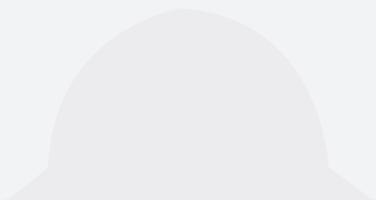


**The Separation Wall and
international law**



2008

Civic Coalition for Defending the Palestinians' Rights in Jerusalem
(CCDPRJ)

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Introduction

This study holds that the Separation Wall that Israel has been constructing inside the West Bank since mid 2002 is one of the most serious violations of international law perpetrated by Israel as an Occupying Power. The Wall has negatively impacted various aspects of Palestinian life including education, employment, health and residency among others, and is a violation of Palestinians' right to self-determination. The Wall is being used by the Israeli authorities as a tool to annex Palestinian land and change the geographic and demographic realities in the occupied territories as well as in Israel. In so doing, the Wall is destroying Palestinian private property and means of survival through agriculture, as well as damaging the natural environment and denying Palestinians the protection afforded them under international humanitarian law as protected persons under occupation.

The Separation Wall has led to or directly caused the following damage in the occupied territories:

- The destruction of the Palestinian agricultural sector through the destruction of thousands of dunums of arable land by Israeli authorities for the construction of the Wall. To date, the construction has led to the uprooting of 100,000 olive trees, the confiscation of 165,000 dunums of land, the razing of 230,000 dunums of land, and the isolation of 238,350 dunums of land. The Wall has also separated farmers from their land in 71 different villages, depriving thousands of Palestinians of their regular income. The destruction of land is prohibited by the Fourth Geneva Convention of 1949.
- Palestinian cities and populations have been suffocated and besieged hindering development, growth and expansion of Palestinian

demography. Israel has appropriated the most important sources of Palestinian water located in the occupied territories through land confiscation or declaration of certain land as military zones. These closures and confiscations have led to Israel's control of the western aquifer which is one of the most important underground sources in the West Bank. Palestinians have also lost 40 water wells to the Israelis.

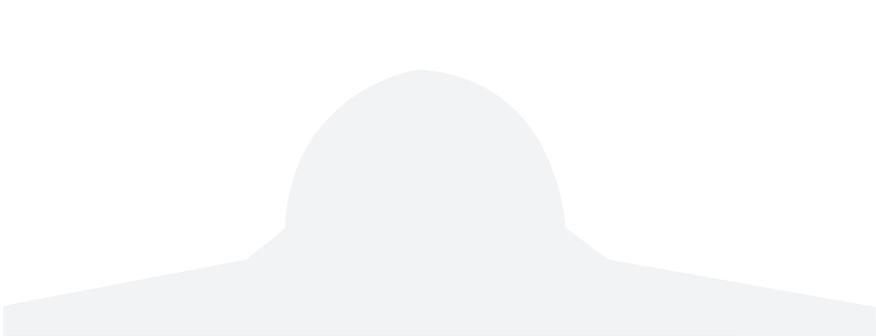
- Hundreds of Palestinian families have been transferred and displaced from their homes to other locations in the occupied Palestinian territories (oPt) as a result of the Wall, causing either a loss of income sources, or an increase in restriction on movement, monitored and implemented by the Israeli authorities.
- In addition to direct and declared land confiscation for the construction of the Wall, Israeli authorities are also using the Wall as a tool for the appropriation of land. Palestinians have been deprived thousands of dunums of land with the construction of the Wall. Their access to their land is prevented or restricted by Israeli authorities for alleged security measures. The appropriation of land by the occupying power is prohibited under international humanitarian law. Israeli appropriation of land within the territories it occupies contravenes its obligations under Geneva Convention IV. Article 47 of the Convention states that "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any annexation by the [Occupying Power] of the whole or part of the occupied territory." Israel as the Occupying Power is prohibited from changing the laws or borders within the territory it is occupying.
- The Wall and its accompanying checkpoints have severely restricted the freedom of movement of Palestinians. Those with Israeli IDs cannot cross into many areas 'outside' the Wall, and the vast majority of Palestinians with West Bank ID cannot cross into occupied Jerusalem. The right to liberty of movement is recognized under Article 12(1) of the International Covenant on Civil and Political Rights, which states that "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence". Article 12(4)

states that “no one shall be arbitrarily deprived of the right to enter his own country”.

- The Wall also affects Palestinians’ rights to work, health and education., all recognized by the International Covenant on Economic, Social and Cultural Rights under Articles 6, 12 and 13 respectively. For example, the Wall has negatively affected 170,000 students in 320 schools and has denied an estimated 220,000 residents in 30 locations their access to health centers and obtain medical services. Teachers in schools also have difficulty in getting to and from their schools, which also impacts the education on their students.
- The Wall has caused the dispersal and separation of many family members. The Wall and Israeli policies on residency in Jerusalem and on family reunification have together led to the disintegration of many families, where children are denied their right to know and be cared for by their parents, enshrined in the Convention on the Rights of the Child under Article 7. Further, the family is recognized as “the natural and fundamental group unit of society and is entitled to protection by society and the state”¹.
- The Wall has caused extensive damage to the Palestinian environment, razing fertile land and destroying the habitats of animals and plants, as well as contributing to the deterioration of water supplies. A recognized component of customary international humanitarian law is the protection and preservation of the natural environment².

1 International Covenant on Civil and Political Rights, Article 23. Similar language is also used in the International Covenant on Economic, Social and Cultural Rights, under Article 10, which provides for “the widest possible protection and assistance” to be given to the family.

2 See Rules 43 through 45 of J.-M. Henckaerts, “Study on customary international humanitarian law”, International Review of the Red Cross, Volume 87, Number 857, March 2005.



1- Overview of the Separation Wall under international law

The successive Israeli governments have justified Palestinian land confiscation and appropriation to construct the Separation Wall by stating security requirements and urgent military needs in order to ensure the security and safety of its citizens against attacks perpetrated by residents of the occupied Palestinian territories (OPT). Regardless of this justification, the Separation Wall is considered illegal under international humanitarian law, and its effects on the population of the OPT constitute various violations of international human rights law.

International Humanitarian Law:

Article 47 of 1949 4th Geneva Convention prohibits the annexation of land. Israel as a State Party to the Geneva Conventions is obligated to uphold and respect the provisions of the Geneva Conventions, including the Section III of Part III of the 4th Geneva Convention, relating to occupied territories. Other agreements that Israel is bound by under treaty based international law relating to armed conflict are the Second Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

In addition to treaty based humanitarian law, there are a recognized set of rules that fall under customary international law. These apply to all States during times of armed conflict, including occupation of territories. There are some provisions of international humanitarian law, therefore, that although Israel might not have signed on to under treaty based law, it is still obligated to uphold and respect to the extent they may also fall under customary law. This is because of the extent to which the rules included in customary international law are recognized by States internationally as applicable in times of armed conflict. This includes for example, Article 75 of the Protocol

Additional to the Geneva Conventions and related to the protection of victims of armed conflicts of 1977 (Protocol 1), and other provisions set out by the International Committee of the Red Cross.

In this regard, we can sum up the violations by the occupying power, Israel, of its obligations under international humanitarian law through its constriction of the Separation Wall as follows:

- A clear violation of article 53 of the 4th Geneva Convention resulting from the unjustified and large scale demolition and destruction of Palestinian private and public property to construct the Wall.
- A violation of article 49 of the 4th Geneva Convention³ resulting from forced collective or individual transfer of Palestinians from their places of residence that have been isolated by the Wall to other locations inside the occupied Palestinian territories, without provision of adequate accommodation for those displaced.⁴
- A clear violation of article 47 of the 4th Geneva Convention, which prohibits “any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory” that would in any way deprive protected persons in occupied territories their protection under the Convention.
- The protection and preservation of the natural environment during times of armed conflict, recognized by the ICRC as constituting customary international humanitarian law⁵.
- A clear violation of the text and content of article 23 of the Laha agreement that banned the destruction or seizure of the enemy’s properties except where such destruction or seizure is rendered absolutely necessary by military operations

3 Article 53 stipulates that “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.»

4 Article 49 of the 4th Geneva Convention permits the “total or partial evacuation of a given area if the security of the population or imperative military reasons so demand”, however the occupying power has the duty to “ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.”

5 See Rules 43 through 45 of J.-M. Henckaerts, “Study on customary international humanitarian law”, International Review of the Red Cross, Volume 87, Number 857, March 2005.

- A clear violation of the text and content of article 46 of the Lahia agreement that frankly and absolutely banned the confiscation of private property.
- Violation of the provision of article 47 of the Lahia agreement that frankly and absolutely banned the stealing by the occupying power of properties, resources and project in the OT.
- Violation of the provision of article 55 of the Lahia agreement resulting from transgression of the occupying power to the code of benefit in relation to public properties.

International Human Rights Law:

The Separation Wall has violated the right of Palestinians to self-determination, enshrined under Article 1 of the International Covenant on Civil and Political Rights (ICCPR). Under Article 1, by virtue of the right to self-determination, all peoples “freely determine their political status and freely pursue their economic, social and cultural development” and may “for their own ends, freely dispose of their natural wealth and resources”. The Article further states clearly and unconditionally that “in no case may person be deprived of its own means of subsistence”⁶. Self-determination is also recognized within Chapter 1 on the purposes of the United Nations, which includes “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”⁷.

In addition to self-determination, the destruction of Palestinian’s means of revenue (destroying their land used for agriculture) is a violation of the right to an adequate standard of living and the right to work⁸, “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”.

6 1966 International Covenant on Civil and Political Rights, Article 1. See also Article 1 of the 1966 International Covenant on Economic, Social and Cultural Rights. Both are ratified by Israel.

7 Charter of the United Nations, Chapter 1, Article 1(2). Signed on 26 June 1945 in San Francisco, United States of America. Available at <http://www.un.org/aboutun/charter/chapter1.htm>

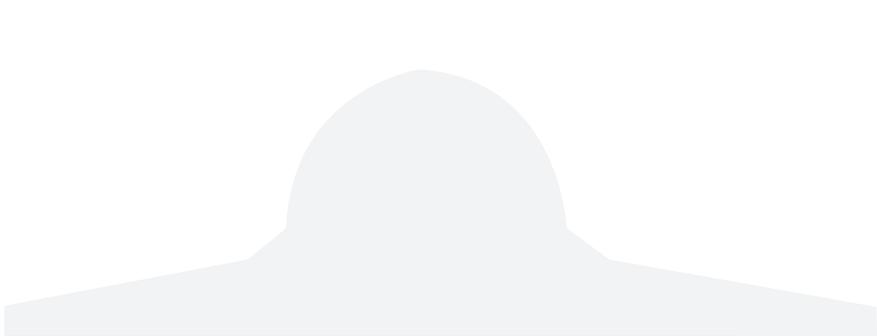
8 1966 International Covenant on Economic, Social and Cultural Rights, Article 6.

The Separation Wall also restricts the right to liberty of movement of Palestinians, which is enshrined in Article 12 of the ICCPR, along with the right to freedom to choose residence⁹. The destruction of land and property (including homes) as a result of the construction of the Wall constitute violations of the right to respect of privacy, family, home and correspondence and protection of honour and reputation¹⁰; and the right to an adequate standard of living, which includes adequate housing and the continuous improvement of living conditions¹¹.

⁹ 1966 International Covenant on Civil and Political Rights, Article 12.

¹⁰ Ibid, Article 17.

¹¹ 1966 International Covenant on Economic, Social and Cultural Rights, Article 11.



2- The legal framework applicable to Israeli construction of the Wall

The rules and regulations related to military occupation¹² obligate the occupying power to avoid actions related to the unjustified confiscation, destruction and damage of private property, to avoid the transfer and displacement of the residents of the occupied territory outside the location of their residences, and prohibit the transfer of populations of the occupying power to occupied lands. Within the Fourth Geneva Convention of 1949, Article 47 prohibits changes into the institutions or government of occupied territories or the annexation of land. Article 47 is not qualified and cannot be derogated from under any circumstances. In other words, no justification on the part of Israel would validate any annexation of land or change within the government or institutions that would deprive Palestinians of their protection under Article 47 of the Fourth Geneva Convention. Other provisions, such as the destruction of property, do provide for some derogation depending on the circumstance. Article 53 prohibits “any destruction by the Occupying Power of real or personal property”, “except where such destruction is rendered absolutely necessary by military operations”. In its advisory opinion on the Wall, the International Court of Justice (ICJ) outlined the requirements for derogation of Article 53 of the Fourth Geneva Convention. After considering the facts submitted to it, the ICJ was “not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely

¹² The principal norms of international humanitarian law dealing with occupation stem from Section III of Part III of the 4th Geneva Convention of 1949, and customary international law. The latter has been compiled and documented in a study by the International Committee of the Red Cross, entitled *Customary International Humanitarian Law*, and edited by Jean-Marie Henckaerts and Louise Doswald-Beck. A summary can be found online at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0860?opendocument> .

necessary by military operations”.¹³

Further, the Fourth Geneva Convention has specified a number of acts and behavior that if perpetrated by the occupying power, can be deemed as grave breaches of the convention (and therefore international humanitarian law). Article 147 of the Convention stipulates that “grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” (emphasis added). It has been shown that the International Court of Justice did not, in its Advisory Opinion on the Wall, believe the destruction or property for the construction of the Wall to be justified by military necessity. The destruction of public and private Palestinian property by Israel for the construction of the Wall thus constitutes a grave breach of the Fourth Geneva Convention, as defined under Article 147 of the convention.

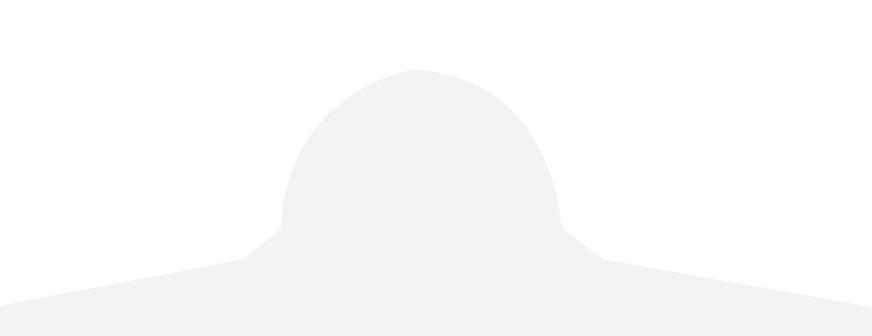
The Court also addressed Israel’s right and duty “to respond in order to protect the life of its citizens”, however emphasized that the measures taken in this regard are bound to conform to international law applicable to Israel¹⁴.

It should also be mentioned here that the member states have not referred to the 1st protocol of the Geneva Convention but were sufficed with article 85 to describe the Israeli actions as grave violations.

As a matter of fact, Israeli measures associated with the wall construction which are not justified by military necessity, fall within the category of war crimes which according to the principles and rules of international law require accountability and punishment of those who ordered the perpetration of these crimes, the perpetrators themselves, the inciters and the planners of these schemes.

¹³ For more details, please refer to the ICJ Advisory Opinion of July 2004, in particular to paragraph 122 on. For the security alibis, please refer to paragraphs 137 and 138. Available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>

¹⁴ ICJ Advisory Opinion, para 141.



3- Legal mechanisms for confronting the Wall

The ICJ advisory opinion issued on 9 July 2004 on the legal implications of the Wall by Israel on occupied Palestinian lands¹⁵ is a legal achievement in favor of Palestinians and their rights under international law. The Advisory Opinion sets a precedent for the international judiciary with regards to the Palestinian cause and the rights of the Palestinian people living under occupation.

The most important issues indicated in the Advisory Opinion can be summed up in the following legal principles:

- Affirmation of the applicability of the term “occupation” to the Palestinian territories and therefore the applicability and validity of international humanitarian law regulating the rights and obligations of the Occupying Power in addition to the rights of Palestinians as protected persons living under occupation.
- Affirmation of the legitimate right of Palestinians to self determination
- Affirmation of the obligations of Israel related to the respect and application of the international law of human rights (namely the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child) and affirmation of the application of the international human rights law to the Occupied Palestinian Territories.
- Affirmation of the prohibition on acquisition and annexation of land of others by force and the necessity of the Occupying Power to respect this.

¹⁵ the ruling was issued in accordance with UN General Assembly Resolution ES-10 / 14 issued during the exception and urgent period and held on 8 Dec 2003

Recognition of the risk of annexation posed by the Wall in its current and planned route within the occupied West Bank. Rejection of justifications provided by Israel for derogation of its obligations under international humanitarian law, specifically the destruction of property and related claims of military and security necessity.

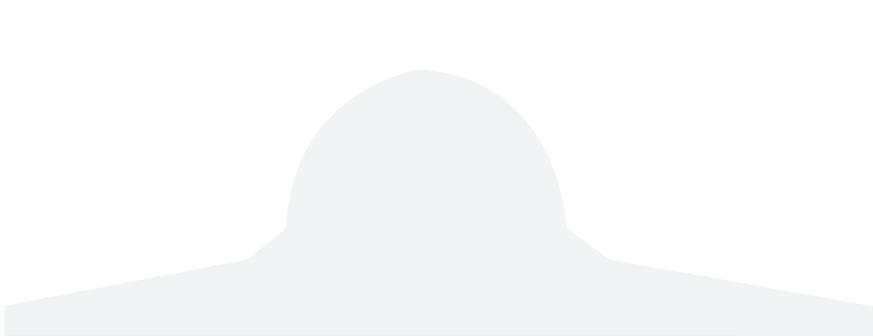
- Affirmation of the illegitimacy of the Wall for its contravention of the principles and rules of international law.

- Affirmation of the occupying power's liability as a result of its contravention with the principles and rules of international law in its construction of the Wall.

- Affirmation of the obligation of Israel as the occupying power "to return the land, orchards, olive groves and other immovable property seized" or if impossible, to "compensate the persons in question for the damage suffered", as well as compensate "all natural or legal persons having suffered any form of material damage as a result of the Wall's construction"¹⁶

Israel's accountability for its actions under international is of paramount importance. This includes both civil and criminal liability and affects Israeli authorities as well as Palestinians who have suffered material damage due to the construction of the Wall.

¹⁶ ICJ Advisory Opinion, para 153.



4- The occupying power's liability as a result of the construction of the Wall

The Occupying Power's violation of the rules and principles of international law evoke an international liability of the occupying power for these breaches. According to rules of international law, this liability is double-faceted: it is both a civil and criminal liability^{17a}

A- The civil liability of the occupying power

Israel's violations of its international legal obligations have led to extensive damage to Palestinian residents affected by the construction of the Wall. According to the provisions of international humanitarian and human rights law, Israel is under obligation to return the property and land it has confiscated and/or to provide compensation to all individuals it has affected. These obligations should be discharged and implemented to mitigate the impact caused by these violations on the people affected¹⁸

With regards to the damages suffered by Palestinians as a result of Israel's construction of the Wall, Israel is required to implement the following steps:

- Cease all constriction of the Wall and implement the total cessation of the destructive and damaging measures against Palestinian private and public property and land.
- Return all public and private property including olive groves, orchards,

17 Please refer to Dr. Mohammad Baha' Adeen Bashan. Reciprocal treatment in international criminal law, General commission for the Emirate Printing affairs, Cairo, 1974, p 179, and Maryer Green, International law, McDonald and Evans, London, 1982, p 219

18 on the types of compensation, please refer to the following:

Dr. Salah Abed Al Badee' Shalabi, the right to rebate, first edition 1983, Cairo – P 209 and the proceeding pages .

agricultural land and other immovable property to any person for the purpose of the Wall and its construction. Dismantling of those sections of the Wall that fall within the occupied West Bank, including East Jerusalem. In addition, all measures taken towards the construction of the Wall must be repealed or rendered ineffective (except for those acts which would provide compensation or other reparation to Palestinians affected by the Wall).

■ Compensation where returning land or property is impossible due to for example destruction or damage to land or property, including destruction or exploitation of natural resources. Compensation must include all direct and indirect damage inflicted on the residents of the occupied Palestinian territories and their public and private properties.

Israel's implementation of the above requirements will mitigate the damage cause by its construction of the Wall only, and cannot in any way exempt Israel from its international liabilities resulting from other or previous actions and measures that violate the rights of Palestinians in the occupied territories.

B- Criminal liabilities

Although the State itself cannot be held criminally liable, there are certain groups or individuals who can, under international humanitarian law, be held accountable for the grave breaches of international law associated with the construction of the Wall. Specifically, those who ordered and designed the plans for the construction of the Wall and those who implemented its construction must, under international law, be held accountable for their actions. This is specifically articulated in article 146¹⁹ of the 4th Geneva Convention, which obligates High Contracting Parties to “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the

¹⁹ The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

present Convention". The grave breaches set out in the Geneva Conventions are considered war crimes, which incur individual criminal liability. Under Article 146 of the 4th Convention, the state is obligated to "search for the persons alleged to have committed or ordered to have committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts".

The same right has also been affirmed and safeguarded in article 6 of the Nuremberg charter: "The crimes hereinafter set out are punishable as crimes under; international law: Crimes against peace:

- 1) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- 2) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)."

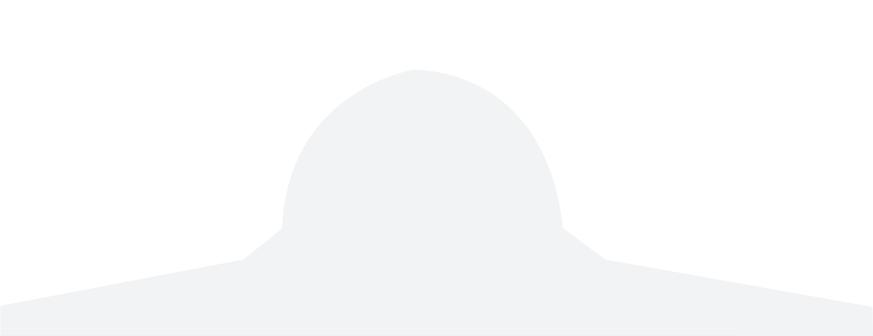
The Palestinian side is therefore entitled to pursue the people who ordered the perpetration of the crime whether military personnel or politicians and state members in accordance with the provisions of the military occupation and the principles of armed conflicts. Not only that, this right also includes all people who participated in the implementation of the war crime in the POT. It should be mentioned here that the principle of non-retroactivity²⁰ and negative impact to the international community and require the elimination of any action that would allow impunity for war criminals. Moreover, the invalidity of non-retroactivity on international crimes is one of the most important safeguards that ensures the oppressed and humiliated people the infliction of punishment, when circumstances allow, on the people who have committed war crimes against them.

20 Article 88.-Mutual assistance in criminal matters:

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.
2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Despite the fact that the charter of the ICC which was ratified in Rome on 17 July 1998 stressed that international crimes are not subject to limitations, however, the same charter has immunized war criminals and perpetrators of international crimes against punishment because they cannot be held accountable for crimes they had committed before the ICC charter became effective. Article 24 stipulates that “No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute”.

This article, as it is understood, comes to drop criminal liability on scores even hundreds of individuals who have committed acts and practices which under the international law are viewed as war crimes when it enters into force. Unfortunately, this article has unjustifiably granted legal cover to those but if the ICC sees light, it will also allow oppressed people to hold accountable and to legally pursue any individual who commits a war crime against them in the future.



5- The legal effects emanating from Israel's international liability

Responsibilities of state members in confronting Israel's violations of the provisions of international law

The absence of an international and effective executive apparatus has had its impact on the countries to set up tools and instruments that could have helped them to organize and consolidate calm international relations based on peace and security and mutual respect of commitments and the rights of the state members also based on banning the use of force and dedicating legal equity among countries.

In light of the developments witnessed by the rules and principles of the provisions of the international law in the wake of the declaration of the UN Charter towards cordial relations among countries, there emerged an unshaken idea in the obligation of respecting international rules and principles. Not only that, this international interest also urges member states to look for creating tools and instruments that guarantee their safety, encourage respect and safeguard sovereignty.

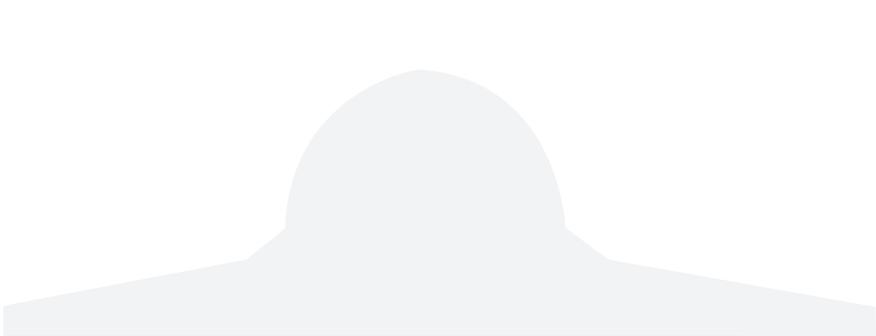
These countries have taken upon themselves the burden of strengthening the law and protecting its sovereignty as an international interest. They have a duty to intervene in the event of undermining this law but, naturally, the commitment of these countries differed in degree and nature depending on the variety of the legal principle for which these commitments were placed for respect and commitment of the member states.

These commitments can be divided into two patterns: the first can be described as negative commitment which results in the refrain of these countries to recognize the actualities established by the occupying power, Israel, in the POT, as a result of the construction of the wall and the commitment to cease and refrain from providing any assistance or

support that can help the occupying power to sustain the violation of the principles and rules of the law.

The second pattern is the positive commitment which goes beyond protest against the behavior of the country that acts in contravention of the international law into some kind of a positive and serious intervention to confront and bring to an end these violations of the rules and principles of international law.

Since this paper treats some of the above mentioned actions as war crimes and international crimes, we think we will clarify these patterns of commitments that emanate from Israel's violations of international humanitarian law and due to Israel's construction of the wall inside the OPT.



6- Responsibilities of UN Member States in confronting Israel's violations of international law vis-à-vis the Wall

Since its creation, the United Nations through its values of peace, democracy and respect for human rights has worked towards establishing and maintaining international peace. This has in part been implemented through the creation and recognition of international legal frameworks including international humanitarian, human rights and criminal law. Part of this framework urges member States to create and implement tools and instruments that guarantee their safety, encourage respect and safeguard sovereignty. Another part of this framework gives member States the duty to intervene in the event of serious or repeated violations of international law that impact on the international community as a whole. An example of such is the United Nations Security Council, who routinely examines and passes resolutions on matters of import to the international community, such as the question of Palestine and the violations of the rights of Palestinian people.

These commitments of UN Member States can be divided into two categories: negative and positive. In the case of Israel's construction of the Wall, negative commitments are for example the duty of States not to recognize the actualities established by the occupying power, Israel, in the oPt, as a result of the Wall and the duty to cease and refrain from providing any assistance or support that would help the occupying power to sustain its violations of the principles and rules of the law.

Positive commitments go beyond protesting against the behavior of the country contravening international law and consist of taking positive and serious measures to intervene and bring to an end the violations of international law.

A- Negative commitments of countries in regards to Israel's violations of the rules and principles of International Humanitarian and Human Rights Law

The negative commitment of member states to Israel's violation of International Humanitarian Law is embodied in the refrain of these countries to recognize the actualities established by the occupying power, Israel, in the occupied Palestinian territories as a result of the construction of the Wall. Member States' commitment to cease and refrain from providing any assistance or support that can help the occupying power to sustain the violation of the principles and rules of the law is also an example of negative commitment.

B- Positive commitments of countries in regards to Israel's violations of International Humanitarian and Human Rights Law

The rules and principles of International Humanitarian Law and Human Rights Law oblige State Members' positive intervention in confronting Israel's violations of these rules. These obligations can be specified as follows:

Intervention to bring an end to violations

Article 1 of the 4th Geneva Convention stipulates that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". Article 146 states that "Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches" (defined in Article 147 as outlined previously).

Although the Convention does not mention specific means that should be followed by the Contracting Parties to impose respect of the convention, by other Contracting Parties, it specifies certain measures that should be taken against individuals who have been proved to have committed grave violations of the 4th Geneva Convention. Article 146 gives Contract Parties the choice to either try the persons in their

national courts or to extradite them to the party that issued the order of arrest to bring to their own national justice system.

Emphasis must be placed on the obligation of State Parties to investigate, prosecute and punish those persons responsible for war crimes (ie grave breaches of the applicable Geneva Conventions). This obligation stands regardless of the demands made by others for this accountability.

The countries party to the 4th Geneva Convention are thus bound to enact any legislation necessary to provide effective penal sanction to any individuals proven to have committed (or ordered to be committed) grave breaches of the 4th Convention, which includes any individuals or groups responsible for the mass destruction or appropriation of property within occupied lands. In the case of the Wall, these would include contractors, construction workers and those authorities who authorized the construction of the Wall (and therefore, the destruction of property within the occupied territory, including East Jerusalem). In its Advisory Opinion on the Wall, the ICJ held that all of the states party to the 4th Geneva Convention “are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention”. This poses a heavy burden on the Palestinian side to demand the signatories of the Geneva Convention and the carry out their obligations in this regard.

- Appeals to support and assist the Palestinian people to confront these violations

In light of the obligations of states parties to the 4th Geneva Convention and the duties of the UN member states in upholding the UN Charter, a number of agreements and declarations issued by the UN have urged member states to support and provide assistance to the Palestinian people in their struggle to claim their rights under international law.

One of the most important resolutions made in this regard is General Assembly Resolution 3236 issued on 22 Nov 1974, which “Appeals to all States and international organizations to extend their support to the Palestinian people in its struggle to restore its rights, in accordance with the Charter” and General Assembly Resolution 35/35 issued on 14 November 1980, which urges “all States, specialized agencies, competent organizations of the United Nations system and other international organizations to

extend their support to the Palestinian people through its representative, the Palestinian Liberation Organization, in its struggle to restore its right to self-determination and independence in accordance with the Charter of the United Nations”.

C- Obligations of the UN in confronting Israeli violations

Israel’s violations of international human rights and humanitarian law require a response from the UN system, and in particular require the General Assembly and the Security Council to fulfill their obligations and uphold the UN Charter²¹ and intervene to ensure the respect of international law and confront the violations taking place. These agencies have a legal obligation through their mandate to intervene against a country that violates its legal obligations and commits illegitimate actions that are expressly prohibited under the provisions of international law.

The Security Council

The UN charter has accorded the Security Council the mandate of preserving international peace and security. As a result, the UN charter in chapter 6 and 7 has listed a number of measures that allows the SC to undertake in order to achieve peace and security worldwide.

The intervention of the Security Council can be conducted in two manners in the event of grave breaches to international law. The first is mediation and negotiations through diplomatic means and public clarification of the party’s obligations under international law and the rights of all persons affected, as well as stating the UN Security Council’s position on these

21 Article 1, Chapter 1 of the UN Charter states the purposes of the United Nations as being:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Available at <http://www.un.org/aboutun/charter/chapter1.htm>.

breaches of international law, and courses of action to confront the party that has perpetrated activities deemed globally illegitimate. These courses of action range between economic sanctions and interruption of transport between the breaching party and the members states²². The Security Council is also entitled to use aerial, land and marine forces to impose the embargo in these cases in order to bring the measures to success.²³ The second option provides for the use of force. In practice, the Security Council, seeking to preserve international peace and security and confront the breaching party, has resorted to the use of force on several occasions including in the 1950 Korean conflict, the Congo in 1960, and Iraq in 1990. With regards to non-military measures, the Security Council has issued a number of resolutions in this regard the most important of which is the South African example and the boycott of southern Rhodesia (Zimbabwe) in 1966 and South Africa in 1977 and the air embargo on Libya and Sudan²⁴ and the embargo imposed on Iraq and the ban of the sale of weapons to Yugoslavia. In 1993, the Security Council issued Resolutions 808 and 827 to form an the International Criminal Tribunal for former Yugoslavia (ICTY) to try war criminals for crimes committed in Bosnia and Herzegovina. In 1994, the Security Council issues Resolution 995, forming the International Criminal Court for Rwanda (ICTR) to try war criminals of the Rwandan conflict²⁵

22 This is stipulated in articles 41 and 42 of the Charter. Article 1 stipulates that «The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations».

23 Article 42 stipulates that «Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations». Please also refer to Bokradres, The principle on non intervention in light of modern international law , The National Book Establishment, Algeria, 1990, P 292 – 298.

24 The measures taken against Libya and Sudan raise reservations and questions on the legitimacy and safety of the UN Security Council resolutions. Giving these examples does not mean that we take the correctness of these resolutions for granted. As for Resolution 748 related to Libya for its involvement in the Lockerbie plane crash that killed 270 passengers, it should be said that the validity of the resolution extradited upon a deal between the international community and Libya in which the latter extradited the two suspects to be tried in Scottish courts.

25 On international criminal courts in Yugoslavia and Rwanda, please refer to the ICRC magazine, issue 58 of Nov/ Dec, 1997. There is a special report on international criminal courts in this edition.

The Security Council must continue to fulfill its obligations and confront Israel with regards to its repeated violations of international law, including grave breaches of the 4th Geneva Convention. As has been demonstrated, the construction of the Wall represents several violations of international law, including Israel's obligations under the 4th Geneva Convention. In this regard, we wish to outline the measures that can be taken against Israel by the Security Council under the provisions of chapter VI and VII:

- Issue unequivocal and absolute resolutions demanding Israel to bring the construction of the wall to an end, to dismantle those sections already constructed and to restore the lands and properties as they were to the rightful owners (or provide adequate compensation in the impossibility of restoring land and property as it was due to destruction resulting from the construction of the Wall).
- Use non-military measures against Israel in the event of its refusal to comply with the UN Security Council resolutions and call all UN State Members to cease their economic dealings with Israel to bring it to compliance with international law, the UN Charter and the many resolutions issued by UN bodies relating to Israel's violations of international law.
- Use force if the previous measures fail in order to achieve the results and the objectives that were set. It is known that the Security Council has refrained from using measures under Chapter VII due to US Veto power, which has often been used to thwart any attempt to propose such a resolution against Israel. The Security Council has to date failed to issue a binding resolution in this regard that would effectively confront the violations of the Israeli occupation against the population of the Palestinian territories. The success of the US attempts in blocking resolutions against Israel represents a genuine obstacle in the Security Council's mission to maintain international peace and security, as well as the double standard and lack of neutrality in treating international issues and crises that require the intervention of the council²⁶.

26 Namibia is a striking similarity as an issue with the question of Palestine in terms of legal status. The Security Council's treatment of Namibia helps illustrate the lack of neutrality and use of double standards with regards to the question of Palestine. Namibia was under the mandate of South Africa but the Security Council has issued several binding resolutions on Namibia. Of these resolutions are resolutions # 245, 246, 248 of 1969, 276 of 1970, 301 of 1971 and 385 of 1976 which placed legal liability of the UN on Namibia and called on South Africa to publicly declare its commitments, the release of all prisoners, and the return of the displaced to their residences and the granting of independence to Namibia without any conditions. The strong position adopted by the Security Council against South Africa finally led to Namibia's independence in February 1990 after over 105 years of suffering and denial of the right to self-determination.

- The General Assembly

Israel's continuous violations of international law also invoke the question of the General Assembly's requirements to bring these practices to end in accordance with the provisions of the UN Charter. The General Assembly initially brings attention to the breaches of international law while the Security Council undertakes to call for and implement measures in response to these breaches²⁷, however with regards to Israel's breaches, the US veto power has thus far impeded the undertaking of these practices. As a result, the General Assembly has issued many resolutions condemning Israel's continuous violations of international human rights and humanitarian law. In addition to these (non-binding) resolutions, the General Assembly is able to take the necessary measures to prevent further violations including the use of force to bring Israel to compliance and respect of its legal obligations (laid out under international humanitarian and human rights law and reaffirmed through the Advisory Opinion of the International Court of Justice) . The intervention of the General Assembly in this case draws legitimacy from the General Assembly Resolution 377 issued November 1950 (also known as Unite for Peace), which permits the General Assembly to examine issues and matters and international conflicts that threaten peace and security and recommend Member States to take the necessary collective measures *including the use of armed force when necessary*, in cases where "the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression"²⁸

In light of the above, the General Assembly is able to maintain international peace and security and thus exercise its responsibilities under the UN Charter even when the Security Council is failing in its related responsibilities. The Unite for Peace Resolution effectively allows the General Assembly to recommend to State Members to take collective action and intervene in order to stop threats or breaches of peace. As Israel's construction of the Wall has as its effect the large scale destruction of property within the land it is occupying,

27 On ways on UN Security Council intervention with regards to the Palestinian question, please refer to Sami Hadawi, Ed., *UN resolutions on Palestine*, the Institute of Palestine Studies, Beirut 1967, pages 127 – 170. On the UN Security Council's intervention in the wake of Israel's war in 1967, please refer to Dr. Hasan Al Halabi, *The decision and the settlement – a legal and political study of settling the Arab / Israeli conflict under the resolution 242* – Beirut 1978, P 22. Also refer to Mahmoud Riyad, *Searching for peace and the ME conflict, 1948 - 1978*, Dar Al Mustaqbal al Arabi, Cairo, 2nd ed, p 142.

28 For the full text of General Assembly Resolution 377, visit <http://domino.un.org/UNISPAL.NSF/561c6ee353d740fb8525607d00581829/55c2b84da9e0052b05256554005726c6!OpenDocument>

which constitutes a grave breach of the 4th Geneva Conventions; the General Assembly could legitimately take action under its Resolution 377.

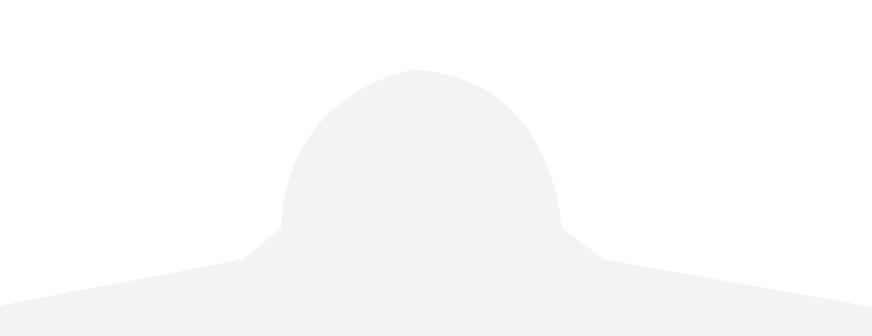
In addition to this Resolution, the General Assembly is also required to consider and address Israel's breaches and violations in line with the UN Charter, to which Israel has the duty to respect and adhere to as a member state of the United Nations. It is commonly held that Israel's membership to the UN is conditional on its respect of the requirements of the General Assembly, namely General Assembly Resolution 194 (addressing full access to Jerusalem and the right of return of refugees)²⁹.

The General Assembly is required to call on Israel and urge it officially comply with its duties towards the United Nations Charter and international human rights and humanitarian law. In the event of Israel's refusal to do so, the General Assembly should consider dismissing Israel from the UN for refusal to respect the values and provisions of the UN Charter, in addition to its repeated failure to respect or implement the numerous General Assembly Resolutions issued with regards to Israel.

Intervention of the General Assembly can be conducted as follows:

- Require Israel to comply with its commitments as a UN member state, with particular regard to the General Assembly Resolutions regarding Israel
- Require Israel to respect the UN charter and the provisions of international humanitarian and human rights law by dismantling the Wall, immediately cease all construction works, and restore land and property as it was to its rightful owners. In the event of Israel's further refusal to comply with the General Assembly's resolutions, the General Assembly can undertake other appropriate measures to bring Israel to compliance and have it retreat from sustaining its practices (as outlined in the 1950 Unite For Peace Resolution)
- In the event of failure of the General Assembly's measures the General Assembly should ask the UN Security Council to undertake military measures to confront Israel. If the UN Security Council fails to ensure international peace in this regard, the General Assembly can recommend the collective action of Member States, including the use of armed force in accordance with the United for Peace Resolution.

²⁹ Israel is the only country whose membership in the UN has been conditional to its commitment to previous agreements and conventions. For more information, please refer to: 1) G- Jans, "Israel and the US: a conditional membership", *Palestinian Affairs*, issue 49, 1975, p 19. 2) William and Sally Melson. *Analysis of UN resolutions on the Palestinian question from an international law perspective*. United Nations Publications, New York 1979, p 29.



Conclusion

In conclusion, Israel's construction of the Wall has been shown to contravene international human rights and humanitarian law, has caused large scale damage to Palestinian lands and livelihoods, and has contributed to the denial of Palestinians' basic right to self-determination. This study has aimed to outline the main legal implications of Israel's construction of the Wall, including the specific violations of international human rights and humanitarian law, as well as the legal obligations of all parties resulting from the construction of the Wall and Israel's breaches of international law. The Advisory Opinion of the International Court of Justice has helped to clarify the duties of Israel as an occupying power towards the Palestinian people, with specific focus on the Wall and its effects on the Palestinians, as well as the obligations of Member States of the United Nations and the body of the United Nations itself that have arisen as a result of Israel's violations of international law.

The study has also examined the principal instrument of international humanitarian law relating to occupation, the 4th Geneva Convention of 1949, and has outlined the obligations of all High Contracting Parties (including Israel) to ensure the full respect and implementation of the Convention.

The study will conclude by listing a number of options available to the Palestinian people in light of the obligations of the international community and the illegitimacy of Israel's construction of the Wall within the occupied territories:

- Demand the High Contracting Parties of the 4th Geneva Convention to assume their responsibilities related to the pursuit and accountability of all people involved in the commission of grave breaches of the Convention. In this regard, the Civic Coalition recommends the launch of a Palestinian campaign urging the High Contracting Parties to hold an international conference to explore the legal obligations of the P

The official Palestinian UN representatives must also make a move to demand the UN Security Council to intervene in accordance with its primary responsibility of ensuring international peace and security, and confront Israel's violations of international law and refusal to adhere to General Assembly Resolutions or the ICJ Advisory Opinion. Palestinian representatives must also be prepared for further steps in the event of slackness by the UN Security Council and lobby for more pressure in the General Assembly and ask it to intervene to remove the Wall in accordance with the powers vested in the General Assembly pursuant to Resolution 337.

- Formation of a team of Palestinian legal experts to explore the possibility of filing a complaint against the leaders of the Israeli occupation and other Israeli officials involved in the construction of the Wall, to be submitted to justice systems of interested or concerned UN member states. It is worthwhile mentioning here that a number of countries provide a jurisdiction for criminal liability for war crimes (Belgium, France, Britain, Spain and others).
- Formation of a governmental and non-governmental committee under the supervision of the Ministry of settlement activity affairs and the Wall to explore the possibility of pushing international human rights organizations and other bodies in solidarity with the Palestinian people to exert pressure on their own countries to demand them to respect their obligations emanating from the 4th Geneva Convention. The committee could additionally urge the human rights organizations to file cases before their own national courts in accordance with article 146 of the 4th Geneva Convention.