criminal manifestation of racial discrimination. The Convention Against Apartheid declares that apartheid is a crime against humanity which violates international law and the purposes and principles of the UN Charter, and threatens international peace and security.³⁰² Apartheid is defined as specified 'inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'.³⁰³ The specified prohibited acts include

measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association...³⁰⁴

300. Also prohibited are any measures

designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof...³⁰⁵

301. Israel is not a party to the Convention Against Apartheid. It remains contentious whether apartheid is a customary international crime.³⁰⁶ Just over half of UN

³⁰¹ Brownlie and Goodwin-Gill Opinion, op cit, para 17.

³⁰² International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 Nov 1973, entered into force 18 July 1976, 1015 UNTS 243, Art I(1).

³⁰³ Ibid, Art II.

³⁰⁴ Ibid, Art II(c).

³⁰⁵ Ibid, Art II(d).

³⁰⁶ N Passas, *International Crimes* (Dartmouth Publishing, Hants, 2003) 557, 571.

members are State parties (101 States) but this degree of participation alone is insufficient to support the existence of a parallel customary crime. The Convention was also adopted in the specific context of apartheid in South Africa, which has since disappeared, although apartheid is connected more generally with the racially discriminatory denial of self-determination,³⁰⁷ which is clearly applicable to Israel's occupation of Palestine. No Western State is a party to the Convention.³⁰⁸ While a number of States in the region are parties to the Convention, there are too few to support the existence of a regional customary norm.

302. On the other hand, many States in the region are parties to the Convention,³⁰⁹ which may support the existence of a regional customary law prohibition on apartheid.
303. Apartheid is also criminalized under international humanitarian law. Apartheid is a grave breach of Protocol I³¹⁰ and is a crime against humanity under the Rome Statute of the International Criminal Court,³¹¹ although in the latter case it must be widespread and systematic.³¹² Its inclusion in the Rome Statute may 'gradually facilitate the formation of a customary rule'.³¹³ Some authors suggest that apartheid is already a customary law crime.³¹⁴
304. The better view is the intermediate position offered by Cassese: 'under customary international law apartheid, although probably prohibited as a State delinquency, is not however regarded as a crime entailing the criminal liability of individuals'.³¹⁵
305. If it is accepted that apartheid constitutes a violation of a customary international obligation, possibly owed *erga omnes*, Israel may be liable under the law of State responsibility for the impact of the Barrier. Some organizations have asserted that the Barrier amounts to a form of apartheid under the Convention definition.³¹⁶
306. The Barrier and related measures are targeted at Palestinians as a racial group, not just at individual suspected terrorists. The Barrier: (a) is a measure calculated to prevent Palestinians from participating fully in the political, social, economic and cultural life of the country; (b) creates conditions preventing the full development of Palestinians as a group, by denying rights to work, education, the right to leave and to return to their country, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association; and (c) divides the population along racial lines, by the creation of separate reserves and ghettos for Palestinians and Israelis, and by the expropriation of property belonging to Palestinians but not Israelis.

Protection of the Family

307. Palestinian families, as the natural and fundamental unit of society, are entitled to protection by society and State (ICCPR, Art 23 and ICESCR, Art 10). This includes

³⁰⁷ UNGA Res 3411 (1975), para D.

³⁰⁸ A Cassese, *International Criminal Law* (OUP, Oxford, 2003) 25.

³⁰⁹ Including Egypt, Jordan, Syria, Iraq, Kuwait, United Arab Emirates, Bahrain, Yemen, Sudan, Libya, Qatar, Oman, Iran, Ethiopia and Afghanistan: www.unhchr.ch/html/menu3/b/treaty8_asp.htm.

³¹⁰ Protocol I, Art 85.

³¹¹ Rome Statute of the International Criminal Court 1998, Art 7(1)(j).

³¹² I Bantekas and S Nash, *International Criminal Law* (2nd ed, Cavendish, London, 2003), 122.

³¹³ A Cassese, *International Criminal Law* (OUP, Oxford, 2003) 25.

³¹⁴ L Hinds, 'The Gross Violations of Human Rights of the Apartheid Regime under International Law' (1999) 1 Rutgers Race and the Law Review 231, 248, 253.

³¹⁵ A Cassese, *International Criminal Law* (OUP, Oxford, 2003), 25.

³¹⁶ Pengon Report, op cit, 23.

freedom from arbitrary or unlawful interference with the family' and a duty on States 'to ensure the unity or reunification of families' which are separated for political, economic or similar reasons'.³¹⁷

308. The UN Human Rights Committee notes that concepts of family may differ in different regions within a State and divergent concepts of 'nuclear' or 'extended' families may be entitled to protection.³¹⁸ It is clear that Palestinian families and extended families have been affected by the construction of the Barrier, particularly where family members living near each other have been physically separated by the Barrier. The Seam Zone permit system may prevent families from holding events in their homes with other family members and relatives, making family life subject to erratic gate openings constituting arbitrary interference.



CONCLUSION

309. All relevant parties, including the Palestinian Authority, recognize the right of Israel to protect itself from terrorist attacks,³¹⁹ although it is not correct of Israel to assert that 'terrorism' has been internationally defined as a crime against humanity.³²⁰
310. However, the UN General Assembly, European Union, World Bank, Amnesty International, Human Rights Watch and others have criticized the Barrier for violating the human rights of Palestinians, without adequate justification.³²¹
311. In its current form, Israel's construction of the separation Barrier in the Occupied Territories violates both international humanitarian law and international human rights law. Israel has not presented any compelling justification on security grounds for the Barrier as it is currently being constructed, and the Barrier imposes unnecessary and disproportionate restrictions on the human rights of Palestinians.



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³¹⁷ UN Human Rights Committee, General Comment No 19 (1990), para 5.

³¹⁸ *Ibid*, para 2.

³¹⁹ EU Presidency Conclusions, *op cit*; UN Human Rights Committee, Concluding Observations: Israel (2003), *op cit*, para 3.

³²⁰ Israeli Ministry of Defence: www.securityfence.mod.gov.il/Pages/ENG/questions.htm.

³²¹ EU Presidency Conclusions, *op cit*; Human Rights Watch, *op cit*; LACC Report, *op cit*, 10-11; UN Special Co-ordinator Report, *op cit*.

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