

# **THE SEPARATION BARRIER AND INTERNATIONAL HUMANITARIAN LAW**

*BRIEFING PAPER*



Harvard Program on Humanitarian Policy and Conflict Research  
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This briefing note discusses the legal implications under international humanitarian law (IHL) of erecting and maintaining a separation barrier<sup>1</sup> in the Occupied Palestinian Territory (OPT). The main objective of this note is to review the applicable IHL rules and present the various legal perspectives of the parties involved in the debate on the legality of the separation barrier, particularly in the context of the advisory proceedings before the International Court of Justice in the Hague. This briefing note will be updated as arguments of the various parties are presented to the courts, and as the courts' rulings are made public.

This briefing note will first review the basic facts pertaining to the construction of the barrier and its impact on Palestinian communities. It will present the rules of IHL applicable to this specific issue, with a particular focus on the concept of military necessity, as referred to by the Israeli Government to justify the construction of the barrier. It will then examine the arguments in favor of and against the legality of the separation barrier under IHL.

Following the practice of the United Nations (UN), this briefing note will refer to the Gaza Strip, the West Bank and East Jerusalem<sup>2</sup> as the "Occupied Palestinian Territory."<sup>3</sup> This paper will deal only with the question of legality of the separation barrier under the law of occupation, and will not examine the implications of the separation barrier in terms of various human rights treaties.

### **Basic Facts Regarding the Separation Barrier**

In June 2002, the Government of Israel began the construction of a major complex of ditches, walls and fences allegedly to prevent the illegal entry of Palestinian suicide bombers into Israel.<sup>4</sup> The barrier currently under construction is composed of the following physical components:

- A ditch and a pyramid-shaped stack of six coils of barbed wire on the eastern side of the structure; barbed wire only on the western side.
- An intrusion-detection fence in the center with sensors to warn of any incursion.
- A path enabling the Israeli Defense Forces (IDF) to patrol on both sides of the detection fence.
- A smoothed strip of sand that runs parallel to the fence to detect footprints.
- Various observation systems along the fence to alert authorities of any attempted intrusions.<sup>5</sup>

According to the Government of Israel, the average width of the barrier complex is fifty meters.<sup>6</sup> The width of the barrier is in some areas narrower, in others wider (up to a hundred meters<sup>7</sup>). According to Palestinian sources, the projected length of the barrier varies between 752 and 788 km.<sup>8</sup> In its submissions to the Israeli High Court, the Government of Israel declared that it has approved the building of the barrier in four

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stages with a total length of approximately 626 km.<sup>9</sup>

In some sections, the barrier runs along the Green Line (the 1949 Armistice Line between Israel and Jordan, currently the internationally recognized border between Israel and the West Bank). In other sections, the barrier complex enters into the West Bank, cutting across land and isolating Palestinian communities. UN sources estimate that only 11% of the planned barrier's length runs along the Green Line (See UN maps);<sup>10</sup> the rest of the barrier—including the sections both already constructed and planned—will run up to several kilometers deep into the West Bank.

In some sections of the barrier, mainly those that run along the Green Line (e.g. in Tulkarem), there are plans for an additional barrier several kilometers to the east, referred to as the “depth barrier.”<sup>11</sup> The Government of Israel described the depth barrier as a “barrier without a fence designed to direct movement to a number of security control points.”<sup>12</sup> B’Tselem described the “depth barrier” as a deep trench with a barbed wire fence alongside it.<sup>13</sup>

The barrier includes a limited number of gates to allow the crossing of people and goods, and a number of agricultural gates to facilitate access to agricultural land.<sup>14</sup> B’Tselem reported that the completed sections of the barrier comprised five gates for the crossing of people and goods, and that future plans call for twenty-six agricultural gates (five of which are placed along the depth barrier).<sup>15</sup>

According to UN, Palestinian and Israeli NGOs estimates, the completed sections of the barrier currently isolate at least 12,000 Palestinians in the areas between the barrier and Green Line<sup>16</sup> and hinder their access to essential public services and employment. In October 2003, the Government of Israel declared this area (also known as the “Seam Area”) a “military closed zone.”<sup>17</sup> According to the estimates, the route of the planned barrier complex, along with the depth barriers, will result in the isolation of approximately 128,500 Palestinians from the rest of the West Bank and from each other in enclaves and double-walled areas on the eastern side of the barrier.<sup>18</sup> It is reported that the completed sections of the barrier have so far resulted in the destruction of some 84,000 dunums (8.4 sq. km.) of olive and other fruit trees, 615 dunums of irrigated agricultural lands (including greenhouses), 37.3 km. of water networks, and 15 km. of agricultural roads in the governorates of Jenin, Tulkarem and Qalqilya.<sup>19</sup>

### **Applicable IHL Rules**

The Occupied Palestinian Territory (OPT) falls under the international legal regime governing occupation. The law of occupation comprises a vast array of norms and regulations contained in various instruments such as the [Hague Regulations](#) of 1907 and the [1949 Fourth Geneva Convention](#) relative to the Protection of Civilian Persons in Time of War, as well as specific provisions contained in legal instruments such as [Additional Protocol I to the Geneva Conventions](#) (1977) and the [Rome Statute of the International Criminal Court](#). It also includes customary norms, derived from the general practice of a majority of states over time.

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Israeli authorities generally accept the applicability of the Hague Regulations as customary international law. In particular, the Israeli High Court of Justice has reviewed government actions in the OPT pursuant to these Regulations.<sup>20</sup> The Israeli Government however does not recognize the overall *de jure* applicability of the Geneva Conventions of 1949 to the OPT even though it claims that it applies *de facto* the “humanitarian” provisions of the Fourth Geneva Convention. This position has been strongly criticized by the majority of the international community. (For a discussion of Israeli objections to the applicability of the Geneva Conventions, the reader should consult the briefing note on the [Applicability of International Humanitarian Law to the OPT](#)). Since Israel did not ratify either the ICC Statute, or Additional Protocol I, these instruments are not formally applicable to the OPT, though certain provisions might be applicable as customary international law.

The law of occupation provides rules regulating the relationship between the occupying power and the population of the occupied territory (including refugees and stateless persons). Its main objective is to allow the life of the civilian populations under occupation to continue as normally as possible (see, e.g. [Article 43](#) of the Hague Regulations) while recognizing the legitimate security interest of the occupying power to maintain its military presence in the territories. It assumes that the situation of occupation is only temporary, pending a settlement of the conflict and the restoration of the legitimate government over the occupied territory. This imposes a number of duties on the occupying power to provide for the security and welfare of the occupied population and to maintain the existing situation in the occupied territories *ex ante*. The occupying power cannot introduce substantive changes in the status and social structure of the territories it occupies, as the occupying power does not have sovereignty over the territory. Specifically, the occupying power cannot introduce changes in terms of law and governance, social and economic policies, and demographic and ethnic composition. It cannot introduce policies that in any way would lead to permanent changes to the social, legal and political configuration of the territories, unless such changes are made absolutely necessary for the security of the occupying power or the fulfillment of its duty as care-taker of the occupied territories.<sup>21</sup> (For further information on the set of obligations of the Government of Israel in the OPT, please refer to the [briefing note](#) on this topic.)

### **Legal issues involved in the construction of the separation barrier**

From the outset, one should distinguish the limited portions of the barrier that are built on the Green Line from those that are built within the OPT. As with the existing fence surrounding the Gaza Strip and along the borders with Egypt, there are no restrictions under international law for a state to build separation structures on its internationally recognized borders to prevent the infiltration of individuals through its borders.<sup>22</sup> This briefing note and most of the current legal debate focus on the legal status of the separation barrier located *within the OPT*, which raises a number of legal issues under IHL.

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The construction of the separation barrier potentially touches on certain powers and duties of Israel as an occupying power, particularly those relating to:

- The confiscation of private property in the occupied territory ([Article 46](#) of the Hague Regulations);
- The destruction and seizure of property in the occupied territory ([Article 23\(g\)](#) of the Hague Regulations and [Article 53](#) of the Fourth Geneva Convention);
- The imposition of “measures of control” on the civilian population of the occupied territory (Articles [27](#) and [78](#) of the Fourth Geneva Convention);
- The forcible transfer of protected civilian populations ([Article 49](#) of the Fourth Geneva Convention);
- The general welfare of the protected civilian population ([Article 43](#) of the Hague Regulations), including responsibilities such as ensuring the means of existence of protected civilian populations ([Article 39](#) of the Fourth Geneva Convention) and the care and education of children ([Article 50](#) of Fourth Geneva Convention), as well as maintaining access to food and medical services (Articles [55](#) and [56](#) of the Fourth Geneva Convention);
- The prohibition against collective punishments ([Article 50](#) of the Hague Regulations, [Article 33](#) of the Fourth Geneva Convention).

In some instances, many of these powers and duties are to be followed strictly and do not allow any exceptions. For example, the language of [Article 33](#) of the Fourth Geneva Convention prohibits, without exceptions, collective punishments, pillage or reprisals against the protected population. In other instances, however, IHL gives the occupying power some discretion in discharging its duties, particularly to accommodate the military and security needs of the occupation forces.<sup>23</sup> Thus, the occupying power may not requisition property except for *the necessities of the army of occupation* ([Article 52](#) Hague Regulations). [Article 23\(g\)](#) of the Hague Regulations stipulates that the destruction and seizure of private property is forbidden unless such measures are “*imperatively demanded by the necessities of war.*” Similarly, [Article 53](#) of the Fourth Geneva Convention prohibits the destruction of private property except when such destruction is rendered “*necessary by military operations.*” The occupying power can impose certain measures of control (i.e. order civilians to assigned residence, or for them to be interned) as “*may be necessary as a result of the war*” (see, e.g. [Article 27](#) of the Fourth Geneva Convention). Such measures, however, should be temporary and subject to periodic legal review ([Article 78](#) of the Fourth Geneva Convention).

The licenses provided for in the Fourth Geneva Convention and in the Hague Regulations are triggered on the basis of specific tests related to the concept of military necessity, with different levels of scrutiny.<sup>24</sup> The determination of these tests is usually left to the occupying power and, by extension, to its judicial courts. The occupying power must interpret these rules in good faith and in an objective manner. A number of general

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guidelines can be extrapolated from existing rules and doctrine to evaluate whether the occupying power has properly applied the concept of military necessity to justify its actions within the framework of the law. These can be presented in the form of cumulative tests; a failure of any of these tests invalidate the use of military necessity as a legal justification for a measure imposed by the occupying power.

**Cumulative Tests to Verify the Proper Use of the Concept of Military Necessity in Occupied Territory.**

*Test 1: Does the measure violate an absolute prohibition contained in IHL?*

The first test is a simple one. In general terms, military necessity is a legal exception to a prohibition contained in IHL. This exception must however be formally stated in the law. Military necessity can never justify actions that are prohibited in absolute terms under the law. For instance, acts of torture or other inhumane treatments that are prohibited in all circumstances can never be justified by military necessity, even if these actions were undertaken to extract critical military information.<sup>25</sup> In this sense, military necessity is primarily a legal, rather than a military, concept.

*Test 2: Is the occupying power facing an actual state of necessity?*

The second test relates to the existence of a state of necessity that justifies the measures the occupying power intends to take. This state of necessity varies according to circumstances: it could be a clear danger facing the forces of occupation, it could emerge from the requirement of military operations, or it could be a present need of the occupation forces (like food, water, medical equipments, command posts, etc.). In any case, the state of necessity refers only to situations that are *within* the occupied territory, and facing the occupying power in the course of occupation. The occupying power has the burden of demonstrating the existence of this state of necessity.

*Test 3: Is the measure the most adequate and effective response to the existing threat?*

The third test examines the level of adequacy and the effectiveness of the response to the threat.<sup>26</sup> Military necessity can cover only measures that objectively can achieve their purpose. For instance, [Article 23\(g\)](#) of the Hague Regulations states that the destruction of property cannot be a goal in itself, but should be potentially capable of achieving a specific military objective arising in the context of military operations.

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*Test 4: Does the military advantage gained by the measure outweigh the damage done to the population?*

The fourth test considers the proportionality of the military advantage gained. Even if the occupying power was able to demonstrate a state of necessity arising from its military operations, and that the measure under consideration was adequate and effective in responding to the threat against the occupying power, other interests protected by the law need to be taken into account. Hence, an additional test is applied to determine whether the action of the occupying power affects the occupied population in a disproportionate manner. If this is the case, the occupying power will need to find an alternative measure that may be less effective but that will better protect the interests of the population.<sup>27</sup>

*Test 5: Was the measure adopted after due consideration of all the interests involved and by the proper authority?*

A decision on the legality of the actions and policies of the occupying power must be made considering all information reasonably available, and after ascertaining that there is no feasible alternative available to obtain the same military objective or to satisfy the security need. Such a decision must be the result of a proper process in which the interests of the protected population have been carefully reviewed by the competent authorities.<sup>28</sup>

### **Arguments for the Legality of the Barrier**

The Israeli position on the legality of the separation barrier has been articulated in preliminary briefs submitted to the Israeli High Court of Justice in cases that were brought against the Government to contest the building of the barrier, the route of the barrier, or specific measures associated with the construction of the barrier.

The Government's position is that the construction of the barrier, the seizure of Palestinian property to build the barrier, and the specific route that it takes are in compliance with customary IHL rules governing the conduct of hostilities and occupation as applied by the Israeli High Court of Justice. In particular, the Government of Israel argued:

- The situation in the OPT since the outbreak of the second *Intifada* is an *armed conflict* (albeit an armed conflict short of war);
- The decision to erect the separation barrier is dictated by military necessity;

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- Accordingly, the seizure of private property, or restrictions on movements, or generally any negative consequences affecting the Palestinian population in the OPT are justified under rules governing the conduct of hostilities and occupation;
  - The barrier is a temporary security measure and does not necessarily imply a permanent change in the status or borders of the OPT.

### *1. Situation of armed conflict:*

Since the outbreak of the second *Intifada* the Government of Israel has characterized the situation existing between Israel and the Palestinians as a situation of armed conflict occurring both inside Israel and in the OPT.<sup>29</sup> The Government of Israel relies specifically on Security Council Resolution 1373, of September 2001, which extends the definition of armed attacks to include acts of terrorism by recognizing the inherent right of self-defense for states targeted by acts of terrorism.<sup>30</sup> Accordingly, the Government of Israel plans and conducts military operations within the legal framework of the law of armed conflict and of its concept of military necessity.

The Government of Israel draws a number of consequences from its characterization of the situation in the OPT as an armed conflict. Most importantly, it has used the characterization of armed conflict to deny the applicability of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on the occupied territories. International human rights were intended for the protection of citizens from their own government in times of peace. In a situation of armed conflict, only the standards of IHL are relevant to occupying forces.<sup>31</sup>

### *2. Application of the concept of military necessity:*

The Government of Israel contends that military necessity was the most prominent consideration underlying both the decision to erect the barrier and the determination of the route that it would take.<sup>32</sup> It has advanced a number of arguments in support of its position.

#### *2.1. Suicide attacks in Israel create a state of necessity.*

According to the Government of Israel, the decision to erect the separation barrier came as a response to the unprecedented wave of suicide bombers that targeted Israeli population centers inside Israel. In this context, the Government of Israel has consistently maintained that decisions regarding the route of the barrier and all other measures needed for the completion of the barrier were taken after careful evaluation of the situation on the ground and on the basis of the consideration of military necessity.

The Government of Israel relies on certain pronouncements of the Israeli High Court, defining military necessity to include not only the military needs of the occupation forces, but also the security of the State of Israel itself,<sup>33</sup> and the security of Israeli citizens within and outside the Green Line.<sup>34</sup> In addition, in evaluating military necessity, the Court claimed that military planning must also take into account not only existing



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dangers, but also dangers that are liable to be created as a result of dynamic developments in the territory.<sup>35</sup> (For more information on the IHL rules applicable to the settlements, see the briefing note on [The Legal Status of Israeli Settlements in the OPT](#)).

*2.2. The separation barrier is a legitimate, effective and adequate response to the threat of suicide bombers.*

According to the Government of Israel, the construction of the barrier is necessary to prevent and repel attacks by Palestinian suicide bombers against Israeli citizens in Israel. The barrier is, under this argument, an effective response to an identified security threat as demonstrated by the reduced rate of attacks since the construction of the barrier started in 2002. The Israeli Government argues that the completed sections of the barrier have had a tangible outcome so far in terms of making it difficult for suicide attackers to cross into Israel. The Israeli Ambassador to the UN claimed in a statement to the UN General Assembly on December 8th, 2003, that in the period from October 4th until December 4th, 2003, “the Israeli security forces have foiled 27 attempts to bring death and destruction to Israeli cities. Fourteen of them were suicide attempts stopped just before being carried out.”<sup>36</sup> The separation barrier is presented as an adequate response to the security threat posed by suicide bombers insofar as it is the only feasible measure available to obtain such results.<sup>37</sup>

*2.3. The harm caused to the Palestinian populations is proportionate and lawful under IHL.*

The Government of Israel does not deny that the construction of the barrier harms Palestinian residents. However, according to the Israeli Government, such harm is a necessary result of the hostilities that have been taking place. As such the harm is within the limits allowed for in IHL. The seizure and the occasional destruction of Palestinian private property to clear space for the barrier, as well as restrictions on the movement of the Palestinian population resulting from the construction of the barrier are consistent with IHL rules on the conduct of hostilities and on occupation.

Under IHL rules governing the conduct of hostilities, specifically [Article 23\(g\)](#) of the Hague Regulations, the seizure and destruction of enemy property is forbidden unless such destruction or seizure is imperatively demanded by the necessities of war. The Government of Israel considers that its actions—especially the seizure and destruction of Palestinian private property—are, in fact, demanded by military necessity as interpreted by the Israeli Supreme Court. As such, these measures are not outside the limits of what any party to an armed conflict can do during the conduct of hostilities.

Furthermore, the measures taken by the Israeli army in building the separation barrier do not fall outside what an occupier can legally do in the territories under its control. [Article 52](#) of the Hague Regulations allows for requisition in kind as long as the requisitions are done for the needs of the army of occupation. The Government of Israel has relied on the Israeli High Court’s interpretation of Article 52, in which “requisitions in kind” has been extended to include seizure of land. The Court has also interpreted “needs of the army of

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occupation” to include ensuring “public order and safety.”<sup>38</sup> Similarly, the Government of Israel contends that the restriction on movement of the Palestinian occupation is lawful and accepted under the law of occupation, particularly during an armed conflict “with terrorists operating among the civilian population.”<sup>39</sup>

#### *2.4. Due process and mitigation measures have been implemented.*

The assessment of military necessity was made on the basis of all sources reasonably available. In addition, the civilian population was given adequate warning and ample opportunities to redress some of the harm that resulted from the barrier, including the right to appeal to the Israeli High Court. The Government of Israel emphasized that the building of the barrier entails a multi-stage process.<sup>40</sup> They claim that the process is deliberate and not arbitrary. The presence of such a deliberate process minimizes the harm to the Palestinian population to cases where the harm rendered is absolutely required by consideration of military necessity. More specifically the Government of Israel contends that in certain cases it has taken measures to alleviate the impact of the barrier on the Palestinian population. According to the Government, agricultural gates situated throughout the barrier should allow farmers to continue cultivating their land from which they are separated by the barrier. In addition, five terminals, operating in a similar manner to the Karni Crossing in the Gaza Strip, will be established throughout the length of the barrier to allow the transfer of goods between Israel and the West Bank. Plans have also been established for the construction of approximately thirteen gates allowing for the passage of pedestrians and cars.<sup>41</sup> Additional mitigation measures include specific instructions for the removal from requisitioned land of income-generating assets such as olive trees and greenhouses. The Government of Israel is also currently re-evaluating the route of the barrier to further reduce its impact on the Palestinian population.

#### *3. The separation barrier remains a temporary measure:*

The Government of Israel maintains that the separation barrier is a security measure to protect Israelis against terror attacks, and that the barrier encompasses settlements as well solely for the purpose of providing protection. According to the Government, “It does not reflect a political or any kind of border.”<sup>42</sup> As such, the separation barrier is a *temporary* measure. It is not inconceivable, the Government of Israel argues, that if an arrangement is reached that guarantees quiet and security, the barrier will be dismantled or relocated.<sup>43</sup> Moreover, according to the Government of Israel, the requisition of property is only a temporary measure, with orders for the requisition set to expire on December 31st, 2005.

These statements are important, and they are usually cited in support of the argument that the Government of Israel does not intend to “change the legal status of the area situated on the other side of the barrier.”<sup>44</sup>

### **Arguments on the Illegal Character of the Separation Barrier**

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A number of arguments can be raised under IHL to contest the legality of the barrier, on the grounds that it is being planned, built, and operated by Israel along a route which runs predominantly outside Israeli territory. The International Committee of the Red Cross, in an unusual public stance, has expressed the view that the construction of the separation barrier was illegal under IHL. Furthermore, at the international level, the UN General Assembly has called on the International Court of Justice in The Hague to deliver an advisory opinion on the legal consequences of the construction of the separation barrier. Israel and other parties to the conflict, as well as members of the United Nations, have been given the possibility of presenting legal briefs to the Court on the legal issues involved. The ICJ may rule on the applicability of the Fourth Geneva Convention, the interpretation of the concept of military necessity and the temporary character of the barrier. (It is important to note, however, that any advisory opinion which the ICJ may issue is not formally binding on the parties. For more information, please see [Information Page: ICJ Proceedings on the Separation Barrier](#).) For the time being, this briefing note will review existing arguments against the legality of the barrier as they stand in early 2004.

The current legal arguments against the construction of the barrier follow three separate but parallel tracks:

- 1. Contrary to the Israeli Government position, the *Intifada* is not a situation of armed conflict under IHL. It has been and remains a case of civil disturbance in the OPT which does not reach a level of violence that would trigger the applicability of the rules pertaining to the conduct of hostilities. Accordingly, the Occupying Power cannot refer to the concept of military necessity to justify the protection of its security interest in Israel, as has been argued in support of the construction of the barrier.
- 2. Even if the *Intifada* could be characterized as an armed conflict, the construction of the separation barrier, its route and the various measures associated with its construction are not demanded by military necessity as the measures fail a number of the legal tests used to verify military necessity, for example, by imposing a disproportionate hardship on the Palestinian population.
- 3. Finally, contrary to the Israeli argument, the separation barrier is being erected as a permanent structure partitioning the West Bank and affecting the life of the occupied population for the foreseeable future. In this context, the route of the barrier within the OPT and around large Israeli settlements demonstrates the Israeli interest not only in preventing the illegal entry of Palestinians into Israel but also in annexing large parts of the OPT to Israel, in particular areas where these extended settlements have been established in violation of IHL.

These three tracks are analyzed in further detail as follows:

*1. The situation in the OPT does not amount to an armed conflict*

The Human Rights Inquiry Commission formed by the UN Commission on Human Rights,<sup>45</sup> as well as some Israeli Human Rights organizations (such as B'Tselem<sup>46</sup>), have

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disputed the characterization of the current situation between Israel and the Palestinians as an armed conflict. The Human Rights Inquiry Commission visited certain areas of the OPT, and concluded that “sporadic demonstrations/confrontations often provoked by the killing of demonstrators and not resulting in loss of life on the part of Israeli soldiers, undisciplined lynchings (as in the tragic killing of Israeli reservists on 12 October 2000 in Ramallah), acts of terrorism in Israel itself and the shooting of soldiers and settlers on roads leading to settlements by largely unorganized gunmen cannot amount to protracted armed violence on the part of an organized armed group.”<sup>47</sup> The implications of this characterization are numerous. Most importantly, the Human Rights Inquiry Commission concluded that the situation is not such that it justifies the Israel Defense Forces to resort to military means as opposed to police measures (with a view towards apprehending perpetrators of crimes). As a result, measures to preserve Israeli security interests in the OPT should remain within the scope of police and law enforcement capabilities and not resort to the use of military force.

In addition, regardless of whether the situation in the OPT constitutes an armed conflict, it is important to bear in mind that the international community considers the OPT to be occupied territory. The law of occupation therefore remains applicable in the OPT for so long as Israel’s occupation continues. Accordingly, the Israel may resort to the concept of necessity only within the framework of the law of occupation (i.e. for the preservation of its security interest within the occupied territory).

## *2. The separation barrier fails the basic tests for military necessity*

Many have argued that the route of the barrier and the measures taken by the Israeli army in the course of building and operating the barrier are not demanded by military necessity. As long as the barrier remains on the Green Line, there is no need to argue for or against military necessity. The issue of military necessity arises only for the segments of the barrier that enter into the West Bank and divide its communities. Various arguments have been advanced that the concept of military necessity does not in fact justify the construction of the barrier.

### *2.1. The military measures involved in the construction of the barrier and the partition of the Palestinian territory are not justified by any state of necessity in the OPT. In no circumstances can the protection of Israeli settlers justify the construction of the separation barrier in the OPT.*

The construction of the separation barrier in the OPT appears to serve primarily the security interest of Israeli citizens residing in the OPT (i.e. settlers). Opponents to the construction of the barrier argue that Israel, as an occupying power, cannot define its security needs, and as a result claim the existence of military necessity, to include the security interests of its citizens who decided to immigrate to and settle in the OPT. The settlements have been declared unlawful by the UN General Assembly and the Security Council, and so there can be no legal right to protect them by diverting the course of the barrier away from the Green Line.

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Under the law of occupation, military necessity extends only to the security interests of the occupation force. The Negotiation Affairs Department of the PLO has argued that military necessity “cannot be invoked to defend violations of the Fourth Geneva Convention, such as Israel’s implementation and maintenance of illegal Israeli colonies. To turn violations into rights and consequently invoke the underlying principles of the Fourth Geneva Convention, such as military necessity, to legitimize and even defend the establishment and expansion of the violation is an affront to international law in general as well as to the Fourth Geneva Convention in particular.”<sup>48</sup> It further argued that the Government of Israel did not explain how the future plans for the construction of the barrier on the eastern side of the West Bank (in the Jordan Valley) can protect Israeli population centers inside Israel on the west side of the West Bank.<sup>49</sup> According to the Negotiation Affairs Department, the barrier aims strictly at further protecting Israeli settlements located in the eastern part of the West Bank. (For more information on the IHL rules applicable to the settlements, see the briefing note on [The Legal Status of Israeli Settlements in the OPT](#).)

*2.2. Even if the separation barrier in the OPT would have a justifiable cause, it does not provide an adequate and effective means to fulfill Israeli security objectives. Other, more adequate measures could be considered.*

According to Israeli and Palestinian civil society sources, the Government of Israel did not exhaust all available options to achieve its security objectives without inflicting such widespread harm to the Palestinian population and communities. In its position paper on the legality of the barrier, B’Tselem examined a number of alternative workable security measures that could provide protection to Israeli population centers from suicide bombers. The paper argued that the Government of Israel did not consider the efficacy of these alternatives, and avoided any explanation for why those other measures have not been examined. These alternative measures include increasing the efficiency of the checkpoints, and more effectively guarding the seam zone. B’Tselem relied on official Israeli documents that pointed out that most suicide bombers have crossed the border areas into Israel through the checkpoints, where “they underwent faulty and shoddy checks.”<sup>50</sup> According to the B’Tselem report, a number of reports by the Israeli State Comptroller pointed out deficiencies in how checkpoints are organized, and in the deployment of the IDF in these areas.

*2.3. The harm caused to the Palestinians is disproportionate and unlawful under IHL.*

The PLO, as well as a number of Israeli and international human rights organizations and various international agencies have all argued that the harm caused to the Palestinians in the OPT cannot be justified under the law of occupation. The hardships caused by the barriers and its associated regime of measures (including a permit system) render it a disproportionate measure.

The construction and maintenance of the barrier, in particular the closing of the seam zone, impose restrictions on the movement of the Palestinian population that are excessive and unjustifiable by military necessity (especially the criteria of

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proportionality). It is true that [Article 27](#) of the Fourth Geneva Convention authorizes the occupying power to take certain “measures of control and security in regard to protected persons” (e.g. curfews, closures, permit system), but this power is limited to those cases where the measures of control are justified by military necessity. Furthermore, even in cases where an occupying power can justifiably claim military necessity, it may not have recourse to any other measure of control more severe than that of assigned residence or internment ([Article 41](#) of the Fourth Geneva Convention). The Negotiation Affairs Department of the PLO has argued that the measures of control associated with the separation barrier are more severe than temporary internment or assigned residence. In fact they amount to “measures of intimidation” and constitute a “collective penalty” against the Palestinian population.<sup>51</sup> As such, these measures are absolutely prohibited by IHL (i.e. [Article 33](#) of the Fourth Geneva Convention).

Finally, citing [Article 54](#) of Protocol I, the Negotiation Affairs Department contends that in certain geographical areas, the barrier “violates the central obligation of the Occupying Power to guarantee the well being and basic sustenance for the occupied civilian population.” [Article 54](#) of Protocol I—which the Negotiation Affairs Department regards as customary international law—seeks to protect “objects indispensable to the survival of the civilian population,” such as agricultural areas for the production of foodstuffs, crops, drinking water installations and supplies and irrigation works. Paragraph five of Article 54, however, allows “derogation from the prohibitions...when required by imperative military necessity.” According to the Negotiation Affairs Department, “the extensive appropriation and destruction of land and property, especially fertile agricultural land and water, deprives and effectively dispossesses the Palestinian population of their basic sources of income and livelihood.”<sup>52</sup> Consequently, the construction and operation of the barrier in this respect is also incompatible with Israel’s duties under [Article 55](#) of the Fourth Geneva Convention in terms of ensuring food and medical supplies to the population in the OPT.

*The barrier introduces permanent changes in the status of the OPT.*

It has been argued by the Negotiation Affairs Department, as well as by Israeli and international NGOs that the building of the barrier and its associated regime will result in the *de facto* annexation of additional Palestinian lands. As such the barrier is not a temporary security measure, and may result in permanent changes in the status of the OPT. Israel, as the occupying power, does not have the authority to introduce such changes. Occupation does not transfer sovereignty to the occupying power. Occupation is temporary by definition; as a legal institution it cannot coexist with annexation (see [Article 47](#) of the Fourth Geneva Convention).

The Negotiation Affairs Department has pointed out that “in some places, such as Qalqilya, checkpoints have been moved further into Occupied Palestinian Territory with Palestinians requiring permits to ‘enter Israel’ if they want to visit those areas beyond the checkpoint (yet still within Occupied Palestinian Territory).” Additionally, a number of Palestinian landowners have received expropriation orders in which Israel claims that it will “correct the border.” According to the Negotiation Affairs Department, while Israel

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has not passed annexation laws regarding the separation barrier, it has nevertheless de facto annexed Palestinian land in violation of international law.<sup>53</sup>

## **Final Observations**

This briefing note aims to review the applicable IHL rules and present the two opposing perspectives on the legality of the separation barrier. This note will be updated as necessary to reflect any decisions handed down by the Israeli Supreme Court and the International Court of Justice in The Hague. For the time being it should be noted that:

1. All sides agree that the Government of Israel has a right to defend itself against suicide bombers by erecting a separation structure on the internationally recognized borders of Israel.
2. Although Israel has consistently rejected the applicability of the Fourth Geneva Convention to the OPT, it refers extensively to the Hague Regulations of 1907 as allowing it to take the necessary measures to erect the separation barrier and preventing the illegal entry of Palestinians.
3. The disagreement centers on the construction of the barrier inside the OPT and particularly on the combination of the security interests of Israeli citizens living in Israel with the ones residing in the OPT.
4. The whole issue is more than a restatement of the debate on the legality and legitimacy of Israeli settlements in the OPT. It addresses in particular the fate of thousands of Palestinian isolated by the barrier from public services, employment, family and communities in the West Bank, as well as the potential annexation of large parts of the West Bank to Israel. It also addresses the security of Israeli citizens living both within and outside the Green Line.
5. The upcoming decisions of the Israeli Supreme Court and the International Court of Justice will have substantial bearing on the future positioning of the parties and the international community on a vast array of legal issues in the Israeli-Palestinian conflict, from the separation barrier itself to the legal status of settlements, the applicable rules to the conduct of hostilities in the OPT and the applicability of IHL in general in the OPT.

## **Notes**

1. There are differences in the terminology used to refer to the barrier. The Palestinians refer to it as “separation wall,” while the Israelis use the term “Security Fence.” This briefing note adopts the more general term “barrier” used by the Secretary General of the United Nations (UN) in his report to the General Assembly. See UN, General Assembly, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, UN Document No. [A/ES-10/248](#), 24 November 2003.
2. For more information on the applicability of IHL to East Jerusalem, please see the briefing note on the [Applicability of IHL to the OPT](#).
3. Following the practice of the UN, this briefing note will refer to these territories as the “Occupied

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Palestinian Territory” (OPT). See, e.g., UN G.A. [Res. ES-10/6](#), U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/ES-10/6 (1999). See also IMSEIS, Ardi, “On the Fourth Geneva Convention and the Occupied Palestinian Territory,” *44 Harvard International Law Journal*, at p. 67, FN 20.

4. For a short history on the decision to erect the barrier, see B’Tselem, Position Paper, [Behind The Barrier: Human Rights Violations as a Result of Israel's Separation Barrier](#), March 2003, at pp. 6-7.

5. For an illustration of the barrier, see the [illustration](#) provided by the Israeli Ministry of Defense.

6. This number is based on a [description](#) by the Israeli Ministry of Defense. In its position paper, B’Tselem reported that the average width of the barrier is sixty meters; see B’Tselem, Position Paper, *supra* note 4, at p. 8.

7. This number is based on declaration by the Government of Israel to the Israeli High Court of Justice as reported by B’Tselem. See B’Tselem, Position Paper, [Behind The Barrier: Human Rights Violations as a Result of Israel's Separation Barrier](#), *supra* note 4.

8. PLO, Negotiations Affairs Department, [Israel’s “Security” Wall: Bad Fences Make Bad Neighbors](#), December 2003.

9. [GOVERNMENT OF ISRAEL WRITTEN BRIEF](#) in *Hamoked v. Government of Israel*, HCJ 9961/03, at pp. 4-6.

10. OCHA, [UPDATE - HUMANITARIAN IMPLICATIONS OF NEW WALL PROJECTIONS](#), 15 December 2003, at p. 2.

11. See [Israeli Ministry of Defense](#).

12. B’Tselem, Position Paper, *supra* note 4, at p. 8.

13. *Ibid.*

14. See Israeli Ministry of Defense, “Israeli Security Fence, [Questions and Answers](#)”.

15. B’Tselem, Position Paper, *supra* note 4, at p. 8.

16. The Palestinian Independent Commission For Citizens’ Rights (PICCR), [Creeping Annexation: The Israeli Separation Wall and its Impact on the West Bank](#), June 2003, at p. 9. B’Tselem reported 11,700 isolated between the barrier and the green line see B’Tselem, Position Paper, *supra* note 4, p. 10. The World Bank study on the impact of the barrier reported that 11,831 Palestinians isolated between the barrier and the green line; see World Bank, Local Coordination Committee (LACC), Humanitarian and Emergency Policy Group (HEPG), [The Impact of Israel's Separation Barrier on Affected West Bank Communities](#), 4 May 2003, at p. 33 (§ I-25).

17. IDF, IDF Forces Commander in the Judea and Samaria Region, [Order Concerning Security Directives \(Judea and Samaria\) \(number 378\)](#), 1970; [Declaration Concerning the Closure of Area Number s/2/03 \(Seam Area\)](#), 2 October 2003.

18. B’Tselem, Position Paper, *supra* note 4, at p. 10. The World Bank reported a higher number of 137,967 Palestinians in enclaves (surrounded on three sides by the barrier) on the eastern side of the border. See World Bank, *supra* note 15, at p. 35.

19. World Bank, *supra* note 15, at p. 33 (§ I-23).

20. See for example [Abu Aita et al. v. Military Commander of the Judea and Samaria Region](#), HCJ 69/81.

21. [Article 47](#) of the Fourth Geneva Convention states that civilians under occupation “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, nor by any annexation by the latter of the whole or part of the occupied territory.”

22. Except that, for example, prohibited weapons could not lawfully be used in any security system incorporated in such structures.

23. On the notion of “military necessity” see Dinstein, Yoram, “Military Necessity,” in R. Bernhardt (ed.), *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, vol. 3 (1997), at p. 395.

24. While the destruction of property is lawful according to [Article 23\(g\)](#) of the Hague Regulations when it is “*imperatively demanded by the necessities of war*,” the requisition of property ([Article 52](#) of the Hague Regulations) requires only that there is a need *for the army of occupation*. The two tests are different. Not only do they refer to two different criteria, but they also impose a different burden of proof on the occupier. If read in light of subsequent developments (particularly [Article 53](#) of the Fourth Geneva Convention), the test in [Article 23\(g\)](#) of the Hague Regulations requires the existence of actual military operations, and then for the destruction to be *imperatively demanded* by these operations. Article 52 of the Hague Regulations,



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however, only requires that the requisition is necessary for the army of occupation. If read in the context of subsequent developments ([Article 55](#) of the Fourth Geneva Convention), the expression “necessary for the army of occupation” can be understood to refer to the routine needs of members of the armed forces and administrative personnel of the occupying power. The requisition in kind, under Article 52 of the Hague Regulations, need not occur in the context of military operations.

25. The Nuremberg War Crimes Tribunal in the Hostages case (1948) defined military necessity as follows: “Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.” (emphasis added) For instance, under the Fourth Geneva Convention, civilians under occupation are entitled *in all circumstances* to humane treatment, the respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs ([Article 27](#) of the Fourth Geneva Convention). The occupying power cannot, as a result, invoke military necessity when the measures that it intends to take violate the fundamental rights of protected persons. Hence, retaliatory and deterrence measures against the civilian population for acts of violence against the occupying forces committed by resistance groups are strictly prohibited, whatever the circumstances.

26. [In re List and Others](#), United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Volume VIII, 1949, at p. 66 (emphasis added); Dinstein, Yoram, *supra* note 23 at p. 397.

27. “The occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done” (ICRC Commentary on Article 53 the Fourth Geneva Convention).

28. This formulation relies on a number of formulations found in various IHL conventions. In particular, see Articles 6 and 13 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999; Article 57/3 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

29. [GOVERNMENT OF ISRAEL WRITTEN BRIEF](#), *supra* note 9 at p. 3.

30. UN, Security Council, [Resolution 1373](#), dated 28 September 2001.

31. UN, General Assembly, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, UN Document No. [A/ES-10/248](#), 24 November 2003 (Annex I: Summary Legal Position of the Government of Israel, at § 4).

32. Other considerations include humanitarian considerations, topography, population density, and environmental considerations. See Israeli Ministry of Defense [statement](#).

33. *Ayyub v. Minister of Defense et al*, HCJ 606/78 cited in GOVERNMENT OF ISRAEL WRITTEN BRIEF, *supra* note 9, at p. 16. This decision is published in SHAMGAR, Meir, *Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects*, Jerusalem: Hebrew University, Harry Sacher Institute for Legislature Research and Comparative Law (1982), p. 371. The opinion in its relevant parts states: “[t]he existing situation is one of belligerency, and the occupying power is responsible for imposing order and security in the occupied territory. It must also forestall dangers imminent in such territory to the occupied territory itself and to the State. Warfare these days takes the form of acts of sabotage, and even those who regard such acts (which affects peaceful citizens) as a form of guerilla war, will admit that the occupying power is authorized and even obliged to take all measures required to prevent them. The military aspect and the security aspect are therefore only one” (p. 374-375).

34. *Yusuf Muhammed Gusen v. Commander of IDF Forces*, HCJ 4219/02, cited in GOVERNMENT OF ISRAEL WRITTEN BRIEF, *supra* note 9, at p. 18.

35. *Amira v. Minister of Defense*, HCJ 258/79, cited in GOVERNMENT OF ISRAEL WRITTEN BRIEF, *supra* note 9, at p. 17.

36. [Statement by Ambassador Dan Gillerman](#), Permanent Representative of Israel to the United Nations (8 December 2003, 58th UN General Assembly).

37. GOVERNMENT OF ISRAEL WRITTEN BRIEF, *supra* note 9, at p. 4 (§14) : “The seam area is intended to block the crossing of suicide bombers and other terrorists into the State of Israel. As conceived by the security and army officials in charge, the creation of a seam area is a major element in the battle against terror that originates in the region of Judea and Samaria. To the extent that the barricade erected does not completely block the infiltration of terrorists, the objective of the barrier is to delay infiltration into Israel for a period of time that will enable security forces to reach the site of the penetration, and thus create a geographic security space that enables the combat forces to pursue the terrorists before they enter

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the state.” Also see §32: “The use of a physical barrier to separate the terrorists from the Israeli civilian population worked successfully in the Gaza Strip, and has been used since the middle of the 1990s. The Gaza Strip is surrounded by a fence, and over the years that the fence has been operational, suicide terrorists have not made their way from the Gaza Strip to Israel by going through the fence.”

38. *Ayyub v. Minister of Defense et al.*, HCJ 606/78; *Abu Rian v. Commander of IDF Forces*, HCJ 401/88 cited in GOVERNMENT OF ISRAEL WRITTEN BRIEF, *supra* note 9, at p. 15.

39. GOVERNMENT OF ISRAEL WRITTEN BRIEF, *supra* note 9, at p. 11 (§ 38).

40. GOVERNMENT OF ISRAEL WRITTEN BRIEF, *supra* note 9, at p. 7, 11 (§ 40), 12 (§ 42).

41. See “The Impact of Israel’s Separation Barrier on Affected West Bank Communities: Update No. 1,” A Follow-up report to the Humanitarian and Emergency Policy Group and the Local Aid Coordination Committee, 31 July 2003, p. 16, FN 15. The Government of Israel’s intention to create such mitigation measures was first established in their responses before the Israeli High court of Justice. See HCJ 3771/02, A-Ras Village Local Council et al. v. Commander of IDF Forces in Judea and Samaria; and HCJ 7784/02, Sa’l ‘Awani ‘abd al Hadi et al. v. Commander of IDF Forces in Judea and Samaria.

42. GOVERNMENT OF ISRAEL WRITTEN BRIEF, *supra* note 9, at p. 5 (§ 17).

43. *Ibid.*, at p. 11 (§ 41).

44. *Ibid.*, at p. 10 (§ 36).

45. UN, Economic and Social Council, 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*, [Document No. E/CN.4/2001/121](#), 16 March 2001, at pp. 12-13 (§ 39).

46. B’Tselem, Position Paper, *supra* note 4, at p. 25.

47. UN, Economic and Social Council, Commission on Human Rights, *Question of the violation of Human Rights in the Occupied Arab Territories*, *supra* note 45, (§ 40).

48. [Petition to the High Court of Justice](#), *Hamoked v. Government of Israel*, HCJ 9961/03, at p. 21; see also the PLO position along the same lines in PLO, Negotiations Affairs Department, [Israel’s “Security” Wall: Bad Fences Make Bad Neighbors: Focus on QALQILYA](#), September 2003.

49. PLO, Negotiations Affairs Department, [Israel’s “Security” Wall: Bad Fences Make Bad Neighbors](#), December 2003.

50. Position Paper, B’Tselem, [Behind The Barrier: Human Rights Violations as a Result of Israel’s Separation Barrier](#), *supra* note 4, at pp. 26-27.

51. PLO, Negotiations Affairs Department, [BAD FENCES MAKE BAD NEIGHBORS – FOCUS ON QALQILYA](#), September 2003; see also Amnesty International, [Israel and the Occupied Territories— Surviving under siege: The impact of movement restrictions on the right to work](#), September 2003.

52. PLO, Negotiation Affairs Department, [BAD FENCES MAKE BAD NEIGHBORS – FOCUS ON QALQILYA](#), September 2003. See also Association For Civil Rights in Israel (ACRI), [Limiting passage through the separation fence impedes olive harvest](#), 17 November 2003.

53. PLO, Negotiation Affairs Department, [Israel’s “Security” Wall: Bad Fences Make Bad Neighbors](#), December 2003.