



RIGHTS AL-MEZAN CENTER FOR HUMAN

REPORT ON THE LEGAL AND ECONOMIC CONSEQUENCES OF THE
UNILATERAL DISENGAGEMENT PLAN

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REPORT ON THE LEGAL AND ECONOMIC CONSEQUENCES OF THE UNILATERAL DISENGAGEMENT PLAN

Report produced by:

Al Mezan Centre for Human Rights

Research conducted by:

Jessica Adley

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Introduction

Israel's Disengagement Plan has been called "a moment pregnant with hope, but also fraught with peril."¹

Pregnant with hope, because the plan's call for the evacuation of 25 Jewish settlements from the Occupied Palestinian Territories (OPT) and the withdrawal of Israeli forces from Gaza holds the potential to bring some normalcy to Palestinians who have lived under a 38 year occupation. Without the presence of settlements and troops it is expected that Palestinians will reclaim control over their land, access the entire length of their coastline, move unimpeded in their own territory, and live more free of Israeli controls and attacks. In light of such benefits, the Israeli plan has been lauded by many as a positive, politically courageous and precedent setting step that could re-launch the peace process and bring an end to Israel's occupation of the OPT.²

The Disengagement Plan is also fraught with peril, because it will not put an end to Israel's occupation of the Gaza Strip. The present terms of the published Disengagement Plan specifically affirm that "[t]he completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip." It is therefore Israel's hope that the plan's implementation will release it of its legal status as an occupying power. Legally speaking however, the continued extent of Israel's physical and administrative control over Gaza means that it will continue to maintain effective control over the territory. This means that the Disengagement Plan will do nothing to change Israel's status as an occupying power or the status of Gazans as protected persons, whose wellbeing Israel has an obligation to provide for under international humanitarian law (IHL).

Disengagement in Gaza vs. the Wall in the West Bank

Appreciating the implications of the Disengagement Plan necessitates one consider it in a broader political context. As a result, a full understanding of Israel's plan demands that one consider the withdrawal from Gaza in relation to the construction of the wall in the West Bank. When such a comparison is made, the underlying motivations of the Disengagement become clear. In exchange for loosening its grip over the Gaza Strip, Israel affirms its intent to consolidate its hold over the West Bank, all while claiming an end to the occupation in the former. While the world becomes transfixed by the prospect of "Jews expelling Jews" from illegal settlements in Gaza, Jews will illegally be expelling Palestinians in the West Bank while accelerating construction of a wall that will ensure the growth of more illegal settlements on more Palestinian land.

Although Israel claims the wall is solely motivated by security concerns, it is impossible to ignore the fact that the wall diverts markedly from the 1949 Armistice Line. In so doing it includes dozens of settlements, some of the West Bank's best agricultural land as well as essential water supplies, on the west (Israeli) side of the wall. Moreover, while Israel claims the wall is a temporary measure, it is already creating "facts on the ground" that will clearly impose long term and potentially permanent consequences, including: the annexation and fragmentation of Palestinian territory, restrictions of movement, and denial of Palestinians' access to their land, water, jobs, schools, hospitals and holy sites.

Israel markets the Disengagement Plan as an instrumental step towards the advancement of Israeli-Palestinian peace. As Israel states, "there is renewed optimism that the Disengagement Plan will succeed to advance peace efforts where previous attempts have failed."³ Yet in reality, the Disengagement Plan operates from the opposite premise. Dov Weisglass, one of the initiators of the plan and a "top" aide to Israeli Prime Minister Ariel Sharon affirmed the true intention of the Plan:

¹ A quote from Alvaro De Soto, United Nations Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General to the Security Council. "Israel's Gaza Disengagement Plan 'A Moment Pregnant With Hope, but Also Fraught With Peril,' Middle East Peace Envoy Tells Security Council." Press Release, 5230th Mtg., SC/8455 (July 21, 2005).

² *Ibid.*

³ Israel, Ministry of Foreign Affairs, "Israel's Disengagement Plan: Renewing the Peace Process," (20 April, 2005) online: Israel Ministry of Foreign Affairs <<http://www.mfa.gov.il>>. [Renewing the Peace Process]

"[t]he significance of the disengagement plan is the freezing of the peace process. And when you freeze that process, you prevent the establishment of a Palestinian state, and you prevent a discussion on the refugees, the borders and Jerusalem...Effectively the whole package called the Palestinian state, with all it entails, has been removed indefinitely from our agenda. And all this with authority and permission. All with a presidential blessing and ratification of both houses of Congress...The disengagement is actually formaldehyde. It supplies the amount of formaldehyde that is necessary so that there will not be a political process with the Palestinians."⁴

With this in mind, Al Mezan Centre for Human Rights stresses the importance of noting that the Disengagement Plan is not based on an equivocally agreed framework, but on terms unilaterally set by an occupier. Rather than a step towards achieving a just and lasting peace, the plan will pave the way for Israel to continue its military activities, the construction of the wall, its systematic campaign of annexing and expropriating Palestinian land, as well as the continued establishment and expansion of settlements. These realities demonstrate that the plan is really about providing the means for Israel to realize its self-interested gains whilst ridding itself of its legal responsibility towards a people that has suffered and will continue to suffer untold human rights violations at its hands.

Disengagement Plan Summarized

First introduced by Israeli Prime Minister Ariel Sharon in 2003, the revised Disengagement Plan was made public on June 4, 2004 after receiving approval by the Knesset and being presented to the US President George W. Bush.⁵ Central to the Plan is the evacuation of all 21 settlements in the Gaza Strip as well as 4 settlements in the northern West Bank and the redeployment of Israeli military outside the evacuated areas. The plan affirms that while "[i]n any future permanent status arrangement" Gaza will be free of all Jewish towns and villages, there will be areas in the West Bank, "including major population centers, cities, town, villages, security areas and other places of special interest to Israel" which will be a part of Israel.⁶

According to the Plan, its stated purpose is to break the current stalemate between Israel and its Palestinian counterpart by fostering "a better security, political, economic and demographic situation."⁷ Concluding outright "that there is currently no reliable Palestinian partner with which it can make progress in a two-sided peace process," the plan is offered as a unilateral initiative "not dependent on Palestinian cooperation."⁸ Despite its one-sidedness, the plan expects that its withdrawals "should reduce friction with the Palestinian population" while dispelling "claims regarding Israel's responsibility for the Palestinians in the Gaza Strip."⁹ In order to attain such goals, the Plan seeks to implement measures that will increase separation between Palestinians and Israelis in legal, economic, demographic and geographic terms.¹⁰

This Report

This two-part report by Al Mezan Centre for Human Rights will demonstrate that the Disengagement Plan is a disingenuous attempt by Israel to relieve itself of its responsibilities as an occupying power in the Gaza Strip while

⁴ Ari Shavit, Aluf Benn & Yair Ettinge. *Haaretz*, "U.S. asks Israel to clarify comments made by top PM aide." (7 October 2004) online: *Haaretz* <www.haaretz.com>.

⁵ Renewing the Peace Process, .3note supra

⁶ Israel, Cabinet Resolution Regarding the Disengagement Plan, "Revised Disengagement Plan," (6 June 2004) at Addendum A, Principle "three," online: Israel Ministry of Foreign Affairs <<http://www.mfa.gov.il>>. [Disengagement Plan]

⁷ *Ibid.* at Principle "two."

⁸ *Ibid.* at Principle "one."

⁹ *Ibid.* at Principle "five" and "six."

¹⁰ *Ibid.* at Principle "two." See also Claude Bruderlein, "Legal Aspects of Israel's Disengagement Plan Under International Humanitarian Law," (Harvard Program on Humanitarian Policy and Conflict Research, September 2004) at 20, Annex 1. online: Harvard Program on Humanitarian Policy and Conflict Research <<http://www.hpcr.org/publications/>>. [Bruderlein]

securing its hold over the West Bank. The implementation of the Plan will have no effect on the legal status of the occupation in the Gaza, but stands to result in further breaches of Israel's obligations as an occupying power and more violations of Palestinians' human rights. According to Al Mezan's fieldwork unit, the human rights violations it has been monitoring over the past years, including: restrictions on movement of people and goods and denial of diverse economic and social rights, will continue being violated after the implementation of the Disengagement Plan. Rather than improving the general welfare of Palestinians, the steps outlined in the Plan are likely to promote political and social instability while further diminishing economic prospects and increasing endemic poverty. In so doing, Israel's disengagement will not, as it claims, reduce tensions in the OPT, but cause them to flare, thus compromising the re-launching of the peace process and the attainment of a just and lasting peace.

A greater appreciation of the Disengagement Plan necessitates that it be considered within a broader historical, legal, and economic framework. In order to understand why the Plan represents yet another of Israel's attempts to relieve itself of its responsibilities towards Palestinians in the OPT, Al Mezan considers, in **Section I** of this report, Israel's historical role as an occupying power in accordance with the law of occupation. In so doing, we offer a critical analysis of Israel's selective application of IHL norms within the OPT. We attempt to bring to light the legally flawed arguments used by Israel to support its untenable position. Lastly, we consider how Israel's transfer of administrative authority and control to the Palestinian Authority in accordance with the Oslo Agreements did nothing to alter Israel's status as an occupying power and the Palestinians in the OPT as a protected persons.

Section II demonstrates that the test of effective control needs to be met for an occupation to exist under international law. In accordance with the test, an occupation exists so long as a foreign power retains effective military and administrative control over the sovereign territory. When applied to the Disengagement Plan, it is clear that despite Israel's redeployment of its military and evacuation of settlements, Israel will retain effective control over Gaza. As a result, Gaza will retain its status as an occupied territory under international law.

Section III looks at the history of Israel's practices of land annexation in East Jerusalem and land expropriation in the West Bank and Gaza Strip and considers them as part of a long-standing campaign to establish more Jewish settlements in the OPT. An analysis of key provisions of the Disengagement Plan demonstrates Israel's intention to continue its strategic program of acquiring more Palestinian land without acquiring Palestinian people, despite the illegal nature of such practices under international law.

Despite its cursory mention, **Section IV** seeks to demonstrate that the wall is of central importance to Israel's Disengagement Plan. In this section, Al Mezan juxtaposes Israel's High Court of Justice (HCJ) ruling on a portion of the wall and the International Court of Justice's (ICJ) decision on the wall and its associated regime. Israel's reasons for accepting its own Supreme Court's decision and refusing the international court's decision are outlined. In addition, the relevance of the ICJ's decision is examined in light of changes made to the wall's route on February 20, 2005.

Israel has always maintained that the wall is a temporary measure that is based solely on providing security. However a critical analysis of the wall's deviation from the Green Line demonstrates that the wall is more about creating permanent effects on the ground than providing a temporary security measure. Such an argument is supported by evidence demonstrating the wall's primary goals which include: the protection and consolidation of settlements, the annexation of Palestinian agricultural land and the appropriation of prime sources of water.

The wall and its associated regime of restrictions impeding people's movement have led to untold human rights violations of hundreds of thousands of Palestinians living in the West Bank. The analysis hereby presented by Al Mezan serves to demonstrate that a clear purpose of the wall is to make life intolerable for Palestinians living in areas near the wall. Among those most affected are farmers who have consistently been denied free access to their farmland. The inability of farmers to care for their land poses serious consequences to the Palestinian agricultural sector, especially in light of the already dire economic situation in the OPT, which greatly compromises the enjoyment of economic rights for these Palestinians.

Part II considers the economic side of the Disengagement Plan. Despite the fact that the plan affirms its intention to achieve a better economic situation, a critical analysis demonstrates that any benefits accrued will be effectively undermined by the continuation of Israel's closure regime in the OPT. An examination of the effects of the

Disengagement Plan on the movement of goods and people within and across Palestinian borders, the passage between Gaza and the West Bank, the airport and seaport, and Palestinian labour flows to Israel demonstrate that the long term economic situation in the OPT will not improve, but will actually deteriorate. This is particularly the case in the Gaza Strip.

The **final remarks** include suggestions from Al Mezan Centre for Human Rights on how Israel can make the Disengagement Plan the success it purports to be.

Section I

Occupation defined

The term occupation is described as “a regime of control over territory and population by a foreign sovereign’s military.”¹¹ The state of occupation is not confined to periods of armed conflict or active hostilities, rather it exists so long as the occupier exercises effective control over the territory.¹² As one report notes, “[t]his is because ‘occupation’ as an *act* is an act of war itself and because it is a description of *status* of a territory with correlative internationally enforceable rights and obligations of the Occupying Power.”¹³

The *Hague Convention IV Respecting the Laws and Customs War on Land* (1907) and its *annexed Regulations* offer a basic definition of occupation: “Territory is occupied when it has actually been placed under the authority of the hostile army. The occupation only extends to the territory where such authority has been established and can be exercised.”¹⁴ This characterization has been reaffirmed and elaborated upon in the Nuremberg jurisprudence,¹⁵ the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*¹⁶, its *First Additional Protocol*¹⁷, in United Nations resolutions¹⁸ and by the International Court of Justice.¹⁹

The law of occupation

The law of occupation is said to apply when “there is an international armed conflict; a foreign military force has made an incursion on enemy territory; and this force exerts any form of control over the population of that territory.”²⁰

¹¹ PLO, Negotiations Affairs Department, “The Israeli “Disengagement” Plan”, (October 2004) at Section 1(A), online: PLO www.nad-plo.org/gazaplan2.php. [PLO Report]

¹² Oxford Public Interest Lawyers, “Legal Consequences of Israel’s Construction of a Separation Barrier in the Occupied Territories” (Oxford: University of Oxford, February 2004) at 10. [Oxford Report]

¹³ *Ibid.*

¹⁴ *Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, and annexed Regulations*, 18 October 1907, 36 U.S. Stat. 2277, Gt. Brit. Tr. Ser. No. 9, Cmd. 5030 (entered into force 26 January 1910) at art. 42. [1907 Hague Convention]

¹⁵ *Hostages Case*, *infra*, note 87.

¹⁶ *Geneva Convention Relative to the Protection of Civilian Prisoners In Time of War*, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 187 (entered into force Oct. 21, 1950) at Article 2 and 6. [Fourth Geneva Convention].

¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 at Article 1(4) and 3(b). [Additional Protocol]

¹⁸ In resolution 242 (1967) the Security Council affirmed “the inadmissibility of the acquisition of territory by war” and “that the fulfilment of [United Nations] Charter principles requires the ...[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict...” See SC Res. 242 (1967), UN SCOR, 1382nd Mtg. UN Doc. S/RES/242, (22 November 1967) at Preamble and Principle 1(1). More recently the General Assembly reaffirmed in resolution ES-10/6 (1999) that “all illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, especially settlement activities and the practical results thereof, remain contrary to international law and cannot be recognized, irrespective of the passage of time.” See *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, GA Res. ES-10/6, UN GAOR, 10th Emergency Special Sess., Agenda item 5, UN Doc. A/RES/ES-10/6 (9 February 1999) at Preamble.

¹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004], 43 I.L.M. 1009 at para 89. [Advisory Opinion]

²⁰ Bruderlein, *supra* note 10 at 6.

The *Fourth Geneva Convention* is viewed as one of the primary international instruments governing the law of belligerent occupation. It is considered a supplement to the *1907 Hague Convention*.²¹ Together they form what is generally regarded as part of the international customary law of war.²²

As Imseis writes,

"To a large extent, the Fourth Geneva Convention and the 1907 Hague Regulations govern the law of belligerent occupation – that branch of international humanitarian law that regulates "the occupation of enemy territory in time of war," as well as "after a cease-fire or truce, when civilians could be subjected to military occupation in the absence of a final political settlement."²³

The Convention represents the "first time that a set of international regulations has been devoted not to State interests, but solely to the protection of the individual."²⁴ The treaty was created specifically to address the failure of international law to safeguard populations ravaged by war, and specifically occupation. Its significance is further reinforced by its broad membership; "almost every country in the world" adheres to the Convention.²⁵ While it does attempt to balance the rights of the occupier against those of the occupied, its "overriding aim... is to ensure that claims of military exigency do not result in the violation of basic political and human rights of the civilians under military occupation."²⁶

Israel as an occupying power in the OPT

Israel's occupation of the West Bank and the Gaza Strip began following the Six-Day War in June 1967. For 38 years it has retained and exercised effective control over the Palestinian territories and people, making it the longest occupation of modern times.²⁷ In accordance with a number of international treaties ratified by Israel, including the *Fourth Geneva Convention*, as well as international customary norms recognized by Israel, such as the *1907 Hague Convention*, Israel continues to- by definition- occupy the Palestinian territories.²⁸ This legal status means Israel's relationship with the OPT is regulated by the law of occupation.²⁹

Following the Six-Day War, Israel set up a civil administration that managed and developed public services for the Palestinian people in the OPT. During the next 27 years the civil administration regulated and –in part- funded the provision of public services.³⁰ In 1994, under the Oslo Agreements, the Government of Israel [GOI] transferred most of its administrative authority to the newly established Palestinian Authority [PA].³¹ This transfer of power did not affect Israel's status as an occupying power. As Bruderlein writes, "even if the transfer of administrative responsibilities to the PA narrowed the scope of duties of Israel as the Occupying Power, it did not extinguish

²¹ *1907 Hague Convention*, *supra* note 14. See also Advisory Opinion, *supra* note 19 at para 89.

²² Ardi Imseis, "On the Fourth Geneva Convention and the Occupied Palestinian Territory" (Winter 2003) 44 Harv. Int'l L.J. 90. [Imseis] Although as Imseis writes: "The Fourth Geneva Convention is not *completely* declarative of customary international law principles on the law of war, however."

²³ Imseis, *ibid* at 66.

²⁴ Jean S. Pictet, ed., *ICRC Commentary on the Civilians Convention* 77 (1958), cited in W. Thomas Mallison & Sally V. Mallison, *The Palestine Problem in International Law and World Order*. (England: Longman House, 1986) at 258. [Mallison]

²⁵ International Committee of the Red Cross, "The Geneva Conventions: the core of international humanitarian law" (March 6, 2004), online: ICRC <<http://www.icrc.org>>.

²⁶ Imseis, *supra* note 22 at 66, footnote 12.

²⁷ *Ibid.* at 67.

²⁸ See *infra*, note 29.

²⁹ The law of occupation includes a wide range of provisions. See Articles 42 to 56 of the *Hague Convention*, *supra* note 14. See also Articles 27 to 34 and 47 to 135 of the *Fourth Geneva Convention*, *supra* note 16. Relevant norms are also included in the *Additional Protocol*, *supra* note 17, *Rome Statute of the International Criminal Court*, UN Doc. 32/A/Conf. 183/9, (17 July 1998) 37 I.L.M. 999 [Corrected through January 6, 2002]. [Rome Statute]. Israel has ratified the four Geneva Conventions, but not the Additional Protocols or the Rome Statute.

³⁰ Bruderlein, *supra* note 10 at 5.

³¹ *Ibid.*

Israel's responsibilities towards the Palestinian population.”³² (See section below titled “The Oslo Agreements Did not Affect the Status of the Occupation”)

Israel's legal responsibilities toward the Palestinian people in the OPT

The law of occupation plays a central role regulating the relations between an occupying power and an occupied population.³³ As soon as a military force acquires control over a foreign territory, it is imposed with a set of obligations in accordance with IHL aimed at upholding the most basic rights of the occupied population. The most fundamental of these standards is set out in Article 43 of the *1907 Hague Regulations*:

“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.”³⁴

While IHL does impart certain rights to protect the occupying power's forces, those rights are secondary to the occupying power's overriding legal duties to maintain the status quo and protect the civilian population that is subject to its temporary rule.³⁵ The *Fourth Geneva Convention* imposes numerous responsibilities on Israel aimed at mitigating, as much as possible, the burden and suffering of the Palestinian people who are, under Article 4, recognized as “protected persons”.³⁶ These obligations range from safeguarding the occupied population's *honour, family rights, religious convictions, practices, manners and customs*, ensuring they are *humanely treated, protected especially against all acts of violence*,³⁷ securing the provision of *food and medical supplies for the population, as well as maintaining medical services*,³⁸ in addition to facilitating *the functioning of institutions devoted to the care and education of children*.³⁹

Despite the fundamental character of such obligations, “the Israeli military has consistently violated nearly every provision of the Fourth Geneva Convention” throughout the occupation's 38 years.⁴⁰ The severity of such violations rose drastically in recent years (during the al-Aqsa *Intifada*), “many of which constitute grave breaches of the *Fourth Geneva Convention* and thus war crimes under international law.”⁴¹ While it is outside the scope of this report to examine all of Israel's breaches, the variation and intensity of Israel's violations during the last *Intifada* is reflected in the following passage:

“The occupying power laid sieges to public buildings and residential quarters, carried out indiscriminate assaults from tanks, helicopters and military watchtowers on traumatized civilians and bystanders, killed or wounded them, targeted children, assassinated individuals, occasionally used poisonous gases, prevented medical teams to function effectively, carried out collective punishment, demolished edifices, shelled even academic institutions, damaged mosques and churches, devastated livestock and agricultural complexes, raised industrial enterprises to ground, bulldozed water wells, destroyed crops, uprooted trees, pursued arrest campaigns, prolonged detentions with no charge or trial, applied torture under detention, transferred them illegally, set strict criteria for release of prisoners, helped the illegal extension of Jewish settlements, closed commercial stores, tightened

³² *Ibid.*

³³ PLO Report, *supra* note 11.

³⁴ *1907 Hague Convention*, *supra* note 14 at art. 43.

³⁵ This statement was first expressed to me by Ardi Imseis.

³⁶ *Fourth Geneva Convention*, *supra* note 16 at art. 4.

³⁷ *Ibid.* at Article 27.

³⁸ *Ibid.* at Article 55 and 56.

³⁹ *Ibid.* at Article 50.

⁴⁰ Allegra Pacheco, “Flouting Convention: the Oslo Agreements,” in Roane Carey ed., *The New Intifada: Resisting Israel's Apartheid* (2001) 181, at 184 as cited in Imseis, *supra* note 22 at 100.

⁴¹ Imseis, *supra* note 22 at 101.

curfews, denied the Palestinians access to their work places, and harassed, arrested, wounded and even killed local and foreign journalists who documented these crimes.”⁴²

Israel rejects the applicability of the Fourth Geneva Convention

Israel has consistently refused to accept the applicability of the *Fourth Geneva Convention* within the OPT.⁴³ The crux of Israel’s argument “rests on an implicit assumption that a belligerent occupant must oust a legitimate sovereign from a territory in question in order for the laws of occupation to apply.”⁴⁴ Israel argues that neither the West Bank nor the Gaza Strip was under the authority of legitimate sovereign when they were taken over by Israel in 1967. Rather both territories were illegally occupied by Jordan and Egypt in 1948, before the West Bank was illegally annexed to Jordan in 1950. As a result, Israel contends the Palestinian territories cannot be considered to be part of the “territory of a high contracting party,” a requirement necessary for the application of the *Fourth Geneva Convention*.⁴⁵

Article 2 of the *Fourth Geneva Convention* reads:

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

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...[Emphasis added]⁴⁶

Israel argues that the tenuous legal status of the Palestinian territories in 1967 indicate that neither the West Bank nor the Gaza Strip can be considered “the territory of a High Contracting Party.”⁴⁷ Moreover Israel contends this “void of sovereignty” over the Gaza Strip and West Bank in 1967 indicates that Israel has the best legal title over the land.⁴⁸ As a consequence, Israel concludes it cannot be considered an occupying power within the meaning of the *Fourth Geneva Convention* and is therefore under no legal obligation to abide by the international humanitarian laws that protect civilians in an occupied territory.⁴⁹

⁴² Written statement submitted by the International Organization for the Elimination of all Forms of Racial Discrimination (EAFORD), “Racism, racial discrimination, xenophobia and all forms of discrimination,” UN ESCOR, 60th Sess., Item 6 of the provisional agenda, UN Doc. E/CN.4/2004/NGO/78 (27 February 2004).

⁴³ See Ruth Lapidoth “The Expulsion of Civilians from Areas which came under Israeli Control in 1967: Some Legal Issues” (1991) 2 E.J.I.L. 97, online: E.J.I.L.:<<http://www.ejil.org/journal/Vol2/No1/art5.html>>. See also Imseis, *supra* note 22 at 68.

⁴⁴ David John Ball, “Toss the Travaux? Application of the Fourth Geneva Convention to the Middle East Conflict- A Modern (Re)Assessment” (June 2004) 79 N.Y.U.L. Rev. 990 at 1024 (Lexis) [Ball]. Israel’s argument is based on the so-called “missing reversioner” theory first outlined by Professor Yehuda Blum, “The Missing Reversioner: Reflections on the Status of Judea and Samaria” (1968) 3 Isr. L. Rev. 279, 293-294. See Imseis, *supra* note 22 at 94 for more in depth analysis.

⁴⁵ Ball, *supra* note 44 at 1016-1017.

⁴⁶ *Fourth Geneva Convention*, *supra* note 16 at Article 2.

⁴⁷ In so doing, Israel dismisses the fact that Jordan ratified the *Fourth Geneva Convention* in 1951.

⁴⁸ Ball, *supra* note 44 at 1018.

⁴⁹ Israel, Ministry of Foreign Affairs, “Disputed Territories- Forgotten Facts About the West Bank and Gaza Strip” (Feb 1, 2003) online: Israel Ministry of Foreign Affairs <<http://www.mfa.gov.il/MFA>>. As the Ministry states “the fact that there were no established sovereigns in the West Bank or Gaza Strip prior to the Six Day War means that the territories should not be viewed as “occupied” by Israel. When territory without an established sovereign comes into the possession of a state with a competing claim - particularly during a war of self-defense - that territory can be considered disputed.”

Israel's argument regarding the applicability of the Fourth Geneva Convention is without legal merit

Israel's rejection of the *de jure* applicability of the *Fourth Geneva Convention* in the OPT has been widely criticized over the years as being without legal merit. As Mallison writes,

“Even if the claim that Jordan annexed the West Bank unlawfully should be accepted for purposes of legal argument, this does not mean that this territory is not ‘the territory of a high contracting party’ within the meaning of Article 2 [of the *Fourth Geneva Convention*].”⁵⁰

What is problematic is the fact that Israel's claim hinges on a “narrowly construed” definition of ‘territory’ that is confined to *de jure* title, or legal title.⁵¹ As Mallison points out, there exists no basis for Israel's argument in the negotiations leading up to the Convention, in the Convention text itself, or in “well-established customary law.”⁵² Rather, it is well recognized in international law that the term ‘territory’ encompasses both *de jure* title and *de facto* title or title in fact.⁵³ This means that the *Fourth Geneva Convention* is applicable to the OPT regardless of whether or not Jordan exercised territorial sovereignty over the West Bank and Gaza Strip. Such an interpretation is upheld by the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.⁵⁴

To reject the applicability of the *Fourth Geneva Convention's* laws of occupation on the grounds of territorial sovereignty would shift the focus away from preventing the violation of fundamental human rights to issues of territorial sovereignty. This risks completely undermining the Convention since it would mean that “civilians in a disputed territory would be denied the protection of law on the basis of a trivial and, indeed, a nonexistent technicality.”⁵⁵ Indeed, the effect of allowing Israel's argument to stand would give all occupying states an attractive loophole that could compromise the very viability of humanitarian law and ensure that the Geneva Convention “would be rarely, if ever, applied.”⁵⁶ As Mallison writes, this would contradict one of the principal reasons for the creation of the *Fourth Geneva Convention*: “to avoid a repetition of the atrocities and massive deprivations of human rights which were inflicted upon civilian populations during the Second World War by the Nazis in Europe and Russia...”⁵⁷

Israel's selective application of the Fourth Geneva Convention amidst international criticism

While rejecting the *de jure* applicability of the *Fourth Geneva Convention* the Israeli government and courts have affirmed Israel's intention to uphold *de facto* the “humanitarian provisions” of the Convention, although neither

⁵⁰ Mallison, *supra* note 24 at 254.

⁵¹ *Ibid.* at 255.

⁵² *Ibid.*

⁵³ *Ibid.* at 254.

⁵⁴ *Supra* note 19 at para 95.

⁵⁵ Thomas Mallison quoted by United Nations Committee on the Exercise of the Inalienable Rights of the Palestinian People (UNCEIRPP), *The Question of the Observance of the Fourth Geneva Convention of 1949 in Gaza and the West Bank Including Jerusalem Occupied by Israel in June 1967*, (New York: UN, 1979) at Section II. [UNCEIRPP]

⁵⁶ *Ibid.* Israel's rejection of its status as an occupying power is commonplace in the international community. See Bruderlein, *supra* note 10 at 10. As Bruderlein states, “[i]n practice, occupiers have been consistently reluctant to designate hostile territory under their effective control as occupied.” See also Eyal Benvenisti, *The International Law of Occupation*, (Princeton: Princeton University Press, 1993) at 6. As Benvenisti writes, “In exploring the phenomenon of occupation, I was struck by the fact that most contemporary occupants ignored their status and their duties.”

⁵⁷ UNCEIRPP, *supra* note 55.

have detailed what this actually includes.⁵⁸ This setup allows Israel to apply with discretion those international laws it finds suitable.

As Bruderlein states,

“By recognizing the applicability of only some of the international instruments to the OPT, the GoI has attempted to circumvent international criticism on key Israeli policies in the OPT, specifically the transfer of Israeli citizens to the OPT or the deportation of Palestinians outside the OPT, both formally prohibited by Article 49 of the Fourth Geneva Convention.”⁵⁹

Israel's selective position regarding the *Fourth Geneva Convention* has been opposed *inter alia* by the majority of states party to the Convention⁶⁰, the General Assembly⁶¹, the UN Security Council⁶², the International Court of Justice⁶³ (ICJ) and the International Committee of the Red Cross⁶⁴, which argue instead for the full application of the Convention in the OPT.⁶⁵ Virtually all government experts and international academics insist that the status of the territories in 1967 does not influence the Convention's applicability.⁶⁶ Indeed, now that the ICJ- the “principal judicial organ of the UN”- has affirmed the general consensus by finding the *Fourth Geneva Convention* applicable in the territories, Israel's arguments appear moot.⁶⁷

⁵⁸ Imseis calls Israel's position “curious... given the complete humanitarian object and purpose of the convention.” *Supra* note 22 at 93.

⁵⁹ Bruderlein, *supra* note 10 at 3, footnote 5.

⁶⁰ During a conference held on July 15, 1999, the State parties to the *Fourth Geneva Convention* “reaffirmed the applicability of the Fourth Geneva Convention on the Occupied Palestinian Territory, including East Jerusalem.” They did so again on December 5, 2001. See Advisory Opinion, *supra* note 19 at para 96.

⁶¹ In resolution 56/60 on Dec. 10, 2001 the General Assembly reaffirmed “that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967.” See *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including Jerusalem, and the other occupied Arab territories*, GA Res. 56/60, UN GAOR, 66 Sess., agenda item 88, UN Doc. A/RES/56/550, (10 Dec. 2001) at para 1.

⁶² In resolution 446 (1979), the Security Council affirmed “*once more* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem”. It called “*once more upon* Israel, as the occupying Power, to abide scrupulously” by that Convention. See SC Res. 446 (1979), UN SCOR, UN Doc. S/RES/446 (22 March 1979) at para 1 and 3. In resolution 681 (1990) the Security Council urged “the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention, to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention”. Additionally, the Security Council called upon “the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof.” See SC Res. 681 (1990) UN SCOR, 2970th Mtg., UN Doc. S/RES/681 (20 December 1990) at para 4 and 5.

⁶³ Advisory Opinion, *supra*, note 19 at para 95-101.

⁶⁴ See ICRC, *Implementation of the Fourth Geneva Convention in the occupied Palestinian territories: history of a multilateral process* (1997-2001) (September 30, 2002) International Review of the Red Cross, No. 847, 661 at Annexe 2, para 2, online: ICRC <http://www.icrc.org>. On December 5, 2001 the international organization declared that “the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem. This Convention, ratified by Israel in 1951, remains fully applicable and relevant in the current context of violence.

⁶⁵ Bruderlein, *supra* note 10 at 3. See also Lapidoth, *supra* note 43 at footnote 18, 19 and following.

⁶⁶ *ibid* Bruderlein,

⁶⁷ In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ held: “In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.” See Advisory Opinion, *supra* note 19 at para 101.

The Oslo Agreements did not affect the status of the occupation

The Oslo Agreements resulted in three principal changes that led to wide debate on the applicability of the law of occupation in the OPT.⁶⁸ Firstly, the agreements led to the establishment of the Palestinian Authority (PA) and elected Council, allowing for the transfer of some administrative responsibilities from the Israeli Government to its Palestinian counterpart.⁶⁹ Secondly, they divided the OPT into three separate "areas," each with a differing degree of PA control. Area A was designated as being under full Palestinian control, Area B was considered shared control between PA and Israelis, while Area C left Israel with full control.⁷⁰ Third, the agreements affirmed both sides' mutual recognition of the other's legitimacy and accompanying political rights.⁷¹

Israel and its supporters used interpretations of Article 6 of the *Fourth Geneva Convention* and Article 42 of the *1907 Hague Regulations* to buttress arguments calling for the declining application of the law of occupation.⁷² Article 6 states "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 a territory." As previously stated, Article 42 of the *1907 Hague Regulations* affirms that an occupation results when a territory is placed under the authority of a foreign state and extends so long as the foreign authority's power remains "established and can be exercised." Proponents of such a position argued that the expected situation resulting from the Oslo Agreements would leave Israel without the ability to exercise the requisite level of "effective control" over Area A, in order to be considered an occupying power.⁷³

Those standing in opposition and claiming that the law of occupation should remain wholly applicable pointed out that the *Fourth Geneva Convention* has precedence over the Oslo Agreements. Such an argument centers on Article 47 of the *Geneva Convention* which 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 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...*"⁷⁴ [Emphasis added]

In light of such a provision it was argued that the Oslo Agreements could not have changed the status of Israel as an occupying power and the Palestinians as protected persons. This view appears supported by the Oslo provisions themselves, which affirmed that: neither party to the agreement will be considered "to have renounced or waived any of its existing rights, claims or positions,"⁷⁵ the West Bank and Gaza Strip will remain "a single territorial unit"⁷⁶ and that "nothing in the Agreement shall be considered to change that status."⁷⁷ As Bruderlein writes, "the Oslo Agreements were never intended to resolve the ultimate legal responsibilities of Israel toward the Palestinian population in the OPT."⁷⁸ Rather the intention was to leave this and other contentious issues for the negotiations of the final status agreement.

⁶⁸ See "Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory," (Harvard Program on Humanitarian Policy and Conflict Research, July 2004) at 9, online: Harvard Program on Humanitarian Policy and Conflict Research <<http://www.hpcr.org/publications/>>. [Review of the Applicability of IHL]

⁶⁹ *Declaration of Principles on Interim Self-Government Arrangements*, Israel-P.L.O., 13 September 1993, 32 I.L.M. 1525 at Article I and VI. [*Declaration of Principles*]

⁷⁰ Review of the Applicability of IHL, *supra* note 68 at footnote 56.

⁷¹ *Declaration of Principles*, *supra* note 69 at Preamble.

⁷² Review of the Applicability of IHL, *supra* note 68 at 9-10.

⁷³ *Ibid.* at 10. See also UN Commission on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of 19 October 2000, UN ESCOR 57th Sess. UN Doc. E/CN.4/2001/121 (16 March 2001) at para 16. [Report of the human rights inquiry commission]

⁷⁴ *Fourth Geneva Convention*, *supra* note 16 at art. 47.

⁷⁵ *Agreement on Preparatory Transfer of Powers and Responsibilities*, Israel and P.L.O., 29 August 1994, 34 I.L.M. 455 at Article XIII, para 3. [*Agreement on Preparatory Transfer of Powers and Responsibilities*]

⁷⁶ *Ibid.* at Article XIII, para 4.

⁷⁷ *Ibid.* at Article XIII, para 5.

⁷⁸ Bruderlein, *supra* note 10 at 5.

The international community clearly supports the latter view. The General Assembly⁷⁹, Security Council⁸⁰, the Israeli Supreme Court⁸¹ and the ICJ⁸² have all affirmed during and/or after Oslo the continuation of Israel's occupation of the West Bank and Gaza. The ICJ summarized the general consensus by stating, "[s]ubsequent events [to the 1967 War] in these territories...have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power."⁸³

The above analysis of the Oslo Agreements demonstrates Israel's unilateral attempt to relieve itself of its responsibilities as an Occupying Power, through self-serving interpretations of the very Convention it refuses to fully apply in the OPT. It foreshadows the divisive international debate that will likely ensue as Israel implements its Disengagement Plan. The unilateral plan specifically affirms that "[t]he completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip."⁸⁴ It clearly demonstrates Israel's expectation that the (partial) withdrawal of its military, and removal of settlements from the Gaza Strip will be sufficient under international law to absolve it of its legal obligations as an occupying power in Gaza.

The following section will demonstrate that Israel's position is an untenable one that contravenes the law of occupation. It will outline the legal conditions necessary to bring about and effectively end an occupation under international law. It will compare such criteria with Israel's Disengagement Plan in order to determine the legal status of the occupation following the plan's implementation.

Section II

The beginning and end of occupation under international law

The test for determining the beginning and end of an occupation is commonly referred to in IHL as the test of *effective control*.⁸⁵ As previously stated, Article 42 of the *1907 Hague Regulations* considers territory as coming under occupation when it is "actually placed under the authority of a hostile army" and when this "authority has been established and can be exercised."⁸⁶ The Military Tribunal at Nuremberg later elaborated upon this basic definition. In the Hostages case (*US v. Wilhelm List et Al.*) the court stated:

"The term... occupation indicated the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied."⁸⁷

⁷⁹ See GA Res. 56/60, *supra* note 61.

⁸⁰ In resolution 904 (1994), the Security Council referred to Israel as "the occupying Power" and reaffirmed "the applicability of the fourth Geneva Convention of 12 August 1949 to the territories occupied by Israel in June 1967, including Jerusalem, and the Israeli responsibilities thereunder." See SC Res. 904(1994), UN SCOR, 3351st Mtg. UN Doc. S/RES/904 (1994) at para 1 and 3. Recently the Security Council has expressed "its grave concern at the continued deterioration of the situation on the ground in the territory occupied by Israel since 1967." See SC Res. 1544 (2004) UN SCOR, 2972nd Mtg. UN Doc. S/RES/1544 (19 May 2004) at preamble.

⁸¹ The High Court of Israel stated in the *Beit Sourik case*, "[s]ince 1967, Israel has been holding the areas of Judea and Samaria...in belligerent occupation. In 1993 Israel began a political process with the PLO, and signed a number of agreements transferring control over parts of the area to the Palestinian Authority. Israel and the PLO continued political negotiations in an attempt to solve the remaining problems. The negotiations, whose final stages took place at Camp David in Maryland, USA, failed in July 2000." See Supreme Court of Israel: *Beit Sourik Village Council v. The Government of Israel* (HCJ 2056/04) [June 30, 2004] 43 ILM 1099, at para 1 [*Beit Sourik*].

⁸² See *infra* note 83.

⁸³ Advisory Opinion, *supra* note 19 at para 78.

⁸⁴ Disengagement Plan, *supra* note 6 at Principle "Six."

⁸⁵ Bruderslein, *supra* note 10 at 6.

⁸⁶ *1907 Hague Regulations*, *supra* note 14 at Article 42.

⁸⁷ *USA v. Wilhelm List et al.* (1949) 8 *Law Reports of Trials of War Criminals* (United Nations War Crimes Commission) 34 at 56. [Hostages Case]

Effective control is comprised of both military control and administrative control.⁸⁸ It is important to note that military control does not necessitate the occupying power's physical presence within the occupied territory. In the Hostages case, the tribunal found that a military occupation existed, despite the fact that the occupying army (Germany) had been evacuated in certain regions and exercised no control over the population of the occupied territories (Greece and Yugoslavia).

“While it is true that the partisan's [resistance forces in Greece and Yugoslavia against the Germans] were able to control sections of these countries at various times, it is established that the Germans *could at any time they desired assume physical control of any part of the country*. The control of the resistance was temporary only and not such as would deprive the German Armed Forces of its status as an occupant.”⁸⁹ [Emphasis added]

This passage demonstrates that the required level of effective control is not determined by the foreign force projecting military control over the whole territory, but rather by its *ability* to do so. In other words, a foreign military is still considered an occupying power regardless of whether it chooses to exert its power. As long as it retains the *capacity* to exercise effective control over the occupied territory, it cannot be relieved of its legal responsibilities towards the occupied population.⁹⁰

In accordance with the decision in the Hostages case, actual physical presence within all parts of the territory is not a *sine qua non* (or determining factor) for an occupation. As a result, the evacuation of a military alone is not a sufficient condition to bring about the end of an occupier's status as an occupying power. As long as it is possible for the occupier to retain control over the territory through other means that do not necessitate permanent physical presence -such as control over the airspace, sea space and borders- it will be found to exercise effective military control.⁹¹

Israel will retain effective military control over Gaza following the implementation of the Disengagement Plan

Following the implementation of Israel's Disengagement Plan, Gaza will exemplify a situation where an occupying power may not maintain a direct physical presence within the occupied territory yet will still retain effective control over the occupied territory. As the plan outlines, “[u]pon completion of this [evacuation] process, there shall no longer be any permanent presence of security forces in the area of Gaza Strip territory which have been evacuated.”⁹² In addition, the plan affirms that military installations and infrastructure in evacuated areas “will be dismantled and evacuated.”⁹³ Despite the military redeployment, the plan states that Israel will continue to “guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.”⁹⁴

Moreover, the plan expressly provides that “the State of Israel reserves its fundamental right of self-defence, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.”⁹⁵ This statement demonstrates Israel's intention and ability to enter the territory at will and exert effective control over Gaza following the disengagement.

⁸⁸ Bruderlein, *supra* note 10 at 7.

⁸⁹ Hostages Case, *supra* note 87.

⁹⁰ Report of the human rights inquiry commission, *supra* note 73 at para 16.

⁹¹ Bruderlein, *supra* note 10 at 8.

⁹² Disengagement Plan, *supra* note 6 at Section 2 (A), para 3.1 (2). It is worth pointing out that this statement does not exclude the possibility of Israel retaining a temporary presence.

⁹³ Disengagement Plan, *supra* note 6 at Section 4.

⁹⁴ *Ibid.* at Section 3, “One: The Gaza Strip,” para 1.

⁹⁵ *Ibid.* at Section 3, “One: The Gaza Strip,” para 3.

It is also worth noting that if the Disengagement Plan did actually succeed in bringing about the end of the occupation Israel would have no right to mount security operations within Gaza territory. Rather the end of the occupation would bring into play “general principles of international law regulating the use of force on foreign territory.”⁹⁶ As a result, Article 2(4) of the *UN Charter* would apply, prohibiting Israel from engaging in “the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations.”⁹⁷ Also relevant is Article 51 of the *UN Charter*, affirming Gaza’s right to self-defense against an armed attack by Israel.⁹⁸ As Bruderlein states, “[c]oncretely this would mean that contrary to what the Revised Disengagement Plan explicitly stipulates, Israel would not be legally justified in invoking the law of self-defence in conducting preventive military operations in the Gaza Strip.”⁹⁹

The Disengagement Plan specifically affirms the IDF will remain in the “Philadelphi Route” located along the Gaza- Egyptian border.¹⁰⁰ It stipulates further that “the evacuation of this area will be “considered” and will be “dependent, inter alia, on the security situation and the extent of cooperation with Egypt in establishing a reliable alternative arrangement.”¹⁰¹ For the purposes of this report, it deserves noting that an agreement has been made between Egypt and Israel concerning the deployment of 750 Egyptian soldiers along the Philadelphi Route.¹⁰² The Egyptian troops will come to replace their Israeli counterparts, theoretically meaning that the Israeli army will not be physically present within the borders of Gaza.¹⁰³

This gives rise to an interesting legal scenario and begs the question: is an Israeli withdrawal from the Philadelphi Route sufficient to end Israel’s occupation of Gaza? The short answer is no. Firstly, as previously demonstrated, the lack of physical presence within an occupied territory is insufficient to relinquish a state from its status as an occupying power. As long as Israel retains the ability to project control over Gaza, whether it be through its airspace or through other means, it cannot be said to have relinquished effective control. This means that Israel would have to resolve a number of other key issues that underlie the test of effective control before one could persuasively argue that the occupation in Gaza had come to an end.

The above analysis demonstrates that while Israel may only maintain a partial and/or temporary presence in the Gaza Strip, it will be able to- in the words of the Hostages case- “at any time...assume physical control of any part of the [territory].” It is noteworthy to point out that the Israeli military’s authority over Gaza will exceed Germany’s authority over Greece and Yugoslavia during World War II, since Israel will not just retain the *capacity* to exert control over Gaza, it will continue to exercise *effective* -and at times- absolute control over Gaza’s air space, sea and borders, thereby holding the greatest authority over the movement of people and goods in and out of the territory. Such controls are expected to continue to have serious implications on Gaza’s economic development, international relations, and the Palestinian people’s right to self-determination.

Effective administrative control

⁹⁶ Bruderlein, *supra* note 10 at 13.

⁹⁷ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7, at art. 2(4). [*UN Charter*]

⁹⁸ *Ibid.* at art. 51.

⁹⁹ Bruderlein, *supra* note 10 at 13.

¹⁰⁰ As the Disengagement Plan states, “[t]he State of Israel will evacuate the Gaza Strip, including all existing Israeli towns and villages and will redeploy outside the Strip. This will not include military deployment in the area of the border between the Gaza Strip and Egypt (“the Philadelphi Route”) as detailed below.” Disengagement Plan, *supra* note 6 at Section 2(A), para 3.1 (1). See also Section 6.

¹⁰¹ *Ibid.* at Section 6.

¹⁰² See “Egypt Gaza border patrol agreed” *BBC News* (24 August 2005), online: BBC News http://news.bbc.co.uk/1/hi/world/middle_east/4179164.stm. See also “Israel approves Egypt Deployment” *BBC News* (31 August 2005) online: BBC News http://news.bbc.co.uk/1/hi/world/middle_east/4201868.stm.

¹⁰³ The term “theoretical” is used because a finalized agreement between the two states does not necessarily mean that there will be no IDF troops within the corridor in charge of overseeing the area.

As previously stated, effective administrative control is also necessary for an occupation to exist. It should be noted that such control does not preclude the local government from playing a decisive role in the administration of the territory.¹⁰⁴ As Bruderlein notes,

“[t]he Hague Regulations, as well as the decisions of various international military tribunals, have given considerable scope to the ability of the Occupying Power to carry out normal administration in cooperation with local authorities and to preserve law and order as an objective indication of the existence of effective control.”¹⁰⁵

Principal functions of a civil government comprise both internal and external factors. These include “control over the internal and external security of the territory”, the “ability to control the international borders of the territory and regulate entry and exit of persons and goods”, and the “ability to engage in political, security, economic and cultural exchanges with other states.”¹⁰⁶

Israel will maintain effective administrative control following the implementation of the Disengagement Plan

With regard to security, the Disengagement Plan stipulates that Israel will maintain a military presence along Gaza’s borders, in addition to retaining sole authority over the air space and continuing “security activity” along Gaza’s coastline.¹⁰⁷ Israel also plans to ensure that Gaza is “demilitarized and devoid of weaponry.”¹⁰⁸ While there will be no “permanent presence” of Israeli forces in evacuated parts of the West Bank, in other areas “current security activity will continue.”¹⁰⁹ As previously stated, in line with its claimed “right of self-defence”, Israel will retain the right to enter Gaza and evacuated parts of the West Bank at will.¹¹⁰ The combination of these variables clearly demonstrates Israel’s intention to retain primary control over the OPT’s internal and external security situation.

With regard to control over Gaza’s international borders, the Disengagement Plan states that Israel “will guard and monitor the external land perimeter of the Gaza Strip.” The Plan also provides that economic arrangements will stay in place, including present arrangements regarding “the monetary regime, tax and customs envelope arrangements, postal and telecommunications arrangements, [and] the entry of workers into Israel”.¹¹¹ [See Part II: The Economic Context of the Disengagement Plan]

Additionally, under the Disengagement Plan “[t]he entry and exit of goods between the Gaza Strip, the West Bank, the State of Israel and abroad” will remain in force.¹¹² “Existing arrangements shall continue” with respect to “international passage between the Gaza Strip and Egypt” and “West Bank and Jordan.”¹¹³ As a result, accessing markets outside and between the West Bank and Gaza Strip will require that Palestinian goods pass through Israel.

This will ensure that Palestinian exports remain subject to Israel’s closure regime and its attendant restrictions, controls, inspections and imposed low-priority status.¹¹⁴ In light of prohibitions preventing Palestinian trucks from entering Israel and Israeli trucks from entering Gaza, imports and exports will continue to be unloaded and

¹⁰⁴ Bruderlein, *supra* note 10 at 8.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Disengagement Plan, *supra* note 6 at Section 3, “Part One: The Gaza Strip,” para 1.

¹⁰⁸ *Ibid.* at Section 3, “Part One: The Gaza Strip,” para 2.

¹⁰⁹ *Ibid.* at Section 3, “Part Two: The West Bank,” para 1 and 2.

¹¹⁰ *Ibid.* at Section 3, “Part One: The Gaza Strip” para 3 and Section 3, “Part Two: The West Bank” para 2.

¹¹¹ *Ibid.* at Section 10. It should be noted that Israel plans to completely phase out the issuing of work permits for Palestinians workers in Israel by 2008.

¹¹² *Ibid.*

¹¹³ *Ibid.* at Section 11.

¹¹⁴ See *infra*, note 343-345.

reloaded at border crossings.¹¹⁵ This will ensure the continuation of significant delays and burdensome transportation costs that are already considered responsible for stunting economic growth in the OPT. [See Part II: The Economic Context of the Disengagement Plan]

The passage of people will not be made easier. Palestinian movement within and between the West Bank and Gaza will remain constrained and be subject to Israel's permit system. In addition, Palestinians residing in the territories will continue to require Israeli authorization to travel internationally. Only a fraction of Palestinians are granted such permission, leaving many unable to travel beyond the borders of their own territory.¹¹⁶ [See Part II: The Economic Context of the Disengagement Plan]

All of these factors demonstrate that the ability for the PA to engage in relations with other states, whether they be of a political, security, economic or cultural nature will continue to be compromised by Israeli- imposed controls and restrictions.

It is clear that in line with the definition of occupation offered at Nuremberg, Israel's military and administrative authority over Gaza and the West Bank will continue. Thus, in spite of the transfer of legal authority over parts of the West Bank and Gaza in accordance with the Disengagement Plan, the Palestinian Territories will remain under occupation.

Section III

Israel's history of illegal annexation and expropriation of Palestinian land

Land has remained one of the central issues of the conflict between Israelis and Palestinians since the beginning of Israel's occupation of the OPT. As Imseis writes, "[s]ince 1967, Israel has engaged in a systematic campaign of usurpation of Palestinian land in the OPT for the purpose of establishing exclusively Jewish colonies."¹¹⁷ Israel has employed two tactics to achieve its goal. First, it has engaged in annexation of land as evidenced in and around East Jerusalem. Second, it has implemented a number of policies and laws aimed at the expropriation of land in the rest of the West Bank and the Gaza Strip.¹¹⁸

The history of land annexation in east Jerusalem

Following the end of the Six Day War in 1967, the Israeli government passed several acts extending its jurisdiction to East Jerusalem, "effectively annexing the city in violation of international law."¹¹⁹ The first step of the process was to re-establish the borders of Jerusalem so that the city's "6.5 square kilometer land area [came] to encompass 71 square kilometers of expropriated Palestinian land."¹²⁰ Over the years Israel has implemented a number of military orders enabling authorities to illegally annex and appropriate Palestinian property by: declaring any area a "closed military area", thus placing it under state jurisdiction, seizing property belonging to "absentee" Palestinian owners who were not included in an Israeli census following the 1967 War, and expropriating Palestinian land for "public" use, which is "almost always synonymous with exclusive Jewish use."¹²¹ All of these "ostensibly legal" methods have allowed Israel to expropriate - without compensation- tens of thousands of dunums in East Jerusalem belonging to Palestinians and convert it into land used exclusively by Jews.¹²²

¹¹⁵ See Diana Buttu, "Palestinian Technical Team: FAQ About Israel's Unilateral Disengagement," (Palestine Media Center: Aug. 1., 2005), online: Palestine Media Center <http://www.palestine-pmc.com/details.asp?cat=2&id=1014>. [Buttu]

¹¹⁶ *Ibid.*

¹¹⁷ Imseis, *supra* note 22 at 101.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Allison B. Hodgkins, *The Judaization of Jerusalem* 6 (1996) cited in Imseis, *supra* note 22 at 101.

¹²¹ *Ibid* at 23. See also Imseis, *supra* note 22 at 102. The Military Orders include: Military Order Number 70 (1967), Military Order Number 150 (1968), and Military Order Number 321 (1968).

¹²² Imseis. *Ibid.*

In 1980, the Israeli government “attempted to further consolidate its annexation of occupied East Jerusalem” by passing a “basic law” providing that the capital of Israel was a “complete and united” Jerusalem.¹²³ Weeks later, the Security Council responded by passing resolution 478, condemning the bill’s enactment as “a violation of international law” that “does not affect the continued application of the [Fourth] Geneva Convention”¹²⁴ and affirmed “that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem... are null and void and must be rescinded forthwith.”¹²⁵

The expropriation of land in the remainder of the OPT

Israel has used similar tactics to those employed in Jerusalem to expropriate Palestinian land in the West Bank and Gaza Strip; the only difference being it has not officially annexed the territory. Through almost identical military orders, Israel has managed to “expropriate a massive expanse of Palestinian land, resulting in de facto annexation of the vast majority of the OPT without having to absorb its large Palestinian population through the extension of its citizenship.”¹²⁶

Despite Israel’s express recognition under the Oslo Accords of the West Bank and Gaza Strip “as a single territorial unit, the integrity and status of which will be preserved during the interim period,” it has continued its illegal policies of expropriation of Palestinian land with the intention of colonizing the OPT with Jewish settlers.¹²⁷ In addition to clearly violating Article 47 of the *Fourth Geneva Convention*, Israel’s annexation and expropriation of Palestinian land “with little doubt” amount to what Article 147 defines as an “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” and therefore constitutes a “grave breach” of international humanitarian law.¹²⁸

The law of occupation & the history of property rights

One of the most salient features of the customary law of occupation is the principle prohibiting the occupying power from disrupting private property rights in the occupied territory.¹²⁹ This is because under international law, a foreign military occupation has been recognized as an inherently temporary situation. Accordingly, the occupying power is limited to the role of “de facto authority” without any rights to permanently alter the occupied territory.¹³⁰

As far back as 1833, Chief Justice Marshall stated in *United States v. Percheman*¹³¹:

“It is very unusual, even in cases of conquest [then considered lawful], for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated, the sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property rights should be generally confiscated and private rights annulled.”¹³²

The 1907 *Hague Convention* and its Regulations codified some of the pre-existing law and added new principles aimed at protecting the integrity and private and public property in the occupied territories. The Regulations specifically provide that personal property “must be respected” and “cannot be confiscated” and

¹²³ *Basic Law: Jerusalem, Capital of Israel*, Knesset, (Israel), 30 July 1980 (published in Sefer Ha-Chukkim No. 980, 5 August 1980 at 186), online: Ministry of Foreign Affairs http://www.mfa.gov.il/MFA/MFAArchive/1980_1989/.

¹²⁴ SC Res. 478, UN SCOR 2245th Mtg. UN Doc S/RES/478 (1980) at para 2.

¹²⁵ *Ibid.* at para 3.

¹²⁶ Imseis, *supra* note 22 103.

¹²⁷ *Declaration of Principles*, *supra* note 69 at Article XI.

¹²⁸ *Fourth Geneva Convention*, *supra* note 16 at Article 147.

¹²⁹ Mallison, *supra* note 24 at 240.

¹³⁰ Imseis, *supra* note 22 at 91.

¹³¹ 32 U.S. (7 Pet.) 82 (1833).

¹³² *Ibid.* at 86-87 cited in Mallison, *supra* note 24 at 240-241.

public property “shall be treated as private property” thereby making “all seizure or destruction of, or willful damage to, institutions of this character...forbidden.”¹³³ These provisions have since become so widely accepted by the international community that they are considered to be customary law.

During World War II, the Nazis in Europe committed flagrant violations of existing customary and treaty law by confiscating private and public property. The Nazi regime “attempted to evade the application of such law by annexing such land or bringing it under the rule of puppet regimes.”¹³⁴ The perpetrators later defended their actions before the International Military Tribunal at Nuremberg and other war crimes tribunals by claiming that the law of occupation could not apply since the territories in question had been annexed to Germany. Such arguments were held to be invalid, and the Nazis were found to have breached the relevant provisions.¹³⁵

Recognizing the failure of international law to protect innocent civilians who fell prey to the German forces, the Geneva Diplomatic Conference of 1949 produced the *Fourth Geneva Convention*. Given that most of the abuses were committed against people residing in German occupied territories, the Fourth Convention focused primarily on protecting civilians living under occupation. Article 47 of the Convention prohibited the annexation of occupied territory and provided that the Convention will continue to apply to protected persons regardless of “any annexation by the [occupying power] of the whole or part of the occupied territory.”¹³⁶ This principle was affirmed at Nuremberg. A state that violates the principle can be found to be in breach of the *UN Charter*’s tenet prohibiting States from engaging in “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.”¹³⁷

Following the Six Day War of 1967, and with specific respect to Israel’s occupation of the OPT, the Security Council passed a resolution “[e]mphasizing the inadmissibility of the acquisition of territory by war.”¹³⁸ In 1970, the General Assembly passed resolution 2625 and, in a style similar to Article 2 of the *UN Charter*, provided that “[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.”¹³⁹ Since then the ICJ has found the principle prohibiting the acquisition of territory resulting from the threat or use of force to be reflective of customary law.¹⁴⁰

The history of Jewish settlements in the OPT

Since 1967, Israel has maintained a strategic program of acquiring Palestinian land without acquiring Palestinian people in order to establish Jewish settlements in the Gaza Strip and the West Bank. The Israeli government is responsible for creating, subsidizing and defending over 100 settlements in the OPT inhabited by approximately 400,000 settlers, about 180,000 of whom live in and around East Jerusalem.¹⁴¹

Israel has never tried to hide the colonial intentions that lie behind its thirty-eight year campaign of annexation and expropriation of Palestinian land.¹⁴² As previously stated, Israel’s authority as an occupying power is considered to be inherently limited under accepted principles of the law of belligerent occupation. In accordance with Article 55 of the *1907 Hague Regulations*, Israel enjoys only temporary and usufructuary rights over the land it occupies. It is obliged to “safeguard the capital of these properties and administer them in accordance with the rules of

¹³³ *1907 Hague Regulations*, *supra* note 14 at Article 46. *Ibid.* at art. 56.

¹³⁴ Mallison, *supra* note 24 at 242.

¹³⁵ *Ibid.*

¹³⁶ *Fourth Geneva Convention*, *supra* note 16 at art. 47.

¹³⁷ *UN Charter*, *supra* note 97 at Article 2, para 4. See Mallison, *supra* note 24 at 243.

¹³⁸ Res. 242, *supra* note 18 at preamble.

¹³⁹ See GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8010 (1970).

¹⁴⁰ See most recently Advisory Opinion, *supra* note 19 at para 87.

¹⁴¹ UN Commission on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967, John Dugard, UN ESCOR, 61st Sess. UN Doc. E/CN.4/2005/29/Add.1 (5 March 2005) at [Addendum to Report of Special Rapporteur]

¹⁴² Imseis, *supra* note 22 at 104.

usufruct.”¹⁴³ Israel’s settlement policy operates according to the opposite premise. As Mallison writes, “[o]ne of the clearest features of the civilian settlements is that they are not intended to be temporary.”¹⁴⁴ Rather, they permit Israeli migration intended to permanently alter the demographic composition of the OPT, thus violating Israel’s obligations as a trustee or usufruct.¹⁴⁵

The creation and expansion of settlements have been justified for years as a military necessity as well as through ideological claims expressed in terms of a “divine” or “eternal” right.¹⁴⁶ As provided by the Drobles Plan, a proposal prepared by Mattiyahu Drobles of the Settlement Department of the World Zionist Organization:

Settlement throughout the entire Land of Israel is for security and by right. A strip of settlements at strategic sites enhances both internal and external security alike, as well as making concrete and realizing our right to Eretz Israel.¹⁴⁷

As the passage reveals, location is a strategic key underlying Israeli policy goals. Settlements are intentionally positioned and expanded in order to isolate Palestinian communities as much as possible. An intricate network of bypass roads covering hundreds of kilometers of land expropriated from private Palestinian land-owners, in the name of “security” or “public use”, have also helped Israel to consolidate its hold over land in the OPT while dividing Palestinian communities.¹⁴⁸ In addition to serving their practical purpose of allowing settlers to travel to settlements without having to pass through Palestinian villages, bypass roads effectively partition the West Bank “into some 60 discontinuous zones”, and segment “the Gaza Strip into four parts.”¹⁴⁹ This division of Palestinian territory and isolation of Palestinian people is not unintentional. It coincides with Israel’s expressed goals of attaining political control over land in the OPT and thereby thwarting Palestinians’ ability to achieve self-determination.¹⁵⁰

As the Drobles Plan provides:

The best and most effective way of removing every shadow of doubt about our intentions to hold on to Judea and Samaria [the West Bank] forever is by speeding up the [Jewish] settlement momentum in these territories. The purpose of settling the areas between and around the centers occupied by the minorities [actually the Palestinian majority in the West Bank] is to reduce to the minimum the danger of an additional Arab state being established in these territories. Being cut off by Jewish settlements, the minority population will find it difficult to form a territorial and political continuity.¹⁵¹

Israeli settlements have grown, for the most part, in a manner consistent with the Drobles Plan.¹⁵² In direct contravention of international humanitarian law as well as Israel’s commitment under the Oslo Peace Process to maintain the integrity and status of the West Bank and Gaza, settlements expanded considerably during the 1990s.¹⁵³ Despite promises to halt settlement growth, the settler population has steadily increased in recent years

¹⁴³ 1907 Hague Regulations, *supra* note 14 at Article 55.

¹⁴⁴ Mallison, *supra* note 24 at 262.

¹⁴⁵ Oxford Report, *supra* note 11 at 20, para 109.

¹⁴⁶ See generally Mallison, *supra* note 24 at 250, chapter 6 (b) titled “The Zionist ideological claims based upon politico-religious grounds.”

¹⁴⁷ Mattiyahu Drobles, Master Plan for the Development of Settlement in Judea and Samaria (1980) as cited in Imseis, *supra* note 22 at 104. [Drobles Plan]

¹⁴⁸ B’Tselem, “Forbidden Roads: The Discriminatory West Bank Road Regime”, (Jerusalem: August 2004) at 8, online: B’Tselem

http://www.btselem.org/English/Publications/Summaries/200408_Forbidden_Roads.asp.

¹⁴⁹ Imseis, *supra* note 22 at 104, footnote 335.

¹⁵⁰ Yitzhak Shamir, then foreign minister, stated in 1982: “We want peace, but only in conditions that will enable us to continue our existence, and this means the Golan Heights, Judea and Samaria within the boundaries of the land of Israel.”

¹⁵¹ Drobles Plan, *supra* note 149.

¹⁵² Imseis, *supra* note 22 at 104.

¹⁵³ Report of the human rights inquiry commission, *supra* note 73 at para 69.

at a higher rate than that of the Israeli population.¹⁵⁴ As UN Special Rapporteur Dugard states, “No longer does the Government of Israel even pay lip service to its claim of several years ago that it would “freeze” settlement expansion.”¹⁵⁵

The settlements and land annexation under the Disengagement Plan

The Disengagement Plan demonstrates Israel’s intentions to further develop Jewish settlements through annexation and expropriation of Palestinian land. In exchange for evacuating all of the settlements in the Gaza Strip as well as four small West Bank settlements, Israel will consolidate and expand the remaining settlements in the West Bank.¹⁵⁶ As the Disengagement Plan provides:

“In any future permanent status arrangement, there will be no Israeli towns and villages in the Gaza Strip. On the other hand, it is clear that in the West Bank, there are areas *which will be part of the State of Israel*, including major Israeli population centers, cities, towns and villages, security areas and other places of special interest to Israel.”¹⁵⁷ [Emphasis added]

Israel’s settlement program cannot be justified as a military necessity. Israel has itself acknowledged that settlements have done nothing to ameliorate the security situation in the region.¹⁵⁸ Rather, Israel’s settlement policy should be viewed for what it is: a systematic and illegal usurpation of Palestinian land in an attempt to alter the demographic situation of the OPT. By creating “factual situations on the ground”, Israel is better able to “establish control over the occupied territories.”¹⁵⁹ Such intentions are reflected in US President George Bush’s letter to Israeli Prime Minister Ariel Sharon:

“In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949...”¹⁶⁰

As a result, it is expected that future settlement expansion under the Disengagement Plan will enable Israel to have an even greater presence in strategic parts of the OPT.

¹⁵⁴ International Labour Organization, Report of the Director-General, “The situation of workers of the occupied Arab territories” (International Labour Conference, 92nd Session, 2004) at para 39, online: ILO < [www.ilo.org/public/english/standards/ relm/ilc/ilc92/pdf/rep-i-a-ax.pdf](http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-i-a-ax.pdf)>. According to the report, “the settler population has continued to increase rapidly, at an annual rate of 5.3 per cent in the West Bank and 4.4 per cent in Gaza since 2000, reaching close to 400,000 persons in the occupied Palestinian territories. This is equivalent to 6 per cent of the Israeli population and 11.5 per cent of the Palestinian population in 2002. The increase in the settler population has been much faster than population growth in Israel (at 1.4 per cent per year over 2000-02), thereby indicating more than natural demographic growth, even allowing for higher fertility among settler families.”

¹⁵⁵ UN Commission on Human Rights, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967, John Dugard, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, UN ESCOR, 59th Sess. UN Doc. 1/59/256 (12 August 2004) at para 20. [Human Rights Questions]

¹⁵⁶ The four settlements in the West Bank include: Ghanim, Khadim, Sa-Nur and Homesh.

¹⁵⁷ Disengagement Plan, *supra* note 6 at Principle “Three.”

¹⁵⁸ Special Rapporteur Dugard states that “Yitzhak Rabin, while he was Prime Minister and Minister of Defence, acknowledged that most of the settlements added nothing to security and in fact were a burden on the army.” See Report of the human rights inquiry commission, *supra* note 73 at para 68.

¹⁵⁹ *Ibid.*

¹⁶⁰ Letters between Israeli Prime Minister Ariel Sharon and U.S. President George Bush, “Exchange of letters between PM Sharon and President Bush,” (14 April 2004) online: Israeli Ministry of Affairs <http://www.mfa.gov.il/mfa>. [Exchange of letters]

The law of occupation and settlements

Settlements are unlawful under international humanitarian law. Article 8 of the *Rome Statute* considers the “transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies” to be a war crime and among one of the “serious violations of the laws and customs applicable in international armed conflict.”¹⁶¹ As one report notes, although Israel is just a signatory to the *Rome Statute*, and has yet to ratify it, it is “under international law still bound to refrain from committing acts which would defeat the object and purpose of the treaty.”¹⁶²

In addition, the *Fourth Geneva Convention* is found to prohibit “in broad and unequivocal terms” the establishment of settlements in the occupied territory.¹⁶³ As Article 49 (6) provides: “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”¹⁶⁴ An argument can be made that a violation of this provision is a war crime under Article 147 of the *Fourth Geneva Convention*.¹⁶⁵

According to the ICRC *Commentary* on the Convention, Article 49(6) was meant to:

“[P]revent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.”¹⁶⁶

A more recent interpretation offered by the ICJ in *Legal Consequences of the Wall* affirms that the article is not merely confined to the deportations and forced transfers characteristic of the Second World War, “but also any measures taken by an occupying power in order to organize or encourage transfers of parts of its own population into the occupied territory.”¹⁶⁷ In accordance with such a definition, the court held that “the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”¹⁶⁸

Israel has completely rejected the arguments against settlements, especially as they relate to Article 49 (6) of the *Fourth Geneva Convention*. Israel argues that the status of settlements is a political rather than a legal issue, and ought to be resolved in negotiations surrounding future status agreements.¹⁶⁹ Palestinians, in contrast, argue that settlements are a major obstacle to the peace process and ought to be resolved in compliance with international law.¹⁷⁰ The international community, including the UN Commission on Human Rights¹⁷¹, the UN Security

¹⁶¹ Rome Statute, *supra* note 29 at Article 8, para 2(b) VIII.

¹⁶² Oxford Report, *supra* note 11 at para 101.

¹⁶³ Mallison, *supra* note 24 at 243.

¹⁶⁴ *Fourth Geneva Convention*, *supra* note 16 at art. 49(6).

¹⁶⁵ Article 147 states, “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: ...unlawful deportation or transfer or unlawful confinement of a protected person... and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” See *Fourth Geneva Convention*, *supra* note 16 at art. 147.

¹⁶⁶ ICRC, “Commentary: Convention (IV) relative to the Protection of Civilian Persons in Time of War,” (Geneva: 12 August 1949) online: ICRC <http://www.icrc.org/ihl.nsf/>.

¹⁶⁷ Advisory Opinion, *supra* note 19 at para 120.

¹⁶⁸ *Ibid.*

¹⁶⁹ Report of the human rights inquiry commission, *supra* note 73 at para 66.

¹⁷⁰ *Ibid.*

¹⁷¹ The UN Commission on Human Rights states: “[t]he Commission is itself of the opinion that Jewish settlements in the West Bank and Gaza violate article 49 (6) of the Fourth Geneva Convention and place a serious obstacle in the way of durable peace.” *Ibid.* at para 67. More recently Special Rapporteur John Dugard has stated that “[s]ettlements constitute an illegality in the removal of which the international community has a legal and moral interest.” See Addendum to Report of Special Rapporteur, *supra* note 143 at para 9.

Council¹⁷² and ICJ¹⁷³, has demonstrated overwhelming support for the latter view and widely condemned Israel's settlement policy.

Section IV

The wall

On July 23rd 2001, the Israeli Cabinet first approved a plan to build a wall¹⁷⁴ within and around the territory of the West Bank including East Jerusalem. Calling it a "security fence," its sole purpose, according to Israel, was to reduce the number of terrorist attacks emanating from the West Bank by preventing the unchecked passage of Palestinians into Israel.¹⁷⁵ Construction began in June 2002. As of February 2005, 209km of the Barrier have been completed, although its construction remains ongoing.¹⁷⁶

The wall consists of a number of components, including: a fence with electronic sensors to detect any "infiltrators," surveillance cameras, "anti-vehicle" ditches up to four metres deep, a smoothed dirt road to track footsteps, a two-lane patrol road, and layers of barbed wire along the perimeter. The average width of the area averages 50-70 meters, but can reach 100 meters "due to topographical conditions."¹⁷⁷ In certain locations near urban areas, such as Qalqiliya and East Jerusalem, watchtowers and an eight-meter concrete wall has been constructed in place of a fence. Future plans anticipate the construction of so-called "depth barriers" about 150 meters in length to be located east of the wall, in order to "direct movement to a number of security control points."¹⁷⁸

Despite the significant role it plays to Israel's long-term interests and the immense burden it poses on Palestinians, the wall is only given a cursory mention in the Disengagement Plan. The Plan provides that "[t]he State of Israel will continue building the Security Fence, in accordance with the relevant decisions of the Government. The route will take into account humanitarian considerations."¹⁷⁹

The Decision of Israel's High Court of Justice on the legality of a portion of the wall

On June 30, 2004 Israel's High Court of Justice (HCJ) in *Beit Sourik Village Council v. The Government of Israel* issued a ruling on the legality of a 40 kilometer- long portion of the wall. The key question before the Court was whether the route of the wall could be considered proportionate or whether the route undermined the "delicate balance" between maintaining security and protecting the citizens of Israel on the one hand, and ensuring the "rights, needs and interests" of the local Palestinians affected on the other.¹⁸⁰ As the Court maintained, as an occupying power Israel could not run roughshod over the legal rights of Palestinians. Rather it was obliged -in accordance with the law of belligerent occupation- to find the proper balance between military necessity and humanitarian considerations.¹⁸¹

¹⁷² In response to "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967" the Security Council found that the settlements were of "no legal validity." See resolution 446 (1979), *supra* note 62.

¹⁷³ Advisory Opinion, *supra* note 19 at para 120. The Court concluded that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

¹⁷⁴ The use of the word "wall" coincides with the terminology used by the ICJ, General Assembly, Special Rapporteur John Dugard, amongst others.

¹⁷⁵ *Beit Sourik*, *supra* note 81, at para3.

¹⁷⁶ *The Humanitarian Impact of the West Bank Barrier on Palestinian Communities*, UNRWAOR and UN OCHAOR Update No. 5. (March 2005) at para 4. [Humanitarian Impact of West Bank Barrier]

¹⁷⁷ See *Beit Sourik*, *supra* note 81 at para 7 and Advisory Opinion, *supra* note 19 at para 82.

¹⁷⁸ ICJ, "Israel's Separation Barrier: Challenges to the Rule of Law and Human Rights: Executive Summary, Part I and II" (6 July 2004) at section 2.1, online: ICJ

http://www.icj.org/news.php3?id_article=3410&lang=en.

¹⁷⁹ Disengagement Plan, *supra* note 6 at Section 2 (b).

¹⁸⁰ *Beit Sourik*, *supra* note 81 at para 34.

¹⁸¹ *Ibid.* at para 33-34.

The HCJ held that the route of the wall could not be considered to have passed the proportionality requirement as the harm caused to affected Palestinians greatly outweighed the security benefits to Israelis. The Court held that the wall “injures local inhabitants in a severe and acute way, while violating their rights under humanitarian international law.”¹⁸² The Court found that the wall’s planned route cut off more than 13,000 Palestinian farmers from thousands of dunums of their land and tens of thousands of trees, without any attempt by Israel to provide them with “substitute land.” According to the Court’s ruling, the passage of thousands of Palestinians would be confined to “two daytime gates” resulting in long line-ups. Movement would be further restricted by a system of licensing and searches applicable to both people and their vehicles.¹⁸³ The Court found that this system posed grave hardships for Palestinians:

“The state of affairs injures farmers severely...As a result, the life of the farmer will change completely in comparison to his previous life. The route of the separation fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired. The difficult reality of life from which they have suffered (due, for example, to high unemployment in that area) will only become more severe.”¹⁸⁴

The HCJ held that the undue hardships posed on Palestinians and their properties were unnecessarily disproportionate and that the route of the wall was therefore illegal. Only by changing the course of the wall would Israel find the proper balance between satisfying its security needs and upholding Palestinians legal rights, the Court held. As a result, the wall was ordered to be re-routed even if it implied “a certain reduction of the security demands.”¹⁸⁵ Despite Israel’s arguments that there was only one viable route, the Court firmly held that “an alternate route exists. It is not a figment of the imagination.”¹⁸⁶ The Court held that re-routing the wall was not only a legal necessity but the only way to justifiably achieve security.¹⁸⁷

The Advisory Opinion of the International Court of Justice on the legality of the wall and its associated regime

On July 9th 2004, only weeks after the HCJ handed down its decision in the *Beit Surik* case, the ICJ issued its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Unlike the HCJ, which merely found the route of a portion of the wall unlawful, the ICJ determined the wall and its “associated regime” in the OPT, including East Jerusalem, constituted violations of international law.¹⁸⁸

In accordance with the ICJ’s ruling, Israel was under a legal obligation to dismantle the wall, to cease all further construction of the wall, and rescind all relevant legislation and regulatory acts related to its construction. In addition Israel was ordered to pay reparations to Palestinians whose homes, business and agricultural land had been seized and destroyed because of the wall.¹⁸⁹ As the Court stated, “The essential principle ...[is that] reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”¹⁹⁰

After concluding that the wall’s construction violated a number of Israel’s international obligations, the ICJ—in response to the question posed by the General Assembly—examined the legal consequences of these breaches.¹⁹¹ The Court held that Israel was obliged “to respect the right of Palestinian people to self-determination and its

¹⁸² *Ibid.* at para 60.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.* at para 71.

¹⁸⁶ *Ibid.* at para 61.

¹⁸⁷ *Ibid.* at para 86.

¹⁸⁸ Advisory Opinion, *supra* note 19 at 163.

¹⁸⁹ *Ibid.* at para 152.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* at para 143.

obligations under international humanitarian law and international human rights law.”¹⁹² More specifically, on the issue of freedom of movement, the Court impressed the need for Israel to ensure free access to holy places in the OPT.

In addition, given the wall’s construction had resulted in the “requisition and destruction of homes, businesses and agricultural holdings” the Court found that Israel had “the obligation to make reparation for the damage caused” to all people and corporations affected by the wall.¹⁹³ In line with the customary principle concerning reparation, the Court held that Israel had an “obligation to return [to all Palestinian people and corporations] the land, orchards, olive groves and other immoveable property seized” for the wall’s construction.¹⁹⁴ If the circumstances rendered this impossible, then Israel was obliged to pay compensation to all who had “suffered any form of material damage.”¹⁹⁵

In addition to considering the legal consequences of Israel’s construction of the wall, the Court assessed the responsibilities incumbent on the international community in light of Israel’s actions. The Court specifically highlighted Article 1 of the *Fourth Geneva Convention*, a provision that appears in all four of the *Geneva Conventions* and specifically provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” It therefore follows that all States party to the Convention, regardless of whether they are involved in the present conflict, have an obligation to ensure that Israel comply with the requirements of the instrument.¹⁹⁶

Furthermore, various obligations violated by Israel were recognized by the Court as being obligations *erga omnes* which are, by their very character, “the concern of all States” and, “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection.”¹⁹⁷ As the Court affirmed, obligations *erga omnes* include the “obligation to respect the right of the Palestinian people to self-determination”¹⁹⁸ and those obligations under international humanitarian law that are “‘so fundamental to the respect of the human person and ‘elementary considerations of humanity’...” that they are “to be observed by all States whether or not they have ratified the conventions that contain them...”¹⁹⁹ As a result, the Court concluded:

“Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem.

Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.”²⁰⁰

Israel’s refusal to comply with the ICJ Advisory Opinion

¹⁹² *Ibid.* at para 149.

¹⁹³ *Ibid.* at para 152.

¹⁹⁴ *Ibid.* at para 153.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.* at para 158. Given the *Geneva Conventions* enjoy almost global wide membership the Court is effectively calling on all UN members.

¹⁹⁷ *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Second Phase, [1970] ICJ Rep. 3, at para 33.

¹⁹⁸ Advisory Opinion, *supra* note 19 at para 149.

¹⁹⁹ *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion [1996] I.C.J. Rep 226 at para 79. [Nuclear Weapons Case]

²⁰⁰ Advisory Opinion, *supra* note 19 at para 159-160.

While Israel has made attempts to comply with the HCJ's holding in the case of *Beit Sourik*, the state has rejected, and refused to abide by, the ICJ's Advisory Opinion.²⁰¹ The reason is obvious; while the HCJ held that Israel had the right to construct the wall as a security measure so long as its route reflected the proper proportionality between Israeli security and Palestinian human rights, the ICJ ruled that the wall and its associated regime constituted a violation of international law and ordered it dismantled. In attempts to comply with HCJ's more lenient and favourable interpretation, Israel implemented plans on February 20th 2005 to reroute certain parts of the wall that had yet to be constructed.

At the same time, in spite of the General Assembly's widely adopted resolution ES-10/15 demanding Israel comply with its legal obligations pursuant to ICJ's Advisory Opinion, Israel has refused to implement the decision. In response, Israel has stated, "The position of Israel was, and remains, that the issue which the Advisory Opinion deals with was not appropriate for consideration by an international legal forum."²⁰² Israel has criticized the ICJ claiming the facts upon which the court based its opinion "were general, inexact and unbalanced." Moreover, Israel claims the decision to be outdated, given revisions it has made to the wall's route and "improvement in the meeting the [sic] challenges relating to providing for the fabric of life of residents living near the fence."²⁰³

While it is outside the purview of this report to delve into all of Israel's arguments, it is important to note that Israel's claims that the ICJ opinion is presently "irrelevant" or obsolete is unfounded. The facts regarding the exact path of the wall does not affect the relevance of the decision. Rather, as long as *any* portion of the route passes through the OPT, the wall be unlawful in accordance with international law, Israel will remain in violation of its legal obligations, and the ICJ opinion will remain applicable.

It is also important to remember that while the ICJ's decision is an advisory opinion and therefore not -as a whole- legally binding, insofar as the court restates pre-existing legal obligations the decision remains legally binding upon Israel. That is to say, insofar as the decision reflects principles of *jus cogens* (internationally recognized norms that cannot be derogated from) and obligations *erga omnes* (obligations all states owe to the international community), as well as other general principles of international law that are equally binding, the advisory opinion is legally binding on Israel.²⁰⁴

For example, the court held that the principle of self-determination places a duty on all states, including Israel, "to refrain from any forcible action which deprives peoples" of such a right and obliges all states, including Israel, "to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter."²⁰⁵ Additionally, the ICJ recalled its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* which stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and elementary considerations of humanity" that they must "be observed by all

²⁰¹ Addendum to Report of Special Rapporteur, *supra* note 143 at para 10.

²⁰² Israel's Ministry of Defence, "Israel's response to the ICJ's advisory opinion on the Security Fence," Feb 12, 2005, at para 12 online: M.O.D. <<http://www.seamzone.mod.gov.il>>. ["Israel's response to the ICJ"]

²⁰³ *Ibid.* at para 16 and 19.

²⁰⁴ This concept was first conveyed to me by Ardi Imseis. In relation to *jus cogens*, the *Vienna Convention on the Law of Treaties*, provides: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) at art. 53.

²⁰⁵ Advisory Opinion, *supra* note 19 at para 88 of ICJ. The ICJ cites General Assembly resolution 2625 (XXV) and reaffirms Article 1 of the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*. See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. art. 1, 6 I.L.M. 268 (entered into force 23 March 1976) [ICCPR] online: Office of the High Commissioner for Human Rights

http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. See *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 Part I, art. 1, (entered into force 3 January 1976) [ICESR] online: Office of the High Commissioner for Human Rights
http://www.unhchr.ch/html/menu3/b/a_cesr.htm.

States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”²⁰⁶

Not only does the Advisory Opinion remain - in part- applicable to the present route of the wall, but also in light of the ICJ’s characterization of the nature of the obligations, the decision continues to be –in part- legally binding on Israel.

The wall’s “security” purpose

Israel has consistently maintained that the “sole purpose” of the wall is to “provide security.”²⁰⁷ The Israeli government has officially stated that “[t]he decision to build the wall was a direct response to the terror attacks against Israel which began in September 2000.”²⁰⁸ Its purpose, according to the Israeli High Court, is to prevent the unchecked passage of Palestinians into Israel, the passage of Palestinians from Israel into the West Bank (in order to avoid the “likely” establishment of “terror cells in Israel”) and the smuggling of weapons.²⁰⁹ While Israel acknowledges that “a majority of the fence is situated...in the West Bank” it defends the route as being crucial for “security reasons.”²¹⁰

Israel points to figures demonstrating the substantial decrease in Israeli fatalities and casualties since the wall’s construction in order to buttress the wall’s claimed security rationale and validate the wall’s route.²¹¹ Israel’s reasoning is premised on the notion that Palestinian terrorists are able to enter Israel through unguarded areas between the checkpoints rather than through the checkpoints themselves. However, a 2002 report by the Israel State Comptroller (an “independent audit body that reports to the Israeli Knesset”) found that a majority of the suicide bombers and car bombs actually passed through the checkpoints “where they underwent faulty and even shoddy checks.”²¹² As a result, one may more convincingly argue that any reduction in the number of attacks and fatalities in Israel has more to do with improvements made at checkpoints than the erection of the wall. More importantly, it demonstrates that the wall is not a necessity or proportionate way for Israel to meet its security objectives.

Even if the wall has resulted in a lower number of Israeli fatalities, it is crucial to recognize that the ends justifying the means type of argument does not hold water in international law. It is important to note that the legal issue does not focus on whether Israel has the right to protect its civilian population against unlawful attacks. As the ICJ explicitly affirmed, “[Israel] has the right, and indeed the duty, to respond in order to protect the life of its citizens.”²¹³ Rather, the central issue, as dealt with by the ICJ and the Israeli High Court, is whether the wall as a security instrument actually conforms to Israeli municipal law and international law. In other words: does the path of the wall and its concomitant effects on Palestinians breach Israel’s legal obligations? With respect to international law the ICJ held:

²⁰⁶ *Nuclear Weapons Case*, *supra* note 201.

²⁰⁷ Israel’s Ministry of Defence, “Israel’s Security Fence,” (Last updated March 19, 2004), online: MOD <<http://www.seamzone.mod.gov.il/Pages/ENG/purpose.htm>>.

²⁰⁸ “Israel’s response to the ICJ”, *supra* note 204 at para 4.

²⁰⁹ *Beit Sourik*, *supra* note 81 at para 12.

²¹⁰ *Ibid.* Israel argued in the case of *Beit Sourik* that the wall’s route was necessary as it afforded “topographic command of its surroundings...in order to allow surveillance and to prevent attacks upon the forces guarding it.” See *Beit Sourik*, *supra* note 81 at para 12. See also “Israel’s response to the ICJ”, *supra* note 204 at para 7.

²¹¹ “Israel’s response to the ICJ”, *supra* note 204 at para 6. In accordance with the findings of the Israel Security Agency, Israel states that during “the period between August 2003 through August 2004, there was a dramatic decrease of 84% in the number of Israelis killed by terror attacks as compared with the period between September 2001 through July 2002.” In attempts to deflect all criticism, Israel has stated “Those who state that Israel has “the right to protect its citizens” while at the same time negating its right to build an anti-terrorist fence are paying mere lip service to the principle of self-defense.” See Israel’s Ministry of Foreign Affairs, “The Anti-Terrorist Fence- An Overview,” online:

. [Anti-Terrorist Fence]<http://www.securityfence.mfa.gov.il/mfm/Data/48152.doc>

²¹² Paul Troop, “The reality and legality of Israel’s wall,” (24 November 2003) at part 1, online: Electronic Intifada > electronicintifada.net/v2/article2207.shtml<

²¹³ Advisory Opinion, *supra* note 19 at para 141.

“the wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.”²¹⁴

In the case of *Beit Sourik* the Israeli High Court arrived at a similar conclusion after finding that Israel had failed to demonstrate the route of the wall was a security imperative.²¹⁵ As a result, Israel was ordered to alter the path of the wall in order to achieve the proper balance between maintaining its security objectives and upholding Palestinians’ legal rights.²¹⁶ The Court affirmed that changing the route was not only a legal imperative, but was the only justifiable way to achieve security:

“Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for.”²¹⁷

More recently, UN Special Rapporteur John Dugard has debunked Israel’s security rationale used to support the wall’s route.²¹⁸ In response to the argument that the wall decreased the number of suicide attacks in Israel Dugard writes:

There is, however, no compelling evidence that suicide bombers could not have been as effectively prevented from entering Israel if the Wall had been built along the Green Line... or within the Israeli side of the Green Line.²¹⁹

Israel’s security rationale is further undermined by its demonstrated willingness and ability to make substantial modifications to the route of the wall. On February 20th 2005, in attempts to comply with the decision in the *Beit Sourik Case*, the Israeli government made significant revisions by situating parts of the wall yet to be constructed, closer to the Green Line.²²⁰

In accordance with these changes the wall, once completed, will be 670 kilometers in length (as opposed to 622 km) and will travel for 135 km along the Green Line (as opposed to 48 km).²²¹ In addition the amount of land seized from Palestinians will be reduced from 12.6 per cent of the OPT to about 10.1 per cent.²²² This means that in total 57, 056 hectares of Palestinian land home to 49,400 Palestinians from 38 villages from the West Bank and East Jerusalem will lie west (on the Israeli side) of the wall.²²³ The ability to make extensive changes puts Israel’s claim that the wall’s route is “dictated by security considerations” and that its placement is based on “topographic command of its surroundings” into serious disrepute.²²⁴

²¹⁴ Advisory Opinion, *supra* note 19 at para 137.

²¹⁵ *Beit Sourik*, *supra* note 81 at paras 61, 67, 71, and 85.

²¹⁶ *Ibid.* at para 85.

²¹⁷ *Ibid.* at para 86.

²¹⁸ UN Commission on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967, John Dugard, UN ESCOR, 61st Sess. UN Doc. E/CN.4/2005/29 (7 December 2004) at para 25 and following. [Report of Special Rapporteur]

²¹⁹ *Ibid.* at para 25.

²²⁰ Ministry of Defence, “The route of the Security Fence approved by the Government” News Brief (20 February 2005), online: Ministry of Defence <http://www.securityfence.mod.gov.il/Pages/ENG/news.htm#news26>.

²²¹ Humanitarian Impact of West Bank Barrier, *supra* note 178 at para 3. See Addendum to Report of Special Rapporteur, *supra* note 143 at para 11.

²²² Humanitarian Impact of West Bank Barrier, *supra* note 178 at para 6. As the report states “The 2.5% decrease...is largely due to the shift of the Barrier back to the Green Line in the South Hebron area.”

²²³ *Ibid.* at para 6 and 8.

²²⁴ *Beit Sourik*, *supra* note 81 at para 12.

Finally, Israel has recently conceded for the first time that the route of the wall is not determined solely by security considerations. In response to a petition brought before the IHC by Palestinians from Azun, a village in northern West Bank, Israel stated that it would be prohibitively expensive to change the route of the wall in the area as it has already been constructed. Indeed, every kilometer of the wall built costs more five million US.²²⁵ Israel's focus on economic implications of the wall's route however "marks a fundamental change in its legal arguments."

Israel's stance also reveals a major policy shift regarding the permanency of the fence. The state has consistently maintained that the wall is a temporary measure and that it is ready and willing to change the route or dismantle it regardless of the associated costs.²²⁶ Such assurances were rejected by the ICJ which found "the construction of the wall and its associated regime [to] create a "fait accompli" on the ground that could well become permanent, in which case... it would be tantamount to *de facto* annexation."²²⁷

Israel's refusal to re-route a wall that diverts markedly from the Green Line gives credence to the ICJ's findings and demonstrates that the wall's route has more to do with Israel's own self-interested long-term gains than providing a temporary security measure. This stands in direct violation of Article 27 of the *Fourth Geneva Convention*, which holds that states are only allowed to adopt measures of security against protected persons if they are "necessary as a result of war."²²⁸ Given the wall does not fall within such an exception, Israel is in violation of its obligations under IHL.²²⁹ The political motivations underlying the wall's construction also violate Israel's municipal law. In the case of *Beit Sourik*, the Israeli High Court clearly stated that the wall's construction could not be motivated by political reasons but only by security justifications.²³⁰

The above analysis puts into disrepute Israel's claim that "the only reason for building the fence is terrorism."²³¹ To argue that the wall's route is motivated solely by security concerns would not only go against the findings of the ICJ, the HCJ, and the UN Special Rapporteur, but Israel's own stated position. It is clear that Israel is using a security rationale to mask less credible and more political motivations behind the construction of the wall. More convincing reasons according to Dugard, include Israel's desire to include settlements within Israel, annex Palestinian land, and "encourage an exodus of Palestinians", by placing severe restrictions on their freedom of movement and denying them access to their land and water resources.²³² These three issues will be explored in the following sections.

The wall, land annexation and inclusion of settlements

In order to construct the wall, Israel has seized control over privately owned Palestinian lands through the use of military orders in the West Bank.²³³ Although Israel retains possession of the land, no legal title is formally passed. Conveniently, this has allowed Israel to make the claim that it is not in violation of the 1907 *Hague Regulations* since it has not permanently confiscated the land, but merely temporarily seized it.²³⁴ However as one report notes, "the apparent permanence of the Barrier and its large cost, and the possibility of indefinite renewal once the temporary seizure order expires on 31 December 2005, all clearly suggest that the requisition orders amount to constructive confiscation in practice."²³⁵

²²⁵ The total cost of the wall is estimated to cost 3.4 billion US, which would mean that each kilometre will cost more than 5 million US. See Humanitarian Impact of West Bank Barrier, *supra* note 178 at para 4.

²²⁶ Advisory Opinion, *supra* note 19 at 116.

²²⁷ Advisory Opinion, *supra* note 19, at para 121.

²²⁸ *Fourth Geneva Convention*, *supra* note 16 at Article 27.

²²⁹ Oxford Report, *supra* note 11 at para 91.

²³⁰ *Beit Sourik*, *supra* note 81 at para 27.

²³¹ Anti-Terrorist Fence, *supra* note 213.

²³² Report of Special Rapporteur, *supra* note 220 at para 26.

²³³ Oxford Report, *supra* note 11 at para 116.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

In *Legal Consequences of the Construction of the Wall*, the Palestine Liberation Organization argued that “[t]he construction of the Barrier is an attempt to annex territory contrary to international law” and that “[t]he de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination.”²³⁶ Other supporting statements submitted to the Court stated that “[t]he route of the wall is designed to change the demographic composition of the [OPT] including East Jerusalem, by reinforcing Israeli settlements.”²³⁷

Israel rebutted with claims that the wall’s only purpose was to meet its security objectives by preventing terrorist attacks.²³⁸ It objected to ulterior motives stating the wall “does not annex territories to the State of Israel” and affirmed that it is “ready and able at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement.”²³⁹

The ICJ found that the construction of the wall deviated by distances of up to 22 kilometres from the Green Line. According to the report submitted by the Secretary-General to the ICJ, if the wall was completed in line with Israel’s former plans (the route planned before the February 20th 2005 revisions), approximately, 975 square kilometers (16.6 per cent of the West Bank) home to 237, 000 Palestinians would be situated between the Green Line and the Wall (also known as the “Seam Zone”). Moreover, “another 160, 000 Palestinians would live in almost completely encircled communities, described as enclaves...” In addition, “nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in Palestinian territory.”²⁴⁰

These estimates led the ICJ to conclude that the planned route of the wall and its associated confiscation of Palestinian land and resources “would be tantamount to *de facto* annexation.” The Court held:

“In the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements...is tending to alter the demographic composition of the Occupied Palestinian Territory.”²⁴¹

While the IHC in *Beit Surik* case stated that it was illegal for the state to build the wall and seize land for building a settlement for political reasons as opposed to military necessity, it refrained from ruling on whether Israel’s actions were based on political intentions. As the court stated:

“We accept that the [Israeli] military commander cannot order the construction of the separation fence if his reasons are political. The separation fence cannot be motivated by a desire to “annex” territories to the state of Israel. The purpose of the separation fence cannot be to draw a political border. In *Duikat* this Court discussed whether it is possible to seize land in order to build a Jewish civilian town when the purpose of the building of the town is not the security needs and defense of the area (as it was in *Ayoob*), but rather based upon a Zionist perspective of settling the entire land of Israel. This question was answered by this Court in the negative.”²⁴²

However, even after Israel’s revisions (made in accordance with the ruling in *Beit Sourik*) to the wall’s route on February 20th 2005, the state’s intent to incorporate as much land, illegal settlements and settlers as possible within Israeli borders remains clear. In addition to annexing 10 per cent of Palestinian land, the modified route

²³⁶ Advisory Opinion, *supra* note 19 at para 115.

²³⁷ *Ibid.*

²³⁸ While Israel refused to take part in the advisory proceedings before the ICJ, the court dually noted Israel’s arguments made before the General Assembly and the Security Council on matters concerning the wall as well as other relevant issues.

²³⁹ Advisory Opinion, *supra* note 19 at 116.

²⁴⁰ *Ibid.* at para 83 and 84. Deviation from the Armistice Line was evident in Jerusalem, where “existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.”

²⁴¹ *Ibid.* at para 133.

²⁴² *Beit Sourik*, *supra* note 81 at para 27.

is set to “penetrate more deeply” into the northern West Bank to include 50, 000 settlers in the Gush Etzion bloc located near Bethlehem.²⁴³

In order to incorporate the settlements of Ariel and Emmanual, the wall “extends 22 km or 42 per cent across the width of the West Bank.” In Ma’ale Adumim, the wall “extends into the West Bank 14 km or 45% of its width.”²⁴⁴ Once the wall’s planned route around the Israeli settlements of Ariel, Emmanuel and Ma’ale Adumim is finalized, an estimated 170, 100 Israeli settlers (not including the 170, 000 settlers residing in East Jerusalem) will be located on the Israeli side of the wall.²⁴⁵ This means that 76 per cent of the settler population in the West Bank will reside on annexed Palestinian land located between the wall and the Green Line.²⁴⁶ As Dugard states, “The determination to build the Wall around 56 settlements [thereby including 80 per cent of settlers west of the wall] simply confirms the view...that the main purpose of the Wall is not security but the incorporation of settlements.”²⁴⁷

Palestinian farmland and water resources

Much of the Palestinian land cut off by the wall is considered to be amongst the “most fertile in the West Bank.”²⁴⁸ Some of the annexed farmland contains “essential privately-owned agricultural wells.”²⁴⁹ For example, Jayyous, a farming village located in the Qalqilya Governate is considered to be “one of the best agricultural lands in the West Bank” and is situated in the “biggest olive and vegetable producing region.”²⁵⁰ Due to the wall’s route, about 70 per cent of the village’s agriculture, all of their irrigated land and six groundwater wells are found on the west side of the wall.²⁵¹ In total “there are approximately 9,307 dunums (931 hectares) of fertile land, 2,000 guava trees-each with an annual yield of 100 kilograms of fruit, and as many as 12,000 olive trees isolated from the Jayyous community.”²⁵²

As pointed out, in addition to separating Palestinians from their agricultural land, the wall also cuts people off from valuable water resources, including numerous communal and private wells used to irrigate farmland.²⁵³ A total of 30 groundwater wells, built before 1967, have been separated from Palestinians in the West Bank as a result of the wall’s first phase of construction alone.²⁵⁴ Water has become so limited in areas east of the wall, it is possible that the level of water scarcity may bring about the demise of Palestinian farming in the area.²⁵⁵ As Malone writes, “[t]he erection of the Security Fence on Palestinian West Bank territory and the concomitant blow to Palestinian control of West Bank water will undoubtedly ruin Palestinian farming in the region.”²⁵⁶

²⁴³ Addendum to Report of Special Rapporteur, *supra* note 143 at para 11.

²⁴⁴ Humanitarian Impact of West Bank Barrier, *supra* note 178 at para 16.

²⁴⁵ Addendum to Report of Special Rapporteur, *supra* note 143 at para 11. The intent to include these Israeli settlements is made clear in a statement by Prime Minister Ariel Sharon’s during a recent visit to the settlement of Ariel: “I reiterate and clarify that this bloc is one of the most important. It will forever be part of the State of Israel, There is no other thought and no other direction of thinking. I came here today to see how the city can be expanded and the bloc strengthened, as I do and shall do in the other blocs. This bloc will forever be an inseparable part of the State of Israel, territorially contiguous with the State of Israel like the other blocs.” See Aluf Benn, “PM: Ariel will forever be an integral part of Israel,” *Ha’aretz* [of Israel] (July 22, 2005). online: Ha’aretz.

<http://www.haaretz.com/hasen/pages/603287.html>

²⁴⁶ Humanitarian Impact of West Bank Barrier, *supra* note 178 at para 21.

²⁴⁷ Para 11, Addendum to Report of Special Rapporteur, *supra* note 143 at para 11. See also Humanitarian Impact of West Bank Barrier, *supra* note 178 at para 21 which came to similar findings: “56 West Bank Israeli settlements (excluding East Jerusalem settlements) will lie between the Barrier and the Green Line.”

²⁴⁸ Humanitarian Impact of West Bank Barrier, *supra* note 178 at para 8.

²⁴⁹ Andrew R. Malone, “Water now: the impact of Israel’s security fence on Palestinian water rights and agriculture in the West Bank,” 36 Case W. Res. J. Int’l L. 639 at 650. [Malone]

²⁵⁰ Humanitarian Impact of West Bank Barrier, *supra* note 178 at 12.

²⁵¹ *Ibid.*

²⁵² *Ibid.* Another example is Al Burj in Hebron. See *Ibid.* at 31.

²⁵³ Malone, *supra* note 251 at 642.

²⁵⁴ See Oxford Report, *supra* note 11 at para 249.

²⁵⁵ Malone, *supra* note 251 at 642.

²⁵⁶ *Ibid.* at 643.

Furthermore, the wall is considered to be directly responsible for the scarcity of clean water in villages in the West Bank. The loss of artesian wells caused by the wall's route is expected to aggravate present shortages, worsening the humanitarian crisis in the West Bank.²⁵⁷ Shortages of water will force those Palestinians affected to travel longer distances to reach supplies and pay higher prices, thus forcing many to abstain from basic water consumption.

It is important to consider the loss of Palestinians water supplies in comparison to Israeli gains. Due to the wall's route, the Western aquifer will lie on the west side of the wall, giving Israel access to West Bank groundwater supplies.²⁵⁸ As a result, Israel's water base will increase allowing it to accommodate Israel's heavy consumption habits while leaving Palestinians with less water for drinking, cooking, washing clothes and bathing.²⁵⁹ As Malone writes, "such an apportionment of water between Israel and the West Bank is far from equitable."²⁶⁰

Israel's actions amount to a violation of key provisions of the *1907 Hague Convention*, and are thus violations of customary international law. Article 46 affirms that private property "must be respected" and "cannot be confiscated." The confiscation of private property to build the wall and situating land on the side opposite to its Palestinian owners ought to be seen as a direct violation of such a provision.²⁶¹ Moreover, Article 55 outlines the limited role of the occupying power by stipulating that it "shall be regarded only as administrator and usufructuary of... agricultural estates... It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct."²⁶² In compliance with such rules, Israel is considered a temporary sovereign permitted to use the land, but prohibited from permanently alienating it or destroying it.²⁶³ Israel's actions also amount to a violation of Article 53 of the *Fourth Geneva Convention* and constitute a grave breach under Article 147.²⁶⁴ This means that those held to be responsible can be tried as war criminals.²⁶⁵

Israel's claim that the wall "is not a border and has no political significance [and] does not change the legal status of the territory in any way" stands in stark contrast to the reality on the ground, as demonstrated by the above analysis.²⁶⁶ Increasingly the wall is being recognized as delineating a new boundary between Israel and Palestine.²⁶⁷ The fact that the wall's construction has been revised to comply with the decision in the *Beit Surik* is seen as giving the wall and its route an unwarranted legitimacy. However, the wall's new route is no more focused on security than the old route; rather one of its principal aims remains the protection and consolidation of settlements, the annexation of Palestinian agricultural land and the appropriation of prime water resources.²⁶⁸ It is becoming increasingly clear that Dugard's once dismissed projection that the wall would constitute "a visible and clear act of territorial annexation under the guise of security" has become a reality.²⁶⁹

²⁵⁷ *Ibid.* at 657.

²⁵⁸ *Ibid.* at 658.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Hague Regulations*, *supra* note 14 at Article 46.

²⁶² *Ibid.* at Article 55.

²⁶³ See generally Marcos A. Orellana, "Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad" (Summer 2005) 12 (Issue 4) *Geo. Int'l Env't L. Rev.* [Orellana]

²⁶⁴ *Fourth Geneva Convention*, Article 53 and 147 of Geneva Convention.

²⁶⁵ Orellana, *supra* note 265 at 35. "That these breaches are considered grave obligates the contracting parties to bring criminals, regardless of their nationalities, before their courts or to extradite such persons for trial in another jurisdiction."

²⁶⁶ Israel's Permanent Representative to the General Assembly restated this view on 8 December 2003. See *Illegal Israeli actions in the occupied East Jerusalem and the rest of the occupied territories: Statement by Ambassador Dan Gillerman*, 58th UN General Assembly, Tenth Emergency Special Session, (8 Dec 2003), online: Permanent Mission of Israel to the United Nations < http://www.israel-un.org/gen_assembly/pal_issues/10ess_8dec2003.htm >. On this occasion, he added: "As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way."

²⁶⁷ Addendum to Report of Special Rapporteur, *supra* note 178 at para 12.

²⁶⁸ This is made explicit by former Israeli Prime Minister Benjamin Netanyahu who stated, "A line that is genuinely based on security would include as many Jews as possible and as few Palestinians as possible within the fence. That is precisely what the security fence does." See Benjamin Netanyahu, "Why Israel needs a fence," (July 13, 2004) online: Embassy of Israel <http://embassyofisrael.org/articles/2004/July/2004071300.htm>.

²⁶⁹ UN Commission on Human Rights, Report of the Special Rapporteur of the Commission on Human Rights on the situation

The wall and the permit system

Among those most affected by the wall are Palestinians residing in or owning property in the Seam Zone, designated a “closed zone” by Israel. In support of the ICJ’s findings on changes in the demographic composition in the OPT, Dugard has stated that a clear purpose of the wall is to make “life intolerable” for Palestinians in the area by severely restricting their movement.²⁷⁰

As the Israeli military order “Declaration Concerning the Closure of Area Number s/2/03 (Seam Area)” stipulates, “no person will enter the seam area and no one will remain there”, and that “a person found in the seam area will be required to evacuate it immediately.”²⁷¹ Despite its general language, the regulation only applies to Palestinians; all Israelis, including Israeli settlers are automatically exempt.²⁷² The two-tier system means that while Israelis are able to freely move through the zone, Palestinians require Israeli approved permits to live in their own houses and access their privately-owned lands.²⁷³

The system works by obliging all Palestinians over the age of 12 seeking entry into the seam zone to fulfill a number of requirements that vary depending on the type of permit sought.²⁷⁴ There exists no criteria for approving or denying requests; rather, the Civil Administration is given complete discretion in deciding who can and cannot enter the Seam Zone. As a report by B’Tselem notes, 25 per cent of Palestinians were denied entry in 2003 received no justification or information, though most were rejected for “security reasons.”²⁷⁵ While there does exist an appeals committee, it is comprised of members of the same body that refused the original application.²⁷⁶ In accordance with Article 14 of the ICCPR, the proceedings before the appeals committee are considered to constitute a “suit at law.”²⁷⁷ As a result, the committee is required to be “competent, independent and impartial.”²⁷⁸ The fact that the appeals committee is part of the same institution which denied initial requests is considered a breach of Israel’s obligations under international law.

The wall’s imposed restrictions on movement and international law

Severe violations of the human rights of tens of thousands of Palestinians living in the West Bank have resulted from Israel’s decision to construct a wall along a route that deviates greatly from many places along the Green Line. The presence of the wall, the closed seam zone, the permit system, the irregular closures of gates, are all serious

of human rights in the Palestinian territories occupied by Israel Since 1967, UN ESCOR, 60th Sess. UN Doc. E/CN.4/2004/6 (8 September 2003) at para 6.

²⁷⁰ See Human Rights Questions, *supra* note 157 at para 27.

²⁷¹ Israeli Defense Forces, Military Order, Order Concerning Security Directives (Judea and Samaria), No. 378, 1970 *Declaration Concerning the Closure of Area Number s/2/03 (Seam Area)* (2003) at 3(a) and 3(b), online: United Nations Information System on the Question of Palestine <http://domino.un.org/UNISPAL.NSF/0/c6114997e0ba34c885256ddc0077146a?OpenDocument>.

²⁷² *Ibid.* at para 4(a).

²⁷³ For personal permits that enable non-residents to enter the seam zone (to access their land, for example) see *ibid.* at para 3. Permanent resident permits are only awarded to Palestinians within one year of the implementation of the Israeli orders regulations who are able to prove that they have permanently resided in the zone for at least two years. See Israel Defense Forces, Military Order, Order Regarding Defence Regulations (Judea and Samaria), No. 378, 5730-1970 *Regulations Regarding Permanent Resident in the Seam Area Permit* (2003) at para 2 (a), online: http://www.hamoked.org.il/items/3170_eng.pdf.

²⁷⁴ See, for example, Israeli Defense Forces, Order Regarding Defense Regulations (Judea and Samaria) (No. 378), 5730-1970, *Regulations Regarding Permits to Enter and Stay in the Seam Area*, at annex part 1, online: Hamoked http://www.hamoked.org.il/items/3160_eng.pdf. This order includes different applications for 12 different categories of persons (depending on the purpose of their visit) requesting entry to the Seam Zone.

²⁷⁵ The Civil Administration also refuses permits based on a failure to prove ownership as well as a failure to prove the person works in agriculture. In certain areas, the number of people given permits was much lower than 25 percent. “In Ar Ras only four out of 70 applicants were issued permits.” See Shlomi Suissa, B’Tselem, “Not all it Seems- Preventing Palestinians Access to their Lands West of the Separation Barrier in the Tulkarm-Qalqiliya Area,” (Jerusalem: June 2004) at 6 and 9. Online: B’Tselem

www.btselem.org/Download/200406_Qalqiliya_Tulkarm_Barrier_Eng.Doc. [B’Tselem Report]

²⁷⁶ *Ibid.* at 7.

²⁷⁷ Oxford Report, *supra* note 11 at para 214.

²⁷⁸ *Ibid.*

impediments to Palestinians freedom of movement.²⁷⁹ These restrictions are only compounded by the effects of other existing aspects of Israel's security and closure regime, including curfews, checkpoints, and road closures.²⁸⁰

Under international law, Palestinian's right to freedom of movement includes liberty of movement, freedom to choose their residence, and freedom to leave their own country.²⁸¹ The *International Covenant on Civil and Political Rights* (ICCPR) provides that the only permissible restrictions to these rights are those that "are provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."²⁸² As one report notes, any restrictions that are imposed "must not 'nullify' the right, must not be discriminatory or arbitrary, and must be [necessarily] proportionate to the purpose underlying the restriction."²⁸³

Arbitrary restrictions enforced through a permit scheme and a series of entry gates and checkpoints that control the passage of Palestinians in the OPT cannot be justified by security concerns. In addition to seriously impeding Palestinians' freedom of movement, the system also infringes Palestinians' freedom to reside in the place of their choice, two rights enshrined in the ICCPR.²⁸⁴ Moreover with one set of rules for Israelis, and another for Palestinians, the two-tier system amounts to a clear violation of Israel's responsibilities pursuant to the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which obliges Israel to promote the rights of all persons subject to its jurisdiction without discriminating against them on the basis of their national origin.²⁸⁵

By severely impeding the ability of Palestinians to farm their own land, the permit system violates Israel's obligations to uphold Palestinians' rights to work, make a living and be safeguarded against unemployment pursuant to Article 6 of the ICESCR as well as Article 23 of the *Universal Declaration of Human Rights*.²⁸⁶ Violations of such rights are especially egregious in light of Israel's clearly arbitrary conduct and the poor state of the Palestinian economy. As one report notes, 'given the already severely degraded state of the Palestinian economy, any restrictions affecting these rights require a stronger justification than comparable restrictions in a regularly functioning economy.'²⁸⁷

Moreover, Israel's refusal to compensate those Palestinians denied access to their land for lost income, amounts to a breach of Article 39 of the *Fourth Geneva Convention* which compels Israel, as an occupying power, to "ensure [the protected persons'] support and that of his dependents" when the protected person is prevented "for reasons of security from finding paid employment..."²⁸⁸

The wall and access to farmland

Farmers trying to access their land have been particularly hard hit by the permit system. For example, in 2004, about 170 of the 700 farmers who applied for permits in the olive- producing village of Jayyous were rejected.²⁸⁹ An

²⁷⁹ See generally *B'Tselem Report*, *supra* note 277.

²⁸⁰ Oxford Report, *supra* note 11 at para 200.

²⁸¹ ICCPR, *supra* note 207 at art. 12.

²⁸² ICCPR, *ibid*.

²⁸³ Oxford Report, *supra* note 11 at para 91.

²⁸⁴ See ICCPR, *supra* note 207 at Article 12(1), which states: "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."

²⁸⁵ See ICESCR, *supra* note 207 at Article 2(2). See ICCPR, *supra* note 207 at Article 2(1).

²⁸⁶ See ICESCR at *supra* note 207 at Article 6(1) which states: "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

See *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. Doc A/810 at 71 (1948) at Article 23(1) which states: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."

²⁸⁷ Oxford Report, *supra* note 11 at para 236.

²⁸⁸ See *Fourth Geneva Convention*, *supra* note 16 at art. 39.

²⁸⁹ Humanitarian Impact of West Bank Barrier, *supra* note 178 at 17.

analysis of those refused demonstrates the arbitrary manner in which Israel enforces its permit system.²⁹⁰ While the length of the permits granted to Palestinian farmers is supposed to vary in accordance with the type of crop being grown, a report conducted by B'Tselem shows that Israeli authorities do not abide by their own standards. Rather, they often issue permits in a haphazard manner.²⁹¹

There are documented instances of olive farmers receiving six-month permits despite the crops' short picking season, while other farmers of crops needing care throughout the year received shorter permits, sometimes giving them no longer than two weeks of access to their farmland.²⁹² The entire system, the report found, is based on faulty assumptions that farmers only need access to their crops at specific times of the year. As pointed out, "cultivation of the orchards throughout the year, such as plowing, pruning, and weeding greatly affect the yield and quality of the olives and the oil extracted from them."²⁹³

In addition to being arbitrary, Israel's system of granting or denying permits has been labelled as being flawed. Following its implementation in 2003, Israel's Civil Administration used a faulty population registry to decide who would receive permits in the Seam Zone. While infants, persons deceased and individuals living abroad received permits, many landowners and residents in the Seam Zone were deemed ineligible.²⁹⁴

Even when farmers are given permits, there are no guarantees they will be able to access their lands on the west side of the wall. Before the Association of Civil Rights petitioned at the Israeli High Court of Justice in October 2003, agricultural gates in the Tulkarm-Qalqilya Area were opened for only a few hours at a time without any definitive schedule.²⁹⁵ As a result, farmers had to wait for hours and sometimes overnight to gain access to their lands.²⁹⁶

While improvements were made following the petition that offered gate access to lands during daylight hours, farmers were still not assured entry due to delays at Israeli operated checkpoints and impromptu extended closures of agricultural gates by Israeli officials following "security incidents."²⁹⁷ More recently, a UN report found it to be "increasingly difficult for farmers to care for their land during the year because of access restrictions, changes in gate operations and the rejection of valid permits."²⁹⁸ The consequences of such closures are the most devastating during the harvest season when significant amount of labour is necessary to ensure profitable crop yields.²⁹⁹

Agriculture is a significant part of the Palestinian economy, comprising about nine per cent of the GDP in the OPT.³⁰⁰ It is of critical importance to Jenin, Tulkarm and Qalqilya, three West Bank towns significantly impacted by the wall. As Malone notes,

"These three districts boast the highest percentage of land used for farming in all of the West Bank, "with 59% in Tulkarm, 50% in Jenin, and 46% Qalqilya"... Together they comprise 37% of West Bank farmland and in the year 2000 they accounted for \$220 million in agricultural output," or 45.1% of the West Bank's total agricultural output."³⁰¹

The inability of farmers to access their lands has had particularly grave consequences, especially in light of the poor economic situation in the OPT since the beginning of the *Intifada* in 2000. About 15 per cent of those unemployed

²⁹⁰ See B'Tselem Report, *supra* note 277 at 8.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.* at 7.

²⁹⁵ *Ibid.* at 13.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.* One "security incident" was the Palestinian attack in Haifa in October 2003 which resulted in more than a three-week closure.

²⁹⁸ Humanitarian Impact of West Bank Barrier, *supra* note 178 at 17.

²⁹⁹ See B'Tselem Report, *supra* note 277 at 14.

³⁰⁰ Malone, *supra* note 251 at 661-662.

³⁰¹ *Ibid.*

in the West Bank in 2003 were agricultural workers.³⁰² Moreover 38.5 per cent of those living in rural areas earned less than \$2.00 a day, therefore falling below the poverty line.³⁰³ The situation has not improved in recent months; the number of Palestinians working in agriculture in the West Bank has decreased substantially from 22.8 per cent in late 2004 to 14.4 per cent in early 2005.³⁰⁴ To make matters worse, Palestinians refused access to their lands have been denied any means of compensation from Israel for lost income.³⁰⁵ As a result, many have been forced to turn to handouts from international aid organizations.³⁰⁶

Part II: The economic context of the Disengagement Plan

The Disengagement Plan offers a unique opportunity to bring a much needed turnaround to the Palestinian economy, which has been stifled by Israeli- imposed restrictions, resulting in a society mired in poverty and high unemployment, and increasingly dependent on humanitarian aid. As the plan states, one of its central objectives is to achieve a better economic situation.³⁰⁷ In addition, the plan claims that “[t]he process will facilitate normal life and Palestinian economic and commercial activity in the West Bank.”³⁰⁸

On its face, the redeployment of troops and the dismantling of settlements in the Gaza Strip and parts of the West Bank appear to be beneficial from an economic standpoint. The reclaiming of Palestinian land, the transfer of potentially viable assets, the anticipated reduction of tensions between the two sides and the loosening of restrictions on internal movement in areas slated for evacuation all hold the potential to improve the economy. However, when placed in a broader context it becomes evident that any benefits that may be accrued from the plan will be effectively undermined by the continued imposition of numerous Israeli closure policies restricting the movement of Palestinian people and goods.

Israel’s system of closures is the primary reason for the dire economic situation that has plagued the OPT since the beginning of the *Intifada* in 2000.³⁰⁹ It is expected to continue relatively unabated after the implementation of the Disengagement Plan. Without a dramatic reversal of the closure policies taking place alongside the withdrawal of troops and the removal of settlements, the long- term economic situation in the OPT will not improve. In fact, some researchers suggest it will deteriorate further, leaving more than 60 per cent of all Palestinians in the OPT living below the poverty line by 2008.³¹⁰ In order for the Disengagement Plan to become the economic success it projects itself to be, the withdrawal must be combined with good faith initiatives aimed at curbing Israeli imposed controls over Palestinians and facilitating the movement of people and goods.

Israel’s closure regime

There are five major crossings in the Gaza Strip, however according to Al Mezan documentation, most have been closed for long periods without opening, creating huge economic losses for Palestinian traders and businesses. The Office for the Coordination of Humanitarian Affairs (OCHA) describes the Israeli system of closures as the “primary cause of poverty and the humanitarian crisis in the West Bank and Gaza...”³¹¹ This argument is buttressed by the World Bank which refers to the system of closures as “the precipitator of Palestinian economic crisis” and

³⁰² Palestinian Central Bureau of Statistics report from 2003 cited in B’Tselem Report, *supra* note 277 at 10.

³⁰³ *Ibid.*

³⁰⁴ Palestinian Central Bureau of Statistics, “Labour Force Survey (January-March 2005) Round (Q1/2005)” (April 28, 2005) at 3, online: Palestinian Central Bureau of Statistics: <www.pcbs.org> .

³⁰⁵ See B’Tselem Report, *supra* note 277 at 11.

³⁰⁶ *Ibid.* at 10.

³⁰⁷ Disengagement Plan, *supra* note 6 at Part 1, principle “Two”.

³⁰⁸ *Ibid.* at Part 2A, section 3.2, para 7. Interestingly enough, Israel’s plan does not make a similar claim with respect to Gaza.

³⁰⁹ See *infra*, note 313 and 314.

³¹⁰ The World Bank, “Stagnation or Revival? Israeli Disengagement and Palestinian Economic Prospects,” Dec 2004, at para 22. [World Bank Report].

³¹¹ Office for the Coordination of Humanitarian Affairs: occupied Palestinian territory (OCHA oPt), “West Bank Closure and Access- April 2005,” (April 2005) at 1. [Closure Update] The report states that the closures “have restricted Palestinian access to health and education services, employment markets and social and religious networks.”

charges it responsible for Palestinian society having "lost all economic dynamism" and having "experienced a recession of historic proportions" in the last four years.³¹² Such economic instability has produced dire social and political consequences, as the "strong social cohesion that characterizes Palestinian life has begun to crack, while the Palestinian Authority has lost credibility and effective control in several parts of the Gaza Strip and the West Bank."³¹³ The system of closure has not only crippled the Palestinian economy, it has also severely harmed Israel's interests. As the Palestinian Economic Council for Development and Reconstruction (PECDAR) reports,

"[t]he policy [of closure], which has become Israel's automatic reaction in the face of any crisis, serves only to provoke hatred amongst ordinary Palestinians and fuel resistance. It has struck a blow to the economy, from which it will take years to recover, and made normal social life impossible."³¹⁴

This demonstrates that economic revival in the OPT is therefore not only key to the Palestinian social and political stability, but is also of grave importance for Israel's own security. The World Bank warns that the economy's "continued deterioration will impoverish and alienate a generation of young Palestinians... (undermining) the credibility of the Palestinian Authority, increasing the appeal of militant factions and threatening Israel's security."³¹⁵ As its report suggests, such negative impacts will not be remedied solely by the implementation of actions outlined in Israel's Disengagement Plan. Rather, economic regeneration and its corresponding positive social and political effects can only be achieved once Israel effectively deals with the root causes of Palestinian economic distress: namely the 605 internal closures in the West Bank that restrict movement, the Gaza Strip and West Bank border controls, the controls inhibiting commodity trade and the passage of people, the significant restrictions on labour flows into Israel, and the prohibition on construction and development of a seaport and airport linking the OPT directly to the outside world.³¹⁶

This is not to say that the steps outlined in the Disengagement Plan will have no positive impacts. The removal of settlements in Gaza and the Northern parts of the West Bank will allow Palestinians to reclaim control over land that is legally and historically their own and potentially make use of the economic assets left behind. In addition, it is anticipated that Palestinian movement in the areas free of settlements will be less encumbered following the dismantling of internal closures.³¹⁷ While these expected benefits are welcome, they are undermined by the continuation of other aspects of Israel's closure system, including: restrictions on the cargo handling system, internal closures in the rest of the West Bank, the construction of the wall, poor transportation links between the West Bank and Gaza, the phase-out of work permits for Israel by 2008, and the abolishment of the quasi-Customs Union in Gaza.³¹⁸

Economic separation

The Disengagement Plan is geared towards physically and economically separating the OPT from Israel.³¹⁹ Separation will continue to permeate Palestinian life, even after the implementation of the Disengagement Plan. Palestinians will continue to suffer from internal segmentation in the West Bank, restrictions on trade and the passage of people to foreign countries, the wall in the West Bank, the phaseout of workers allowed into Israel, and the lack of a safe passage linking the West Bank to the Gaza Strip.

³¹² World Bank Report, *supra* note 312 at para 1 and 24.

³¹³ *Ibid.* at para 1.

³¹⁴ Dr. Muhamad Shtayyeh et als., "Israel's Disengagement From Gaza Strip: Implications for Social and Economic Development", (Jerusalem: Palestinian Economic Council for Development & Reconstruction (PECDAR)) 2005 at 21. [PECDAR Report]

³¹⁵ World Bank Report, *supra* note 312 at para 14.

³¹⁶ *Ibid.* at 7 and 24. As the World Bank report states, "removal of significant portions of the system is indeed possible without compromising Israel's security objectives." In addition, for a breakdown of closure barriers in the West Bank see Closure Update, *supra* note 313 at 1.

³¹⁷ World Bank Report, *supra* note 312 at para 27.

³¹⁸ *Ibid.* at para 99.

³¹⁹ *Ibid.* at para 19.

Palestinians have never been afforded a significant role in shaping their economic relations with Israel. Rather, the unequal bargaining positions of the parties have meant that the Palestinian economy has been involuntarily shaped by Israel's unilateral decisions. By evolving at the mercy of Israel's self-interested gains, the Palestinian economy has a deep imbedded dependence on the Israeli economy.³²⁰ The Disengagements Plan will not change this. Rather, it will allow Israel to continue to decide the course of the Palestinian economy without accountability.

The Palestinian economy during the Intifada

Israeli-Palestinian relations largely dictate the state of the Palestinian economy at any given time, as is evidenced by the state of the economy during the *Intifada*. The economy deteriorated drastically during the *Intifada*, and then recovered somewhat in 2003 as "mild positive growth returned."³²¹ The slight economic upturn is linked to a number of factors, including a lull in violence, alleviation of curfews and closures, and an increase in labor permits issued to Palestinians. In addition, about 100,000 jobs were created "albeit many of them of poor quality", and investment increased by 14 per cent.³²²

The fragile economy experienced another downturn in 2004 as Israel mounted several military incursions into Gaza. These operations led to the segmentation of Gaza and the imposition of severe restrictions on the movement of people and goods to and from Israel and Egypt.³²³ This resulted in a sharp decline in exports from Gaza, and temporarily blocked the provision of humanitarian aid. Only 1,000 Palestinian workers (compared to 6,000 in 2003) were permitted into the Erez Industrial Estate and Israel. In addition, the fighting seriously damaged much public infrastructure as well as private property.³²⁴

The overall impacts of the *Intifada* have proven devastating to the Palestinian economy. Al Mezan reported economic losses of over \$1 billion in the agricultural sector alone; this sector is one of the most productive in the Gaza Strip, employing an important percentage of the workforce. Grinding poverty is endemic in the OPT, with almost half of the population living below the poverty line. About 16 per cent or 600,000 people live in deep poverty, meaning they are unable to afford the basic food, shelter and clothing necessary for survival.³²⁵ The rate of poverty in the OPT has more than doubled in the last few years, rising from 20 per cent in 1999 to 48 per cent in 2004. During the same period, poverty rates tripled in the West Bank, rising to 38 per cent in 2004, while they doubled in Gaza, ballooning to 65 per cent.³²⁶ Not surprisingly,³²⁷ the unemployment rates have followed a similar pattern, rising from 12 per cent in 1999 to 27 per cent in 2004.

The movement of people and goods

Palestinians movement within and between the West Bank and Gaza Strip as well as to Israel is constrained by controls that often necessitate Israeli- approved travel permits. Palestinians residing in the Gaza Strip also need Israeli authorization to travel internationally. Less than a third of Palestinians are granted these permits. Most often, these are given to Palestinians in the West Bank. In the Gaza Strip, less than one out of ten people receive the proper authorization to travel beyond the Strip's borders.³²⁸

³²⁰ Oren Gross, "Mending Walls: The Economic Aspects of Israeli-Palestinian Peace" (2000)

15 Am. U. Int'l L. Rev. 1539 at 1551. [Gross]

³²¹ World Bank Report, *supra* note 312 at para 20.

³²² *Ibid.*

³²³ *Ibid.* at para 21.

³²⁴ *Ibid.*

³²⁵ *Ibid.* at para 109.

³²⁶ *Ibid.* at 32. See "Annex Table 1: Recent Macroeconomic Indicators."

³²⁷ These numbers are comparable to the figures from the Palestinian Central Bureau of Statistics which found the percentage of Palestinians unemployed in the OPT up to 26.3 per cent in early 2005 in comparison to 10.0 per cent in the late 2000. This figure is determined in accordance with ILO standards and is based on the number of people who were unemployed and seeking jobs. During the Intifada, the unemployment rate rose from 22.6 per cent in the West Bank and decreased slightly to 24.0 per cent in the Gaza Strip. (The rise and decrease in figures is in comparison to 4th quarter unemployment rates in the West Bank and Gaza Strip).

³²⁸ Buttu, *supra* note 317.

The passage of goods is not made substantially easier. According to Al Mezan monitoring reports, the flow of goods across Karni crossing (which is the only crossing for movement of cargo) has been severely impeded by delays and obstacles. In addition to traders paying untoward fees to cover damaged goods or compulsory storage fees, permits are frequently denied, the crossing closes sporadically and controls have limited the number of traders or goods permitted to access the crossing. Moreover, in the West Bank, hundreds of checkpoints fragment the territory so Israelis may conduct numerous “security” searches. This involves the unloading and reloading of Palestinian goods from truck to truck before they reach their destination, similarly leading to significant hikes in transportation costs and significant time delays. As Buttu writes, “goods originating from Hebron (in the Occupied West Bank) destined for Nablus (also in the Occupied West Bank) must be unloaded and reloaded an estimated seven times.”³²⁹

Strict Israeli controls on the cross-border passage of goods have debilitated the Palestinian export sector and hurt trade relations, delivering a serious blow to the economy. Serious reforms are not expected as a result of the Disengagement Plan, which simply states that “economic arrangements currently in operation between the State of Israel and the Palestinians shall remain in force” including “the entry and exit of goods between the Gaza Strip, the West Bank, the State of Israel and abroad.”³³⁰

Internal movement

The ability of Palestinians and goods to move freely within the borders of the OPT is key to the health of the Palestinian economy.³³¹ Israeli restrictions on internal movement have fragmented the occupied territories, splintered the economy, caused serious unpredictability in the labour market and resulted in prohibitive transaction costs. As long as these restrictions continue, Palestinian standards of living will continue to decline.³³² The World Bank has estimated that the dismantling of internal closures alone has the potential to lead to a 3.5 per cent growth in Gross Domestic Product in 2005.

Under Israel's Disengagement Plan, following the dismantling of settlements and redeployment of troops, Israeli forces will no longer have a “permanent presence” in Gaza and in northern parts of the West Bank.³³³ As a result, full internal movement will be theoretically restored in these areas, thus helping to revive the production of goods and local markets.

The Disengagement Plan states that Israel will maintain closures in the rest of the West Bank, although it “will work to reduce the number of internal checkpoints throughout the West Bank.”³³⁴ However, in the past a reduction in checkpoints has been disingenuously accompanied by an increase in other movement-restricting measures. For example, between November 2004 and March 2005 three checkpoints were removed from the West Bank, bringing the total number to sixty-four, but during the same period the number of roadblocks³³⁵, roadgates³³⁶ and earth walls increased. Overall, however, the number of closures has decreased by 75, to a total of 605 barriers.³³⁷

Additionally, it appears inevitable that any reduction in the number of internal closures will be accompanied by the continued construction of the wall in the West Bank, with all of its associated restrictions on movement. This means that any improvements to mobility will be overshadowed by the wall and its demonstrated tendency to fragment the

³²⁹ *Ibid.*

³³⁰ Disengagement Plan, *supra* note 6 at para 10, “one”.

³³¹ World Bank Report, *supra* note 312 at para 26.

³³² World Bank, “Twenty-Seven Months- *Intifada*, Closures and Palestinian Economic Crisis” (May 2003) at para 26.

³³³ See Disengagement Plan, *supra* note 6 at section 3, part “One. The Gaza Strip,” para 2 and part “Two. The West Bank,” para 1. See World Bank Report, *supra* note 312 at para 27 which states that “[a]lthough several small settlements are slated to remain in the Jenin/Tulkarm/Nablus “triangle” the IDF would not maintain a “permanent” presence in the area.”

³³⁴ *Ibid.* at note 6 at section 3, part “Two. The West Bank,” at para 3 which states “[i]n other areas of the West Bank, current security activity will continue. However, as circumstances require, the State of Israel will consider reducing such activity in Palestinian cities.”

³³⁵ Defined by OCHA as “a series of 1 metre high concrete blocks used to obstruct vehicle access.”

³³⁶ Defined by OCHA as “a metal gate, often manned by IDF, used to control movement along roads.”

³³⁷ See Closure Update, *supra* note 313 at 1.

economy, annex Palestinian land and impede private land-owners' access to their properties in the Seam Zone.³³⁸ These economic consequences are expected to become even worse as construction of the wall proceeds. The World Bank anticipates that the wall may be responsible for a 17 per cent decline in the agricultural GDP, a 2 per cent decline in the total GDP and, upon completion, a 3- 5 per cent drop in Palestinian gross national income.³³⁹

Movement across international borders and trade

Israel has proposed the introduction of major technological upgrades, such as modern electronic scanners, at border crossings in an effort to accelerate the movement of people and cargo across borders. While these initiatives have the potential to return cargo transfers up to pre- *Intifada* levels, the World Bank warns that any benefits accrued may be effectively undermined by Israel's failure to resolve key transport problems.³⁴⁰ In other words, Israel's upgrades may offer only the appearance of accommodating increased movement across its borders, while in effect maintaining the status quo. As the PECДАР report states,

"[t]he use of modern technology, including large scale scanning equipment, is only likely to be effective, however, within the framework of a real commitment on the part of Israel to facilitate rather than hinder Palestine's intra-state, regional and international trade."

One major concern is the continuation of Israel's cargo transport regime. In light of the prohibitions preventing Palestinian trucks from entering Israel and Israeli trucks entering Gaza, imports and exports must be unloaded and reloaded at border crossings. Such a system is not only incompatible with the free flow of goods, but is also unnecessary as a security measure, given the availability of effective alternatives.³⁴¹ Diverting attention to the introduction of modern upgrades shifts the focus from where it should be: the alleviation of existing restrictions.

Spurring economic recovery in the OPT would require, in the short term, dismantling the system of closures and the implementation of a new system that ensured Palestinians "reliable and predictable access to export markets."³⁴² In the longer term, a cooperative trading regime between the Palestinians and Israelis would be necessary. In order to be successful, such a trading scheme would need to respect Palestinian sovereignty, encourage trade liberalization, allow for unrestricted access to Israeli and international markets, and offer institutional remedies for Israel's unfair trade practices.³⁴³

Israel's unilateral approach to dealing with borders has been criticized as inadequate and responsible for aggravating tensions.³⁴⁴ Al Mezan insists that a transition to a more cooperative approach would help reduce friction while offering Palestinians an opportunity to improve their trade relations and build confidence in the market. Given the current state of relations, it is unlikely any notable improvements will be made without the direct involvement of the international community. International actors could play a decisive role in ensuring that economic interests are upheld while security concerns are properly addressed.³⁴⁵

Passage between the Gaza Strip and the West Bank

The issue of a proper passage linking Gaza and the West Bank is also unresolved within the framework of the Disengagement Plan. Presently, there exists no proper transport route linking Gaza and the West Bank, despite the

³³⁸ World Bank Report, *supra* note 312 at para 28.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.* at para 36.

³⁴¹ The World Bank outlines a number of measures that could replace the back-to-back system "without [an] appreciable additional security risk." *Ibid.* at para 46.

³⁴² See PECДАР Report at 21.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.* at 46.

³⁴⁵ *Ibid.*

vital need for such a linkage. As the World Bank states, “[a]n unfettered flow of people and goods between Gaza and the West Bank is needed to link the two territorial elements of the Palestinian economy, and to lay the basis for viable statehood.”³⁴⁶

Over the years, the link between the territories continues has consistently remained a central issue in negotiations between the Israeli government and the Palestinian Authority. The concept of a safe passage is rooted in the 1993 Oslo Accord’s *Declaration of Principles*, which affirmed that the West Bank and Gaza Strip would be considered a single territorial unit.³⁴⁷ Under the *Oslo II Interim Agreement* of 1995, Israel agreed to establish a “safe passage” linking the Gaza Strip to the West Bank.³⁴⁸ Travel through the passage was subject to serious restrictions by the Israeli military. In 2000 the route was suspended, effectively isolating the Gaza Strip from the rest of the OPT.³⁴⁹ Recent demands by the PA for the re-opening of the territorial link have been met with strong opposition by Israel.³⁵⁰

The lack of any adequate link between the West Bank and Gaza poses considerable political, economic and social consequences. As PECДАР notes, the absence of transportation links “makes it impossible to develop a unified system of government or develop an integrated national economy. Social interaction, including among members of the same family and loved ones, has become impossible.”³⁵¹

With specific regard to economic impacts, figures demonstrate that there is a significantly lower number of trucks traveling between the two territories than before the *Intifada*. Part of the problem is the discrimination experienced by Palestinian transport companies.³⁵² Israel’s exclusive control over customs means that “cargoes are subject to long en-route inspection delays and low priority status at [the border crossing at] Karni, disadvantaging them relative to cargoes from Israel.”³⁵³

The World Bank has proposed “a simple road connection” as the most economical and safe-conscious solution to the problem. While such a project would undoubtedly be expensive, it would prove far more economical than constructing the wall and offer an “investment in peace and a clear sign of good faith.”³⁵⁴

Labour flows to Israel

One of the primary reasons for the dramatic rise in unemployment and poverty rates is the sharp decline in Palestinian workers allowed into Israel. Before the *Intifada*, Israelis were among the Territories’ largest employers, employing 116,000 Palestinians, equivalent to more than one-third of the Palestinian labour force and injecting US \$728 million in wages into the OPT.³⁵⁵ The significance of such work to the Palestinian economy was huge. As Gross writes,

"Most of these Palestinians were employed in low-skill, manual labor jobs in construction, agriculture and services. The income from Palestinian employment in Israel contributed directly to about twenty-

³⁴⁶ World Bank Report at para 53.

³⁴⁷ *Declaration of Principles*, *supra* note 69 at Article XIII, para 4.

³⁴⁸ *The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, Israel-P.L.O., 28 September 1995, Washington, D.C. 36 I.L.M. 557 at art. XXIX, chapter 5.

³⁴⁹ Buttu, *supra* note 117.

³⁵⁰ World Bank Report, *supra* note 312 at para 53.

³⁵¹ PECДАР Report, *supra* note 316 at 41.

³⁵² *Ibid.* at 6.

³⁵³ World Bank Report, *supra* note 312 at para 54.

³⁵⁴ PECДАР Report, *supra* note 316 at 41.

³⁵⁵ Gross, *supra* note 322 at 1552. The World Bank quotes the same figure for the “eve of the *intifada*.” See World Bank Report, *supra* note 312 at para 59. PECДАР also quotes the same number of Palestinian workers employed in Israel in 2000. See PECДАР report, *supra* note 316 at 22. As PECДАР states, “remittances from Gaza and West Bank workers in Israel fell from US\$728 million, in 2000, to only US \$53 million in 2003.”

five percent of the Territories' [Gross National Product] and added to it indirectly by increasing demand for locally produced goods, thus further contributing to the GDP."³⁵⁶

Since the beginning of the *Intifada*, Israel's implementation of stricter closure policies, coupled with its recruitment of foreign workers, has resulted in a major decline in the numbers of Palestinian workers allowed into Israel.³⁵⁷ By 2004, the number of Palestinian workers in Israel fell to 37,700, a drop of almost 80,000 jobs from the pre- *Intifada* period. Between 2000 and 2003, remittances from Palestinians employed in Israel fell from US \$728 million to just \$53 million.³⁵⁸ Such trends will only continue as Israel reduces the number of work permits, with the intent of stopping all flow of Palestinian labour into Israel by 2008. The Disengagement Plan states,

"In the longer term, and in line with Israel's interest in encouraging greater Palestinian economic independence, the State of Israel expects to reduce the number of Palestinian workers entering Israel, to the point that it ceases completely. The State of Israel supports the development of sources of employment in the Gaza Strip and in Palestinian areas of the West Bank, by international elements."³⁵⁹

A phase-out of work permits under the framework of Disengagement is expected to result in an additional loss of 9,000 jobs. Completion of the wall is expected to further exacerbate the employment situation by preventing approximately 20,000 illegal workers from crossing the Green Line into Israel. This means that by 2008 approximately 30,000 Palestinians will lose their jobs.³⁶⁰

It is not only the loss of employment that causes a serious blow to the Palestinian economy, but the loss of income. For example, Palestinian wages in Israel are up to two-and-a-half times greater than the average pay in Gaza. In 2003, average daily earnings in the Gaza Strip were about US \$12 and about US \$15.80 in the West Bank in comparison to US \$29 for Palestinians working in Israel.³⁶¹ This is especially troubling since despite the disparity in wages, much of the goods in the OPT are imported from Israel and are therefore set at high prices. These burdensome costs will undoubtedly force more Palestinians to seek humanitarian aid, which has in recent years become "an essential part of the Palestinian social safety net."³⁶² As PECДАР states,

"Israel... through its closure policy, has the potential to do enormous damage to the Palestinian economy and to the living standards of ordinary Palestinians. The shocking recent increases in poverty and unemployment are a clear indication that Israel is quite happy to use that power to further its short-term political interests."³⁶³

In the view of the World Bank, putting a complete stop to labour flows in Israel would have "serious negative impacts on Palestinian incomes and on the prospects for Palestinian economic recovery."³⁶⁴ The World Bank agrees that the Palestinian economy needs to shift from its dependency on the labour market within Israel to an export based economy. However, such a transition must be smooth; the loss of employment must be counterbalanced by a simultaneous growth in trade to avoid a further economic crisis. Such a shift has not thus far taken place due to a number of factors including: heightened conflict during the *Intifada* (accompanied by greater restrictions), political insecurity and an unstable commercial environment.³⁶⁵ As a result, the World Bank has called on Israel to, at the very least, sustain the number of Palestinian labourers currently allowed into Israel over the coming years.³⁶⁶

³⁵⁶ Gross, *supra* note 322. at 1552-1553.

³⁵⁷ See PECДАР report, *supra* note 316 at 22.

³⁵⁸ *Ibid.*

³⁵⁹ Disengagement Plan, *supra* note 6 at Section 10.

³⁶⁰ World Bank Report, *supra* note 312 at para 60.

³⁶¹ PECДАР Report, *supra* note 316 at 22.

³⁶² World Bank Report, *supra* note 312 at para 109.

³⁶³ See PECДАР report, *supra* note 316 at 17.

³⁶⁴ World Bank Report, *supra* note 312 at para 58.

³⁶⁵ *Ibid.* at para 60.

³⁶⁶ *Ibid.* at para 62.

Supporting current levels into the next decade “would make an important and positive contribution to economic and social stability.”³⁶⁷

Air and seaport

In addition to border crossings, the closures of Gaza’s airport and maritime port constitute a grave breach of numerous economic and social rights, according to Al Mezan reports. As growth of the export sector is central to long term economic viability in the OPT, it is essential that Palestinians have direct access to foreign markets through a seaport and airport. As the United Nations Conference on Trade and Development (UNCTAD) notes, “[h]aving a seaport in Gaza is the only solution capable of independently integrating the Palestinian economy with the region and the rest of the world, and therefore expanding its trade in a long-lasting and sustainable manner.”³⁶⁸ As the World Bank states, “[a]ir services are also important, and preference should be given to reconstruction of the airport and a resumption of fixed-wing air services.”³⁶⁹ The issue of making operational an air and seaport are not adequately addressed in the Disengagement Plan. The GOI only eludes to the issue when stating:

“If and when conditions permit the evacuation of this area, the State of Israel will be willing to consider the possibility of the establishment of a seaport and airport in the Gaza Strip, in accordance with arrangements to be agreed with Israel.”³⁷⁰

Seaport

In spite of its 30 miles of coastline, economically speaking, Gaza functions like a land-locked state. As UNCTAD notes, “[i]n contrast to other land-locked states, whereby access to international markets is obstructed by the absence of a seashore, the [OPT’s] land-locked status is dictated by the absence of a national seaport.”³⁷¹ While plans for the construction of a seaport were agreed upon by Palestinian and Israeli authorities years ago, they were put on hold indefinitely following the outbreak of the second *Intifada*.³⁷²

The lack of any shipping infrastructure means that Palestinians exporting bulk goods to distant markets are compelled to use Israeli ports. Israeli-imposed delays can prove catastrophic for the export of perishable goods, such as fruits and vegetables. The situation is not much better for imports. Palestinian companies are compelled to go through Israeli middlemen, nearly doubling the costs of all imported goods “from automobiles to furniture.”³⁷³ While re-routing Palestinian imports and exports from Israeli ports to Port Said in Egypt and Aqaba in Jordan would be feasible, a study by UNCTAD notes that this would prove even more costly, with 50-60% of the expenditures resulting from Israel’s closure policies.³⁷⁴

Moreover, the closure of Gaza’s coastline has had serious consequences on the local fishing industry and has denied local fishermen their right to fish and earn their living, as reported in Al Mezan monitoring reports. However it is not yet clear whether Israel will allow for the construction of a seaport in Gaza. While the international community

³⁶⁷ *Ibid.* at para 106.

³⁶⁸ UNCTAD, *Transit Trade and Maritime Transport Facilitation for the Rehabilitation and Development of the Palestinian Economy*, UNCTAD/2004, UNCTAD/GDS/APP/2003/1 at 47, online: UNCTAD <www.unctad.org/en/docs/gdsapp20031_en.pdf> . [UNCTAD Trade Facilitation Report]

³⁶⁹ World Bank Report, *supra* note 312 at para 51.

³⁷⁰ Disengagement Plan, *supra* note 6 at Section 6.

³⁷¹ United Nations Conference on Trade and Development (UNCTAD) *Gaza Disengagement Plan: Implications for the Palestinian Authority in the area of Trade Facilitation*, Report submitted to the United Nations Coordination Meeting on Gaza Disengagement Plan, (March 17, 2005) at Section I. online: UNCTAD www.unctad.org/Palestine. [UNCTAD Report on Disengagement]

³⁷² Ministry of Foreign Affairs, News Release, “Sher and Erekat Reach Agreement on Gaza Seaport” (21 September 2000) online: Ministry of Foreign Affairs < www.mfa.gov.il>.

³⁷³ PECDAR report, *supra* note 316 at 47.

³⁷⁴ UNCTAD Trade Facilitation Report *supra* note 370 at 27-28

and the GOI have demonstrated some support for the construction of a Roll-On, Roll-Off (RoRo) cargo facility in Gaza, there are no definitive plans in place.³⁷⁵ According to the World Bank, a RoRo port would be “a relatively rapid and cost-effective way to initiate the development of a full-service seaport.”³⁷⁶ However as UNCTAD warns, a RoRo port is not a viable long term option given that it “has a limited capacity, requires appropriate investments in lifting and transport equipment... and operations could be difficult to insure during stormy winter months.”³⁷⁷ Despite such potential setbacks, UNCTAD impresses the need for the implementation of a RoRo system as part of a “phased approach” towards the seaport’s future expansion.³⁷⁸

Airport

The Gaza International airport was opened in 1998, with President Bill Clinton as the guest of honour. It stayed open 24 hours a day, transporting people and goods to and from the outside world. As the only Palestinian controlled air link, it was said to be a “symbol of state sovereignty”, a glimpse of what life could look like once the occupation ended.³⁷⁹ Shortly after the start of the *Intifada*, Israel shut the airport down and months later bombed the radar station and tore up the runway. It has remained closed ever since.

In common with the seaport, the airport is necessary for direct access to international markets. The World Bank has proposed initiating the restoration of air services with a helicopter route to Amman, Jordan in order to facilitate business connections. While the PA insists that a helicopter route alone is insufficient to meet Gaza’s air service needs, the GOI object to the prospect of a full restoration of “fixed-wing services” for security reasons.³⁸⁰ In light of such concerns, the World Bank has considered the prospect of involving a third party state to conduct security checks on imported and exported goods. The Government of Egypt has indicated its interest in such a venture.³⁸¹

Settlement assets

One of the key issues currently being examined in Al Mezan’s PNA Budget Analysis Programme is one which underlies the Disengagement Plan and concerns the assets that will be left behind once the settlements are evacuated. While the settlers’ houses are slated to be destroyed, and the synagogues dismantled, many greenhouses will remain intact as well as the settlement infrastructure, including roads, electric and water lines, and sewage.³⁸² During her visit in late June, US Secretary of State Condoleezza Rice mediated an agreement between the two sides, whereby Israel would destroy the settlers’ homes in Gaza and provide money to the Palestinian Authority to remove the rubble.³⁸³ The final location of the rubble has yet to be determined, although discussions are underway with the Egyptian government over proposals to bury the material in Sinai.

The Jewish settlers’ homes are not considered suitable for Palestinian resettlement because they cannot satisfy the housing demands of a burgeoning population. Israeli settlements were constructed in a horizontal fashion, with 2,800 single-family low lying residences spread out over 20 per cent of the land of Gaza housing approximately 8200 Jews.³⁸⁴ Expectations are that, following Disengagement, the land will be developed in a way that better suits

³⁷⁵ See also World Bank at para 49. RoRo is a system of loading and unloading a shipping vessel where cargo is driven on and off by way of a ramp.

³⁷⁶ World Bank Report, *supra* note 312 at para 50.

³⁷⁷ UNCTAD Report on Disengagement, *supra* note 373 at II(b).

³⁷⁸ *Ibid.*

³⁷⁹ Alan Johnston, “Years of delay at Gaza Airport,” *BBC News*. (April 15, 2005) online: [BBC News http://news.bbc.co.uk/1/hi/world/middle_east/4449461.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4449461.stm).

³⁸⁰ World Bank Report, *supra* note 312 at para 51.

³⁸¹ *Ibid.* at para 52.

³⁸² The Disengagement Plan provides: “In general, residential dwelling and sensitive structures, including synagogues, will not remain.” See Disengagement Plan, *supra* note 6 at Section 7.

³⁸³ Herb Keinon, “Six key pullout issues still unresolved,” *Jerusalem Post* (Aug. 3 2005) online: <http://www.jpost.com>

³⁸⁴ See Buttu, *supra* note 117 for quoted figures on the number of houses and percentage of land. There were approximately 8200 settlers in Gaza before the Disengagement. In comparison, in 2003 there were 7,595 settlers in the Gaza Strip. See PCBS, “Palestinian Central Bureau of Statistics released a statistical report about Israeli settlements in the Palestinian Territory 2003,” News Release (2003) online: PCBS <http://www.pcbs.org/press_r/settlements03_e.pdf>. The number of settlers in Gaza grew

the demographic and economic needs of Palestinians. As Diana Buttu writes, “the land upon which the colonies sit can be used to build high-rise apartments to house more people while simultaneously freeing land for investment purposes to rehabilitate the Palestinian economy.”³⁸⁵

Plans regarding the transfer of settler greenhouses to the PA remain uncertain. While lauded as valuable assets for the Palestinians, the PA has stated that the maintenance of greenhouses is not economically viable.³⁸⁶ As pointed out, in the past, settler greenhouses were heavily subsidized by the Israeli government, received shipments of necessary water supplies, and were guaranteed -as Israeli exported goods- quick passage to international markets.³⁸⁷ Without such support the benefits available to Palestinians from the greenhouses may be largely diminished. As Buttu writes,

“While, on face level, it may seem like a good idea for these greenhouses to be maintained, unless the free movement of goods produced in these greenhouses can be guaranteed and unless the subsidies can be maintained, the greenhouses will be worthless.”³⁸⁸

Settlement land

The PA estimates that 95 per cent of the land used for Israeli settlements and military installations is public land, and ownership will therefore revert to the PA once the settlements are dismantled.³⁸⁹ It has been said that the public land will be used to “build hospitals, schools and housing projects as well as tourist locations.” The other five per cent of the land will be available to be reclaimed by its Palestinian private owners “in accordance with Palestinian law.”³⁹⁰

Economic conditions following the implementation of the Disengagement Plan

The World Bank Report describes a possible future (and rather optimistic) economic scenario in the OPT following the Disengagement Plan that reflects the “GOI’s stated intention of separating Israelis and Palestinians while effecting improvements in movement and access, particularly of goods.”³⁹¹ The economic analysis of the World Bank’s “Disengagement Plus Scenario” is based on a situation where internal closures in Gaza and the northern areas of the West Bank are removed altogether and reduced slightly in the rest of the West Bank, travel between Gaza and the West Bank is moderately improved, and a rail link is constructed to connect Gaza and Tulkarm.³⁹² The calculations assume losses to trade from the expected termination of the quasi-Customs Union in Gaza and the termination of labour flows in 2008. Donor assistance is estimated to remain at about US\$900 million per year between 2005 and 2008.³⁹³

Even under this optimistic scenario, the World Bank projects that “after a mild improvement in key indicators in 2005, long-term decline would resume...”³⁹⁴ It is anticipated that by 2008, the real GDP would be nine per cent lower than in 2004. In addition, unemployment in the OPT would rise to 31 per cent overall (4 per cent higher than

dramatically from 2003-2005 in anticipation of the Disengagement Plan. See “Big rise in Gaza settler numbers” *BBC News*, (July 19, 2004) online: BBC News http://news.bbc.co.uk/2/hi/middle_east/3907577.stm.

³⁸⁵ Buttu, *supra* note 117.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ World Bank Report, *supra* note 312 at para 100.

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

in 2004) and 44 per cent in Gaza.³⁹⁵ About 55 per cent of Palestinians would be living below the poverty line (as opposed to 48 per cent in 2004) with 70 per cent of Gazans living below the poverty line.³⁹⁶

Is economic recovery possible?

Economic recovery is feasible. Key actions must be adopted and, if properly implemented, can lay the foundation for economic regeneration in the West Bank and the Gaza Strip. In its report, the World Bank outlines a number of important steps specifically geared towards economic recovery.³⁹⁷

The principal improvements needed include:

Borders and trade

With regards to border and trade issues, the World Bank recommends that the wall in the West Bank be relocated to the Green Line.³⁹⁸ The back-to-back cargo system should be dismantled and replaced by a less restrictive alternative to improve the movement of cargo.³⁹⁹ Current trade, tariff and customs procedures ought not to be revoked by the GOI without negotiations with the PA.⁴⁰⁰ Israel should approve the construction of a RoRo facility off the coast of Gaza as a preliminary step towards a full service seaport. In addition, the airport should be re-opened under the oversight of a third party, to ensure Israel's security interests are upheld.⁴⁰¹ The World Bank also calls for "a secure, efficient and reliable Gaza-West Bank transport link" allowing for the movement of people and goods.⁴⁰²

Internal movement and labour flows

The system of over 600 internal closures fragmenting the West Bank needs to be progressively dismantled in order to facilitate movement. Palestinian labour flows into Israel ought to be, at least, maintained at current levels of about 38,000 (this figure excludes East Jerusalem workers).

The PA's involvement

While Israeli- imposed closures are the primary cause of the Palestinian economic crisis, the Palestinian Authority plays a definitive role in bringing about an economic revival in the OPT. Despite the unilateral approach of the Disengagement plan, Israel's withdrawal from the Gaza Strip and parts of the West Bank does offer the PA an opportunity to demonstrate its leadership and ability to exercise control over the region and make key decisions pertaining to the use of the land and assets that are left behind.⁴⁰³

Should levels of attacks against Israelis continue or increase, the GOI will have more reasons to justify maintaining its closure policies. As a result, the Palestinian Authority has a significant role to play in improving the cross-border security situation. In addition, the PA must also create a more secure internal environment necessary to create social stability and attract the private investment necessary for economic growth. Al Mezan is closely monitoring the developments in the internal situation and stresses the importance of continuing to hold free elections, upholding the rule of law through a strong judicial system, maintaining transparency and accountability, and dealing with corruption.⁴⁰⁴

Should the steps outlined above be implemented under the Disengagement Plan, the necessary foundation will have been laid for economic growth in the OPT.

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.* at para 106.

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.* at para 69.

⁴⁰⁴ *Ibid.* at para 10.

Conclusion

Al Mezan Centre for Human Rights asserts that Israel's motives behind its unilateral Disengagement Plan and the anticipated impacts of the Plan's implementation will not lead to economic recovery, but will rather ensure the further strangulation of the Palestinian economy, perpetuating its downward spiral. Undoubtedly, life in the OPT will become even more unbearable. As suffering becomes more acute, the level of disillusionment and desperation will rise, likely leading to more attacks against members of the society that many Palestinians view as being responsible for their grave situation. If history is any guide, this will prompt a retaliatory response by Israeli forces that will come in the form of serious breaches of humanitarian law, acts of collective punishment, extra-judicial killings and disproportionate and indiscriminate attacks against Palestinian civilians.⁴⁰⁵ Indeed the justification for such reactions is provided for in the Disengagement Plan, in which Israel retains the right to preventative and reactive "self-defence" and use of force.⁴⁰⁶

There exists an alternative. The key is the dismantling of Israel's closure regime and an end to economic separation. An increased ability for Palestinians and goods to move within the territory and across borders, combined with "a sustained effort to reform Palestinian institutions and generous additional donor assistance", can bring about the necessary turnaround for an economy that has been crippled by unemployment, poverty and little private investment.⁴⁰⁷

It cannot be denied that economic development and social welfare are key to the attainment of a long-lasting peace between Israel and Palestine.⁴⁰⁸ The Disengagement Plan states that Israel "is committed to the peace process and aspires to reach an agreed resolution of the conflict based upon the vision of US President George Bush."⁴⁰⁹ Bush has vocalised his support for the revival of the peace process, affirming that the "United States supports the establishment of a Palestinian state that is viable, contiguous, sovereign, and independent, so that the Palestinian people can build their own future..."⁴¹⁰. Yet as the World Bank states, "[n]o state can be truly free with its economy in chaos and with the majority of its population living below the poverty line."⁴¹¹

Without a sufficient degree of liberty and control over the national economy, the chances of achieving the political stability and social cohesion necessary to build a viable state are effectively compromised. If Israel is truly committed to the peace process and the Roadmap's goal of allowing the emergence of a "Palestinian state living side by side in peace and security with Israel and its neighbours," it is in its interest to promote initiatives specifically designed to raise the standard of living and the quality of life in the OPT.⁴¹² The continuation of crippling restrictions and controls for which the Disengagement Plan allows is incompatible with such a goal and can only be viewed as undermining the creation of a sovereign and viable Palestinian State and the attainment of a long-lasting peace.

Final Remarks

⁴⁰⁵ Palestinian Centre for Human Rights (PCHR), "A Denial of Human Rights, not an end to occupation: the unilateral Israeli Redeployment Plan for the Gaza Strip," (October 2004) online: PCHR <http://www.pchrgaza.org/files/Reports/English/sharon.htm>.

⁴⁰⁶ The Disengagement Plan states "The State of Israel reserves its fundamental right of self-defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip." See Disengagement Plan, *supra* note 6 at Section 3, "One. The Gaza Strip," para 1.

⁴⁰⁷ World Bank Report, *supra* note 312 at para 60.

⁴⁰⁸ Gross, *supra* note 322 at 1543.

⁴⁰⁹ Disengagement Plan, *supra* note 6 at part 1.

⁴¹⁰ See Exchange of letters, *supra* note 162.

⁴¹¹ World Bank Report, *supra* note 312 at para 2.

⁴¹² See *A performance-based roadmap to a permanent two-state solution to the Israeli-Palestinian conflict*, UN SC, Letter dated 7 May 2003 from the Secretary-General addressed to the President of the Security Council, Annex, UN Doc. S/2003/529 (7 May 2003).

Al Mezan acquiesces that the Disengagement Plan deserves support insofar as the international law demands that the illegal settlements be dismantled and that the occupying forces be withdrawn. Equally, the Plan deserves to be opposed for the disingenuous motivations that inspired it and the reality it will create. Rather than being a positive step aimed at advancing the peace process, the Plan represents yet another part of a long- standing and systematic campaign to absolve Israel of its legal responsibilities towards Palestinians, while laying claim to the West Bank. In attempts to achieve its goals, Israel has committed untold human rights violations against Palestinians, including acts so egregious they are defined as war crimes. The continuation of military activities under the Disengagement Plan and its concomitant effects on territorial contiguity, social and political stability, economic development and the ability to exercise self-determination, will effectively undermine the establishment of a sovereign Palestinian state. In so doing, the Disengagement Plan can only be seen an initiative that will compromise chances to resume the peace process.

The purpose of this report by Al Mezan Centre for Human Rights is to demonstrate that the Disengagement Plan is not occurring in a vacuum. While the withdrawal of troops and evacuation of settlements is taking place in Gaza, an illegal wall is being built in the West Bank. With this in mind, the Disengagement Plan becomes as much about allowing Palestinians to reclaim land in Gaza as it is about the continued annexation and expropriation of Palestinian land in the West Bank. It is also as much about the removal of some settlements as it is about consolidating and expanding others. This is clearly evidenced by Israel's position that there will be no Jewish towns or villages in the Gaza Strip while simultaneously affirming that "on the other hand" there will clearly be parts of the West Bank which will become Israeli territory. Al Mezan stresses that at its core, the Plan is fundamentally about a strategic exchange that will enable Israel to recoup, reorganize and redeploy its resources so it can cement control over its long- term interests in the OPT.

While the evacuation of settlements and redeployment of troops should be considered to be of "military significance," the PA's limited ability or inability to exercise key functions of government including control over the borders, airspace and seaspaces, the entry and exit of people and goods as well as fundamental aspects of security, economic development and international relations are serious impediments to recognizing the end of the occupation in Gaza.⁴¹³

If the Disengagement Plan is really about attaining "a just settlement that would allow both people to live in genuine peace and security", Israel must do more. Al Mezan issues the following urging remarks:

→ To begin with, Israel must recognize its status as an occupying power in both Gaza and the West Bank and accept the full *de jure* applicability of the *Fourth Geneva Convention* even after the plan's implementation.

→ Israel must transfer primary authority over key governmental functions to the PA, including control over borders, airspace, seaspaces, the cross-border passage of people and goods, as well as security, economic development and international relations.

→ Israel must put an end to its policy of illegal land annexation and expropriation in the West Bank.

→ Israel must freeze the illegal expansion of settlements and engage in additional "disengagements" aimed at evacuating the dozens of remaining settlements in the West Bank while dismantling military infrastructure. It must also remove all of its troops from Palestinian territory.

→ Israel must abide by ICJ's decision and dismantle the wall. This includes returning all property seized as a result of the wall's construction and paying compensation to those who have suffered damages. It also necessitates upholding Palestinians' freedom of movement, including facilitating access to land, water, jobs, schools, hospitals and holy sites.

→ Any alternative security regime that is established in its place must respect the boundaries set by the Green Line, uphold Palestinian human rights, and take into consideration Palestinian needs. In so doing, Israel must eliminate

⁴¹³ Bruderlein, *supra* note 10 at 19.

the permit system, a regime that can only be seen as a form of collective punishment intent on discriminating against Palestinians and promoting hostilities.

→ It is in Israel's interest to promote economic recovery in the OPT by first and foremost dismantling its closure regime. This necessitates removing the more than 600 physical obstacles that impede freedom of movement and territorial contiguity within the West Bank.

→ In addition, Israel should reduce border controls to better enable the passage of goods and people, in order to increase trade and the possibility of economic regeneration. A safe passage linking the West Bank and Gaza should be re-established to promote territorial contiguity, social cohesion and self-determination.

→ Israel must allow for the airport and seaport in Gaza to become operational in order to increase trade and improve external relations.

→ Until economic independence is truly achieved, Israel should (at least) maintain current labour flows into Israel. This would be seen as a good faith initiative that could help economic development.