

**LEGAL CONSEQUENCES OF ISRAEL'S CONSTRUCTION OF
A SEPARATION WALL IN THE OCCUPIED TERRITORIES
SUMMARY OF AN INTERNATIONAL LAW OPINION***

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

I. INTRODUCTION

The issue concerns the legality of Israel's decision to construct a barrier or Wall in the Occupied Palestinian Territory made up of the West Bank, Gaza Strip, Golan Heights and East Jerusalem. The Occupied Territories form part of Israel's territory.

On 8 December 2003, the United Nations General Assembly passed resolution A/RES/ES-10/14 requesting the International Court of Justice to render urgently an advisory opinion under Article 95 of the Court's Statute and Article 96 of the United Nations Charter on the following question:

What are the legal consequences arising from the construction of the Wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

Generally speaking, Israel is entitled to defend its territory and its military and administrative functions in the Occupied Territories from militant or terrorist attacks. However, Israeli activities in the Occupied Territories are subject to both international humanitarian law and

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international human rights law, including customary international law. Any security measures taken must conform strictly with Israel's obligations under international law. As Chief Justice Barak of the Israeli Supreme Court stated in *Ajuri v IDF Commander*:¹

Israel is fighting a difficult war against terror. It is a war carried out within the law and with the tools that the law makes available.

This opinion will therefore focus on the extent the wall is in conformity with Israel's obligations under international humanitarian law and under international human rights law.²

II. INTERNATIONAL HUMANITARIAN LAW

The 1907 Hague Regulations, 1949 Geneva Convention IV and customary humanitarian law in the Occupied Territories bind Israel. As a result, no derogation is permissible from humanitarian law even in times of public emergency.

(a) Security Measures

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

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

¹ High Court of Justice, Israel, 7015/02.

² The Opinion does not consider the admissibility of the General Assembly's request to the International Court for the advisory opinion.

(b) Property

Israel's requisition of Palestinian property to construct the Wall violates the prohibition on the confiscation of private property in Occupied Territory under the Hague Regulations.³ Further, a state of hostilities does not currently exist that would permit Israel to destroy or seize property for imperative military reasons in war.⁴ Where the Wall is constructed on appropriated public land, it violates Article 55 of Geneva Convention IV, which requires an Occupying Power to deal with public land on trust for the occupied population, which in this case are the Palestinians.

(c) Civilian Population

The Wall violates Israel's international obligation to ensure the general welfare of the civilian population in Occupied Territory under the Hague Regulations.⁵ Under Geneva Convention IV there are also the obligations on medical treatment and public health,⁶ employment,⁷ the care and education of children,⁸ food supplies,⁹ and relief schemes.¹⁰

(d) Collective Punishment

By deliberately separating Palestinian communities and subjecting them to unprecedented measures of physical control and criminal suspicion, the Wall exhibits the characteristics of collective punishment, contrary to Regulation 50 of the 1907 Hague Regulations and Article 33 of Geneva Convention IV.

(e) Forcible Transfers

The seizure of Palestinian property and demolition of houses, arbitrary refusals of residency permits in closed military zones, and irregular

³ Regulation 46.

⁴ Regulation 23(g).

⁵ Regulation 43.

⁶ Articles 16-17, 20-23, 55-56.

⁷ Articles 39 and 52.

⁸ Article 50.

⁹ Article 55.

¹⁰ Articles 59-62.

gate openings may result in the direct or constructive forcible transfer of Palestinians. This is contrary to Article 49 of Geneva Convention IV and potentially amounting to a war crime or grave breach under Article 147 of the Convention.

III. INTERNATIONAL HUMAN RIGHTS LAW

Israel's obligations under customary international law and international human rights treaties¹¹ are engaged wherever Israel exercises effective control over territory, including over non-sovereign Occupied Territory. Although the 1995 Interim Agreement between Israel and the Palestinian Authority transferred some legal authority over parts of Palestine, Israel continues to exercise effective *de facto* control over the areas affected by and adjacent to the Wall. Article XIX of the Interim Agreement states specifically that Israel's human rights obligations persist in accordance with international law.

Israel has not notified other States of any relevant *derogations* from its human rights obligations in the Occupied Territories. Where *limitations* on human rights are permitted on security grounds, they must be strictly necessary and proportionate to meet the security threat. The construction of a Wall chiefly inside the Occupied Territories is neither necessary nor proportionate in response to the threat to Israel.

Given the already severely degraded state of the Palestinian economy, any restriction on the human rights of Palestinians requires a stronger justification than comparable restrictions in a regularly functioning economy. The economic crisis is partially due to existing Israeli restrictions on Palestinian freedom of movement.

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

There is strong evidence that the Wall unjustifiably violates Palestinian human rights under the ICCPR. More specifically, the rights relate to freedom of movement,¹² freedom from arbitrary or unlawful

¹¹ They are mainly the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).

¹² Article 12.

interference with privacy, family and home;¹³ freedom of peaceful assembly¹⁴ and association;¹⁵ freedom of religion;¹⁶ rights of minorities;¹⁷ and rights of due process.¹⁸

The Wall may also increase the likelihood of unjustifiable violations of the right to liberty and security of person and freedom from arbitrary detention in violation of Article 9. Further, the likelihood extends to freedom from cruel, inhuman or degrading treatment in violation of Article 4 and the 1948 Torture Convention generally.

Israeli military tribunals and domestic courts do not provide effective remedies to Palestinians for violations of their rights¹⁹ resulting from the construction of the Wall, property requisition orders, permits in closed military zones, and the establishment of Israeli settlements in the Occupied Territories.

(b) Economic, Social and Cultural Rights (ICESCR)

There is strong evidence that the Wall unjustifiably violates Palestinian human rights under the ICESCR in relation to the following: employment and livelihood;²⁰ adequate standard of living, food and housing;²¹ physical and mental health;²² education;²³ and participation in cultural life.²⁴

(c) Common Rights (ICCPR and ICESCR)

The Wall is inconsistent with the right of Palestinians to self-determination under Article 1 of both the ICCPR and the ICESCR. In this regard, the Wall is inconsistent with Israel's obligations as

¹³ Article 17.

¹⁴ Article 21.

¹⁵ Article 22.

¹⁶ Article 18.

¹⁷ Article 27.

¹⁸ Article 14.

¹⁹ See for example ICCPR Article 2.

²⁰ Article 6.

²¹ Article 11.

²² Article 12.

²³ Article 13.

²⁴ Article 15.

usufructuary in Occupied Territories under humanitarian law.²⁵ The wall violates Israel's duty under Articles XI(1) and XXXI(8) of the 1995 Interim Agreement to preserve the "integrity and status" of the West Bank and the Gaza Strip as "a single territorial unit", pending final status.

The Wall discriminates against Palestinians on prohibited grounds contrary to Article 2(1) of the ICCPR and Article 2(2) of the ICESCR. Further, it may amount to a violation of the international customary prohibition on apartheid²⁶ as an aggravated form of racial discrimination. The Wall also unjustifiably interferes with Palestinian family life contrary to Article 23 of the ICCPR and Article 10 of the ICESCR.

²⁵ Regulation 55 of the 1907 Hague Regulations.

²⁶ See generally the 1973 Apartheid Convention.