

**International Legal Consequences
of the Construction of a Barrier by
Israel in the West Bank**

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Introduction

At the 10th emergency special Session on December 8, 2003, the 191-member United Nations General Assembly adopted a resolution requesting an 'urgent' advisory opinion from the International Court of Justice in The Hague on the legal consequences of Israel's construction of a 'Barrier' between itself and the West Bank and East Jerusalem.¹ The Secretary General of the United Nations transmitted the request for the advisory opinion to the Court in a letter dated December 8, 2003. The Assembly has requested advisory opinions from the Court fourteen times since the Court's inception in 1946, with the majority requested immediately following World War II. While the Court's opinion is not legally binding, the opinion provides strong guidance to both parties, as well as the international community, on how to treat the current situation and how to proceed with negotiations.

The International Court of Justice, principal judicial organ of the United Nations, has rendered its advisory opinion in the case on July 9, 2004.

The Court found that 'the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law.'²

Of course, Israel did not accept the finding. It has raised the question of possible bias within the Court. Israel reasons its position *inter alia* with some terminological objections. It argues that the Court has allegedly adopted a prejudicial terminology.

And indeed, a word about language and terminology is in order. Language is a powerful instrument. This explains why words that accurately describe a particular situation are often avoided out of fear that they will too vividly portray the situation, which they seek to depict. In politics euphemism is often preferred to accuracy in language.³ So it is with the barrier that Israel is presently constructing within the territory of the West Bank. On the one hand –in Israel- it goes by the

¹ UN GA Res A/Res/Es-10/14 (8 December 2003).

² See website of the International Court of Justice: <http://www.icj-cij.org/icjwww/idecisions.htm> (accessed on 10 September 2004).

³ See *infra* n 4.

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name of 'Seam Zone', 'Security Fence' or 'Separation Wall'. On the other hand -in Palestine, the term 'Apartheid Wall' is frequently used to describe the barrier.⁴ 'Wall' is the term also used by the General Assembly in resolution ES-10/14 of 3 December 2003.

Israel argues that the term 'wall' is prejudicial since it connotes a kind of imprisonment of the Palestinian people. However, Israel's own term-'security fence'-would also have prejudicial connotations. Even if Israel argues that the wall was erected solely for security reasons, the Palestinians argue that it is a land-grab scheme. Consequently, for the purposes of this thesis, the more general and neutral term 'barrier' is used.

Also symptomatic of the Arab-Israeli conflict is the variety of terms designating the area in question – that part of Mandatory Palestine⁵ under Jordanian control between 1948 and 1967. Alternative terms most frequently employed are 'the West Bank of Jordan,' 'the former West Bank of Jordan,' 'Eastern Palestine,' and 'Judea and Samaria.' The terms must, however, be rejected as inappropriate for a legal analysis since they are insufficiently neutral. The first three terms imply sovereignty resting, respectively, with Jordan, with some entity other than Jordan, or with the Palestinian people.⁶ The term 'Judea and Samaria' implies, at least to the non Israeli reader, that Israel's right of sovereignty will be asserted. This is so despite the fact that 'Judea and Samaria' is both a historical and geophysical term: Judea designating the mountainous ridge of which Jerusalem, Bethlehem, and Hebron are the main towns, and Samaria, the plateau further north, centred around Jenin and Nablus. Israel has since 1969 officially referred to the region, exclusive of East Jerusalem, as 'Judea and Samaria' rather than West Bank.⁷ Non-Israeli writers have, however, rarely employed the term 'Judea and Samaria' when referring to the political and legal status rather than historical and geophysical aspects of that region and have thus conditioned the

⁴ See Dugard *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine* Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories occupied by Israel since 1967. E/CN.4/2004/6 page 6 available at: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.6.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.6.En?Opendocument) (accessed on 25 May 2004).

⁵ See *infra* n 25 and accompanying text.

⁶ Gerson 'Trustee-Occupant' 14 (1973) *Harvard International Law Journal* 1.

⁷ Gerson (n 6) 1.

public to accept its use in a political or legal context as other than neutral in value⁸. The 'West Bank', by contrast has been the term most frequently employed to designate the area. Although arguably the term implies sovereignty resting with the entity in control of the other Bank, Jordan, its frequent use by different schools of political opinion has rendered the term most neutral in value.⁹ In keeping with this practice, the territory concerned, including East Jerusalem, will be referred to collectively as the 'West Bank' throughout this thesis.

Because of the enormous importance and influence of the advisory opinion it seems to be necessary to analyse the issue again from a neutral point of view. Furthermore, one main focus of the courts opinion is whether it has jurisdiction to give the opinion requested or not; whereas this paper only addresses the substantive law in question.

After providing a brief historical background of the Arab-Israeli conflict, this paper will address in part B the facts about the construction of the barrier. The following chapter will be devoted to a legal analysis of the issue. This chapter is subdivided in five parts. Part one addresses the question of territorial title to the West Bank. Part two focuses on international humanitarian law comprising the legal debate regarding difficulties of the application of international law to the West Bank. Part three continues with the discussion of the applicability and possible violation of international human rights law. The issue addressed in part four is the possible justification of asserted violations of international humanitarian and human rights law. The last issue that needs to be determined is the potential violation of general international law. Finally, this thesis will end with some concluding comments.

A. Historical Background

It is difficult to understand the complexity of the Palestinian-Israeli conflict without at least a rudimentary understanding of the history of the region. This sketch outline is meant to frame the current dispute. The following sections endeavour to provide the historical context of the conflict. It is by no means a definitive account.

⁸ Gerson (n 6) 1.

⁹ See Gerson (n 6) 39 *et seq.*

I. The Ottoman Empire (1517 to 1917)

Numerous rulers have controlled the Holy Land in the past three thousand years.¹⁰ For the purpose of this paper, the most important historical period began in the sixteenth century, when the Ottoman Empire obtained dominion over the Holy Land.¹¹ The Ottoman Turks controlled the Holy Land from 1517 to 1917.¹² Their Empire, ruled from what is now Turkey, extended from the Balkans to Vienna, through most of the Middle East, and from Egypt to Algeria.¹³

World War I signalled the fall of the Ottoman Empire. The Allied Forces promised Arab peoples sovereignty over their territory if they assisted them in defeating the Central Powers.¹⁴ The Arabs formally accepted this bargain in negotiations between Sherif Husain, Emir of Mecca, and Sir Henry McMahon, British High Commissioner of Egypt.¹⁵ The British, however, dubiously contended that Palestine had been excluded from the agreement.¹⁶

In 1916, when the fall of the Ottoman Empire was imminent, negotiations began between the United Kingdom, France, Russia, and Italy to divide up the Empire among the European colonial powers.¹⁷ Since it was home to important religious sites, the Allied powers attempted to place Palestine under international control.¹⁸

Despite this, the League of Nations ultimately decided to place Palestine in the hands of United Kingdom under the mandate system. In theory, the mandate

¹⁰ Dominion over the Holy Land has passed from these groups: Jews, Babylonians, Persians, Romans, Jews, Romans, the Byzantine Empire, and finally the Ottoman Empire (listed chronologically), see Keith *The Perennial Dictionary of World Religions* 379.

¹¹ Keith (n 10) 379.

¹² Van de Craen 'Palestine' in Bernhardt *Encyclopedia of Public International Law* Volume III 862.

¹³ Keith (n 10) 355.

¹⁴ UN Division for Palestine *The Origins and Evolution of the Palestine Problem: 1917-1988 Part I 1917-1947* (hereinafter UN Division for Palestine I) page 5, available at: <<http://domino.un.org/UNISPAL.NSF/0/aeac80e740c782e4852561150071fdb0?OpenDocument>> (accessed on 15 May 2004)

¹⁵ UN Division for Palestine I (n 14) 5.

¹⁶ UN Division for Palestine I (n 14) 6.

¹⁷ The resulting document was the Sykes-Picot agreement. These negotiations claimed to be a plan for the specific recognition of an 'independent Arab State,' or 'confederation of Arab states.'. Some Arab Kingdoms, such as Saudi Arabia and Yemen, were granted outright independence as national entities, while others, ironically compromising the most sophisticated and culturally advanced Muslim populations of the Middle East (ie Palestine, Lebanon, Iraq, Syria and Egypt) were carved into spheres of influence under the League of Nations mandates. See Keith (n 10) 357.

¹⁸ UN Division for Palestine I (n 14) 3.

was supposed to be a temporary and transitory phase to usher Palestine into independent statehood.¹⁹

II. Zionist Immigration into the Holy Land

As a result of increased anti-Semitism in the late nineteenth century,²⁰ Zionism emerged as a European-wide political movement. Its purpose was to aid Jews in escaping persecution in Europe by establishing a national homeland.²¹ The first important leader of this movement was Theodor Herzl. Early Zionists considered several sites, including Uganda, for the Jewish State. Palestine, however, was ultimately Zionism's target because of its historical ties to the Jewish people.²² The acquisition of land in Palestine was essential to the Zionist dream. Zionist propaganda stated that Palestine was 'a land without people for a people without land' ignoring the fact that the Palestinians themselves, well over half a million at the turn of the century, lived in Palestine, that it was their home.²³

Therefore, during the years of the Palestine Mandate, from 1922 to 1947, large-scale Jewish immigration from abroad, mainly from Eastern Europe took place, and with it, increased land purchases and settlements. The numbers were swelling in the 1930s with the notorious Nazi persecution of Jewish populations. The demographics of the territory during this time period are important to note. When the United Kingdom took control of Palestine in 1917, circa 90 per cent of the population were Arab Muslims. But due to the increasing Jewish immigration to Palestine, which was strongly opposed by the Arab inhabitants, in the mid-1940s the Arabs comprised only about a mere two-thirds of the territory's population.²⁴

¹⁹ UN Division for Palestine I (n 14) 3.

²⁰ Jews had been persecuted in Europe for hundreds of years. The French revolution helped the Western European Jews, but the Eastern European Jews in Poland and Russia were limited in what they could do for a living and where they could live. In 1881, Tsar Alexander III made the situation even worse for the Jews, denying them the right to vote, be professionals, live in cities and more. Additionally, severe attacks against Jews called pogroms took place in the late 19 century. Consequently, many Jews immigrated. Most went to America, but some went to Palestine. See Quigley *Palestine and Israel: A Challenge to Justice* 3.

²¹ Quigley (n 20) 3.

²² Jews were displaced from Palestine in the second century c.e., and very few Jews lived there until modern times. See Keith (n 10) 379.

²³ UN Division for Palestine I (n 14) 11.

²⁴ At the time of the Balfour declaration, there were in Palestine 80 000 Jews and 600 000 Arabs; in 1939 there were already 450 000 Jews. See Sybesma-Knol 'Palestine and the United Nations' in Silverburg *Palestine and International Law* 275.

III. The British Mandate (1917 to 1947)

The Palestine problem became an international issue towards the end of the First World War with the dismemberment of the Ottoman Empire. The Supreme Council of the Principal Allied powers decided in April 1920 at the San Remo Conference to place Palestine, like the several former Ottoman Arab territories, under an international mandate pursuant to Article 22 of the Covenant of the League of Nations. The United Kingdom, already administering the territory we now know as Israel, the West Bank, Gaza and Jordan, was selected as the Mandatory Power. With the ratification of the Lausanne peace treaty on September 29, 1923, the Palestine class A Mandate officially came into force.²⁵ In principle, the mandate was meant to be in the nature of a transitory phase until Palestine attained the status of a fully independent nation, a status provisionally recognised in the League's Covenant, but in fact the mandate's historical evolution did not result in the emergence of Palestine as an independent nation.²⁶

In contrast to the other A-Mandates that became fully independent states, as anticipated, the Palestine Mandate contained an important *sui generis* characteristic.²⁷ It gave international legal authorization to the Balfour Declaration,²⁸ which was a policy declaration by the British government including a promise to 'secure the establishment of the Jewish national home' in Palestine.²⁹ By 1936, the Mandate System began to break down. The increasing Jewish immigration to Palestine³⁰ was strongly opposed by the Arab inhabitants. The Arabs began to organize in both violent and non-violent groups aimed at halting the immigration and land purchases by Jews.³¹ Palestinian demands for independence and the resistance to Jewish immigration led to a full-scale rebellion in 1936, followed by continuing terrorism and violence from both sides during and immediately after the Second World War.³² It is submitted that the Arab revolt from 1936 to 1939 was a culmination of Palestinian resistance to British rule, and

²⁵ See Mandate for Palestine, League of Nations Document C529.M.314.1922.VI(1922).

²⁶ UN Division for Palestine I (n 14).

²⁷ Van de Craen (n 12) 862.

²⁸ Balfour Declaration, November 2, 1917 available at the United Nations Information System on the Question of Palestine [UNISPAL]<<http://domino.un.org/unispal.nsf>> (accessed on 25 May 2004).

²⁹ See Articles 2, 4, 6, 7, 11, and 25 of the Mandate (n 25).

³⁰ See *supra*.

³¹ Quigley (n 20) 23, 24.

³² UN *History of the Palestine Problem* available at:

<<http://www.un.org/Depts/dpa/ngo/history.html>>(accessed on 15 May 2004)

reflected the unease connected with the increasing Zionist settlements. With the support of Zionist militias Britain successfully repressed the uprising.³³

Faced with this escalating violence and frustrated with its inability to create peace, the United Kingdom unilaterally decided, in February 1947 to depart from Palestine and to turn the question of Palestine over to the United Nations.³⁴

IV. Post WW II (1947 –1967) Developments and the Creation of the State of Israel³⁵

By 1947, Jews were over thirty percent of the population of Palestine.³⁶ The Mandate System had failed by not creating an independent Palestinian State. The United Nations General Assembly gathered to discuss the fate of Palestine in April of 1947.³⁷ The United Nations Special Committee on Palestine (UNSCOP) was called to prepare a report on what should be done with Palestine.³⁸

After looking at various alternatives, a majority of the UN General Assembly proposed the partitioning of Palestine into two independent states, one Palestinian Arab and the other Jewish, with Jerusalem internationalised under the supervision of the Trusteeship Council.³⁹

The Palestinians viewed partition as an attempt to solve Europe's so called 'Jewish Question' at their expense, and the resolution was therefore rejected out of hand.⁴⁰ The Arab side contended that there was no justification for allotting 55 per cent of the territory of Palestine to the Jewish minority⁴¹ which formed only one

³³ Cavanaugh 'Selective Justice: The Case of Israel and the Occupied Territories' 26 (2003) *Fordham International Law Journal* 937.

³⁴ UN Department of Public Information *The United Nations and the Question of Palestine* available at: UNISPAL
<<http://domino.un.org/UNISPAL.NSF/0/3b58e8d0adf62b5f852561230077c62d?OpenDocument>>
(accessed on 15 May 2004)

³⁵ For a fresh look at the events surrounding the establishment of the Israeli state see Rogan, Shlaim *The War for Palestine: Rewriting the History of 1948*.

³⁶ UN Division for Palestine *The Origins and Evolution of the Palestinian Problem Part II:1947-1977* (hereinafter UN Division for Palestine II) 1 available at
<<http://domino.un.org/unispal.nsf/0/d442111e70e417e3802564740045a309?OpenDocument>>
(accessed on 15 May 2004).

³⁷ UN Division for Palestine II (n 36) 2.

³⁸ UN Division for Palestine II (n 36) 3.

³⁹ UN GA Res 181 (II) 29 November 1947 (33 in favour, 13 against, 10 abstentions including the United Kingdom).

⁴⁰ For the Palestinian position on partition see Cattani *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict*.

⁴¹ As envisaged in GA Res 181 (II).

third of the population and most of which had come from abroad as 'colonists'.⁴² Furthermore, they felt it violated the UN Charter, which states that the United Nations grants people the right to decide their own destiny. The Jewish population, on the other hand, widely accepted partition as the 'indispensable minimum' despite some dissatisfaction with the status to be given to Jerusalem⁴³

The UN organs were not able to carry out the partition plan in view of continued hostilities between Jews and Arabs⁴⁴ and the refusal of the United Kingdom to allow the United Nations Special Committee on Palestine to enter the area.⁴⁵ In the weeks before the end of the mandate violence increased when military units from neighbouring Arab states began crossing into Palestine. They were concerned about their own borders and the growing number of Palestinian refugees pouring into their countries.⁴⁶

Amidst increasing conflict in Palestine and under the condition that the Mandate would come to an end, and only one day before it actually did so Ben Gurion proclaimed unilaterally in the name of the provisional State Council, the predecessor of the Knesset, the Israeli parliament, the independence of the State of Israel in the last hours of May 14, 1948.⁴⁷

On May 15th, the day the mandate ended, full-scale war broke out. Egypt, Iraq, Jordan, Lebanon and Syria attacked Israel's forces at the request of the Arab leadership in Palestine in order to prevent a unilateral realisation of the partition plan. But the Israeli forces were able to resist the attack and even occupied territories which had been assigned to the Arabs by the United Nations under the partition plan in order to gain control over a coherent territory including the western part of Jerusalem.⁴⁸

However, at the end of the 1948-1949 Arab-Israeli conflict, Palestine was divided into three parts. Israel assumed control over 77 per cent of the territory.

⁴² Malanczuk 'Israel: Status: Territory and Occupied Territories' in Bernhardt (ed) *Encyclopedia of Public International Law Vol II* 1479.

⁴³ Malanczuk (n 42) 1479.

⁴⁴ UN Division for Palestine II (n 36) 30, In the first three months after the partition plan was adopted the casualty toll was 869 dead and 1909 injured.

⁴⁵ Patsch 'Israel and the Arab States' in Bernhardt (ed) *Encyclopedia of Public International Law Vol II* 1461.

⁴⁶ Takkenberg *The Status of Palestinian Refugees in International Law* 12.

⁴⁷ UN Division for Palestine II (n 36) 44, Some Zionist lawyers said that the 'international decision [of partition] had preceded the emergence of the state and thus may be said to have been its legal foundation.' See Quigley (n 20) 64.

⁴⁸ Takkenberg (n 46) 12.

Jordan occupied East Jerusalem and the area that is now referred to as the 'West Bank'. Egypt took control over the Gaza Strip.⁴⁹

By the spring of 1949 Israel had concluded individual armistice agreements (not peace treaties) with Egypt⁵⁰ and Jordan,⁵¹ which led to a carving up of Palestine among these three States. While the UN plan had proposed that Jerusalem become an independent zone, free from both Arab and Jewish control, the 1949 armistice agreement divided the city into two halves- East Jerusalem controlled by Jordan and West Jerusalem controlled by Israel.

The 1948 war not only led to the creation of the State of Israel but also created a Diaspora of Palestinians, as over one million Palestinians fled or were expelled, most of them settling in Jordan.⁵²

In March 1949 Israel submitted an application for membership to the United Nations for the second time, and was finally accepted as a member.⁵³

V. The June 1967 War and the Peace Process

The June 1967 War, known as the Six Day War, witnessed the most wide-ranging political transformation in the Middle East since 1948 marking Israel's decisive military defeat of its neighbouring Arab countries.⁵⁴ In the course of this war, between June 5 and 10, 1967, the Israeli army conquered the old city of Jerusalem⁵⁵ and the West Bank from Jordan, the Gaza Strip and the Sinai Peninsula up to the Suez Canal from Egypt and the Golan Heights from Syria⁵⁶ As a result of Israel's occupation of the West Bank, East Jerusalem and the Gaza Strip, the Jewish state had established full control over the whole area that was

⁴⁹ Quigley (n 20) 89.

⁵⁰ February 24, 1949, UNTS Vol 42 p 251.

⁵¹ April 3, 1949, UNTS Vol 42 p 303.

⁵² Today the number of Palestinians living in Jordan; Lebanon, Syrian Arab Republic, the West Bank and the Gaza Strip is estimated at 3.6 million. See Report of the Commissioner-General of United Nations Relief and Works Agency for Palestine Refugees (UNRWA) A/54/13 vii available at: <<http://domino.un.org/UNISPAL.NSF/0/30438ba9117e948c052681f0068f53e?opennDocument>> (accessed on 1 August 2004).

⁵³ See UN GA Res 273 (III) of May 11, 1949. As war raged on between Arabs and Jews, Israel continually applied to the United Nations for membership but was rejected until 1949. See Quigley (n 20) 87.

⁵⁴ Schulze *The Arab-Israeli Conflict* 33-40. See generally Sachar *A History of Israel from the Rise of Zionism to Our Time* 616-66.

⁵⁵ *ie* East Jerusalem which was administered by Jordan at that time.

⁵⁶ Partsch (n 45) 1462.

once mandated Palestine. Again, many Palestinian refugees left the newly occupied territories.⁵⁷

On November 22, 1967, the UN Security Council unanimously adopted Resolution 242 reaffirming 'the inadmissibility of the acquisition of territory by war' and calling on Israel to withdraw from territories it had occupied in the 1967 conflict.

On May 20, 1964, the Palestinian Liberation Organisation (PLO) was founded as an umbrella for both, political and military Palestinian groups struggling to regain Palestinian control over pre 1948 Palestine. In 1975 the UN General Assembly conferred on the PLO the status of observer in the Assembly and in other international conferences held under UN auspices.⁵⁸

A new element has been added to the conflict by the continued uprising (intifadah) in the occupied territories which began in early December 1987. Conditions in the Palestinian territory during more than 20 years of military occupation, including land confiscation, settlement by Israeli settlers and restrictions of civil liberties, contributed to the eruption of this first spontaneous grassroots intifadah. Palestinians from all walks of life -youth, merchants, labourers, women and children- have since been involved in massive popular street demonstrations, economic boycotts, commercial strikes and tax resistance. The weapons of choice in this revolt were stones and Molotov cocktails. The first intifadah lasted until 1993.⁵⁹

The Security Council, the General Assembly and the Secretary-General responded with deep concern to the measures taken by the occupation authorities against the intifadah. Since the very beginning of the uprising, starting with Security Council resolution 605 (1987) of 22 December 1987, the question of how to ensure the safety and protection of Palestinians in the occupied territory in accordance with international humanitarian law has received special attention.⁶⁰

⁵⁷ Estimated at more than half a million. See UN Division for Palestine II (n 36).

⁵⁸ UN GA Res 3237 (XXIX) 1975.

⁵⁹ Imseis 'On the Fourth Geneva Convention and the Occupied Palestinian Territory' 44 (2003) *Harvard Journal of International Law* 82.

⁶⁰ UN Department of Public Information *The United Nations and the Question of Palestine* 8 available at:
<<http://domino.un.org/UNISPAL.NSF/0/3b58e8d0adf62b5f852561230077c62d?openDocument>>
(accessed on 15 May 2004).

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Throughout the 1960s, the 1970s and into the 1980s, intensive efforts were made within and without the United Nations to resume and conclude the peace negotiating process in order to resolve the diplomatic deadlock in the Middle East and achieve a comprehensive peace.

In October 1973, Egypt and Syria attacked Israel from two directions. Their unexpected attack and Israeli counter-attacks resulted in great losses on both sides. Finally, Israel concluded an armistice with Egypt in January 1974.⁶¹

In November 1977, Egyptian President Anwar al-Sadat visited Jerusalem. Subsequently, direct negotiations between Egypt and Israel, with the United States as intermediary, led in September 1978 to the signing of two frameworks for peace agreements, known as the Camp David accords.⁶² The first provided a framework for peace between Egypt and Israel; the second was a broader framework intended to resolve the Palestinian question. Only the Egyptian-Israeli agreement took effect. The treaty led to the withdrawal of Israeli forces from the Sinai in April 1982. Since then the boundary between the two states has become identical with the previous boundary under the British Mandate, while the problems of the West bank and the Gaza Strip remain pending a positive solution.⁶³

Motivated in part by Jordan's disengagement in July 1988 of all legal and administrative ties with the West Bank,⁶⁴ the Palestinian leadership made an important move forward by proclaiming the independence of the state of Palestine with Jerusalem as its capital. It did so with express reference to the provisions of International law, including United Nations General Assembly Resolution 181 (II) of 1947, which had provided for the partition of Palestine into an Arab and a Jewish State.

During a noteworthy speech to the United Nations in Geneva on December 14, 1988, PLO Chairperson Yasir Arafat issued a long-awaited statement explicitly recognizing 'the right of all parties concerned in the Middle East conflict to exist in peace and security... including the States of Palestine, Israel and other neighbours, according to resolution 242'.⁶⁵ Although the proclamation of the independence of

⁶¹ 13 (1974) *ILM* 23.

⁶² 17 (1978) *ILM* 1463.

⁶³ Partsch (n 45) 1462.

⁶⁴ On July 31, King Hussein of Jordan finally and unequivocally recognised that Jordan did not have title over the West Bank. See Van de Craen (n 12) 866.

⁶⁵ UN Department of Public Information (n 60) 9. See also the *Palestinian Declaration of Independence* UN Doc A/43/827 (1988).

the state of Palestine was done, however, more in order to create a new fact than to proceed with the establishment of a Palestinian state as such, the Palestinian authority had, with its statements, in effect recognised the State of Israel.

Thus, by the end of 1988, the signs were set for a peace process based on the principle of a two-state solution as outlined in Security Council Resolution 242 and 338, the principle which eventually formed the basis of peace negotiations between Israel and the PLO.

The promising Israel-PLO peace process, known as the Oslo peace process,⁶⁶ was initiated in 1993. On 10 September 1993, Israel and the PLO exchanged letters of mutual recognition. The PLO recognised Israel's right to exist, and Israel recognised the PLO as the representative of the Palestinian people.

Three days later, on 13 September 1993, at a historic ceremony in Washington, D.C, Israeli Prime Minister Itzhak Rabin and PLO Chairperson Yasir Arafat signed the Declaration of Principles on Interim Self-Government Arrangements for Palestinians (DOP).⁶⁷ Following the signing, they shook hands.

Under the terms of the DOP, the parties undertook to conclude a number of interim agreements leading to a final settlement of their conflict based on the 'land for peace' principle laid down in United Nations Security Council Resolutions 242 and 338. Accordingly, the DOP opened the way for eventual Palestinian self-rule, providing for Israeli withdrawal and the establishment of interim Palestinian self-government, first in the Gaza Strip and in the West Bank town of Jericho, and later in the rest of the West Bank. Nonetheless, the DOP did not address several problematic, but crucial issues, including the return of Palestinian refugees. Although the parties have signed a number of interim agreements,⁶⁸ the peace process rapidly broke down in 1996 and permanent status negotiations have failed to produce any major breakthroughs.⁶⁹

⁶⁶ The process was so named in correspondence to the Norwegian city where the parties first held secret meetings to frame the conditions of their accords.

⁶⁷ Declaration of Principles on Interim Self-Government Arrangements for Palestinians, Isr-PLO, September 13, 1993, 32 (1993) ILM 1525.

⁶⁸ Inter alia the Agreement on the Gaza Strip and the Jericho Area (Gaza-Jericho Agreement), May 4, 1994, Isr-PLO, 33 (1994) ILM 622; the Agreement on Preparatory Transfer of Powers and Responsibilities, August 29, 1994, Isr-PLO and the Interim Agreement on the West Bank and the Gaza Strip (Oslo II Accords), September 28, 1995, Isr-PLO. For a thorough survey of the various peace accords see Bell *Peace Agreements and Human Rights*.

⁶⁹ Watson *The Oslo Accords: International Law and the Israeli Palestinian Peace Agreements* 310.

The following years were characterised by allegations of continuing gross human rights violations by Israel in the OPT on the one hand, and, suicide bomb attacks against Israeli civilian and military targets on the other hand.⁷⁰

A new attempt to revive the peace process was made in 2000, known as Camp David II. Israeli/Palestinian talks took place in July 2000. At the invitation of the US President, Yasir Arafat and Israeli Prime Minister Ehud Barak engaged in final status negotiations. The meetings ended without agreement on July 25, 2000.⁷¹

VI. The Al-Aqsa Intifadah

It is submitted that -combined with the lack of progress in ending the occupation through the repeatedly stalled peace negotiations- the killing of several Palestinians by Israeli police forces on the Temple Mount caused the beginning of the second intifadah, known as Al-Aqsa Intifadah on September 28, 2000. Following this incident, Palestinians began violent demonstrations against the Israeli Defence Forces throughout the Occupied Territories.⁷²

VII. The Roadmap for Peace

The latest element in the Middle East situation was introduced by a 'quartet' of international entities (the United States, the European Union, Russia, and the United Nations) in 2002: The so called 'Roadmap for Peace'⁷³ is a performance-based plan with unambiguous milestones and definitions, intended to lead to a final and comprehensive settlement of the Israeli-Palestinian conflict. It follows from the statement made on June 24, 2002 by U.S. President George Bush, a new United

⁷⁰ B'Tselem Oslo: Before and After: The Status of Human Rights in the OPT 10,11.

⁷¹ Bell (n 68) 76.

⁷² So called because of Ariel Sharon's (Israeli Defence Minister at the time and subsequently Prime Minister) visit to the al-Aqsa mosque compound in the old city of Jerusalem immediately prior to the outbreak of violence. His visit prompted demonstrations which were severely repressed by the Jerusalem police resulting in the death of protestors. Commentary which blames the intifada entirely on this visit oversimplifies matters. The visit and the protests and deaths which followed it are better described as an ignition point for resentment over the failure of the peace process which had been building for some time. Information available at <<http://encyclopedia.thefreedictionary.com/Al-Aqsa%20Intifadah>>, see also the article in the New York Times of 29 September 2000 available at <<http://www.nytimes.com/2000/09/29/international/29ARAFAT.html?ex=1100408400&en=5f139809fa83f29f&ei=5070>> (both accessed on 10 September 2004).

⁷³ Available at <<http://www.un.org/News/dh/mideast/roadmap122002.pdf>> (accessed on 25 May 2004).

States policy formulation for the Middle East. The quartet will supervise and support the plan.

The roadmap comprises three goal-driven phases with the ultimate goal of ending the conflict as early as 2005. Phase I (as early as May 2003) comprises the following components: End to Palestinian violence; Palestinian political reform; Israeli withdrawal and freeze on settlement expansion; Palestinian elections. Phase II (as early as June-Dec 2003) covers these elements: creation of an independent Palestinian state; international conference and international monitoring of compliance with the roadmap. Finally, phase III (as early as 2004-2005) contains the following aspects: Second international conference; permanent status agreement and end of conflict; agreement on final borders, clarification of the highly controversial question of the fate of Jerusalem, refugees and settlements; Arab states to agree to peace deals with Israel.⁷⁴

However, as a performance-based plan, progress will require and depend upon the good faith efforts of the parties, and their compliance with each of the obligations. Should the parties perform their obligations rapidly, progress within and through the phases may come sooner than indicated in the plan. Non-compliance with obligations will impede progress. As of the end of 2003, the Palestinian Authority has not prevented Palestinian terrorism, while Israel has not withdrawn from Palestinian areas occupied since September 28, 2000 or frozen settlement expansion. Thus, the parties have not complied with the requirements of Phase I of the road map and no further progress on the roadmap has been made and it is thus currently effectively in limbo. Furthermore, an ongoing series of retaliatory attacks by Israelis and Palestinians threatens to derail the road map.

Not surprisingly, on July 18, 2004, United States President George W Bush stated that the establishment of a Palestinian state by the end of 2005 is unlikely due to instability and violence in the Palestinian Authority.⁷⁵

VIII. History of the Barrier

The idea of erecting a barrier to halt infiltration into Israel from the central and northern West Bank has been considered by the Government of Israel in various

⁷⁴ For details in all three phases see the 'Roadmap for Peace' (n 73).

⁷⁵ *Le Figaro* available at: <<http://www.lefigaro.fr/magazine/20040716.MAG0008.html>> (accessed on 30 July 2004).

forms for years. Following the outbreak of the al-Aqsa Intifada, in late September 2000,⁷⁶ the government made a number of decisions that ultimately led to the current separation-barrier plan.⁷⁷ The first Cabinet approval of such a plan was made in July 2001. The barrier was supposed to be erected in what is referred to as the 'seam area,' a strip of land extending along the two sides of the so called 'Green Line'.⁷⁸ After a sharp rise in Palestinian terror attacks in the spring of 2002, the Cabinet approved Government Decision 64/B on 14 April 2002, which called for construction of 80 kilometres of the barrier in the three areas of the West Bank. The seam zone Administration, headed by the director general of the Israeli Ministry of Defence, was established to implement that decision. On 23 June 2002, Israel's Cabinet Decision 2077 approved the first phase of a 'continuous' barrier in parts of the West Bank and Jerusalem. The decision stated that the barrier 'is a security measure' that 'does not represent a political or other border'. The route discussed was not made public; the decision stated that the 'exact and final route of the fence will be decided by the prime minister and minister of defence'. On 14 August 2002, the Cabinet approved the final route for Phase A construction, which ultimately included 123 kilometres in the northern West Bank and 19.5 kilometres around Jerusalem.⁷⁹

On 1 October 2003 the Israeli Cabinet approved a full barrier route in Decision 883. According to the Ministry of Defence, the planned route of the barrier will form one continuous line stretching 720 kilometres along the West Bank. A map of the route, which shows both completed and planned sections, was posted on the Ministry of Defence website on 23 October 2003,⁸⁰ two days after the General Assembly approved resolution ES-10/13, demanding that 'Israel stop and reverse the construction of the wall in the OPT including East Jerusalem...'⁸¹

At the date of writing, Israel has not stopped or reversed the ongoing construction of the barrier.

⁷⁶ See above VI.

⁷⁷ B'Tselem *Behind the Barrier* 2003 page 3.

⁷⁸ The name 'Green Line' originates from the colour used for the armistice demarcation line in the maps of the 1949 armistice agreement between Israel and Jordan (the de facto border between Israel and Palestine); hereinafter the 'Green Line' (see n 51).

⁷⁹ Website of the Israeli Ministry of Defence:

<<http://securityfence.mod.gov.il/Pages/ENG/execution.htm>> (accessed on 10 August 2004).

⁸⁰ An updated version of the map was posted on 30 July 2004 on that website:

<<http://securityfence.mod.gov.il/Pages/ENG/route.htm>> (accessed on 10 August 2004)

⁸¹ UN GA Res ES-10-13 (21 October 2003).

B. Factual Background

In the following part I will give a short description of the facts concerning the construction of the barrier by Israel. It should be noted that all the estimates referred to in this thesis may not be completely accurate and may differ depending on the source they come from. However, they are based on studies from reliable sources and it is significant that they have not been seriously challenged by Israel.

I. Components of the Barrier

According to the Israeli Ministry of Defence the barrier has resulted in or will result in a 'multi layered composite obstacle' consisting essentially of:⁸²

A fence, in the centre, with electronic sensors to warn of any incursion.

A ditch (up to 4 metres deep) and a pyramid shaped stack of six coils of barbed wire on the eastern side structure, barbed wire only on the western side

A two lane asphalt road enabling the patrol of Israeli Defence Forces (IDF) on both sides of the structure

A smoothed strip of sand that runs parallel to the fence, to detect footprints

Various observation systems

In certain areas, the structure consists of a solid wall as opposed to a fence. The total length of these concrete wall sections is 8.5 kilometres. The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. 'Depth barriers' may be added to these works. IDF and Border Police units will be deployed along the barrier under the command of the IDF.

The cost of the Wall is variously estimated. According to one source, the wall will cost approximately US \$3.4 billion.⁸³

II. Route of the Barrier

The Israeli Ministry of Defence states that the route of the 'Security Fence is derived from topography, population density and threat assessment of each terrain

⁸² Website of the Ministry of Defence:

<<http://securityfence.mod.gov.il/Pages/ENG/operational.htm>>; see also for a picture of the concrete structure (accessed on 10 August 2004).

⁸³ Website of the Palestinian Environmental NGOs Network (PENGON):
<<http://stopthewall.org/factsheets/64.shtml>> (accessed on 9 May 2004).

compartment.⁸⁴ According to the Ministry of Defence the barrier is a continuous land base 'obstacle' stretching from Beit-Shean in the North to Arad in the South.

However, the final route of the barrier will be composed of four different stages.

Stage A runs for roughly 140 kilometres from Salem to Elkana, and around Jerusalem (in the northern and southern sections) and was completed by the end of July 2003.⁸⁵ Stage B, running around 40 kilometres from Salem towards Bet-Shean along the northern part of the Green Line was approved in December 2002. Stage B was due for completion by the end of July 2004.⁸⁶ Stage C is a continuous section encompassing a number of large settlements and will link the north-western end of the barrier built around Jerusalem with the southern point of Phase A construction at Elkana. The last section (Stage D) will run for 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement south-east of Hebron.

According to a written statement of the UN Secretary General,⁸⁷ some 190 kilometres of construction had been completed by 25 January 2004, covering Stage A and the greater part of Stage B. Further construction in Stage C had begun in certain areas of the central West Bank and in Jerusalem. Stage D, planned for the southern part of the West Bank, had not yet begun.

The length of the barrier, once it is completed, is estimated differently. According to one source, it will be 687 kilometres in length.⁸⁸ According to the Israeli Ministry of Defence and a Palestinian NGO, it will form one continuous line stretching circa 720 kilometres along the West Bank.⁸⁹ In December 2003, Israel declared that in 2004 520 km of the planned 720 km would be completed with the entire barrier finished in 2005.⁹⁰

⁸⁴ Israeli Ministry of Defence (n 80).

⁸⁵ Website of the Israeli Ministry of Defence:

<<http://securityfence.mod.gov.il/Pages/ENG/news.htm#news6>> (accessed on 10 August 2004)

⁸⁶ Israeli Ministry of Defence (n 80).

⁸⁷ *Written Statement of the Secretary General*, available at: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpstatements/iWrittenStatement_10_UnitedNations.pdf> (accessed on 7 August 2004).

⁸⁸ Dugard Addendum to *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine* Report of the Special Rapporteur of the Commission on Human Rights, UN Document E/CN.4/2004/6Add.1, page 7, available at:

<<http://domino.un.org/unispal.nsf/0/631c8deb907650e985256e6000520f3b?OpenDocument>> (accessed on 25 May 2004).

⁸⁹ Israeli Ministry of Defence (n 80) and PENGON (n 83).

⁹⁰ PENGON (n 83).

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Most of the barrier's route does not coincide with the Green Line separating the West Bank from Israel. For most of its route it lies almost entirely on land occupied by Israel in 1967. In some areas, the barrier is located up to almost 8 kilometres inside the West Bank. At one point, when completed, the barrier will make a way some 22 kilometres into Palestinian territory to include three Israeli settlements east of the Green Line.⁹¹ In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and, in some cases, even beyond the eastern municipal boundary of Jerusalem as fixed by Israel.⁹²

In several areas, the winding route of the barrier creates loops that surround Palestinian villages on all sides. The barrier will separate many Palestinian villages and turn some of them into isolated enclaves. In numerous locations, the barrier will separate villages from farmland belonging to their residents.

III. Impact on Population

On the basis of that route, approximately 14.5 per cent of the West Bank land⁹³ (excluding East Jerusalem)⁹⁴ will lie between the Green Line and the barrier. As a result of the construction of the barrier, approximately 280 000 Palestinians will be enclosed in the area between the barrier and the Green Line or in enclaves completely surrounded by the barrier while another 400 000 living to the east of the barrier will need to cross it to get to their farms, jobs, schools, services etc.

The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) estimated in its report of 9 November 2003, that approximately 680 000 persons - that is 30 per cent of the population of the West Bank - will be directly harmed by the barrier.⁹⁵

The planned route incorporates nearly 320 000 settlers on the western side of the barrier, including approximately 178 000 in East Jerusalem.⁹⁶

⁹¹ Dugard (n 88).

⁹² Report of the UN Secretary-General prepared pursuant to General Assembly resolution ES-10/13, UN Doc A/ES-10/248, page 3, available at: <<http://domino.un.org/unispal.nsf/0/a5a017029c05606b85256dec00626057?OpenDocument>> (accessed on 7 August 2004).

⁹³ Dugard (n 88) 8.

⁹⁴ Including East Jerusalem it will be 16.6 per cent, see UN Secretary General (n 92).

⁹⁵ OCHA 'New Wall Projections' November 9, 2003 available at: <<http://domino.un.org/UNISPAL.NSF/0/4e0b9b40c993ea2c85256de10058b1fb?OpenDocument>> (accessed on 20 August 2004).

⁹⁶ UN Secretary General (n 92).

Additionally to the construction of the wall, Israel has introduced a new system of residency status in October 2003. According to that system, the area between the Green Line and the barrier is a 'Closed Zone' in which Israelis may travel freely, but not Palestinians. Thus, Palestinians who live in the 'Closed Zone' are obliged to have permits to live in their own homes.⁹⁷ Palestinians living east of the barrier within the West Bank with farmland inside the 'Closed Zone' require permits to cross the Wall into this zone, as do others from the West Bank who wish to visit the zone for personal, humanitarian or business reasons.

Access to and exit from the 'Closed Zone' is only possible through checkpoints, which are opened infrequently and for short periods. Furthermore, it is reported that these checkpoints are administered in an arbitrary manner.⁹⁸

C. Legal Analysis

Any measures Israel undertakes in the alleged occupied territories must comply with its obligations under international law. Three sets of complementary legal frameworks may apply to Israel's conduct in the West Bank and the Gaza Strip: International humanitarian law, international human rights law and general international law. To analyse the legal aspects of the construction of the barrier in the West Bank by Israel, I will first examine the status of the territories occupied by Israel in 1967. Thereafter, I will determine whether the different international legal regimes are applicable and if this is answered in the affirmative, whether the construction of the barrier is or is not in breach of the applicable rules and principles of international law.

I. Question of Territorial Title

In the course of history, Palestine has seen many rulers.⁹⁹ Thus, the question of who has appropriate title to the territory is inevitably heavily disputed. For the purposes of this paper it is only of interest whether the territory east to the Green

⁹⁷ See Israeli Order Regarding Security Regulations (Judea and Samaria) (No. 378) 5730-1970 [Declaration concerning Closing an Area No. S/2/03 (Seam Zone)] as cited in Dugard (n 88) 8.

⁹⁸ Dugard (n 88) 8.

⁹⁹ See *supra* n 10.

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Line and the former eastern boundary of Palestine¹⁰⁰ under the Mandate has to be considered as occupied territory or not.¹⁰¹

According to paragraph 1 of Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907

[T]erritory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

It is submitted that after the state of Israel came into being in 1948,¹⁰² a 'sovereignty vacuum' remained for the rest of Palestine, since no Arab Palestinian state was established.¹⁰³ There was not only no state sovereignty vested in the rest of Palestine, but there was not even an administering authority entitled and willing at that time to exercise its powers. However, the Arab Palestinians did not cease to exist as people. They have never accepted foreign rule over their territory. On the contrary the Palestinian people always made claims for self-determination.

However, during the subsequent armed conflicts,¹⁰⁴ Egypt gained control over what is today known as the Gaza Strip and Jordan took control over the West Bank since that time. The 1949 armistice agreements led to a carving up of Palestine among Israel, Egypt and Jordan. They could be considered as trustees over the seized territories but definitely not as sovereigns.¹⁰⁵

But since the Six Day War and the Israeli invasion of June 1967, the Gaza Strip and the West Bank were not any longer under Egyptian and Jordanian administration respectively; Israeli forces took control over all the territories which had constituted Palestine under the British Mandate including those known as the West Bank, lying to the east of the Green Line.

From this time on the Gaza Strip and the West Bank remain nothing more than occupied territories. Israel's allegation that Egypt and Jordan did not have legal title to the territories prior to the 1967 armed conflict¹⁰⁶ does not alter Israel's

¹⁰⁰ Today most commonly known as the 'West Bank'.

¹⁰¹ For impressive documentation on the issue see Gerson (n 9) 1 et seq.

¹⁰² See *supra* n 47.

¹⁰³ Van de Craen (n 12) 864.

¹⁰⁴ See *supra* A.IV.

¹⁰⁵ Van de Craen (n 12) 864.

¹⁰⁶ Falk, Weston 'The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza' in Playfair (ed) *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* 132.

status as the occupying power in these territories. It makes no difference to an occupying power whether the ousted power had *de iure* or mere *de facto* title to the territory.¹⁰⁷

Although Israel took a number of measures following the 1967 war, to change the status of the territory, especially that of East Jerusalem, the status remains unchanged. All these measures have been widely condemned by almost the whole of the international community including by binding UN Security Resolutions¹⁰⁸ and non-binding UN General Assembly Resolutions.¹⁰⁹ Significantly, most of these General Assembly Resolutions were passed by an overwhelming majority and are therefore good evidence of international opinion on the matter. The resolutions can also be interpreted as evidence of non-recognition of any purported changes, thus attempting to deny them validity. Consequently, Israeli measures cannot be considered as having altered the status of the territory.

Therefore, the entire West Bank (including East Jerusalem) remains occupied territory and Israel has continued to have the status of occupying power since 1967.

II. International Humanitarian Law

International humanitarian law, or the *ius in bello*, is one of the oldest bodies of modern international law.¹¹⁰ It evolved from principles of customary international law. Since the mid-nineteenth century the *ius in bello* has become more specific and binding through the use of international agreements and conferences. The most important rules of the *ius in bello*, or law of war, were defined at the two peace conferences at the Hague in 1899 and 1907.¹¹¹ More recent instruments developing and codifying aspects of the law relating to hostilities are the four

¹⁰⁷ Mallison, Mallison *The Palestine Problem in International Law and World Order* 47.

¹⁰⁸ Eg UN Sec Res 298 (1971), 478 (1980), 904 (1994).

¹⁰⁹ Eg *inter alia* UN GA Res 32/91 (1977), 42/160 (1987), 54/77 (1999).

¹¹⁰ Von Glahn *The Occupation of Enemy Territory - A Commentary on the Law and Practice of Belligerent Occupation* 3.

¹¹¹ Von Glahn (n 110) 9.

Geneva Conventions of August 12, 1949,¹¹² and the two additional Protocols of 1977.¹¹³

In part C.I. it was concluded that Israel has the status of occupying power in the West Bank. The law generally applicable to belligerent occupation includes the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949¹¹⁴ and the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annexed Regulations respecting Laws and Customs of War on Land of October 18, 1907.¹¹⁵

1. Applicability of International Humanitarian Law

The fact that the West Bank and Gaza still have the status of occupied territory and Israel remains the occupying power¹¹⁶ does not automatically mean that the whole regime of international humanitarian law (IHL) is applicable there. For that reason, I will now discuss the applicability of IHL to the West Bank.

As the International Military Tribunals in Nuremberg¹¹⁷ and Tokyo¹¹⁸ ruled in 1946 and 1948 respectively and the International Court of Justice affirmed in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*¹¹⁹, the provisions of the Hague Regulations of 1907 must be regarded nowadays as declaratory of general customary International law and are therefore binding on all states. On the other hand, the provisions of the Fourth Geneva Convention are largely constitutive in character and therefore obligate contracting parties only.

¹¹² Convention I: Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention II: Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention III: Treatment of Prisoners of War; Convention IV: Protection of Civilian Persons in Time of War. All four Conventions entered into force October 21, 1950.

¹¹³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

¹¹⁴ Hereinafter the 'Fourth Geneva Convention'.

¹¹⁵ Hereinafter 'the Hague Regulations of 1907'.

¹¹⁶ See above C.I.

¹¹⁷ 41 (1947) American Journal of International Law 248-249.

¹¹⁸ 15 International Law Report 365-366.

¹¹⁹ ICJ Reports 1996 (I) 256 para 75.

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Following the 1967 war, Israel, a party to the Fourth Geneva Convention,¹²⁰ initially expressed an intention to apply the Convention to the West Bank.¹²¹ But only four months later, in October 1967, it has changed its position completely.¹²² Since that time Israel has maintained consistently that the Fourth Geneva Convention is not *de iure* applicable to either the West Bank or the Gaza Strip.¹²³ Instead, Israel has insisted that it applies the 'humanitarian aspects' of the Fourth Geneva Convention. In other words, Israel has declared an intention to act *de facto* in accordance with the Hague Regulations and the Fourth Geneva Convention but is not obliged to do so *de iure*. This position results from the fact that Israel views its presence in the territories in question as 'administration' but never as 'occupation'.¹²⁴

In contrast to the Israeli point of view an overwhelming majority of the international community has maintained the applicability of the Fourth Geneva Convention to the West Bank.¹²⁵ To find out whether Israel's position is maintainable in terms of international law, a short analysis of the legal arguments is in order.

The clauses of the Fourth Geneva Convention relevant to the question of applicability read as follows:

Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2

In addition ... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

¹²⁰ Israel has signed (1949) and ratified (6 July 1951) all four Geneva Conventions, see website of the International Committee of the Red Cross (ICRC):

<[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/\\$File/Conventions%20de%20GenSve%20et%20Protocoles%20additionnels%20ENG-logo.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20GenSve%20et%20Protocoles%20additionnels%20ENG-logo.pdf)> (accessed on 20 August 2004). Israel's only reservation to its adoption of the Fourth Geneva Convention related to the use of the Red Shield of David rather than the Red Cross as the appropriate distinctive emblem, see Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Berne 348.

¹²¹ This intention was expressed by Israel through the promulgation of Military Order No. 3 from June 7, 1967, stating in its Article 35 that: 'the Military Court ... must apply the provisions of the Geneva Conventions of 13 August 1949 [sic] regarding the protection of civilians during war as to all which pertains to legal proceedings. If there should be any contradiction between the provisions of the order and the Geneva Conventions, the provisions of the Conventions should apply.'

¹²² In October 1967, Article 35 of Military Order No 3 was deleted by Military Order 144, and in 1970, Proclamation No. 3 was replaced by Military Order 378.

¹²³ Von Glahn *Law among Nations* 684, Imseis (n 59) 93.

¹²⁴ Falk, Weston (n 106) 131.

¹²⁵ See *infra*.

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

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 4

Persons protected by the Convention are those who, at a 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.

Article 6

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

The Israeli Government has brought forward different arguments against the applicability of the Fourth Geneva Convention in respect of the West Bank and the Gaza Strip.

First, Israel has relied upon and adopted the argument of the so called 'missing reversioner'.¹²⁶ The main argument of this doctrine is that the object and purpose of the law of belligerent occupation in general, and the Fourth Geneva Convention in particular, is to protect the rights of the ousted sovereign holding valid legal title.¹²⁷ As a result, it is concluded that because neither Jordan in the West Bank nor Egypt in the Gaza Strip were the legitimate sovereigns (or 'reversioners') prior to 1967 owing to their alleged unlawful aggression against Israel in 1948-9, that territory cannot be said to constitute the 'territory of a High Contracting Party' under common article 2, thereby rendering the Fourth Geneva Convention totally inapplicable. In Professor Blum's words:

The concurrent existence, in respect of the same territory, of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law, which, while recognising and sanctioning the occupant's rights to administer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign. It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign; those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application.¹²⁸

¹²⁶ The argument was first advanced by Professor Yehuda Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', 3 (1968) *Israel Law Review* 293, 294. Professor Blum was later Israel's permanent representative to the UN. For indication that the Government of Israel has adopted Blum's thesis, see Shamgar 'The Observance of International Law in the Administered Territories', 1 (1971) *Israel Yearbook on Human Rights* 265-66.

¹²⁷ Blum (n 126) 293.

¹²⁸ Blum (n 126) 293.

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Another argument, brought forward by Israel, holds that Israel possesses 'better title' to the West Bank than does Jordan, based on a notion of 'defensive conquest'.¹²⁹ The claim maintains that because Israel came into control of the territories in 1967 through a 'defensive war'¹³⁰ against Jordan and Egypt, neither of whom held valid legal title to that territory, its control of the West Bank and Gaza is tantamount to perfect legal title, thus making the Fourth Geneva Convention inapplicable. Again, according to Professor Blum, because

no state can make a legal claim to Judea and Samaria [viz. the West Bank] that is equal to that of Israel, this relative superiority of Israel may be sufficient under international Law to make Israel's possession of those territories virtually undistinguishable from an absolute title to be valid erga omnes; . . . I would, therefore, conclude by saying that Israel cannot be considered as an occupying power within the meaning given to this term in international Law in any part of the former Palestine mandate, including Judea and Samaria.¹³¹

Furthermore, it is argued, that the failure so far of the international community to achieve any final resolution of the underlying territorial status of the West Bank results in a continuing lease of life for the Palestine Mandate, making the 1922 League of Nations Mandate for Palestine¹³² the law applicable in the territory, not the law of belligerent occupation.¹³³

Finally, there is the argument that the special, prolonged (now thirty-seven years) character of Israel's occupation of the West Bank makes Israel 'a trustee occupant' rather than a 'belligerent occupant'.¹³⁴ According to this line of reasoning, Israel becomes *de facto* sovereign power in the West Bank.

These Israeli contentions have enjoyed very limited support by the international community and are questioned by different authorities on international law. Professors Falk and Weston concluded that some arguments are 'strained

¹²⁹ Schwebel as quoted by Blum *The Colonization of the West Bank Territories by Israel: Hearing Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary, 95th Congress (1978)*, 35 (statement of Yehuda Blum).

¹³⁰ There has traditionally been great controversy over who was to blame for the 1967 war, however, even if one accepts that a 'preemptive strike' or 'preemptive self-defence' is permitted under International Law, a question which is itself heavily disputed (see Randelzhofer 'Use of Force' in Bernhardt (ed) *Encyclopedia of Public International Law* 1257), according to Israel's new historiography it is today only hardly maintainable that the 1967 war was a 'defensive war' or that the prerequisites for lawful 'preemptive self-defence' were fulfilled. See Shlaim *The Iron Wall: Israel and the Arab World* 236-239; Quigley (n 20) 164 and Gerson (n 9) 14-22.

¹³¹ Blum (n 129).

¹³² See n 25.

¹³³ Rostov 'Palestinian Self-Determination: Possible Futures for the UN-allocated Territories of the Palestine Mandate' 5 (1979) *Yale Studies in World Public Order* 147.

¹³⁴ Gerson (n 9) 1

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and artificial in character, and commanded little or no respect among 'highly qualified publicists' or within the organized international community'.¹³⁵

A number of arguments countering Israel's legal position can be set out. First, the pivotal provisions of the Fourth Geneva Convention have to be interpreted.

According to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Furthermore, one has to take Article 32 of the Vienna Convention into account which provides that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 ... leaves the meaning ambiguous or obscure; or ... leads to a result which is manifestly obscure or unreasonable'.

The international humanitarian law of armed conflict for the protection of war victims, which includes the customary law on the subject as well as conventional or treaty law, such as the Fourth Geneva Convention, is human rights law in the most fundamental sense. It provides a basic or minimum standard of human rights protection for individuals which are to be applied in the situation of war or international armed conflict, including belligerent occupation. The governments which have created this law have acted on the assumption that even urgent military necessity cannot be allowed to deprive human beings of certain elementary protections. The overriding purpose of the Geneva Conventions of 1949, as reflected in the negotiating history, was to avoid a repetition of the atrocities and massive deprivations of human rights which were inflicted upon civilian populations during the Second World War.¹³⁶

Consequently, the Israeli arguments have to be interpreted in the light of this drafting history of the Fourth Geneva Convention.

The official Israeli legal arguments against the application of the Fourth Geneva Convention to the West Bank and the Gaza Strip are based on a highly

¹³⁵ Falk, Weston (n 106) 132.

¹³⁶ Benvenisti The International Law of Occupation 105-106.

formalistic interpretation of the second paragraph of article 2.¹³⁷ It is very well questionable, if this is the correct provision to be applied to the situation in the West Bank and the Gaza Strip. The drafting history of article 2 reveals that the second paragraph was introduced only to ensure application of the Convention in cases of occupation that did not result from armed conflict. Therefore, the second paragraph is irrelevant in cases of occupation arising from armed conflict, as these are covered by the first paragraph.¹³⁸

But even if one were to concede *arguendo* that the relevant paragraph for the matter in hand is the second Paragraph of article 2, this does not mean that the West Bank is not 'the territory of a High Contracting Party' within the meaning of the second paragraph of article 2. It is well established that the word 'territory' includes, in addition to *de iure* title, a mere *de facto* title to the territory. Otherwise, civilians in disputed territory would be denied the protection of law on the basis of a trivial, and indeed, a nonexistent technicality.¹³⁹

Another legal obstacle to the acceptance of the missing-reversioner theory is that it frustrates the entire humanitarian purpose of the Convention.

Even the United States, one of Israel's closest allies, has rejected the missing reversioner theory. The US Legal Adviser rejected Israeli arguments as to the inapplicability of the Fourth Geneva Convention as long ago as 1978, writing that the principles of belligerent occupation,

'... appear applicable whether or not Jordan and Egypt possessed legitimate sovereign rights in respect of those territories. Protecting the reversionary interest of an ousted sovereign is not their sole or essential purpose; the paramount purposes are protecting the civilian population of an occupied territory and reserving permanent territorial changes, if any, until settlement of the conflict. The Fourth Geneva Convention, to which Israel, Egypt and Jordan are parties, binds signatories with respect to their territories and the territory of other contracting parties, and "in all circumstances" (Article 1), in "all cases" of armed conflict among them (Article 2) and with respect to all persons who "in any manner whatsoever" find themselves under the control of a party of which they are not nationals (Article 4).'¹⁴⁰

The United Kingdom has taken the same position, and the Deputy Legal Adviser expressed the following views at an Experts' Meeting on the Fourth Geneva Convention in Geneva on 27-9 October 1998:

¹³⁷ See *supra*.

¹³⁸ Kretzmer *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* 33, 34.

¹³⁹ Mallison, Mallison (n 107) 254; Kretzmer (n 138) 34.

¹⁴⁰ Digest of US Practice in International Law, 1978, 1575-8.

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'In fact the law does not make it a precondition that the territory occupied must have belonged to the displaced sovereign prior to the occupation. It might appear so from Geneva Convention IV Article 2(2): "The Convention shall also apply in all cases of partial or total occupation of the territory of an ACP, even if the occupation meets with no armed resistance". But this is not the primary criterion for application. It is, rather, a residual role. The primary rule is in Article 2(1): "The Convention shall apply to all cases of declared war or other armed conflict". So if, during an armed conflict, a state takes military control of territory it did not control before the conflict the Convention is applicable, whatever the underlying disputes about title ... the application of IHL depends upon a factual situation of occupation. For the sake of the civilians caught up in the situation it needs to be applied notwithstanding legal arguments over status, whether of territory or of parties to the conflict. The drafters of the Convention did their best to exclude such arguments. It is sad that they are still used to justify its nonapplication.'¹⁴¹

With respect to the assertion postulating that the Fourth Geneva Convention cannot apply because of the fact that the ousted power's control over the territory was the result of unlawful aggression in the first instance leads to an absurd result, namely that although the 'inhabitants of the West Bank were victims of Jordanian aggression in 1948,' it is because of this aggression 'that these civilians must be victimized further by being denied the humanitarian protections of the' Geneva Conventions under Israeli occupation.¹⁴² Thus, the Conventions provide no basis for a 'just war' theory which would deprive an alleged aggressor of the benefits of the law while saving those benefits for an alleged defender. In the same way, the negotiating history makes it clear, since the application of the Conventions is mandatory, that questions as to *de iure* titles to territory are not involved and that the Convention must be applied in occupied territory whatever the claims concerning the *de iure* status of that territory.¹⁴³

Furthermore, even if one were to assume for purposes of legal argument that Israel's actions in 1967 were defensive,¹⁴⁴ the argument of 'defensive conquest' is not persuasive because it is not compatible with the *ius cogens* principle of the inadmissibility of the acquisition of territory through the threat or use of force.¹⁴⁵ Additionally, as noted by Professors Falk and Weston, the institution of belligerent occupation represents 'a step away from rights to territory acquired by

¹⁴¹ M Eaton, Deputy Legal Adviser, at an Experts' Meeting on the Fourth Geneva Convention on Humanitarian Law, held in Geneva on 27–9 October 1998 in Marston *United Kingdom Materials in International Law*, Part Seventeen. I.D. item 54.

¹⁴² Mallison, Mallison (n 107) 256, 257.

¹⁴³ Kretzmer (n 138) 34.

¹⁴⁴ See n 130.

¹⁴⁵ Shaw *International Law* 423; Von Glahn (n 123) 324.

conquest and reinforces the contemporary legal notion that war, regardless the circumstance, no longer provides a legal foundation for territorial claims.¹⁴⁶ Furthermore, the contemporary law of belligerent occupation which is provisional in nature carries an 'implicit duty to withdraw once hostilities have been brought to an end.'¹⁴⁷

Moreover, the relevant international law on the use of force in self-defence does not permit the defending state to acquire territory through such use of force.¹⁴⁸ As noted by Professor Mallison,

'[a] state exercising national defence may go beyond its national boundaries to repel an attack, but it may not go beyond its national boundaries to acquire territory ... If international law provided for an exception to this basic rule under the heading of "defensive conquest," it would prove to be an irresistible attraction for a militaristic and expansionist state.'¹⁴⁹

In essence, the 'concept of "defensive conquest" is unknown in modern international law.'¹⁵⁰

With respect to Rostow's 'continuing mandate' argument it is submitted that it makes light of both the terminating acts of the United Kingdom as mandatory power¹⁵¹ and the decision of the United Nations¹⁵², which itself provides one of the firmest legal grounds for Israel's own legal status as a sovereign state.¹⁵³ Therefore, this position is not maintainable under international law.

Furthermore, the 'trustee occupant'¹⁵⁴ argument of Gerson is also unknown in modern international law. The sole intention of this argument, 'terminating the status of belligerent occupation is to give Israel greater discretion during the period of Israel's ongoing occupation than is conferred by the Fourth Geneva Convention.'¹⁵⁵

Thus, according to the due interpretation of the relevant international norms, Israel is bound as a High Contracting Party to the Fourth Geneva Convention to

¹⁴⁶ Falk, Weston (n 106) 133.

¹⁴⁷ Falk, Weston (n 106) 134.

¹⁴⁸ See n 145.

¹⁴⁹ Mallison, Mallison (n 107) 259.

¹⁵⁰ Imseis (n 59) 97.

¹⁵¹ See (n 34) and accompanying text.

¹⁵² See *infra* n 159 and 160.

¹⁵³ Falk, Weston (n 106) 133.

¹⁵⁴ Gerson (n 9) 39 et seq.

¹⁵⁵ Falk, Weston (n 106) 132.

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apply the Convention's provisions to the West Bank notwithstanding the fact that its domestic law considers it to be a non-self-executing treaty.¹⁵⁶

This conclusion is also supported by the fact that the whole of the international community -except Israel- is of the opinion that the Fourth Geneva Convention is indisputably applicable in the West Bank, including East Jerusalem, and the Gaza Strip.¹⁵⁷

For example, in its December 5, 2001 Declaration, the reconvened International Conference of High Contracting Parties to the Fourth Geneva Convention expressed its deep concern at the deteriorating humanitarian situation, reaffirmed the applicability of the Convention to the Occupied Palestinian Territory, including East Jerusalem, and reiterated the need for full respect for the Convention in that territory.¹⁵⁸

What is more, since 1967 the UN Security Council¹⁵⁹ and the UN General Assembly¹⁶⁰ have issued scores of resolutions affirming the applicability of the Fourth Geneva Convention to the West Bank and the Gaza Strip, and calling upon Israel to abide by its terms as the occupying power.

Under article 24 of the UN Charter, Member States confer on the Security Council 'primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.' Under article 25, '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter.' Already in 1970 the International Court of Justice found in the Namibia decision¹⁶¹ that article 25 was not limited to enforcement

¹⁵⁶ Kretzmer (n138) 35 et seq.

¹⁵⁷ Falk, Weston (n106) 135.

¹⁵⁸ Conference of High Contracting Parties to the Fourth Geneva Convention: Declaration, Geneva, December 5, 2001 available at: <www.reliefweb.int> (accessed on 15 September 2004).

¹⁵⁹ See UN SC Res 1322 (2000); UN SC Res 904 (1994); UN SC Res 799 (1992); UN SC Res 726 (1992); UN SC Res 694 (1991); SC Res 681 (1990); UN SC Res 673 (1990); UN SC Res 672 (1990); UN SC Res 641 (1989); UN SC Res 636 (1989); UN SC Res 608 (1988); UN SC Res 607 (1988); UN SC Res 605 (1987); UN SC Res 592 (1986); UN SC Res 484 (1980); UN SC Res 478 (1980); UN SC Res 476 (1980); UN SC Res 471 (1980); SC Res 469 (1980); UN SC Res 468 (1980); UN SC Res 465 (1980); UN SC Res 452 (1979); UN SC Res 446 (1979); UN SC Res 271 (1969).

¹⁶⁰ See UN GA Res 58/97 (2003); UN GA Res 56/204 (2001); UN GA Res ES-10/8 (2001); UN GA Res 56/60 (2001); UN GA Res 55/131 (2000); UN GA Res 54/77 (1999); UN GA Res 53/54 (1998); UN GA Res 52/65 (1997); UN GA Res 42/160 C (1987); UN GA Res 32/91 A (1977); UN GA Res 2252 (ES-V) (1967). Significantly, most of these General Assembly resolutions were passed by an overwhelming majority, usually with only one or two states -Israel and, frequently, the United States- voting against them, and are therefore solid evidence of international opinion on the matter.

¹⁶¹ ICJ Reports 1971 page 16 et seq.

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actions, but applied generally to Security Council decisions adopted in accordance with the Charter. According to one author, a Security Council declaration under article 24 in the exercise of its primary responsibility would therefore constitute a decision under article 25, and Member States would be expected to act in consequence of the declaration made on their behalf.¹⁶²

The legal status of General Assembly resolutions is more difficult.¹⁶³ Most governments regard them as recommendations only.¹⁶⁴ Thus, they are generally not legally binding.¹⁶⁵ However, the most common view among writers is that in certain circumstances General Assembly resolutions can have the effect of setting out rules which are legally binding upon Member States – for example as evidence of a State practice and *opinio iuris* giving the rule in the resolution the quality of customary international law.¹⁶⁶ Such a position has been upheld by the International Court of Justice in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.¹⁶⁷ However, according to Professors Brownlie and Goodwin, the consistency with which the General Assembly has endorsed general humanitarian principles and the applicability of the Fourth Geneva Convention 'cannot be disregarded in any assessment of the current legal situation.'¹⁶⁸ The repetitive, very substantial and often nearly unanimous voting on resolutions¹⁶⁹ in this, the widest forum available to the international community of States demonstrates continuity and shows that those resolutions enjoy a stable support from the majority of States. Furthermore it 'is a strong indication of *opinio iuris* in normative matters affecting the conduct of Israel in relation to the occupied territories.'¹⁷⁰

The basic legal position regarding the Fourth Geneva Convention continues to be maintained in the most recent resolutions.¹⁷¹

¹⁶² Brownlie, Goodwin-Gill *The protection afforded by international humanitarian law to the indigenous population of the West Bank and the Gaza Strip and to foreign citizens therein, with particular reference to the application of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* 26.

¹⁶³ See Harris *Cases and Materials on International Law* 58 *et seq.*

¹⁶⁴ Harris (n 163) 62.

¹⁶⁵ Harris (n 163) 60, 61.

¹⁶⁶ Brownlie, Goodwin-Gill (n 162) 29, Harris (n) 59, 61.

¹⁶⁷ ICJ Reports 1996 page 255.

¹⁶⁸ Brownlie, Goodwin-Gill (n 162) 32.

¹⁶⁹ See n 160.

¹⁷⁰ Brownlie, Goodwin-Gill (n 162).

¹⁷¹ See, for example, UN GA Res ES-10/14 (2003); UN SC Res. 904 (1994), adopted as a whole without a vote following a paragraph by paragraph vote on 18 March 1994; UN SC Res. 1322 (2000), adopted by 14-0-1 (USA) on 7 October 2000; UN SC Res. 1397 (2002), adopted by 14-0-1

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To this international consensus on the applicability of the Fourth Geneva Convention to the West Bank and the Gaza Strip has been added the opinions of a number of other intergovernmental and non-governmental organisations such as the United Nations Commission on Human Rights,¹⁷² the International Commission of Jurists,¹⁷³ Amnesty International¹⁷⁴ and the International Committee of the Red Cross.¹⁷⁵

The International Committee of the Red Cross is of particular importance because it is the impartial body that originally drafted the Four Geneva Conventions in 1949, and it is vested with a special status under articles 30 and 143 in the interpretation and supervision of the application of the Conventions and of international humanitarian law at large. Furthermore, the Committee is usually reserved in comment, normally dealing in confidence with the authorities concerned.¹⁷⁶ It is in this capacity that the Committee has consistently declared that the Fourth Geneva Convention 'is applicable *in toto*' to the West bank and Gaza, and that it is unacceptable 'that a duly ratified international treaty may be suspended at the wish of one of the parties.'¹⁷⁷

In a nutshell it can be summarised that despite Israeli insistence to the contrary, the bulk of legal and international opinion insists on the applicability of the Fourth Geneva Convention to the West Bank.

With respect to the often repeated argument that the situation in the Middle East cannot be measured by accepted standards, 'being clothed instead with the lawyers' panacea of *sui generis*', the International Commission of Jurists comments 'that this argument is a dangerous one. Acceptance of it would nullify

(Syria), in which the Security Council affirmed 'a vision of a region where two States, Israel and Palestine, live side by side within secure and recognised borders', and stressed also 'the need to respect the universally accepted norms of international humanitarian law'.

¹⁷² UN Division for Palestine Rights The Question of Observance of the Fourth Geneva Convention of 1949 in Gaza and the West Bank including Jerusalem 11-12.

¹⁷³ 'Israeli Settlements in Occupied Territories' 19 (1977) *Review of the International Commission of Jurists* 35

¹⁷⁴ Numerous reports on the issue are available at <<http://web.amnesty.org/library/eng-isr/reports>> (accessed on 10 September 2004).

¹⁷⁵ See statement by the ICRC at the Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001 available at: <<http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JRGW?OpenDocument>> (accessed on 15 September 2004).

¹⁷⁶ Kellenberger 'Speaking out or remaining silent in humanitarian work' 855 (2004) *International Review of the Red Cross* 593.

¹⁷⁷ International Committee of the Red Cross *Unsolved Problems Covered by the Fourth Geneva Convention*, 1975 Annual Report 22.

the whole concept of the laws of war or even the concept of international law in general. No war or military occupation is precisely like another. Legal rules are established in advance to be of general application.¹⁷⁸

In sum, the Israeli position is based on -as a distinguished Israeli scholar put it- 'dubious legal grounds,'¹⁷⁹ considering that the Fourth Geneva Convention does not make its applicability conditional on recognition of titles. The Four Geneva Conventions want to ensure -in various ways- that their field of application is not restricted by legal technicality. The goal of the Convention was not to respond to claims of sovereignty, but to prevent the violation of basic human rights.¹⁸⁰ The letter and the spirit of IHL in general and the Fourth Geneva Convention in particular is to protect human needs not sovereigns. Moreover, one has also to take into consideration the latest developments in international law that the traditional 'State-sovereignty oriented approach has been supplanted by a human-being oriented approach ...'¹⁸¹

By that standard, the Fourth Geneva Convention applies in full to the territories occupied by Israel since the 1967 Six-Day War during the hostilities and for a year after the general close of hostilities.¹⁸²

Overall coverage of occupation by the Hague Regulations is explained in beautifully simple language in paragraph 1 of Article 42: 'Territory is considered occupied when it is actually placed under the authority of the hostile army.' That simple sentence avoids all reference to legitimate sovereigns, to the previous legal status of the territory and so on.¹⁸³

In toto, Israel cannot credibly claim exemption from -indeed, is indisputably bound by- the requirements of the Fourth Geneva Convention and other obligations comprising the modern-day law of belligerent occupation.¹⁸⁴ The Fourth Geneva Convention, ratified by Israel in 1951, remains applicable and relevant in the current context of violence. As an occupying power, Israel is also bound by other customary rules relating to occupation, expressed in the Regulations

¹⁷⁸ International Commission of Jurists (n 173).

¹⁷⁹ Dinstein 'The International Law of Belligerent Occupation and Human Rights' 8 (1978) *Israel Yearbook on Human Rights* 107.

¹⁸⁰ Mallison, Mallison (n 107) 58.

¹⁸¹ *Tadic Case* (Prosecutor v Tadic) para 97 available in Steiner, Alston *International Human Rights in Context* 1166.

¹⁸² See Article 6 para 3 of the Fourth Geneva Convention.

¹⁸³ Von Glahn (n 123) 684.

¹⁸⁴ Falk, Weston (n 106) 136.

annexed to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907.¹⁸⁵

2. Violations of International Humanitarian Law

Having concluded that the Fourth Geneva Convention and the Hague Regulations are indeed applicable to the West Bank, the following part will discuss whether the construction of the barrier violates these norms or not.

The international law of occupation provides a wide range of safety features for the populations of occupied territories, yet it also strives to leave the occupying power with enough flexibility to maintain its dominance.¹⁸⁶ Occupier's law, as provided by the Hague and Geneva Conventions, can be summarised into four key points.¹⁸⁷

The first principle comes from Article 43 of the Hague Regulations and states that the occupant acquires only temporary authority, not sovereignty, over the occupied territory.¹⁸⁸ The occupier has only temporary and *de facto* authority, subject to various limitations, which should only be used to protect its security interests.¹⁸⁹

A second principle is that the occupying power is required to administer the territory it occupies.¹⁹⁰ The Fourth Geneva Convention imposes specific obligations including: education (Article 50), food and medical supplies (Article 55), maintenance of medical hospitals (Article 56), and relief efforts where necessary (Articles 59 to 62). The occupying power may also take measures which are necessary to protect its armed forces and preserve its military position.¹⁹¹

¹⁸⁵ See n 175.

¹⁸⁶ Takkenberg (n 46) 202.

¹⁸⁷ Greenwood 'The Administration of Occupied Territory in International Law' in Playfair *International Law and the Administration of Occupied Territories* 244.

¹⁸⁸ Article 43 reads: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall 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.'

¹⁸⁹ Greenwood (n 187) 244.

¹⁹⁰ Article 43: 'restore and ensure ... public order and safety', Greenwood (n 187) 246 points out that this passage of Article 43 is an inadequate translation of '*l'ordre et la vie public*' the term used in the French text, which is the only authentic text of the Hague Regulations. According to Greenwood, the duty to restore and ensure '*l'ordre et la vie public*' reaches far beyond the mere restoration of public order and extends to the whole social, economic and commercial life of the territory.

¹⁹¹ Greenwood (n 187) 247.

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Article 43 of the Hague Regulations and Article 64 paragraph 1 of the Fourth Geneva Convention give the third principle: 'unless absolutely prevented,' the occupying power has a duty to respect existing law. The underlying principle is that international law does not recognise the legislative competence of the occupying power, consequently, existing laws should not be changed unless absolutely required for the needs of the occupation.¹⁹²

The final key point comprises specific requirements for the occupant to provide a minimum standard of humanitarian protection for the existing population.¹⁹³ These minimum standards include *inter alia* the prohibition of collective punishment (Article 33), hostage taking (Article 34), torture (Article 32), deportation (Article 49), slave labour, (Article 51) destruction of property (Article 53), and forcing individuals to perform work assisting the military (Article 51).

After this very brief general overview of the international law of occupation, the following parts will examine the pertinent provisions in more detail.

a) The Hague Regulations of 1907

First, a distinction must be drawn between the provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation, *ie* after the general close of hostilities.

The Hague Regulations of 1907 deal in Section II with hostilities and in particular with 'means of injuring the enemy, sieges, and bombardments.' Section III deals with military authority in occupied territories. Because the armed hostilities leading to the occupation of the West Bank in 1967 ended a long time ago, only Section III of the Hague Regulations is currently applicable in the West Bank. Section III of the Hague Regulations includes Articles 43, 46, 52 and 55, which are applicable in the West Bank and the Gaza Strip. Article 43 imposes a duty on the occupant to 'take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country.' Article 46 adds that private property must be 'respected' and that it cannot 'be confiscated.' Finally, Article 52 authorises, within certain limits, requisitions in kind and services for the needs of the army of occupation.

¹⁹² Greenwood (n 187) 249.

¹⁹³ Greenwood (n 187) 250, Takkenberg (n 46) 205.

aa) Protection of Property

At least since 1899 the immunity of private property is generally acknowledged.¹⁹⁴

Property in occupied territory is accorded protection under the Hague Regulations. In the section addressing military occupation, article 46 of the Regulations explicitly affirms that, '[P]rivate property cannot be confiscated.' And article 52 states that an occupying power may not confiscate property unless it is for 'the needs of the army of occupation.' In addition, article 53 affirms that an army of occupation may only take possession of 'all movable property belonging to the state that may be used for military purposes,' while article 56 of the Regulations declares that

'[T]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.'

The construction of the barrier in the West Bank has resulted in destruction of vast amounts of property, notably private agricultural land and olive trees, fountains, citrus groves and green houses. Moreover, alone around the town of Nazlat Issa at least 125 private shops have been destroyed.¹⁹⁵ According to one source, the Israeli Defence Forces have confiscated at least 14,680 dunums¹⁹⁶ of land in order to construct the barrier. The first phase alone will result in the confiscation of over 120,000 dunums, which represent about 2 per cent of the West Bank.¹⁹⁷ The seizure of land for the building of the barrier has taken place without due process of law. Notice of seizure of land has been served in an arbitrary manner and there is, in the circumstances, no real remedy available to landowners to contest the seizure of land. The barrier has infrequent gates for the purpose of crossing. Consequently, those farmers granted permits to farm their land have difficulty in accessing their land.¹⁹⁸

From this information it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46, 52, 53 and 56 of the Hague Regulations of 1907.

¹⁹⁴ Von Glahn (n 123) 706.

¹⁹⁵ Report of the UN Secretary-General (n 92).

¹⁹⁶ One dunum = 1000 square meters.

¹⁹⁷ Palestinian Environmental NGOs Network (PENGON) *Know the Facts About the Wall* available at: <<http://www.pengon.org/wall/fact-march-2003.pdf>> (accessed on 2 September 2004).

¹⁹⁸ See Dugard (n 88) 3.

bb) Change of Status

Article 55 of the Hague Regulations forbids the occupying state from making permanent changes in the character and nature of state property, except for security needs and for the benefit of the local population. Furthermore, this article requires that the occupying state must 'safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.'

There is widespread debate over the permanency of the barrier. Much political debate in Israel has been premised on the assumption that the political impact of its construction will have a determinative impact on future Israeli-Palestinian negotiations and that the barrier will serve as a permanent boundary, particularly if Israel implements the 'unilateral disengagement' plan broached by Prime Minister Sharon. These assumptions have been aired almost daily in the Israeli media, particularly since the prime minister's speech at the Herzliyya Institute of Policy and Strategy in December 2003. In this speech, Mr. Sharon stated that the Israeli government would carry out a 'unilateral security move of disengagement' based on 'new security lines' established by a revised Israeli Defence Forces deployment and the separation barrier.¹⁹⁹

In their response to a case before the Israeli High Court, the Israeli authorities have recognised that temporary land seizure orders -which are theoretically in effect until 2005, but are renewable indefinitely- have been and may be used to establish permanent structures.²⁰⁰ These structures include settlements and roads. Invariably, this procedure creates facts on the ground which will be difficult to reverse. Once trees have been uprooted and crops destroyed and a road has been paved in their place, it would be very difficult to restore the land to its previous use.

The large scale and high cost of this project would make it even more difficult to reverse. Additionally, public comments by officials involved with the wall's construction have also indicated that they consider the barrier to be permanent.²⁰¹

¹⁹⁹ Full text of Prime Minister Sharon's speech from 18 December 2003 is available in English at: <http://news.bbc.co.uk/2/hi/middle_east/3332941.stm> (accessed on 26 October 2004).

²⁰⁰ For extensive discussion on the matter see B'Tselem *Land Grab: Israel's Settlement Policy in the West Bank* available at <www.btselem.org> (accessed on 10 September 2004).

²⁰¹ See Human Rights Watch (n 207).

Moreover, scores of demolition orders concerning houses in the area surrounding the barrier have been issued, and various homes and shops have been demolished.²⁰² Based on Israel's historical practice, it is likely that the barrier will permanently alienate land from protected persons and incorporate it into the territory of the occupying power. This alienation may be *de facto* or *de iure*. *De facto* alienation may arise in the case of private land seized for the barrier's construction. The legal tools used to take control of this land have been military orders specifying 'requisition for military needs.' These 'temporary' orders have been used extensively in the past to appropriate private Palestinian land for the construction of settlements.²⁰³

From this information it seems as if Israel is changing the status of the territories concerned and thereby violating Article 55 of the Hague Regulations.

b) Fourth Geneva Convention

Likewise in the Hague Regulations, a distinction is made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. The whole Convention is applicable from the 'outset of any conflict or occupation'²⁰⁴ and for a year 'after the general close of hostilities'.²⁰⁵ Subsequently, in accordance with Article 6 paragraph 3 of the Convention, only Articles 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143 of the Convention apply to the territory.²⁰⁶ Since the military operations leading to the occupation of the West Bank in 1967 ended some time ago, only those Articles of the Fourth Geneva

²⁰² See *supra* (n 195).

²⁰³ B'Tselem *Land Grab: Israel's Settlement Policy in the West Bank* available at <www.btselem.org> (accessed on 10 September 2004).

²⁰⁴ Article 6 para 1 of the Fourth Geneva Convention.

²⁰⁵ Article 6 para 3 of the Fourth Geneva Convention.

²⁰⁶ Article 6 of the Fourth Geneva Convention reads:

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease 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 the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

Convention referred to in Article 6 paragraph 3, remain presently applicable in the West Bank.

aa) Human Treatment of the Local Population

First and foremost, Israel is obliged under Article 27 of the Fourth Geneva Convention to treat the occupied population humanely at all times. Considering the ongoing humanitarian crisis the barrier is causing,²⁰⁷ it appears that the construction of the barrier constitutes a breach of Article 27 of the Fourth Geneva Convention.

bb) Protection of Property

Property is not only protected in the Hague Regulations but also in the Fourth Geneva Convention. With regard to the Convention, article 53 prohibits the destruction of real or personal property.

According to the official commentary of the ICRC, Article 53 must be understood in a 'very wide sense.'²⁰⁸ Therefore, the prohibition covers the destruction of all property (real or personal), whether it is the private property of protected persons (owned individually or collectively), State property, that of the public authorities (districts, municipalities, provinces, etc) or of co-operative organisations. The extension of protection to public property and to goods owned collectively, reinforces the rule already laid down in the Hague Regulations, Articles 46 and 56 according to which private property and the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences must be respected.²⁰⁹

The core of article 53 of the Convention, originating in article 23 (g) and article 46, as well as the prohibition of collective penalties in article 50 of the Hague Regulations, are nowadays considered by some authors as rules of customary

²⁰⁷ See *inter alia* the reports of the following independent and internationally recognised NGOs: Human Rights Watch *Briefing Paper, February 2004* available at: <<http://hrw.org/english/docs/2004/02/20/isrlpa7581.htm>>, Amnesty International *Israel and the Occupied Territories: An ongoing human rights crisis* available at: <<http://web.amnesty.org/pages/isr-index-eng>>, B'Tselem (n 77).

²⁰⁸ ICRC Commentary available at the website of the ICRC: <<http://www.icrc.org/IHL.nsf/WebCOMART?OpenView&Start=1&Count=150&Expand=4#4>>.

²⁰⁹ See *supra*.

international law,²¹⁰ and thus not dependent on the applicability of conventional international law.

In order to dispel any misinterpretation in regard to the scope of Article 53, it must be pointed out that 'the property referred to is not accorded general protection.'²¹¹ The scope of the provision is only concerned with the 'destruction of property situated in occupied territory.'²¹² Therefore, one could assume that the Israeli objection that the Palestinian land on which the barrier is being built is seized only 'temporary' and for 'military needs' is justified. But on the other hand one has to take into account that large areas of cultivated Palestinian land have been destroyed.²¹³ This practice of 'temporary' seizure of more Palestinian land by the Israeli army for building permanent structures continues throughout the West Bank and the Gaza Strip.²¹⁴

As long as the destruction and 'mere' seizure of land goes hand in hand it is not possible to accept the Israeli view that the 'mere' seizure of land is no breach of Article 53 of the Fourth Geneva Convention.

Other examples of the legal protection of property can be found in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).²¹⁵ Also, the Rome Statute of the International Criminal Court (ICC) has consolidated the protection of property under international law. Article 8 of the Rome Statute reaffirms that grave breaches of the 1949 Conventions are to be considered as war crimes. More specifically, article 8(2)(a)(iv) states that the grave breach of extensive destruction and appropriation of property is a war crime. And article 8(2)(b)(xiii), declares that 'Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war,' to be a serious violation 'of the laws and customs applicable in international armed conflict,' and thus a war crime. Although these norms of recent modern international law may not be applicable to the Israeli actions in the West Bank they are a strong indicator of the seriousness and illegality of the construction of the barrier in the way it is being built.

²¹⁰ Meron Human Rights and Humanitarian Norms as Customary Law 46, 47.

²¹¹ ICRC Commentary (n 208).

²¹² ICRC Commentary (n 208).

²¹³ See *supra* (n 195).

²¹⁴ Amnesty International *Israel and the Occupied Territories: The place of the fence/wall in International Law* available at <<http://web.amnesty.org/library/index/engmde150162004>> (accessed on 10 September 2004).

²¹⁵ Article 3 (b), (d), (e) ICTY.

cc) Prohibition against Transfers of Population

An occupying power is prohibited under Article 49 of the Fourth Geneva Convention from transferring members of its own population into occupied territories.²¹⁶

Israel has constructed, maintained, and expanded illegal civilian settlements in the occupied West Bank for nearly three decades. The settlements themselves violate customary as well as treaty-based international humanitarian law prohibitions against population transfer.²¹⁷ The barrier will reinforce the serious harms caused by Israel's existing network of settlements and bypass roads. According to the report of the Secretary-General, the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the territory concerned, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians.²¹⁸ The complexity of the barrier's planned route in the Jerusalem area is perhaps the most obvious example of how the barrier is being constructed in a manner to incorporate illegal settlements in the West Bank and East Jerusalem.²¹⁹

These alterations to the demographic composition of West Bank resulting from the construction of the barrier and its associated regime create a *'fait accompli'* on the ground that strengthens the position of the Israeli settlements in the West Bank instead of removing them.

Although, Israel has repeatedly stated that the barrier is only a temporary measure, the complexity and the enormous costs of the building are a clear sign of the permanent character of the barrier, thus incorporating the Israeli settlements for all time into the territory of State of Israel.²²⁰

²¹⁶ Article 49 para 1 and 6 read:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

²¹⁷ UN SC Res 446 (1979).

²¹⁸ See (n 195).

²¹⁹ Human Rights Watch (n 207).

²²⁰ See supra.

In short, the construction of the barrier, along with measures taken previously, severely violates Article 49 of the Fourth Geneva Convention.

III. International Human Rights Law

The main body of human rights law is to be found in the 1948 United Nations Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Together, these bodies of law address the most fundamental human rights.

1. Applicability of International Human Rights Law

As the UDHR is a declaration of principles and not an actual treaty, there is no provision for ratification by states.²²¹

Israel ratified both the ICCPR and ICESCR in 1991, but it contended that neither the ICCPR nor the ICESCR apply in the West Bank or the Gaza Strip,²²² despite the fact that it has ratified both treaties.

One argument against the applicability of the Covenants to the West Bank and the Gaza Strip is based on the assumption that the Covenants were directed solely to the protection of human rights in peacetime, but are therefore not applicable in armed conflict.²²³

This argument has been rejected by the International Court of Justice as well as the UN Human Rights Committee, the UN body responsible for monitoring implementation of the Covenants. In its advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court held that

²²¹ The UDHR was annexed to General Assembly Resolution 217 (III) (1948), with 48 votes in favour, none against and 8 abstentions. Despite its 'non-binding' status as a General Assembly Resolution, there has been growing acknowledgement over the past half century that it does now have some legally binding force, whether as customary International Law, or as an authoritative exposition of the UN Charter's references (which do constitute legal obligations) to human rights (see Charter, Articles 1, 55, 56, 62, 68 and 76). Under the Charter of the United Nations, a Member State is obligated to 'promote and encourage respect for human rights'.

²²² See United Nations, Concluding Observations of the Human Rights Committee: Israel 21/08/2003. CCPR/CO/78/ISR. (Concluding Observations/Comments), available at: <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?Opendocument)> (accessed on October 15 2004).

²²³ Report of the UN Secretary General (n 92), page 8.

the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency ...²²⁴

The Committee reached the same conclusion in its Concluding Observations on the periodic report submitted by Israel under the Covenant. The Committee said:

the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the state under article 2, paragraph 1, for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas ... where Israel exercises effective control ...²²⁵

The applicability of human rights norms in armed conflict is also affirmed by Article 27 of the Fourth Geneva Convention which obliges the occupying power to respect the fundamental rights of protected persons. Professor John Dugard, Special Rapporteur on the question of the violation of human rights in the occupied Arab territories referred to explains:

The 'rights of the individual' have been proclaimed, described and interpreted in international human rights instruments, particularly the international covenants on civil and political rights, and economic, social and cultural rights of 1966, and in the jurisprudence of their monitoring bodies. These human rights instruments therefore complement the Fourth Geneva Convention by defining and giving content to the rights protected in article 27. This is borne out by repeated resolutions of the General Assembly (for example, resolution 2675 (XXV)) and by the Vienna Declaration adopted by the World Conference on Human Rights in 1993, which declared that: '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.'²²⁶

²²⁴ ICJ Reports, 1996, page 240 para 25.

²²⁵ UN doc. CCPR/C/79/Add.93, 18 August 1998, available at:

<<http://www.unhcr.ch/tbs/doc.nsf/0/7ea14efe56ecd5ea8025665600391d1b?Opendocument>> (accessed on 15 October 2004).

²²⁶ Report of the Special Rapporteur of the Commission on Human Rights (John Dugard) *On the situation of human rights in the Palestinian territories occupied by Israel since 1967*, UN doc.E/CN.4/2002/32, 6 March 2002, para. 9.

Another argument, brought forward by Israel, against the applicability of international human rights law is that human rights law is concerned only with a state's treatment of its own nationals inside its borders, not its treatment of aliens.

This dogma is not compatible with modern human rights treaties. According to its Article 2 paragraph 1, the ICCPR applies to 'all individuals' within a state's 'territory and subject to its jurisdiction.' This or similar provisions can be found in most major human rights treaties,²²⁷ and these instruments establish a baseline of human rights to which all people, citizens and aliens, are entitled. This provision makes clear that both nationals and aliens are covered by the Covenant and that a state's obligation to protect human rights is not necessarily limited to its territory, but also extends to people within its jurisdiction. Furthermore, the UN Committee on Economic, Social and Cultural Rights held that the 'State party's obligations under the Covenant apply to all territories and populations under its *effective control*.'²²⁸ Moreover, the Committee states that

even in a situation of armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law...²²⁹

Since Israel has now been exercising effective control over the West Bank and the Gaza Strip for 37 years at least, it is obliged to apply them to all persons under their control, regardless of sovereignty issues.

Thus, Israel is bound by the provisions of the ICCPR, ICESCR and the UDHR.

2. Violations of particular Human Rights

The following part will be devoted to an analysis of the particular human rights violations resulting from the construction of the barrier.

²²⁷ See eg Article 1 European Convention on Human Rights.

²²⁸ UN document E/C.12/1/Add.90, paras 15 and 31 (emphasis added), available at: <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.90.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.90.En?Opendocument)> (accessed on 15 October 2004).

²²⁹ See n 228.

a) Freedom of Movement

Freedom of movement is a freedom recognised by all major international human rights instruments. Article 12 paragraph 1 of the ICCPR provides that everyone shall 'have the right to liberty of movement and freedom to choose his residence.' Similarly, the UDHR provides in its Article 13 paragraph 1 that '[e]veryone has the right to freedom of movement and residence within the borders of each State.'

Nonetheless, serious restrictions are imposed on the freedom of movement of the inhabitants of the West Bank by the erection of the barrier: the strip of land between the barrier and the Green Line, and apparently between the barrier and the municipal boundaries of Jerusalem as well, is declared a 'Closed Military Area'.²³⁰ As indicated above, a special permit system applies for persons living or farming along the Seam Zone between the barrier and the Green Line. They require permits to move between home and agricultural land.²³¹ Palestinians who live east of the barrier and own land to the west of it are also subjected to IDF-controlled checkpoints, if they want to cross the barrier.²³²

The process for obtaining permits entails repeated harassment of the residents and is based on arbitrary criteria. Permits are seldom granted for private vehicles. Palestinians have often been refused permits without being given a reason for the denial. According to an Israeli human rights organisation, these permits are often granted for limited periods only and more than once, Palestinians received a permit after intervention by human rights organisations, indicating the arbitrary manner in which Israel denies the requests.²³³

Movement from the enclaves to other areas of the West Bank and back again, is allowed only through the specially established crossing points and checkpoints.²³⁴ Establishing these checkpoints along the barrier is liable to raise further problems. According to B'Tselem, crossing checkpoints depends sometimes on the goodwill of the soldiers, who do not operate according to the rules known to the Palestinians. Soldiers have forced Palestinians to wait many hours before allowing them to cross, confiscated identity cards, car keys, and even

²³⁰ See note 97.

²³¹ See notes 97, 98 and accompanying text.

²³² See n 231.

²³³ B'Tselem (n 77) 11 and *Bureaucratic Harassment; Abuse and Maltreatment During Operational Activities in the West Bank in the First Year of the Declaration of Principles*.

²³⁴ See n 236.

vehicles. In many cases, soldiers degrade the Palestinians and have, at times, beaten them.²³⁵ This and other past experiences raise the fear that the crossing points along the barrier will be closed for prolonged periods and the passage of Palestinians may be completely prohibited.²³⁶

Moreover, the gates giving access to the 'Closed Zone' are frequently not opened at scheduled times. In general, this system is operated in an arbitrary manner. It is clear, therefore, that the state's promise to build crossing points and 'agricultural gates' along the barrier is insufficient to prevent harm to the Palestinians. Israel's policy on the movement of Palestinians makes it very uncertain whether Palestinians will indeed be allowed to cross the barrier.²³⁷

Especially, in the Jerusalem area the barrier has a disastrous impact on the local population.²³⁸ It is submitted that those living on the West Bank side of the barrier with West Bank identity documents will be denied access to work, schools, universities, hospitals and places of worship on the Israeli side of the barrier. Equally, those on the Israeli side of the barrier will be denied access or find access seriously inconvenient to their places of work, educational institutions and hospitals on the West Bank side of the barrier.²³⁹ Furthermore, it is submitted, that there is the real fear that many Palestinian families will be divided because many with Jerusalem residence documents are married to West Bank identity document-holders. Whether they will be permitted to live together in Jerusalem remains to be seen. There is also a real fear that Jerusalem identity document-holders forced to live outside the Wall, as a result of the unavailability of property within East Jerusalem, will lose their Jerusalem residence rights.²⁴⁰ Additionally, all the region's residents, numbering several hundred thousand, will be forced to pass through one large terminal at Kalandiya.²⁴¹

It is submitted that the current regime of checkpoints and permits that governs the lives of Palestinians is comparable to the notorious 'pass law' system which determined the right of Africans to move and reside in so-called white areas

²³⁵ B'Tselem (n 233).

²³⁶ Interim report on violations of international humanitarian law and human rights in the Palestinian territories occupied since 1967, submitted by John Dugard, Special Rapporteur, pursuant to Commission on Human Rights resolutions 1993/2, section A, and 2004/10, UN Document A/59/256 of 12 August 2004.

²³⁷ Human Rights Watch (n 207).

²³⁸ In this area the 'barrier' is in fact mostly a wall.

²³⁹ Amnesty International (n 207).

²⁴⁰ See *supra* n 236.

²⁴¹ See *supra* n 236.

under the Apartheid regime of South Africa.²⁴² The Special Rapporteur of the Commission on Human Rights even goes to such lengths as stating that 'by creating separate and unequal roads for settlers and Palestinians, Israel has gone beyond the scope of restraints on freedom of movement imposed by Apartheid.'²⁴³

This system of control of freedom of movement of people and goods is a source of constant humiliation and causes personal suffering and inconvenience to every Palestinian.²⁴⁴ In addition, these restrictions resulted in widespread unemployment.²⁴⁵ According to one source, these restrictions resulted also in severe disruption to education, health care services, work, trade, family and political life and are primarily responsible for the decline of the Palestinian economy.²⁴⁶

In sum, the construction of the barrier together with Israel's practice of imposing severe and frequently arbitrary restrictions on freedom of movement constitutes a violation of the right of freedom of movement embodied in the international human rights instruments mentioned above.

b) Rights to Work, Health, Education and an Adequate Standard of Living

As already indicated in the last paragraph the barrier also has an enormous impact on other human rights such as rights to work, health, education and an adequate standard of living which are all embodied in the ICESCR.

aa) Right to Work

According to the Universal Declaration of Human Rights, 'everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'²⁴⁷. The right to work includes 'the right of everyone to the opportunity to gain his living by work.'²⁴⁸

The construction of the barrier within the West Bank separates thousands of people residing near the Green Line from their sources of income. Even if the

²⁴² See *supra* n 236.

²⁴³ See *supra* n 236.

²⁴⁴ See *supra* n 236.

²⁴⁵ See *infra* n 252.

²⁴⁶ See *supra* n 236.

²⁴⁷ Article 23 UDHR.

²⁴⁸ Article 6 paragraph 1 ICESCR.

barrier does not create total isolation,²⁴⁹ it clearly reduces the ability of many residents to work and earn sufficient income to ensure a minimum standard of living. Residents of the enclaves created west of the barrier are harmed as well. Even if most of the land they own remains west of the barrier, according to one source, their ability to sell their products in the rest of the West Bank is severely curtailed.²⁵⁰ Residents of enclaves who work outside their villages may lose access to their workplaces.

Farming has always been a primary source of labour and income for Palestinians in the West Bank in general, and for those living in many of the villages, towns, and cities neighbouring the Green Line in particular.²⁵¹ The percentage of land used for agriculture in these districts is the highest in the West Bank.²⁵² With the construction of the barrier, the land with the main agricultural potential will be on the Israeli side. Thousands of Palestinians living east of the barrier will be separated from their land on the western side. Therefore, blocking tens of thousands of Palestinians from their sources of income is particularly grave considering the relative importance of this source of income and the current economic situation in the West Bank.²⁵³

The barrier, as presently constructed, harms also people who work in sectors other than farming, whose workplace lies outside their community. Most of those affected are residents who work for the Palestinian Authority in the district offices and live in outlying villages. Even if the Palestinian Authority takes their situation into account and continues to pay their salaries, as it has done in such cases since the beginning of the Al-Aqsa intifadah,²⁵⁴ their right to work, as distinct from their right to an adequate standard of living, is liable to be severely harmed.

Again, this problem is especially grave in villages near the Jerusalem envelope because, unlike in the north of the West Bank, most of the citizens are not engaged in farming and are dependent, directly or indirectly, on work in East Jerusalem.²⁵⁵

²⁴⁹ But see the harsh restrictions imposed on the freedom of movement described *supra*.

²⁵⁰ See Human Rights Watch (n 207).

²⁵¹ See World Factbook available at: <<http://www.cia.gov/cia/publications/factbook/geos/we.html>> (accessed on 18 September 2004).

²⁵² See the Palestinian Central Bureau of Statistics, *Land Use Statistics in the Palestinian Territories* available at: <www.pcbs.org> (accessed on 10 September 2004).

²⁵³ B'Tselem (n 77) 12.

²⁵⁴ See B'Tselem (n 77) 12.

²⁵⁵ See *supra*.

Thus, it is submitted, Israel is in breach of its obligation under the ICESCR to safeguard the right of the residents of the Occupied Territories to earn their living by work.²⁵⁶

bb) Right to an Adequate Standard of Living

The right to work is also instrumental to the realisation of other rights, including the right to an adequate standard of living. Article 11 of the ICESCR requires states parties to 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.' States must refrain from impeding access to the resources needed for the realisation of this right, including income-generating activities that allow individuals to maintain an adequate standard of living.²⁵⁷

The barrier will dramatically increase Palestinian impoverishment. Many Palestinians have lost their income as a result of the barrier and are now forced to rely on aid.²⁵⁸ Currently, fifty percent of the work force in the West Bank is unemployed and the percentage of the population living under the poverty line²⁵⁹ has reached fifty-eight percent.²⁶⁰ According to an independent study, the dramatic decline in income has also affected nutrition and led to a significant increase in malnutrition among Palestinian children.²⁶¹ However, the availability of charity and humanitarian assistance in the West Bank and Gaza Strip does not release Israel from its obligation to guarantee Palestinian rights to an adequate standard of living work, so that they can feed and provide for themselves and their families with dignity.

cc) Right to Health

²⁵⁶ Article 6 Paragraph 1 ICESCR.

²⁵⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 12 (E/C.12/1999/5).

²⁵⁸ UNRWA: Emergency appeal of 12 December 2003 and Special Report on the West Bank Barrier available at: <www.un.org/unrwa/emergency/barrier> (accessed on 10 August 2004).

²⁵⁹ *I.e.*, the people who live on less than two dollars a day per person

²⁶⁰ Office of the United Nations Special Coordinator in the Occupied Territories (UNSCO) *The Impact of Closure and Other Mobility Restriction on Palestinian Productive Activities* available at: <<http://www.arts.mcgill.ca/mepp/unsco/unfront.html>> (accessed on 10 September 2004).

²⁶¹ John Hopkins University et al *The Nutritional Assessment of the West Bank and Gaza Strip* available at: <http://www.usaid.gov/wbg/reports/Nutritional_Assessment.pdf> (accessed on 15 September 2004).

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Article 12 paragraph 1 of the ICESCR states that '[t]he States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'²⁶² Also, under customary international law, Israel has a positive obligation to ensure the welfare of residents of the West Bank.²⁶³

The barrier is liable to harm, to one degree or another, the right to health of residents in nearby communities. But the residents most likely to be affected are those living in enclaves west of the barrier. However, the right to health of many residents of villages on the eastern side of the barrier who depend on services from one of the main cities which will be isolated from the rest of the West Bank (Tulkarm, Qalqiliya, and East Jerusalem) will also be affected.²⁶⁴

Particularly problematic is the anticipated decline in the level of health services provided to the residents. Nine of the villages that will become enclaves west of the barrier do not have a medical clinic. Other communities provide basic and preventive medical care, but rely on the medical services available in hospitals in the isolated cities.²⁶⁵

Thus, by further reducing access to health care, the construction of the barrier underscores Israel's failure to meet its obligations in this regard. This failure led the International Committee of the Red Cross in November 2003 to end large-scale emergency relief distributions in the West Bank. 'Humanitarian aid is no longer the best way to help,' the ICRC said. 'It is essential that the West Bank Palestinians' basic rights under international law are respected.'²⁶⁶

²⁶² See also Article 56 of the Fourth Geneva Convention which provides that '[T]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.' Although this Article is not applicable to the current conflict due to Article 6 of the Fourth Geneva Convention (see *supra* n 206), it is an indicator of Israeli obligations.

²⁶³ Article 43 of the 1907 Hague Regulations which has evolved into international customary law. See Meron (n 210) and Dinstein 'The Israeli Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations' 25 (1995) *Israel Yearbook on Human Rights* 8.

²⁶⁴ B'Tselem (n 77) 13.

²⁶⁵ The information is based on the 'Map of Health Services' of the Palestinian Ministry of Health available at <<http://www.healthinform.org>> (accessed on 9 September 2004).

²⁶⁶ ICRC *New Strategy for the West Bank* The UN World Food Programme subsequently undertook some food distribution activities in the wake of the ICRC's termination of its large-scale emergency relief program. For previous ICRC activities in the occupied territories see ICRC *Israel and the Occupied/Autonomous Territories: Overview of Humanitarian Activities 2003* available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList325/8B829E119CD5E20041256CA2003F5720>> (accessed on 13 August 2004).

dd) Right to Education

The right of everyone to education is defined by international law in the following terms: '...education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.'²⁶⁷ Furthermore, Article 28 of the International Covenant of the Rights of the Child, which Israel is a party to, provides:

State Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, ... (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates ...

The barrier will have a very negative effect on education. The difficulties in moving from one place to another that will result from the barrier will make it dramatically complicated for Palestinian pupils and teachers to access their schools. In Tulkarm alone, 650 teachers out of 1,964 face difficulty reaching their classes when travelling.²⁶⁸ In addition, the restrictions on movement affect the students at the colleges and universities in East Jerusalem, Qalqiliya, and Tulkarm, which serve the entire region. In consequence, it is submitted, the construction of the barrier is also a harsh infringement of the right to education.

²⁶⁷ Article 13 ICESCR. The UDHR also acknowledges this right in Article 26: Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Parents have a prior right to choose the kind of education that shall be given to their children. Additionally Article 50 para 4 of the Fourth Geneva Convention states that '[t]he Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.'

²⁶⁸ World Bank The Impact of the West Bank Separation Barrier on Affected West Bank Communities 39.

c) Property Rights

The violation of property rights has been described extensively *supra*.²⁶⁹ Under international human rights law private property is additionally protected by Article 17 UDHR.²⁷⁰

IV. Self Defence against Armed Attacks

To sum up, by constructing the barrier on its current route, Israel, it is submitted, is in breach of the following provisions of international humanitarian law and international human rights law: Articles 46, 52, 53, 55 and 56 of the 1907 Hague Regulations, Articles 27, 49, 53 of the Fourth Geneva Convention, Articles 6, 11, 12 and 13 of the ICESCR and Article 12 ICCPR (see *supra*).

But international law does not provide absolute protection for all human rights and humanitarian guarantees. There are circumstances in which infringement of certain human rights is lawful and where the derogation from the *ius in bello* may be permitted. Therefore, at this point, the question still arises whether the construction of the barrier is justified under international law or not.

1. International Humanitarian Law

A rule of the *ius in bello* cannot be derogated from by invoking military necessity 'unless this possibility is explicitly provided for by the rule in question.'²⁷¹

Some of the applicable humanitarian provisions contain such limitation clauses allowing the occupying power to restrict the right concerned.

No clause of this kind is contained in the applicable articles of the Hague Regulations. Only Article 23 (g) provides that the destruction or seizure of an enemy's property is 'especially forbidden', unless 'imperatively demanded by the necessities of war.'

Similar provisions can be found in Article 27 paragraph 4,²⁷² Article 53²⁷³ and Article 49 paragraph 5²⁷⁴ of the Fourth Geneva Convention.

²⁶⁹ See *supra* text accompanying notes 194 *et seq.*

²⁷⁰ Article 17 UDHR reads: 'Everyone has the right to own property alone as well as in association with others.'

²⁷¹ See n 275.

²⁷² 'However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be *necessary as a result of the war.*' (emphasis added).

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Military necessity means the absolute requirement for measures essential to attain the goals of war, which measures have to be lawful in accordance with the laws and customs of war.²⁷⁵ The ICRC's official Commentary on the Fourth Geneva Convention warns that 'unscrupulous recourse to the clause concerning military necessity would allow the occupying power to circumvent the prohibition set forth in the convention.'²⁷⁶ One of the most highly qualified publicists in the field of international law has stated that as the state making a claim of military necessity was regarded as the judge of the situation, 'necessity merely appeared as the window dressing of *raison d'etat*.'²⁷⁷ Therefore, such reservations must be interpreted in a reasonable manner and occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done.²⁷⁸

Under these prerequisites, the construction of the barrier must be examined.

Israel has always claimed that the barrier is designed entirely as a security measure with no intention to alter political boundaries. Furthermore, Israeli authorities have argued that the barrier is vital to prevent suicide bombings and other attacks against civilians in Israel. From the available information it seems that these assertions are not supported by the facts.

The infringement of international humanitarian law is not justified if other courses of action are available to achieve the same objective without causing such infringement. This principle is firmly enshrined in International law, which deals with war and occupation,²⁷⁹ and in decisions of Israel's Supreme Court.²⁸⁰

An examination of the facts indicates that there are at least two means that are suitable alternatives to the barrier. Israel did not investigate the efficacy of

²⁷³ '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, is prohibited, except where such destruction is rendered *absolutely necessary by military operations*.' (emphasis added).

²⁷⁴ 'The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or *imperative military reasons so demand*.' (emphasis added).

²⁷⁵ ICRC Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949 Martinus Nijhoff Publishers, Geneva, 1987, 393.

²⁷⁶ ICRC Commentary to the Fourth Geneva Convention available at: <<http://www.icrc.org/ihl.nsf/b466ed681ddfcd241256739003e6368/a13817cda3424c3cc12563cd0042c6e6?OpenDocument>> (accessed on 12 September 2004).

²⁷⁷ Brownlie International Law and the Use of Force by States 48

²⁷⁸ See *supra* n 276.

²⁷⁹ See eg Article 57 para 3 of the First Additional Protocol to the Geneva Conventions of 1977.

²⁸⁰ See eg HCJ 6055/95, Sagy Tsemach et al. v. Minister of Defense et al., Piskei Din 53 (5) 241.

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these options, even though they would result in less extensive violations of international norms than those caused by the erection of the barrier.

First, it would be possible for Israel to improve the efficacy of the checkpoints along the Green Line. Numerous checkpoints existed along the Green Line, through which entry into Israel was possible before the barrier was constructed. The decision to erect a barrier separating Israel from the West Bank to prevent attacks within Israel is based on the assumption that the perpetrators of the attacks enter Israel through the open areas between the checkpoints and not through the checkpoints, which ostensibly check the people who cross into Israel. An Israeli investigation pointed out 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 careless checks.²⁸¹ According to the investigation, the checkpoints in the seam area are not organised properly to check vehicles, freight, and people, and there is an urgent need to improve inspections at checkpoints by having permanent and skilled personnel check vehicles, using technological means, and institutionalising the crossing points.²⁸² Furthermore, the erection of the barrier will increase the number of checkpoints between Israel and the West Bank. Thus, a paradoxical situation will arise in which the barrier will increase the danger of attacks within Israel, if the state does not improve the effectiveness of the checkpoints.

Thus, improving the effectiveness of the checkpoints would be one less intrusive and less restrictive alternative to address the well reasoned security needs of Israeli civilians.

A second option to prevent Palestinians from crossing from the West Bank into Israel would be an intensification of the IDF presence in unpopulated territories. This option must include a substantial presence of security forces, patrols, observation points, and close coordination between IDF and Police forces. However, Israel decided to implement a new concept in the seam area which affected the ability to guard the seam area. Among these effects were the significant reduction in activity to prevent Palestinians from crossing from the West Bank into Israel due to a shortage of soldiers in the unpopulated territories along the seam area; and a decline in coordination and cooperation between IDF forces

²⁸¹ State Comptroller Audit Report on the Seam Area 35.

²⁸² State Comptroller (n 281) 36.

and the Israel Police Force.²⁸³ Furthermore, at the time that the investigation was conducted, observation posts had not been set up to cover a great part of the seam area and the IDF lacked technological means to locate infiltrators. IDF patrols in the seam area did not reach relevant points within a short span of time; communication between the IDF and the Israel Police Force was limited, which prevented efficient use of the forces.²⁸⁴

However, the failure of this new concept does not release Israel from its legal duty to implement optional means before adopting a means that will lead to especially grave violations of international law as the barrier does.

These options indicate only some means that jointly could provide a proper response to the entry of Palestinians into Israel through the open areas. These means are all less harmful to the Palestinian Population than the creation of the barrier. Therefore, it is submitted, that Israel violates its duty to rely on all other courses of action available to achieve the same objective without causing such infringement.

But even if one is willing to accept Israel's assertion that the construction of the barrier is the only way to guarantee its security needs, the construction of the barrier on its current route is still very questionable. Most of the barrier is built in Palestinian territory. From the information available, it seems that there is no security need to create a barrier which deviates from the Green Line.

Where the barrier goes through Palestinian territory it winds around villages, separating villages and people from agricultural land. It is stated that in all likelihood, the barrier has been built in this way in order to put agricultural land out of the reach of farmers - and within the reach of settlements next to these lands.²⁸⁵ According to Dugard, enclaves within the Closed Zone between the Green Line and the barrier cannot be explained in terms of security. It is much more likely that enclaves of this kind have been created as a measure to isolate villages so that their inhabitants will ultimately withdraw to the eastern side of the barrier, leaving more vacant land to Israel.²⁸⁶

²⁸³ B'Tselem (n 77) 22.

²⁸⁴ B'Tselem (n 77) 21-22.

²⁸⁵ See reports by Amnesty International (n 207) and Human Rights Watch (n 207).

²⁸⁶ Dugard (n 236).

From the information available, it seems as if security could just as easily and probably more effectively, have been achieved by building the barrier to the west along the Green Line.

Israel claims that the purpose of the barrier is to prevent Palestinian suicide bombers from crossing into Israel.²⁸⁷ So that the question arises, why Israel is unconcerned about the security risk posed by the thousands of Palestinians who are situated in villages on the Israeli side of the barrier (between the Green Line and the barrier)?²⁸⁸ According to the Special Rapporteur of the UN Commission on Human Rights, it seems likely that the final aim is to compel the residents of this area to relocate to the West Bank side of the barrier.²⁸⁹ These assumptions make it very difficult for Israel to persuade the international community that the latter is confronted with a good faith attempt to provide security for its people rather than forcible territorial expansion.²⁹⁰

Thus, it is submitted, the infringement of international humanitarian law is not justified by means of military necessity.

2. International Human Rights

As far as human rights are concerned, both the ICCPR and the ICESCR contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. There is no clause of this kind in Article 6, 11, 12 or 13 of the ICESCR but Article 4 contains the following general provision:

The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Similarly, Article 12 paragraph 3 of the ICCPR provides that the liberty of movement as guaranteed under that Article

shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or

²⁸⁷ See the Israeli Ministry of Defence (n 79).

²⁸⁸ Dugard (n 236).

²⁸⁹ Dugard (n 236).

²⁹⁰ See *supra*.

morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.

Such restrictions must be necessary, proportionate, provided by law and consistent with the respect for other internationally guaranteed human rights. Notably, the UN Human Rights Committee, the body responsible for monitoring the implementation of states' obligations under the ICCPR, has clarified that:

The permissible limitations which may be imposed on the right protected under article 12 must not nullify the principle of liberty of movement ... It is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, ... if an individual were prevented from travelling internally without a specific permit.²⁹¹

Furthermore, the UN Human Rights Committee stated that 'any limits on freedom of movement cannot reverse the relation between right and restriction, between norm and exception.'²⁹²

The barrier embodies long-term and severe restrictions on the aforementioned human rights. These restrictions cause disproportionate harm to the lives of tens of thousands of Palestinian civilians. It effectively makes more than a hundred thousand men, women, and children live in enclaves. It will institutionalise, and threatens to make permanent, a discriminatory system in which all movement of large numbers of people is sharply curtailed except for a handful of permit-holders. The scope and duration of such restrictions endanger Palestinians' access to basic services like education and medical care, and in many cases to land, jobs, and other means of livelihood. As shown above,²⁹³ the Israeli government has failed to demonstrate that it could not adopt less intrusive and less restrictive alternatives to address the security of civilians, including a barrier contiguous with the Green Line.

²⁹¹ UN Human Rights Committee General Comment 27 of 2 November 1999 (CCPR/C/21/Rev.1/Add.9).

²⁹² UN Human Rights Committee (n 291).

²⁹³ See *supra* n 281 *et seq* and accompanying text.

In summary, the creation of a humanitarian crisis by restrictions on the mobility of goods and people, the inhuman treatment of civilians, the widespread destruction of property and territorial expansion cannot, it is submitted be justified as a proportionate response to the violence and threats of violence to which Israel is subjected. The barrier cannot, it is submitted, be justified by military exigencies or by the requirements of national security or public order (*ordre public*) as stipulated in the qualification clauses in the relevant human rights Covenants.

Accordingly, the construction of the barrier along its current route results in grave violations of human rights, affecting both civil and socio-economic rights.

V. General International Law

1. Prohibition of the Acquisition of Territory by Forcible Means

The barrier does not follow the 1949 Armistice Line. Instead, it follows a route that incorporates substantial parts of Palestine within Israel. At present the barrier intrudes up to eight kilometres into Palestine, but there are proposals to penetrate still deeper into Palestinian territory in order to include several settlements.²⁹⁴ The barrier thereby creates facts that may not be an act of annexation in a strict legal sense. Nonetheless, the situation created still has the same effect as annexation. In other words, the construction of the barrier constitutes *de facto* annexation.

However, under modern international law it is clear that annexation or the acquisition of territory by the use of force is illegal. Article 2 (4) of the UN Charter reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This paramount provision of international law on the prevention of war, which is also called the 'heart of the United Nations Charter',²⁹⁵ shows that peace should govern international relations and that territorial integrity is especially protected.

²⁹⁴ See *supra* n 91 and accompanying text.

²⁹⁵ Henkin 'The Reports of the Death of Article 2(4) are Greatly Exaggerated' 65 (1971) *American Journal of International Law* 544.

Furthermore, the 1970 Declaration on Principles of international law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations²⁹⁶ declares that

the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.²⁹⁷

This prohibition is also confirmed by the Oslo Accords, which provide that the status of the West Bank and Gaza shall not be changed pending the outcome of the permanent status negotiations.²⁹⁸

Israel's claim that the barrier is designed entirely as a security measure with no intention to alter political boundaries does not eliminate the illegality of the barrier due to the fact that the prohibition on the acquisition of legal title to territory by force applies irrespective of whether the territory is acquired as a result of an act of aggression or in self-defence.²⁹⁹

Therefore, from my point of view, the construction of the barrier on its current route violates the prohibition on the acquisition of territory by forcible means contained in Article 2 (4) of the United Nations Charter and General Assembly resolution 2625 (XXV) of 24 October 1970 on the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations because the construction of the barrier has the same effect as annexation.

2. Self-determination

Whether self-determination is a right in international law and if so what its scope and character is, has been the subject of discussion for a long period of time.³⁰⁰ But today it is widely accepted that self-determination is a recognised right in

²⁹⁶ GA Resolution 2625 (XXV) of 24 October 1970.

²⁹⁷ See also Article 5 (3) of the Consensus Definition of Aggression adopted in 1974 by the UN GA. Similarly, by Article 52 of the 1969 Vienna Convention on the Law of Treaties, a treaty providing for the transfer of territory may be void for duress.

²⁹⁸ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, chap. 5, art. XXXI, para. 7.

²⁹⁹ Shaw *International Law* 423; Mallison, Mallison (n 107) 259.

³⁰⁰ Sureda *The evolution of the right of self-determination* 26, 27.

international law.³⁰¹ Some scholars go so far as to classify the right of self-determination as *ius cogens*.³⁰²

It nowadays well established that the Palestinian People is one of the bearers of the right to self-determination.³⁰³ Besides, the right to self-determination is closely linked to the notion of territorial sovereignty.³⁰⁴

A people can only exercise the right of self-determination within a territory. The confiscation of Palestinian territory by the barrier interferes with the right of self-determination of the Palestinian people as it substantially reduces the size of the self-determination unit within which that right is to be exercised.³⁰⁵

Accordingly, it is submitted that the construction of the barrier violates two of the most fundamental principles of contemporary international law: the prohibition on the forcible acquisition of territory and the right to self-determination.

³⁰¹ Common Article 1 of the ICCPR and ICESCR; Doehring 'Self-Determination' in Simma (ed) *The Charter of the United Nations* Mn 1; Castellino *International Law and Self-Determination* 42; Cassese *Self-Determination of Peoples* 2.

³⁰² Doehring *Voelkerrecht* 338 and n 301 Mn 57.

³⁰³ Cassese 'The Israeli-PLO Agreement and Self-Determination' 4 (1993) *European Journal of International Law* 564;

³⁰⁴ Thürer 'Self-Determination' in Bernhardt (n 12) Volume IV 367.

³⁰⁵ Ipsen *Völkerrecht* 436; Shaw (n 145) 231.

Conclusion

International law is challenged by the construction of the barrier in the West Bank. The situation has not been adequately anticipated in modern international law treaties, even though it can be persuasively assessed from a perspective that relies upon relevant international law principles and rules.

However, in this paper we have seen that, by building the barrier, the Government of Israel pursues a strategy that challenges severely the humanitarian provisions of the Hague Regulations of 1907 (Articles 46, 52, 53, 56) and the Fourth Geneva Convention (Articles 27, 49, 53), the human rights provisions of the increasingly authoritative 'International Bill of Human Rights', comprising the ICCPR (Article 12) and the ICESCR (Articles 6, 12, 13), each of which assures humane treatment of peoples.

Additionally, as far as general international law is concerned, it is submitted that Israel has violated the prohibition on the forcible acquisition of territory and the right to self-determination of the Palestinian people.

Each of these established sources of international law thus provides authoritative guidance for the options expressed here, and the status of this guidance is underwritten by an overwhelming consensus of governments, manifest in a stream of formal pronouncements from diverse organs of international authority, as well as by the weight of impartial expert commentary.

But the fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. Therefore, no one doubts the right, and indeed responsibility and duty, of the Israeli government to protect its citizens from attacks. But the measures taken must nonetheless be in conformity with international law. By building a barrier departing from the Green Line, Israel has gone far beyond anti-terrorist measures. Hence the construction of the barrier is not justified in terms of international law by the principle of self defence.

In order to achieve a just and durable peace in the Middle East, which is of paramount importance not only for Israelis and Palestinians but also for the international community, it is of fundamental importance to revive the Mideast Peace Process developed by the United States, Russia, the UN, and the European Union. But Israel's construction of the barrier cannot be viewed as a 'good-faith

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attempt³⁰⁶ to enter into successful negotiations. The placement of a barrier departing from the Armistice Line of 1949 is a serious obstacle to negotiations for a lasting peace and security between Israel and the Palestinian leadership. While Israel emphatically maintains that the barrier is temporary, the expense, effort, and placement of the barrier imply that it is a more permanent solution.

If the spirit and the letter of modern international law, international humanitarian law and international human rights law are to be applied in any meaningful way, the international community must see to their immediate enforcement in the West Bank.

We feel that the Arabs and Jews are cousins in race, having suffered similar oppression at the hands of powers stronger than themselves, and by a happy coincidence have been able to take the first step towards the attainment of their national ideals together.³⁰⁷

³⁰⁶ See n 4 page 15.

³⁰⁷ From an exchange of letters between Emir Feisal, chief delegate of the Arabs to the Paris Peace Conference of 1919, and the American Zionist leader Felix Frankfurter. Quotation from Feisal's letter of March 3, 1919.

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