



20 July 2006

Kofi Annan
Secretary-General
United Nations Secretariat
UN Plaza
New York NY 10017
United States

RE: Implementation of GA resolution A/ES-10/L.18/Rev.1

Dear Mr. Secretary-General:

Today marks the second anniversary of the General Assembly resolution “Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem” (A/ES-10/L.18/Rev. 1), which affirmed the Court’s findings of obligations borne by Israel and the international community of States in resolving the illegal situation of the Separation Wall that Israel has built across Palestine’s occupied West Bank.

In response to General Assembly resolution ES-10/14 (8 December 2003), requesting an Advisory Opinion of the International Court of Justice (ICJ),¹ the Court found that international law required Israel to terminate forthwith its breaches of international law by:

- ceasing construction of the Wall in the West Bank and East Jerusalem,
- dismantling the related structure in the West Bank and East Jerusalem,
- repealing or rendering ineffective all legislative and regulatory acts relating to the Wall, and
- making reparation for all damage caused by the Wall’s construction in the occupied Palestinian territory (oPt), including in and around East Jerusalem.²

The ICJ found that the international community of States is also under legal obligation “not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction,” and that all States Parties to the Fourth Geneva (Civilians) Convention bear an additional obligation to ensure

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Israel's compliance with international humanitarian law.³

In the same opinion, the ICJ further advised the United Nations, especially the General Assembly and Security Council, to take due account of the Advisory Opinion and to consider what further action is required to bring to an end to this illegal situation.⁴ Acknowledging the Court's findings in its resolution A/ES-10/L.18/Rev.1, while calling on Israel and all States to adhere to relevant norms of public international law, the General Assembly requested also that the Secretary-General establish a Register of damage that the Wall, its construction and its associated regime have caused to all natural or legal persons.

Two years after the Court's Advisory Opinion and the General Assembly's subsequent resolution, commemorated today, the Secretary-General has yet to establish the Register of damages, upon which the needed remedies depend. We propose here to offer some constructive recommendations and to confirm our interest in the success of all good-faith UN efforts to establish the Register and implement the ICJ's Advisory Opinion.

The Current Situation

In February 2005, the State of Israel approved a revised—and prolonged—route for the Wall, reaffirming its contempt of the ICJ and its Advisory Opinion. Currently, over half of the revised 703 km length of the Barrier is complete, while another 13% remains under construction.⁵ Its meandering length will be more than twice that of Israel's actual 315-km Green Line border.⁶ Its "seam zone" (between the Wall and Israel's border on the Green Line) currently incorporates 10.17% (57,518 Ha) of the West Bank's most-fertile land. In the north, Israel's military orders (September 2004) have created a 150–200-meter buffer zone on the east side of the Wall, where all Palestinian constructions are prohibited and subject to demolition.

The Israeli Wall, as currently projected, will leave 60,500 West Bank Palestinians living in 42 villages and towns enclosed between it and the Green Line and in other enclaves. More than 500,000 Palestinians, for example, live within a one kilometer strip of the Wall and all Palestinians are required to obtain permits to pass through designated gates, as is necessary to access health and education services, jobs and markets in the West Bank. Twelve villages and their 31,400 inhabitants will be completely encircled by the snaking structure and its extensive complex. Approximately 124,300 additional Palestinians living in 28 locations located on the Wall's east side, including in Qalqiliya town, and the Biddya and Biddu areas, are being surrounded on three sides and controlled on the fourth with an adjacent physical closure.⁷

Approximately one-quarter of the 230,000 Palestinian Jerusalemites are located on the east side of the Wall, which severs the city. They are forced to wait in queues to cross through one of four terminals restricting their access to Jerusalem for daily services and jobs.⁸ The Jerusalem Wall and the Ma'ale Adumim bloc of illegal settlements impede road traffic to prevent Palestinians' movement into Jerusalem and their north-south movement within the West Bank. In January of this year, the Israeli army barred West Bank Palestinians from using eight of the 12 routes into Jerusalem, diverting them to "human terminals" with extensive and humiliating security checks.

Meanwhile, illegal settlements in the Palestinian territory are expanding. The Ari'el settlement group extends 22 km, or 42% across the width of the West Bank, north of Jerusalem. Adjacent to Jerusalem, the Wall will encircle the Ma'ale Adumim settlement bloc and extend 14 km into the West Bank, or 45% across its width. Already in 2005, the expansion of Ma'ale Adumin completely

dissected the West Bank at Jerusalem, preventing Palestinians' passage between north and south and into their own capital city.

Since the ICJ's Advisory Opinion and the GA's resolution A/ES-10/L.18/Rev.1, Israel's colonization of the Jordan Valley has accelerated amid Israel Prime Minister Ehud Olmert's 7 February 2006 announcement of plans to annex the Jordan Valley (28 percent of the West Bank) and major Jewish settlement blocks to Israel and, thus, to redraw Israel's borders.⁹ Israel's parastatal institutions, including the World Zionist Organization/Jewish Agency and Jewish National Fund, continue to colonize Palestinian lands without international scrutiny, carrying out population transfer strictly prohibited in international humanitarian and criminal law.

The Israeli Wall and its population control/transfer regime, integrated with Israeli confiscation, settlement and separation policies, stand as the most visually obvious factors preventing a peaceful solution in accordance with the two-state principle espoused by the UN and the "Quartet."

Israel's Wall construction, in defiance of general international law and explicit determinations of the ICJ, has cumulative impact on livelihoods. The tight restrictions on normal movement, constant bulldozing and confiscation of Palestinian land areas and the incremental eviction orders and demolition of Palestinian property in both rural and urban areas make life untenable for Palestinians.

Forced evictions and displacement have proved to be among the greatest factors deepening poverty globally, eluding Millennium Development Goal No. 7. Wall-related displacement of Palestinians is ongoing, and substantially more displacements are expected in the coming years. Estimates of current and potential displacement as a result of the Wall's construction range from nearly 14,500 persons already displaced in 145 Wall-affected localities by May 2005,¹⁰ to an estimated 90,000 potentially displaced.¹¹

Ever since the 1967 occupation, no local institution, international body or UN agency has assessed the consequences of this ongoing dispossession and displacement in the oPt. Nor does any UN or other international body systematically monitor and report on Israel's population transfers, including illegal colonization and settlement construction throughout the oPt. In the face of this tremendous monitoring gap, the General Assembly's call for a Register of Wall-related damages is very welcome.

Concerns over the Register of Damages and Losses

Already by mid-2004, at the time the GA adopted resolution A/ES-10/L.18/Rev.1, the Wall's construction had caused the Palestinians' loss of some of the West Bank's most fertile lands and water resources; whereas, agricultural areas account for 86% of the total 270 sq. km of oPt lands that Israel has confiscated.¹² Meanwhile, developments toward implementing the aforesaid General Assembly resolution and the Register have been excruciatingly slow. In addition to the lack of progress, the Register's proposed terms of reference leave us with deep concern over the need for a good-faith design and methodology for the Register that remains consistent with resolution A/ES-10/L.18/Rev.1 and the ICJ Advisory Opinion at its base. Meanwhile, Palestinian Authority and civil monitoring initiatives have sought to compensate the long wait, and we trust that the coincident efforts could prove to be complimentary, as they undoubtedly should be toward a successful loss and damage assessment process.

In the UN Secretariat's view, the Register would be a subsidiary UN organ under the authority of the Secretary General's office, which apparently has proposed terms of reference that delink it from the legal obligations and required actions clarified in the ICJ's 2004 Advisory Opinion and, thus, vitiate any remedial purpose. The Secretary-General has asserted, in his 11 January 2005 letter to the President of the General Assembly (A/ES-10/294), that "The act of registration of damage, as such, does not entail an evaluation of the loss or damage."

The Register's executive Board ultimately would determine which information would be included in the Register. However, in light of the A/ES-10/294 letter, that Board effectively would serve as the gatekeeper to ensure that the Register avoid any evaluation of actual damages, losses or other values required to implement the ICJ's finding of Israel's obligation to compensate all affected natural and legal persons. That could mean also that the Register would evade any determination of responsibility, effectively absolving the duty bearer and impeding needed remedy for actual damages, losses or other values indefinitely.

If the Register's operation were to follow the ICJ criteria faithfully and maintain a problem-solving objective, it also would have to assess losses and damages arising from impediments to accessing the means of livelihood and subsistence, health services, educational opportunities and water sources. Those effects are not exclusively material in nature, but no less consequential. Therefore, reparation will require also compensation of those consequent values lost, as well as rehabilitation.

Another serious concern relates to the scope of information to be collected. If the Register documented only *material* damages resulting from construction of the Wall and its regime, it would fail to incorporate sufficiently the human rights and humanitarian criteria that are the practical tools applicable to the task, and the legal basis of the ICJ Advisory Opinion that resolution A/ES-10/L.18/Rev.1 applies.

Moreover, an overly restrictive geographical scope of the Register also would dismiss important damages and losses arising from the Wall and its regime. The collected data should not exclude areas affected on either side of the Wall (e.g., counting only those inside the "seam zone" or within a narrow swath along the Wall's route). This concern relates to the urgency of victims' access to remedy and the need for the Register to provide adequate outreach functions. Geographical coverage and verification of data remain challenges, requiring not only a thoughtful methodology, but also trained field personnel with local knowledge, in addition to international personnel.

If the Register's methodology and functions omitted to include the necessary damage and loss assessment, it would lack both its essential purpose and any foreseeable endpoint. The Register may have to continue indefinitely, as the damages would persist and the value of the losses would ever grow. Surely, a *perpetual* Register, merely listing damages, would be neither desirable nor cost effective.

Practical Recommendations

For the sake of legal, ethical and practical integrity toward a remedy for damages associated with the Wall, it is essential to keep in mind the four inextricable aspects of Israel's State obligations that the ICJ determined in its Advisor Opinion and that the General Assembly reaffirmed in its subsequent resolution A/ES-10/L.18/Rev.1: (1) to end construction of the wall in the West Bank and East Jerusalem, (2) dismantle the structure there, (3) repeal or render

ineffective all legislative and regulatory acts relating thereto, and (4) make reparation for all damage caused by the construction of the Wall.

As the Court has advised the international community of States “not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction,” a failure of the UN’s Register of damages to contribute to required remedies would have the UN itself falling short of the norms to which it is bound and which the UN’s highest judicial body has reaffirmed. Therefore, we propose the following suggestions and recommendations in an effort to avoid further breaches of public international law:

- Alternative, good-faith terms of reference for the UN Register of damages should be compatible with the relevant ICJ opinion, and function within a framework of international law and the relevant GA resolutions.
- The Register should establish economic, social and cultural rights criteria to guide its board and staff functions, and its outcomes.
- A field-based function that also provided capacity building for affected persons would be necessary to facilitate their effective cooperation with the registration process.
- A geographical scope of the Register encompassing the West Bank and Jerusalem.
- A critical review of best and worst practices in the restitution field conducted at the design stage. This would include recognition of the fact that most preceding models have arisen from a context of conducive political will, or imposed political acquiescence to the registration/compensation of losses and damages in a *postconflict* environment, which is not the case in Palestine.
- Incorporation of guidelines recently developed in the UN system on the rights and functions of restitution would be indispensable to developing the Register’s terms of reference, including the Pinheiro Principles (2005),¹³ the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims (2005)¹⁴ and the IDP Guiding Principles (1998),¹⁵ as well as the Guidelines on Force Evictions in Development and Other Situations that the Special Rapporteur on adequate housing has proffered.¹⁶
- Reviewing and incorporating other sources of indicators and evaluation models should be considered, including the Habitat International Coalition-Housing and Land Rights Network’s “Loss Matrix” for quantifying costs and losses arising from housing and land rights violations.
- Consultation with the current Special Rapporteurs on adequate housing and on human rights in the occupied territory.
- Consultation with a representative sample of communities that the Wall has affected;
- A Register programme that provides local capacity building of Palestinian official and civil actors to develop and apply proper quantification methods in documenting damages, losses and costs.
- Accompanying the Register’s funding from assessed contributions with an ethical code of noninterference, so as not to compromise the Register’s nonpartisan function or its integrity.
- Under no circumstances should the Register or any of its functions imply recognition of a transfer of title or of any form of legal tenure, possession or ownership of any real or moveable property to the occupying Power, or any of its agents, including natural and legal persons, or to any other public or private party.
- Assessments of damages, costs and losses would include both short-term and long-term values, and remain consistent with the foregoing principle.

It is our hope that this first practical UN effort toward implementing the ICJ decision be relevant and successful. We realize that, if the Register failed to promise a remedial and corrective

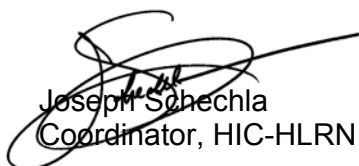
outcome now, then a further corrective effort surely would be needed in the future. A Register without a remedial purpose could only compound, but not correct, the record of lawlessness and impunity. The choice remains, therefore, to establish a damage Register with a problem-solving purpose and endpoint, or promote a costly and perpetual exercise that would be inert, at best. What is most feared, however, is that a Register without such a remedial purpose fail to address rights and responsibilities to the mounting loss and frustration of the civilian victims. Requiring victims further to pay the price of impunity with their lands, lives and livelihoods, naturally, would only further erode faith in the UN, the international rule of law, human rights, and the regional peace and security that we all seek.

Mr. Secretary-General,

We appreciate your good efforts to ensure the implementation of resolution A/ES-10/L.18/Rev.1 is carried out in its integrity with the ICJ Advisory Opinion and the best remedial purposes.

Please be assured of our highest consideration.

Sincerely,



Joseph Schechla
Coordinator, HIC-HLRN

On behalf of:

Applied Research Institute—Jerusalem, Badil Resource Center for Palestinian Residency and Refugee Rights (Bethlehem), al-Haq : Law in the Service of Man (Ramallah), Housing and Land Rights Network (Cairo, Geneva, New Delhi), Ittijah: Union of Arab Community-based Organizations (Haifa), Al Mezan Center for Human Rights (Gaza).

CC: **Matti Vanhanen**, Prime Minister of Finland and President of the European Union
H.E. Mr. Jan Eliasson, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Sweden, President of the sixtieth session of the United Nations General Assembly
Jean-Marc de LA Sablière, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of France, President of the Security Council
Ali Hachani, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Tunisia, President of ECOSOC
John Dugard, Special Rapporteur on human rights in the occupied Palestinian territory
Miloon Kothari, Special Rapporteur on adequate housing
Jean Ziegler, Special Rapporteur on the right to food
Jan Egeland, Under-Secretary-General for Humanitarian Affairs
Alvaro De Soto, UN Special Coordinator's Office (UNSCO)
Jens Frandzen, Special Representative, United Nations Development Programme/PAPP

¹ The General Assembly requested that the International Court of Justice address its Advisory Opinion to the 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?"

² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, General List 131, 9 July 2004, paras. 151.

³ Ibid., para. 159.

⁴ Ibid., para. 160.

⁵ OCHA, Preliminary Analysis of the Humanitarian Implications of the April 2006 Barrier Projections, Update 5 (July 2006), at: http://www.humanitarianinfo.org/opt/docs/UN/OCHA/OCHABarrierProj_6jul06.pdf.

⁶ Peace Now, "The West Bank - Facts and Figures" (August 2005), at: <http://www.peacenow.org.il/site/en/peace.asp?pi=195&docid=1430>.

⁷ OCHA, op cit.

⁸ Population figures based on the Palestinian Central Bureau of Statistics 1997 census, 2006 estimates, and the Jerusalem Statistical Yearbook, 2003.

⁹ Chris McGreal, "Israel unveils plan to encircle Palestinian state," *Guardian* (7 February 2006), at: <http://www.guardian.co.uk/israel/Story/0,,1705021.00.html>.

¹⁰ According to Palestinian Central Bureau of Statistics, in OCHA, op cit.

¹¹ According to B'Tselem, in OCHA, op cit.

¹² The Palestinian Center for Human Rights (PCHR) (April 2004), "Uprooting Palestinian trees and levelling of agricultural land: 1 April 2003–30 April 2004".

¹³ See "Principles on Housing and Property Restitution for Refugees and Displaced Persons," in Final Report of the Special Rapporteur Paulo Sérgio Pinheiro, submitted in accordance with Sub-Commission resolution 2004/2, E/CN.4/Sub.2/2005/17 (2 May 2005).

¹⁴ "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law," as developed with the contributions of Special Rapporteurs Theo van Bowen and Cherif Bassiouni: UN Commission on Human Rights resolution 2005/35 (19 April 2005).

¹⁵ "Guiding Principles on Internal Displacement," developed with contributions from the Independent Expert Francis Deng, in E/CN.4/1998/53/Add.2 (11 February 1998).

¹⁶ "Basic principles and guidelines on development-based evictions and displacement," in Report of the Special Rapporteur Miloon Kothari on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context, E/CN.4/2006/41 (14 March 2006).