The Legality of the Israeli Wall

An international law perspective
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1. Introduction

The subject of my thesis is the question of the legality of the wall that is being built between Israel and the occupied Palestinian territories. The purpose of the paper is to examine whether the building of the wall has support in international law or if the decision violates international law and, if it does, how, why and which consequences that has.

1.1. Background

The then Prime Minister of Israel, Ehud Barak, initiated the project with the wall. The first decision regarding the wall came in November 2000, only two months after the second intifada had started. In 2002, the new Prime Minister of Israel, Ariel Sharon, revived the project and in August 2002, the Israeli military ordered the construction of a security barrier north of Jerusalem. Israel claims that the reason why the wall is being built is national security, mainly the Palestinian suicide attacks on Israeli ground that has led to many deaths of civilians in Israel. Their basis for the legality of the wall is article 51 in the UN-charter, the right to self-defense. The Palestinians on their side argue that the wall is an Apartheid wall that will force the Palestinians away from Jerusalem. Their basis for the illegality of the wall is the fact that, as occupying power, Israel has no right to change the status quo of the occupied territory they are obliged to maintain. By placing large parts of the wall on Palestinian territory, Israel is changing the status quo as they incorporate parts of the Palestinian land into Israel.

1.2. Limitation

In order to fully understand why the wall is being built I have a rather extensive section describing the history of the area and the situation between Israelis and Palestinians. (Chapter 2) During my writing I found it almost impossible to fully comprehend the situation without examining the history between Israelis and Palestinians properly, therefore I believe that this section also helps the reader. In chapter three I have facts about the wall and also a comparison with the former Berlin wall. The center of gravity for my thesis will lie on the presentation of the legal system and which of these rules is applicable to this issue. (Chapter four) In chapter five I have an analysis over the alleged Israeli crimes and whether each one constitutes a crime according to international law. In the final chapter I summarize my opinion of the wall and the solution to the conflict. To simplify for the reader I have chosen to have a number of maps and pictures in my appendix. It is almost impossible to explain how the wall is being built without the help of maps. I also have pictures of the wall in order to easier give the reader opportunity to form their own opinion how it might affect the people.

1.3. Method

The basis of the part of history and the situation is mainly based on written literature. For the part on international law I have mainly used written literature and conventions, resolutions from the UN, the UN-charter, the Advisory Opinion from the International Court of Justice (ICJ) and one case from the Israeli High Court. The analysis/conclusion will, to a great extent, be based on articles in papers and information from the Internet since the question is so pressing that there are not many other sources to obtain yet.
1.4. Remarks

In materials I have used, the writers refer to the construction either as a wall or a (security) barrier. I have found that sources of Israeli origin almost always use barrier or security barrier and that the UN uses the term wall. Since the UN General Assembly has determined that the term wall is preferable I have chosen to use that term, unless quoting from a source that uses another term.

2. The area, its history and current situation

2.1. Palestine

Palestine is located on the East coast of the Mediterranean Sea, West of Jordan and to the south of Lebanon. (See appendix 1.) The territory of Palestine covers around 6,220 square kilometres while Israel covers 20,770 square kilometres. Palestine has a population of 3.7 million; the main language is Arabic and the major religion Islam. Their GNI per capita is 1,120 USD. Israel has a population of 6.3 million, the major languages are Hebrew and Arabic and the major religions Judaism and Islam. Their GNI per capita is 19,176 USD. At the end of 1918, there were 700,000 people living in Palestine. These were divided into 574,000 Muslims, 70,000 Christians and 56,000 Jews. Between 1800 and 1945, the Jewish Population of Palestine increased from about 25,000 to 600,000. In 1945, that meant that approximately 33 per cent of the country's population were Jews.

2.1.1. The settlements

Israel is since 1967 the occupying power over the Palestinian territories, the West Bank, the Gaza Strip and eastern Jerusalem. On these occupied territories there are Israeli settlements. These are residential blocks where only Jews are allowed to live. The settlements are built on land that is owned by Palestinians but confiscated by the Israeli army. Israeli Jews has always been encouraged to move to the settlements by tax relieves and lowered rents. Approximately 400,000, 7,000, on the West Bank, and 180,000 in East Jerusalem, lived in settlements in 2003. The UN has for almost 40 years, since 1967, indicated that Israel's policy on settlements is illegal. The settlements are contrary to article 49 (6) of the fourth Geneva Convention, which prohibits the transfer of "parts of its own civilian population into the territory it occupies". In 2005, Israel decided to leave the settlements on the Gaza Strip. On August 17 2005, the assigned time period for the settlers to leave Gaza expired; approximately 50 per cent had then left. But the about 8,500 settlers that have left the area are only about 5-6 per cent of the total number of settlers on occupied territory, the remaining are on the West Bank. But, in return for this dismantling on the Gaza Strip, Ariel Sharon has announced that the remaining settlements on the West Bank will be consolidated and expanded. 6 per cent of the Israeli population are settlers and they amount to 11, 5 per cent of the people living on the occupied territories. The increase in the settler population, 6 per cent, has been faster than

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3 Johansson, Fredrik, Berge, Ulrika, Malm, Andreas, Weithz, Jesper, Vi skulle få leva här; Om muren i Palestina, Agora, Lettland, 2005, p 33
4 Id, p 33
5 The fourth Geneva Convention of 1949, article 49 (6)
population growth in Israel, 2 per cent. This indicates a more than natural demographic growth among the settlers.\(^6\)

It is important to note that this dismantling of settlements in Gaza does not mean that Israel cease to be the occupying power over the area according to the fourth Geneva Convention.

2.2. History

During the second millennium B.C. Palestine was occupied by Canaanites. Other population groups at that time were for example the Babylonians and the Philistines (from which the name Palestine derives).\(^7\) Hebrews constituted a community in Palestine around 1000 B.C. in the area, which is now called the West Bank, while the Philistines occupied the coastal plain. In 928 B.C. the Hebrew state were split into two parts, the northern called Israel, in Samaria and the southern Judah, in Judea.\(^8\) The Hebrew were driven out of both areas, but started to return and gain dominance in Judea again around 150 B.C. They were called Jews because their association with Judea and controlled, at the time, a large part of modern Palestine. In 63 B.C. the Romans took over and by A.D.133 they expelled the Jews. Palestine now consisted of Philistines, Canaanites, Romans and Greeks. Arabs conquered the area in the seventh century A.D., but since the numbers of Arabs that came to the area were small, their impact on the ethnic composition was as well. In 1881 the majority (450,000) of the population in Palestine descended from groups such as the Canaanites, which inhabited Palestine in the second millennium B.C., while there were about 20-25,000 Jews.\(^9\)

2.2.1. Before 1947

In Europe, during the late nineteenth century, a movement formed among Jews to establish a Jewish state in Palestine. As mentioned earlier, Palestine had in the first millennium B.C. been the site of a Hebrew kingdom and were now an Arab-populated country under the Ottoman Empire. The Jewish movement took the name Zionism\(^10\) and their main purpose at the time was to escape discrimination in Europe. For the purpose of buying land for Jewish settlers, the movement formed in 1901 a company, the Karen Kayemeth. The aim was to “redeem the land of the Palestine as the inalienable possession of the Jewish people”\(^11\). The fund could not acquire land without displacing Arab farmers. Some thought this displacement might be a problem in the future but their leader stated that this was “a necessary step to get the Arabs out of Palestine”\(^12\). The World Zionist Organization formed in 1909 the Palestine Land Development Company, which became the main purchasing agency for the Fund. As the land purchase increased the opposition among Arabs towards them, and consequently towards Zionism itself, increased. Even the indigenous Jews of Palestine reacted negatively to Zionism, they thought it unnecessary to worsen the relations with the Arabs and saw no need for a Jewish state in Palestine. The Organization sought and got British support for their cause, which later also led to the British support for statehood for the Jews. Arabs and many Jews in

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\(^10\) Zionism is the doctrine that advocates that a Jewish state should be founded.


the area feared that a Palestinian state would lead to an ethically based state without complete religious freedom. When the World Zionist Organization represented the Jewish population of Palestine at the Versailles Conference in 1919, the indigenous Jews, who were opposed Zionism, were outnumbered by Zionist settlers. In 1922 the League of Nations gave Britain mandate to administer Palestine. The land purchase increased, now with the support of Britain, and led in 1929 to attacks by Palestine Arabs on Jewish settlements, which resulted in the deaths of 133 Jews. The British high commissioner for Palestine realised the severity of the situation and recommended suspension of Jewish immigration and land purchase, a recommendation that was rejected by the Colonial Office in Britain. Between 1931 and 1935, as anti-Semitism grew in Germany, Britain allowed immigration that doubled the Jewish population in Palestine. At that time, 30 per cent of the Palestinian population were Jewish. As Zionism did not allow non-Jews to cultivate the land or work for Jews, many Arabs were kept from many jobs.

During the 1930s the antagonism increased, a new Zionist military group was formed, Britain gave itself increased powers to expel Arabs from the territory and a British commission suggested the partition of Palestine into one Arab and one Jewish state. During 1938 there was also a conference held regarding the resettlement of the victims of Nazism. The Zionist Organization negotiated with Gestapo to get them to force those Jews into going to Palestine since they feared that Jews otherwise would go elsewhere. In November 1938 the British government rejected the commission’s proposal with a two-state solution, but they issued a statement that limited the immigration of Jews and restricted land purchase. That statement annoyed many Jews and some even began to organize a military wing that would fight the British army while others began series of bombings against Arabs. The Jewish Agency now started to look for support elsewhere and turned to the U.S. The first open statement of an aim to establish a Jewish state in all of Palestine came in 1942 from an American committee. This was later confirmed in 1945.

As a result of the genocide of over six million Jews during World War II, many Jews feared to remain in Europe. The Jewish Agency wanted them all to come to Palestine and lobbied therefore that no other country would take them, leaving them no choice. As the war ended, the Jewish Agency began a campaign to drive Britain out of Palestine, which contained military operations against British army personnel, bridges, roads and so on. In 1947 Britain announced that it would leave Palestine. Since they had not found any solution of the Jew-Arab-situation, they asked the UN for a proposal.

2.2.2. United Nations General Assembly Resolution 181, November 29, 1947

The UN responded the same year. In 1947 the UN Special Committee on Palestine stated that the British mandate system meant that the internationally recognized principle of the right to self-determination was not applied to Palestine. The decision of the majority in the General Assembly was UN-resolution 181. It “recommends to the United Kingdom, as the mandatory Power for Palestine, and to all other Members of the United Nations the adoption and implementation, with regard to the future government of Palestine, of the Plan of Partition with Economic Union set out below”15. (For map over the plan, see appendix 2.) The territory was still to be an economic union with common rail transport and postal service, but the area of Palestine was divided into an Arab state (44 per cent of Palestine) and a Jewish state (55 per cent of Palestine) with the city of Jerusalem administered under an international regime.

13 For reasoning see Quigley, p 12-13
15 UN-resolution 181, p 1-2
duration of this special regime was stated to initially remain in force for ten years.\footnote{16}{\footnotesize "...remain in force in the first instance for a period of ten years, unless the Trusteeship Council finds it necessary to undertake a re-examination of these provisions at an earlier date. After the expiration of this period the whole scheme shall be subject to re-examination by the Trusteeship Council in the light of the experience acquired with its functioning. The residents of the City shall be then free to express by means of a referendum their wishes as to possible modifications of the regime of the City." UN resolution 181, p 24}

The plan gave a lot of the Arab-territory to the Jews but a little of the Jewish-area to the Arabs. In the resolution it was stated that the boundaries of the plan "are to be modified in such a way that village areas as a rule will not be divided by state boundaries unless pressing reasons make that necessary."\footnote{17}{\footnotesize Supra note 15, p 4} The Jewish Agency welcomed the partition plan while the Arabs rejected it. The day after the resolution was adopted the Jewish Agency called upon every Jew between seventeen and twenty-five to register for military service while the Arabs held a three-day strike to protest against the plan. After this the fighting between Jews and Arabs rapidly increased, for instance several military attacks occurred. Because of this, the UN Security Council adopted in March 1948 a resolution that called upon the permanent members\footnote{18}{\footnotesize Britain, France, China, the USSR and the United States.} to make recommendation regarding the implementation of the plan. The U.S. got second thoughts and suggested that the plan should be abandoned. The resolution was abandoned in April and had thus failed.

2.2.2.1. The binding force of the resolution

Decisions taken by the General Assembly, as a main rule, are not binding. So even if the Assembly intended to impose partition, it is not clear if they had the legal authority to do so. Some argue that a recommendation from the Assembly does not constitute a legal obligation to follow it\footnote{19}{\footnotesize Supra note 12, p 47}, while others argue that the Assembly has the power to decide the status over a territory whose sovereignty is unclear\footnote{20}{\footnotesize Supra note 12, p 48}. There are also some that argue that the Assembly does not have the power to make binding decisions in general but that it had decision-making power over a territory that was under a League of Nations mandate\footnote{21}{\footnotesize Supra note 12, p 48}. But it is unclear whether, even if the recommendation was binding, the Assembly had the power to determine the future status of a mandate territory against the wishes of the inhabitants, which was the case with resolution 181.

If the resolution were a binding determination of future status, it would have violated the Arabs’ right of self-determination and, according to the UN-charter article 80 paragraph 1, the rights of a people under a League of Nations mandate may not be altered to its detriment. This means that the resolution, if regarded as binding, would, for the population of Palestine, lead to violations of the UN-charter. One other argument is that even if the resolution was not binding it became binding since the Security Council affirmed it. It is true that the Council issued resolutions regarding Palestine but none of them implied an affirmation of resolution 181. In addition to this, even if the Council had affirmed resolution 181, which would not have meant that it would automatically have been binding, the Security Council does not have power to dispose over a territory.\footnote{22}{\footnotesize For reasoning see Quigley, p 47-53}
2.2.3. The 1948 war and the establishment of Israel

2.2.3.1. The war

In May 1948, Britain renounced authority in Palestine. The Arabs did not proclaim statehood while the Jewish Agency declared a Jewish state in Israel; the state of Israel, according to the resolution, even though it was abandoned. David Ben-Gurion declared the state. He was since his early years a strong advocate for a Jewish state. He was born in Poland but moved to Palestine, from where he was expelled in 1915 and returned after World War I. Ben Gurion led Israel during its war in 1948 and became Prime Minister on February 25, 1949 and remained in that post until 1963. The Jewish Agency relied, in addition to the resolution, on the thought that modern Jews are the successors to the ancient Hebrews, who were forced out of Palestine by the Romans. Their second basis for their claim was the right to self-determination, which was a norm of law in 1948. 23

The first claim was, as mentioned, based on an ancient, historical right to the area. A claim based on that has not generally been recognized. 24 Some argued that the Jews couldn’t have a right to a territory that they occupied two thousand years ago. 25 Others argued that since no identifiable people can demonstrate any special relation to Palestine prior to the centuries of Jewish statehood, the Jews should have the right to the area. 26 Those stating the latter were opposed; “the Palestine Arabs derive from peoples who occupied Palestine before the Hebrew kingdom”. 27 In a decision from ICJ in 1953, 28 the Court rejected a claim of ancient right by France towards Britain, since Britain had controlled the area during the nineteenth and twentieth century. They reasoned that if ancient titles were to be recognized, it would lead to many wars, as communities would claim right to a land that had belonged to their ancestors. Even if the ancient right were recognized, it would not necessarily support the Zionist claim, the Jewish Agency would also have to prove a connection between themselves and the population that lived in Palestine in ancient times.

The Jewish Agency claimed that the Arabs who lived in Palestine were no separate ethnic group from other Arabs; therefore they had no right to Palestine. The Agency relied on the fact that the Palestinian Arabs had, in the early twentieth century, sought a single Arab state/affiliation with Syria. But the Arabs meant that that did not mean that they wanted to be regarded as Syrians. When France and Britain divided the Arab territories after World War I, the Arabs identified themselves as Syrian Arab, Iraqi Arab or Palestinian Arab. The Arabs argued long-time occupation to the territory and mean that the fact that the Palestinian Arabs are not distinct from neighbouring peoples cannot be used to defeat their right to the territory.

The Arab Higher Committee as well as the Jewish Agency was recognized by the League of Nations as representatives for their respective community in Palestine. The majority of the population in Palestine were Arabs, 1,300,000, against 300,000 Jews, as being in majority, the Arabs had a fairly strong claim to get sovereignty. Palestine on the other hand possessed many attributes to statehood after the British mandate; for example an internationally recognized border and inhabitants that carried Palestinian citizenship.

The Jewish Agency’s military actions against the Arabs in 1947-48 were regarded by the UN as coming from a state. The Security Council regarded the complaint of aggression from the

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23 Supra note 12, p 67
24 Supra note 12, p 68
25 Supra note 12, p 69
26 Supra note 12, p 69
27 Supra note 12, p 69
28 International Court of Justice, Judgment of 17 November 1953, Britain v. France, Minquiers and Ecrehos Case
Jewish agency against the Arab League when Arab forces entered Palestine in May 1948, as a state-to-state complaint. The Arabs meant that their attack was an action to defend the Arabs in Palestine, a so-called humanitarian intervention. The doctrine in international law regarding humanitarian intervention is controversial, but the need to protect the Arabs life was very strong. The Arab League justified their intervention as a lawful action of a regional body, which according to the UN-charter, is authorized to intervene against breaches of peace. Article 6 in the pact of the Arab League gave the Council power to give a member state right to use appropriate measures against another member state in cases of aggression. The first problem was whether the aggression came from a state, Israel, the second whether the aggression was against a member state, Palestine was not a member state of the Arab League.

In Israel, Arabs were now expelled and the government formed a policy to demolish the Arabs’ homes in order to make sure that they could not return, and quickly brought Jews to the area. When looking at some numbers of Arabs expelled, it is clear that not many Arabs were left.\(^{29}\)

The war was ended along an armistice line, later called the Green Line. (For map over the armistice line, see appendix 2.) The line ran between the areas the Zionists had conquered and the areas that were still inhabited by Arabs; the West Bank including eastern Jerusalem and the Gaza Strip. As the war was ended, Israel had 77 per cent of the former British mandate of Palestine. The line was for almost 20 years the real border for Israel.

2.2.3.2. The establishment of the state of Israel

The provisional government in Israel applied on November 29 1948, for UN membership. The Security Council rejected this. In the spring of 1949, Israel concluded individual armistice agreements with Egypt, Lebanon, Syria and Transjordan. A new application was admitted to the UN and this time both the Security Council and the General Assembly approved it, making Israel a member of the UN in May 1949. Before this, few countries had recognized Israel as a state, but after the membership in UN more states did. Israel used the membership to legitimise the establishment of the state, even when no legal basis actually existed for their establishment.

Another theory regarding the founding of the state of Israel, is to see Israel as the lawful successor to the Jewish Agency, based on the fact that, after Britain had left, the only authority left, were the Israeli. But the Jews were in minority (see 2.2.3.1.); it is therefore difficult to argue that they were entitled to sovereignty in Palestine.

The third theory is based on a legal maxim “one owns what one possesses”, which in this case means that Israel is legitimate since it exists. The international community does not approve this theory in the case of Israel. In order to argue this theory successfully, the possession has to be peaceful and unchallenged, which is not the case for Israel.

In October 1949, Israel stated that they have a right to the territory within the 1949 armistice lines, but this is doubtful since the armistice agreement stated that those lines were not to be regarded as international borders.

2.2.4. The six-day war in 1967 and the Israeli control over Gaza and the West Bank

According to the armistice agreement of 1949, Gaza was administered by Egypt, which treated the area as a part of Palestine, and the West Bank by Transjordan (later the Kingdom of Jordan), which incorporated the area. In order to stop Arab refugees from returning to Israel, Israel started attacking villages near the armistice line. Unorganised refugees then started

\(^{29}\) The figures before and after the expulsion, examples: Jerusalem 70,000 to 3,500, Haifa 70,000 to 2,900, Safad 9,530 to 0. Quigley, p 86
military raids into Israel. The Arab states complained to the Security Council against these attacks, Israel claimed the right to self-defence, which was rejected by the Council. Even though the UN condemned all the Israeli attacks, the attacks continued and even increased. In 1956, Israel, with support from France and Britain, invaded Egypt and occupied the Gaza Strip, which led to that all Jews in Egypt left the country. Because of pressure from for example the United States, Israel withdrew. This was the so-called Suez-war. In 1964 the Arab states, under the lead of the President of Egypt, Gamal Abdel Nasser, formed the Palestine Liberation Organization (PLO) for Palestinians living in exile, in order to have a strong union against Israel and to be able to free all of Palestine (including Israel).

2.2.4.1. The six-day war

In April 1967 Israel started cultivating land in the demilitarised zone along the Syria-Israel armistice line, crossing the Green Line. In response, Syria attacked and Israel counter-attacked. As Syria became more and more convinced that a major Israeli attack on Syria was imminent, they sought help from Egypt. In May, Israel announced a full military mobilization. Egypt moved their troops toward the armistice line, in the purpose of deter Israel from attacking them. The Cabinet of Israel authorized an invasion of Egypt on June 4 and June 5, 5 a.m., Israel attacked Egypt, Jordan and Syria and sent troops into the Sinai Peninsula. Jordan retaliated, as a response to the attack, according to the right to collective self-defence, by shelling in the Jerusalem area and bombing Israel. Cease-fire was effected June 8. Israel had than taken the West Bank, the Gaza Strip and the Sinai Peninsula. Israel attacked Syria June 9 and occupied their Golan Heights but stopped its attack June 10, under pressure from the U.S. In the 1967-armed conflict, Israeli forces occupied all the territories, which had constituted Palestine under British Mandate. (For map over the territories occupied in 1967, see appendix 3.) On 22 November 1967, the Security Council unanimously adopted resolution 242, which emphasized the inadmissibility of acquisition of territory by war and called for the withdrawal of Israeli forces from the occupied territories and termination of all claims.

2.2.4.2. Israeli control over the West bank and Gaza

During the war, 350,000 Arabs (about 25 per cent of the population in the areas) were displaced.\(^{30}\) The Security Council called in November 1967 in their resolution 242, for Israeli withdrawal from the areas. The resolution was taken under Chapter 6 of the Charter, as a recommendation, instead of under Chapter 7, as binding for its member states. Instead of withdrawal, Israel increased their acquiring of land. The Supreme Court of Israel tried several claims regarding the legality of the acquiring but found most of them legal, while the international society considered them unlawful. In 1969, the guerrilla movement al-Fatah took over the PLO and their leader, Yassir Arafat, became the leader of PLO. The goal for al-Fatah was at this time to free all of Palestine, their means of doing that were to attack Israel from bases in neighbouring countries. In 1970, PLO were forced, by the Jordan King Hussein’s army, to move its base from Jordan to Lebanon, and as their raids continued, Israel sent troops to Lebanon in 1972. In 1973, Egypt and Syria attacked Israel during the Jewish weekend of Yom Kippur (which means the day of reconciliation). The attack was a success and other Arab countries joined Egypt and Syria and the oil producing countries cut back the supply of oil to mainly the U.S. (seen as an allied to Israel). Israel managed to turn the war to their success just before the West World forced the parties to a cease-fire. In 1974, the Arab states recognized PLO as the only legitimate representative for the Palestinian people and PLO were also

\(^{30}\) Supra note 12, p 168
given the status of observer in the UN. In 1978, in search for the PLO, Israel invaded Lebanon. They concluded a peace agreement in 1981, but as Israel again in 1982 invaded Lebanon, the fighting continued. The Israeli army were not drawn back until 2000. In 1978 the Camp David agreement were concluded between Israel and Egypt. The treaty required Israel to return the Sinai Peninsula to Egypt and also contained provisions regarding limited autonomy for the Arab population, a prohibition against Palestinian military force and a continued Israeli military presence for the West Bank and Gaza. The Israeli army were drawn back in 2000. In 1980, both the Security Council and the General Assembly unconditionally called upon Israel to withdraw from these areas.

The situation for the Palestinian Arabs became more and more difficult and in December 1987, a demonstration developed into severe riots and Arabs stopped their purchasing of Israeli goods and did not go to their jobs. An underground leadership emerged to direct this uprising, the so-called (first) intifada. This was an informal insurgency against the occupying power on the West Bank and the Gaza Strip, the goal was to form an independent Palestinian state. The intifada continued until it eventually was over in 1993. At about the same time as the intifada begun, the Israeli opposition movement Hamas were founded. Hamas believes that the area of Palestine, including Israel, is sacred Muslim land that cannot be negotiated away or divided. The organisation quickly became an important political movement among Palestinians. In 1988, Jordan gave up their claims on the West Bank and PLO declared an independent Palestinian state (with Yassir Arafat as President from 1989). PLO also recognized Israel’s right to exist within secure borders and stated that they will not use terror anymore. In practice, PLO had then recognized a two-state solution. In 1988, the Palestine National Council declared independence and within months, 89 states had recognized Palestine as a state. In 1988, the Palestine National Council declared independence and within months, 89 states had recognized Palestine as a state.31

Up until 2002, over 100 states, among them Malta, Singapore, Turkey and Austria, had also recognised Palestine as a state.32

2.2.5. From 1990 to present day

In the Oslo agreement of 1993, the PLO recognized Israel’s right to, exist within determined border, while Israel admitted the PLO as the legitimate representative for the Palestinian people. PLO was then able to return to the West Bank/Gaza from their exile in Tunisia, and was also able to start the rebuilding of the Palestinian authority. This was the starting point of the peace process. The agreement aimed at a two-state solution, with limited but expanded Palestinian self-governing on the West Bank and Gaza. The Israeli forces, which still controlled the borders, were drawn back from some areas. The areas were despite this still to be regarded as occupied since the Israelis still controlled the borders. In 1994, Israel also entered a peace agreement with Jordan. As the peace process advanced, a Jewish settler shot 29 Palestinians to death in Hebron and Hamas started to perform suicide attacks against civilian Israelis, their purpose being to stop the peace process. In November 1994, a young Jew murdered the then Prime Minister of Israel, Yitzhak Rabin. This became the starting point of the end of the peace process.

Yassir Arafat won the first Palestinian democratically parliament- and presidential elections in 1996. The terror from Hamas rapidly increased and led to a victory in the Israeli elections for Benjamin Netanyahu, which led to increased support for the settlements. The disturbances between the Palestinians and the Israelis are increased and in September 2000, the new leader for the right party Likud in Israel, Ariel Sharon, visits the al-Aqsa mosque in Jerusalem. This leads to the Palestinian al-Aqsa riot or the second intifada and in October Ehud Barak, the

31 Supra note 12, p 212
32 Bring, Ove, FN-stadgan och världspolitiken, Om folkrättens roll i en föränderlig värld, 4 uppl, Göteborg, 2002, p 198 (footnote 13)
Prime Minister of Israel since 1999, declared the peace process ended and the peace agreement ceased to be valid.

In 2001, Likud, under the lead of Sharon, won the election in Israel. The violence between Israelis and Palestinians continued and Sharon terminated all contact with Arafat. In March 2002 Israel invaded a number of Palestinian cities on the West Bank, among them Ramallah, where Arafat’s headquarter was located, and Jenin. For 34 days Arafat was unable to leave his house while water and electricity were cut off. Jenin were razed to the ground by Israeli forces, the reason was, according to Sharon, that Jenin was the city that had produced most of the suicide bombers. All efforts to reach peace were ended in 2002, as Hamas performed an exceptionally bloody suicide attack. A further reason was the start of the construction of the wall between Israel and Palestine in 2002. (See Chapter 3.) In May 2003, the United States, Russia, the European Union and the UN proposed a new peace plan, the so-called road map for peace. This plan aimed at the founding of a Palestinian state in 2005. The plan was accepted by Ariel Sharon and Mahmoud Abbas (Prime Minister of the Palestinian self-government) but the violence continued. In 2004 Sharon released a plan to evacuate the settlements in Gaza (without negotiating with Arafat), the plan was adopted in October. In November Arafat died and was replaced by Abbas as new President of the PLO.

During the second intifada, the Israeli Defence Force killed 3,300 Palestinians, while Palestinian suicide bombers killed 1,000 Israelis. 4,170 Palestinian homes were destroyed and restrictions on movement have resulted in great losses of income, unemployment and poverty in Palestine.

The Israeli choice to build the wall in order to protect themselves from attacks, has led to substantial reductions on their welfare system, and increased unemployment and poverty. On 8 February 2005, the Palestinian Leader, Mahmoud Abbas, and the Prime Minister of Israel, Ariel Sharon, agreed on a cease-fire by whose terms both sides agree to stop all military actions or acts of violence against each other. These are of course important changes but they do not address the issues of the settlements, the wall checkpoints and roadblocks, the imprisonment of Gaza and the continued incarceration of Palestinians. In August 2005 Israel evacuated its settlers from the Gaza Strip and withdrew its forces, ending almost four decades of military occupation. But, it is important to note that as Israel still control the borders of the occupied areas, they remain the occupying power according to international law. The test for application of the legal rule of occupation is not whether the occupying power fails to exercise effective control over the territory, but whether it has the ability to exercise such power. Sharon proposed evacuation of Gaza on one condition; that the President of the United States, George Bush, agreed to support the idea that Israel can keep the Jewish settlements on the West Bank permanently.

2.2.6. Proposed solutions

The UN, as well as the ICJ in their Advisory Opinion, proposes a two-state solution with one Arab state and one Jewish state. Another conceivable solution is the one-state solution, which demands that Israel gives democracy to the occupied people and right to the Palestinian refugees to return. The problem Israel faces with this solution is that the Jews risks becoming the

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34 Den gäckande freden (Elusive peace, BBC), Dokument utifrån, 2005, part 2. On the news last week, one could see the problems during an attempt to evacuate a settlement on the West Bank. It is therefore still unclear whether Israel intends to keep the settlements on the West Bank or not.
minority in an Israel/Palestine-state. The most likely solution to work is therefore the two-state solution.

3. The Wall

In November 2000, then Prime Minister of Israel, Ehud Barak, gave the green light to the project of building a barrier at the West Bank. In 2002, his successor Ariel Sharon, revived the project. In August 2002 the Israeli military gave order to start the construction of a “security barrier”\(^{35}\) north of Jerusalem. A long barrier is therefore being built to separate Palestinian areas from Jerusalem. This will in practice close the road between the West Bank and Jerusalem. Israel claims that the barrier is built due to national security reasons, in order to stop Palestinian attacks (mainly suicide bombers) in Jerusalem. The Palestinians refers to the barrier as “the Apartheid wall” because Palestinian land is confiscated, Palestinians are denied access to water, land, job and the city of Jerusalem, to which they pay taxes. They mean that the wall will force the Palestinians away from Jerusalem.

The barrier takes a variety of forms; in certain areas the wall is pure concrete 8 meters high and fortified with armed watchtowers and in other areas it may be part concrete/part fence or a series of razor wire and/or electric fencing all of which includes a 70-100 meters “buffer zone” with trenches, roads, razor wire, cameras, and trace paths for footprints. In Bethlehem and Jerusalem, the wall is made up of a combination of these edifices. \(^{36}\) (Photograph of the wall, see appendix 4.)

The building of the barrier is ongoing, of the planned 670 kilometres, 210 were done in February 2005. 135 of these 670 kilometres will run on the Green Line. The barrier is, where in concrete, 8 metres high and is in average 60 metres wide. In comparison, the Berlin wall was 155 kilometres long and in average 3, 6 metres high. (See appendix 5.) This makes the Palestinian wall at least four times longer and, where in concrete, more than twice as high. The barrier is estimated to be approximately twice as long as the Green Line. Approximately 16, 6 per cent of the West Bank would, according to a report of the Secretary-General\(^{37}\), lie between the Green Line and the wall. That area is stated to be home to about 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities. As a result of the planned route, nearly 320,000 Israeli settlers would be living in the area between the Green Line and the wall.\(^{38}\)

The construction of the wall has also been accompanied by the creation of a new administrative rule. In October 2003 the Israeli Defence Forces issued orders establishing the part of the West Bank lying between the Green Line and the wall as a “Closed Area”. Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. Most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within

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\(^{38}\) International Court of Justice, Advisory Opinion of 9 July 2004, Legal consequences of the construction of a wall in the occupied Palestinian territory, paragraph 84
the closed area without a permit. Access to and exit from the closed area can only be made through access gates, which are opened infrequently and often for short periods.

3.1. Comparison with the Berlin Wall

In 1945, World War II was over and Berlin, taken by the Soviet army during the closing months of the war, was divided between the Allies into four sectors, one for each; the Soviet Union, the United States, the United Kingdom and France. At first, the city of Berlin was administered in partnership between the four Allied countries and the leadership rotated between them on a monthly basis. “As the early phases of the Cold War unfolded, tensions between the Soviets and the western allies escalated”\textsuperscript{39}. “In 1948, there was a currency reform that divided Berlin into two different currency zones. After 1949, the three sectors controlled by the United States, the United Kingdom and France (West Berlin), although nominally still under joint four-power Allied sovereignty, were in effect an exclave of West Germany, completely surrounded by East Germany”\textsuperscript{40}.

West Germany was founded in May 1949, and East Germany in October the same year. The citizens of Berlin were at first allowed to move between the zones without restraints. Nevertheless, as the Cold War advanced, their movement between the zones became restricted and travel between the sectors in Germany required a so called “Interzonenpass (Inter-zone passport)”\textsuperscript{41}. In 1952, the border between East and West Germany and between East Germany and West Berlin was closed and only the border between East and West Berlin were still open. In 1957, leaving East Germany without permission was forbidden and violations were prosecuted with prison up to three years.\textsuperscript{42} Since many persons living in East Germany left for West Germany, the East German government saw no other way to prevent this escaping to the West via Berlin than closing the border between East and West Berlin on August 13, 1961.\textsuperscript{43} (Map over the Berlin wall, see appendix 6.)

Over the years, the wall went through four phases; in 1961, basic wire fence, in 1962-1965, improved wire fence, in 1965-1975, concrete wall and finally in 1975, “border wall 75”.\textsuperscript{44} The fence built up in 1962, located up to 91 meters in on East German territory, led to destruction of those houses situated there and relocation of those living there.\textsuperscript{45} Between the two fences, the so-called death strip was created, an area known as an empty no man’s land paved with raked gravel, which made it easy to spot footprints left by escapees. In addition to this, it offered no cover; “it was mined and booby-trapped with tripwires” and “offered a clear field of fire to the watching guards”.\textsuperscript{46} The fourth part of the wall, officially known as the so-called “Stützwandelement UL 12.11 (Retaining wall element UL 12.11)”\textsuperscript{47}, was the last part and most advanced version of the wall. It was constructed from 45,000 separate sections of reinforced concrete, each 3.6 m high and 1.5 m wide, and cost 16,155,000 East German Marks.\textsuperscript{48} The top of the wall was lined with a smooth pipe, intended to make it more difficult

\textsuperscript{39} Background, Retrieved December 11 2005 from http://en.wikipedia.org/wiki/Berlin_wall
\textsuperscript{40} Id
\textsuperscript{41} Berlin Wall History: Escape Attempts to the West, Retrieved January 13 2006 from http://www.dailysoft.com/berlinwall/history/escape.htm
\textsuperscript{42} Berlin Wall Timeline, Retrieved February 2 2006 from http://www.dailysoft.com/berlinwall/history/berlinwall-timeline.htm
\textsuperscript{43} Why the Berlin Wall was built up, Retrieved February 2 2006 from http://www.dailysoft.com/berlinwall/history/why-the-berlinwall-was-built.htm
\textsuperscript{44} How the wall worked, Retrieved December 11 2005 from http://en.wikipedia.org/wiki/Berlin_wall
\textsuperscript{45} Id
\textsuperscript{46} Id
\textsuperscript{47} Id
\textsuperscript{48} Id
for escapers to scale it. It was in addition to this, reinforced by mesh fencing, signal fencing, anti-vehicle trenches, barbed wire, over 300 watchtowers and thirty bunkers. This version of the wall is the one most commonly seen in photographs, and surviving fragments of wall in Berlin and elsewhere around the world are generally pieces of the fourth-generation wall. 49

The Berlin wall was 155 km long and had an average height of 3.6 metres. During the wall’s existence there were lots of attempts to escape from East to West Berlin, around 5,000 were successful, 192 people were killed trying to cross and around 200 were seriously injured.

During the construction of the wall allied military personnel, officials and diplomats, were still able to pass into East Berlin, while Germans living in West Berlin, were subject to severe restrictions. Between August 26, 1961 and December 17, 1963, all possible crossing points for West Berliners, were closed. These travel restrictions were eased in September 1971. In total, there were twelve crossing points on the Berlin wall, out of these, ten were intended only for Germans. For Westerners, there was only one possible crossing between East and West Berlin, the famous Checkpoint Charlie. 50

The barrier was built by East German troops and workers, not directly involving the Soviets. It was built a little way inside East German territory to ensure that it did not encroach on West Berlin at any point. 51 The government of East Germany “claimed that the wall was an "anti-fascist protection barrier", intended to dissuade aggression from the West. However, this position was viewed with skepticism even in East Germany; its construction had caused considerable hardship to families divided by the wall, and the Western view that the wall was a means of preventing the citizens of East Germany from entering West Berlin and West Germany was widely seen as being closer to the truth.” 52

Due to the construction of the wall, many families were split. Many Germans living in East Berlin were also cut off from their jobs and chances of a better life. West Berlin became “an isolated enclave in a hostile land”. 53 Many West Berliners, led by their mayor Willy Brandt, demonstrated against the wall. Several times people in the Communist countries such as Hungary and Czechoslovakia had rose up against the Communist system, but failed. On August 23, 1989, Hungary opened the iron curtain to Austria. Months before, East German tourists used their chance to escape to Austria from Hungary and in September 1989, more than 13 000 East Germans escaped via Hungary within three days. 54 This was the first mass migration of East Germans after the erection of the wall in 1961. In the end of September 1989, mass demonstrations against the government and the system in East Germany begun. As a consequence of this, Erich Honecker, East Germany's head of state had to resign on October 18, 1989. The new government prepared a new law to lift the travel restrictions for East German citizen. At 06.53 pm on November 9, 1989, a member of the new East German government was asked at a press conference when the new East German travel law would come into force and he answered: "Well, as far as I can see, ... straightaway, immediately." 55 Because of this statement, thousands of East Berliners went to the border crossings. At Bornholmer Strasse, the people demanded that the borders would be opened and at 10.30 pm it was. That moment is regarded as the end of the Berlin Wall. 56 In October 1990 Germany was fully reunited.
4. International law

International law is divided into public international law and private international law. The latter deals with matters regarding determination of which law is applicable when several states are involved in an issue, for example divorce between a Swedish man and a Norwegian woman, living in Denmark. Public international law is the system that regulates the relationship between states. Therefore I will only regard this system in my description. For an overview over international law and how it is divided up, see appendix 7.

4.1. Public international law

Human rights, as well as international humanitarian law, are a part of public international law. Therefore, when looking at this issue, three aspects have to be taken into account; international humanitarian law, human rights law and general principles of international law. Human rights are applicable during all times while humanitarian law is only applicable during armed conflicts, more commonly referred to as war.

Public international law is divided into treaty law and customary law. Many of the conventions, covenants, charters and so on within international law, are regarded as being customary law. Customary law arises when two demands are met, state practice and opinio juris. State practice arises when many states act in the same way and opinio juris arises when a state feels bound to act according to these legal instruments. Customary law is international rules that are so well-known and well-established, that they are binding for all states in the international community. The other component, treaty law, is rules written down in treaties between two or more states. The treaties are binding for the signatory states because of the customary principle *pacta sunt servanda*. Out of treaty law and customary law, customary law is the primary source in international law between states.\[57\]

As mentioned earlier, the state is the central concept in public international law. In order to be recognized as a state, the area has to have the four distinguishing features of a state; a permanent government/rule, a certain defined territory and a permanent population. It also has to be accepted as a state by other members in the international society, for example by recognition, invitation to inter-state conference or by becoming part of an international organization. None of the points are decisive but together they can determine whether the area functions like a state or not. The international community does not recognize Palestine as a state.\[59\] But a state that in reality functions as a state has a right to exist and be treated as a state, even if not recognized. This was for some time the case with the former Yugoslavian Republic of Macedonia. In addition, in 1947 the UN voted on the partition plan between Israel and Palestine. It received 33 votes in favour, 13 against and 10 abstentions.\[60\] One could reason that those who voted in favor of the partition plan are those who are willing to recognize Palestine.

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\[57\] For reasoning in this part see: Bring, Ove och Körlöf, Anna, *Folkrätt för totalförsvaret, En handbok*, 3 uppl, Stockholm, 2002, p 14-15

\[58\] The Montevideo Convention on the Rights and Duties of States, 1933, article 1

\[59\] Swedish Foreign Ministry, November 2005

\[60\] In favour: Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Ecuador, France, Guatemala, Haiti, Iceland, Liberia, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Sweden, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United States of America, Uruguay, Venezuela.

Against: Afghanistan, Cuba, Egypt, Greece, India, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, Turkey, and Yemen.

Abstained: Argentina, Chile, China, Colombia, El Salvador, Ethiopia, Honduras, Mexico, United Kingdom, and Yugoslavia.
as a state. On the other hand, those who voted against the plan were mostly Arab countries, the same countries that you can actually imagine are the ones who are now willing to recognize Palestine. It is therefore hard to say how many or which countries recognize Palestine as a state even though Palestine does not meet the four conditions.

4.1.1. General principles of public international law

The examples below are examples of principles in international law that are customary law and as that, binding for all states. Self-determination is a principle that means that a people ought to be able to determine their own governmental forms and structure, free from outside influence. In Palestine, Jewish immigrants claimed self-determination to justify the creation of the state of Israel in the former lands of the Ottoman Empire, just as people in the West Bank would later claim independence as a Palestinian state. The prohibition of acquisition of land by use of force is also an international principle of law. This principle means that any acquisition of land that is done with the help of force is illegal.

4.1.2. International humanitarian law

The basis for humanitarian law is the four Geneva Conventions of 1949, their two additional protocols from 1977, and the Hague Regulations of 1907.

4.1.2.1. The Hague Regulations of 1907

Under customary international law in article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (the Hague Regulations of 1907), territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line and the former eastern boundary of Palestine under the British mandate, were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these areas are therefore since 1967, occupied territories in which Israel has the status of occupying power. Subsequent events in these territories have done nothing to alter this situation.

4.1.2.2. The Fourth Geneva Convention of 1949

The fourth Geneva Convention is according to its article 2 paragraph 2, applicable to occupation. Israel ratified the Convention in 1951 and PLO has in 1989 declared themselves bound to the four Geneva Conventions from 1949 and their two additional protocols from 1977. Israel tries to argue that the fourth Geneva Convention is not applicable to the specific occupation of the Palestinian territories. The claim is based on the theory that the Convention is not applicable to areas that have never belonged to any other state and that they therefore cannot be occupied.\(^{61}\) Both the international community as well as the UN, in several resolutions from the General Assembly and the Security Council, have rejected this argument. As an example, a unanimous Council stated in resolution 607 (1988), that Israel is bound to follow the convention regarding the situation with the occupied territories. Most parts of the Geneva Conventions are in addition to this regarded as customary law and therefore binding for Israel.

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in any case. Accordingly, there can be no doubt: Israel is bound by the rules set up in the Ge-

neva Convention.

According to the Convention, Israel is not allowed to change the demography of the occu-

pied area, annex parts of the occupied area or worsen the conditions for the people living in

the occupied area. In the convention there is a distinction between provisions applying during

military operations leading to occupation and those that remain applicable throughout the en-

tire period of occupation. Thus, only those articles of the fourth Geneva Convention referred

to in article 6, paragraph 3, remain applicable in the occupied territory. Relevant articles here

are 47, 49, 52, 53 and 59.

Article 47 is about protected persons, it states that these persons “shall not be deprived of the

benefits of the Convention by any change introduced, as the result of the occupation of a ter-

ritory, into the institutions or government of the said territory, nor by any agreement con-

cluded 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.” Article 49 states

that all forcible transfers of persons are prohibited, with the exception that the occupying

power may undertake total or partial evacuation of a given area if the security of the population

or imperative military reasons so demands. Finally article 49 states that the occupying

power shall not deport or transfer parts of its own civilian population into the territory it oc-

cupies. According to article 52, it is prohibited for the occupying power to take any measure

that aims at creating unemployment or at restricting the opportunities offered to workers in an

occupied territory, in order to induce them to work for the occupying power. Article 53 con-

tains the prohibition of destruction by an occupying power of personal property, unless absolu-

tely necessary. Lastly, in article 59 the occupying power is given the obligation to facilitate

the population of the occupied territory if that area is inadequately supplied.

4.1.2.3. The laws of war

As early as the 5th century BC, in the so-called Manu-law in India, we can find examples of

norms regarding international law. The ruler named Manu formulated a prohibition against

use of poisoned weapons as a result of their extremely inhuman consequences. During the 7th

century AD an Arabic/Turkish war people, the Saracens, introduced rules of warfare based on

the Koran, prohibiting fire and poisoned arrows as means of warfare. In the Western World,

Hugo Grotius (1583-1645), often called the father of public international law, wrote about the

distinction between righteous and unrighteous wars. He developed this theme further in his

book De Jure Belli ac Pacis (1625) (On the Law of War and Peace), translated into English

1814. Grotius also discussed the issue of justification of terror attacks and suggested prohibi-
tions of plundering and collective punishment in this book. After the experiences of the Swiss

Henry Dunant at the bloody battle of Solferino in 1859, Dunant wrote the book A Memory of

Solferino (1862). This led to the first assumption of the first Red Cross Convention in 1864.

Since then, more conventions have been added and gradually replaced their precursors. During

the civil war in America, Lincoln asked a professor named Francis Lieber to prepare a

handbook for the military in order to humanize warfare. The result was the Lieber Code

(1863).

The concept of the laws of war was strongly criticized by several peace movements, who

believed that wars ought to be forbidden, not regulated. The main counter argument was, and

still is; that wars will occur now and then, whether forbidden or not and the best we can do is

to prevent as much suffering as possible. This is the fundamental thought in the laws of war.

62 Supra note 5, article 2 paragraph 2
63 Supra note 61, p 58
64 For reasoning in this part see Bring, Folkrätt för totalförsvaret, p 57-60
Another fundamental thought, that the only legitimate target is the weakening of the enemy’s military powers, was established in 1868. In 1899, 26 states convened to negotiate about disarmament and the laws of war. This resulted in a convention regarding war on land and an annexing document, the so called Land Warfare Regulation, where one for example can find a prohibition of use of weapons devoted to cause superfluous damage. In an annexing declaration, the famous prohibition on the use of the so-called dum-dum bullet can be found. The rules in the Hague Convention also apply to war at sea, and these rules played an important part in the First World War. During the 1920s and 1930s there were several attempts to limit the use of certain extreme types of weapon. In 1925, the first Geneva protocol, which prohibits the use of bacteriological and chemical weapons, came to be.\(^{65}\)

The central thought in the laws of war is that the civilian population always should be protected from the direct effects of war. The principle of distinction sets a demand that in warfare there must be a difference between military targets and civilian people and property, where only the first is a legitimate target for military attacks. Ever since the declaration from 1868, where it was determined that the only legitimate target is the weakening of the enemy’s military powers, it has been commonly recognized that weapons and warfare that worsen the suffering for soldiers already put out of belligerent condition, are prohibited. This is the principle about unnecessary suffering. The principle of proportionality means that any attack on military targets has to be limited or avoided, if the meaning of the attack is disproportionate to the risks the civilian population is subject to. It is obvious that international law cannot regulate every situation that can arise in armed conflicts. Even if there are no clear rules, humanitarian demands should be respected; this is stated in the Martens Clause, found in the preamble to the 1899 Hague Convention (II).\(^{66}\) This clause is aimed at preventing a war conducting part, from exceeding humanitarian demands, under the excuse that there are no rules regulating that specific case.\(^{67}\)

A major part of the laws of war are considered being rules of jus cogens; customary rules that the parties cannot, bilaterally or regionally, agree away.\(^{68}\) This means that both Israel and Palestine are bound to follow the laws of war, just as any other state in the international community.

The rules regarding armed conflicts between states, so called international armed conflicts, are better developed than the rules regarding internal/civil wars and occupation. Both parties, regardless of who is right and who is wrong, must respect the humanitarian aspects of the laws of war and both the government as well as private individuals must respect them.\(^{69}\) The laws of war are divided into three set of rules; humanitarian law on and beside the battlefield, the law of neutrality and the law of occupation.\(^{70}\) The laws on occupation contain one part regarding the interests of the occupying power and one part regarding humanitarian aspects and the protection of the interests of the civilians while the law of neutrality does not contain humanitarian aspects at all but is focused on states rights and obligations towards each other.

Since this paper considers an issue in an occupied area, I will in the continuation only address the law of occupation.

\(^{65}\) Id

\(^{66}\) "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

\(^{67}\) For reasoning in this part see Bring, Folkrätt för totalförsvaret, p 62-63

\(^{68}\) Supra note 61, p 64

\(^{69}\) Supra note 61, p 30-31

\(^{70}\) Supra note 61, p 30
4.1.2.3.1. Public international law during occupation

Occupation means a temporary taking of power within the area of the opponent. It does not result in any change in the belonging of state of the occupied area. A permanent taking of an area is called annexation. According to article 42 in the Hague Regulation, a territory is occupied when it actually is under the power of the hostile army. This means that the legal powers are transferred to the occupying power and that the occupying power also takes over the responsibility for the civilians who remain in the occupied area.

Around the shift of the last century public international law regarding occupation started to develop. Rules on military authority on hostile territory were introduced in the Hague Regulations. During the German occupation of large parts of Europe during the Second World War it became clear that these rules were not enough. In light of this, in 1949, the fourth Geneva Convention was created. New rules are also found in the First Additional Protocol to the fourth Geneva Convention. According to the fourth Geneva Convention, the occupying power cannot change the economic and social structure or the legal system. This also means that the occupied areas should be allowed to develop as normally as possible.

The fourth Geneva Convention shall be applied in every armed conflict where the parties are part to the Convention, even if one of them does not admit that an armed conflict is at present. The Convention shall also be applied in occupation that is not met by military resistance, as was the case with Denmark in 1940.

4.1.2.3.2. Non-international conflicts

Compared to the extensive set of rules applicable to international armed conflicts there are only a few sets that regulate internal wars, conflicts within a state. Ever since 1945, internal conflicts within the territory of a state have become more common than conflicts between two or more states. Since a non-international conflict arises within one state, few customary rules have been able to develop. Every convention up until 1977 had only dealt with international conflicts. In the four Geneva Conventions, there is the common article 3 (article 3 has the same wording in all the four Geneva Conventions), which deals with the minimum demands regarding the treatment of persons in non-international conflicts. Due to the lack of sanctions and control, international law faces great difficulties in the observance of these rules. The first written rules regarding non-international conflicts, beside common article 3, came in The Second Additional Protocol to the Geneva Conventions, 1977. In order for Protocol II to be applicable, there are some demands that have to be met. These are; a conflict in a state has to be between the state’s forces and rebellion, armed forces or other organized groups. Further, this rebellion group must exercise such control over their territory that they can perform coherent and coordinated military actions. If these demands are not met, the conflict falls outside the frame of the Protocol’s applicability. Protocol II is therefore not applicable to riots or other isolated or sporadically acts of violence. Every person affected by the internal conflict must apply the Protocol and no one must be discriminated because of race, religion, sex, ethnical or social heritage, language, and political or any other circumstance.

In conclusion, the only rules that regulate internal conflicts are the common article 3 and the second additional protocol.

71 Supra note 61, p 255
72 Supra note 61, p 255
73 For reasoning in this part see Bring, Folkrätt för totalförsvaret, p 256
74 Supra note 61, p 71
75 Second Additional Protocol to the Geneva Conventions, 1977, article 1
76 Id, article 2
4.1.2.4. The UN-charter

Even though the UN-charter is part of the conflict prevention part of public international law and both the Geneva Convention and The Hague regulations are part of the humanitarian law, there are certain rules in the charter that are relevant to the issue of belligerent occupation. Article 2 (4), the prohibition of use of force and article 51, the right to self-defense, are both regarded being part of customary law. These articles are therefore binding for Israel as well as the occupied Palestinian territories.

4.1.3. Human rights law

Israel claims that human rights apply in peacetime while international humanitarian law in wartime. Since there is not peace in the area, human rights instruments do not apply. This view is not acceptable; human rights apply in all times, war as well as peace. Human rights are rights for the individual and duties for the state. The documents in question here are mainly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Since Israel has ratified both, in 1991, they are bound by them. In the ICCPR, article 4 states that derogation from the convention can be made if public safety demands it, Israel claims that their state, since 1948, is in a state of emergency and Israel has therefore the right to derogate from certain rights. But Israel has only officially derogated from article 9, the right to liberty and security of person. They are therefore under an obligation to respect the remaining rights. Relevant to this issue are; article 17; no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation, and article 12; 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. The latter is especially interesting in regard to the access to the holy places in Jerusalem. As regards the ICESCR, that instrument includes a number of relevant provisions; the right to work (articles 6 and 7); protection and assistance accorded to the family and to children and young persons (article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right “to be free from hunger” (article 11); the right to health (article 12) and the right to education (articles 13 and 14).

4.2. Relevant case law

In order to show how different courts interpret the instruments in international law, I have chosen to summarize the Advisory Opinion from the ICJ and the last relevant case regarding the wall from the Israeli High Court, the decision regarding the Alfei Menashe enclave. The reasons why I choose these two cases are that they are both fairly new and one is from an international court and the other from a national.

4.2.1. ICJ’s Advisory Opinion

The organization of the UN includes among other institutions, the General Assembly and the Security Council. If the Security Council intends to act there are five countries that can issue

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77 This statement is based on a lecture held by Wrange, Pål, during the course “Globalisation, Human Rights and Corporate Responsibility” at Stockholm University, February 10, 2005 and a lecture held by Professor Wouters, Jan, during the course “Public International Law” at Catholic University of Leuven, Belgium, Autumn 2004
Due to the fact that the veto often is used for political reasons, the Council have had difficulties acting in the conflict between Israel and the occupied territories. This is also the case regarding the wall. The General Assembly has in reality no real power, but in 2003 they requested the ICJ to investigate the legal consequences of the construction of the wall. According to article 65 the Court “may give an Advisory Opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”\textsuperscript{79}. It is therefore clear that the Court have jurisdiction and competence to give an opinion in this case. Before the Assembly commissioned ICJ, one member state had proposed a resolution to condemn the wall and order the seizure of the building, but the U.S. choose to veto that resolution.

The question ICJ were to solve was “What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”.\textsuperscript{80} On July 9, 2004, the opinion was ready and on 20 July the General Assembly approved it.

4.2.1.1. Relevant rules and principles of international law

In order to be able to indicate the legal consequences of the wall the Court must first determine whether or not the wall is in breach of international law. The Court starts with an analysis of the status of the territory concerned, and then looks at the already constructed wall or, in course of being constructed, in that territory. They find that the territories situated between the Green Line and the former eastern border for Palestine was occupied by Israel in 1967. According to customary international law these territories are therefore since then still occupied, under the occupying power if Israel. The Court finds that the construction of the wall has also led to a new administrative regime. Residents in special areas may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. Most residents have received permits for a limited period and access to and exit from these areas is only possible through access gates, which are opened infrequently and for short periods.

The Court starts by examining article 2, paragraph 4, of the UN-Charter, which reads “all members shall refrain in their international relations from 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”. ICJ has previously stated that this principle, as well as the illegality of territorial acquisition resulting from the threat or use of force, reflects customary international law.\textsuperscript{81} The right to self-determination is in the Court’s view a right \textit{erga omnes}.\textsuperscript{82} The Court then turns to international humanitarian law, mainly The Hague Convention of 1907 and the fourth Geneva Convention of 1949. Israel is not a party to the Hague Convention, but the provisions of that convention have become part of customary law and are recognized by all the participants in the proceedings before the Court. Regarding the Geneva Convention, Israel disputes the applicability regarding the occupied territories; the Court finds

\textsuperscript{78} See note 18
\textsuperscript{79} Statute of the International Court of Justice, Article 65, paragraph 1
\textsuperscript{80} Supra note 38, paragraph 1
\textsuperscript{81} International Court of Justice, (Nicaragua v. United States of America) \textit{Military and Paramilitary Activities in and against Nicaragua}, 1986
\textsuperscript{82} Obligations \textit{erga omnes} are those obligations owed by States that relate to rights of such great importance that all States have undeniable interests in their perpetuation.
however that both Israel, since they on a number of occasions, have applied the convention towards the occupied parts, and Palestine, which in 1982 gave a unilateral undertaking to apply the Convention, are bound by that convention. The Convention is applicable if two conditions are fulfilled; the first is that there must be an armed conflict and the second is that the conflict is between two contracting parties. The Court finds the fourth Geneva Convention applicable in the occupied territories.

Furthermore, Israel claims that ICCPR and ICESCR, both of which Israel have ratified, are not applicable to the occupied Palestinian territory. Israel asserts “humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.” In order to determine this issue, the Court addresses first the issue of the relationship between international humanitarian law and human rights law and then the issue of the applicability of human rights instruments outside national territory. The conclusion they reach is that the protection of human rights law does not cease in case of armed conflict, that, in order to answer the question given to the Court, they must look at both branches of international law, namely human rights law and, lex specialis, international humanitarian law. Finally, the Court finds that these human rights instruments are applicable as Israel exercises their jurisdiction outside its own territory. Israel is therefore bound by both conventions.

4.2.1.2. Whether the construction of the wall has violated those rules and principles

A report by the UN in 2003 points out several violations of international law; the construction is an attempt to annex the territory contrary to international law, the annexation of land interferes with the territorial sovereignty and therefore also with the right of the Palestinians to self-determination, the construction constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force and finally that the route of the wall is designed to change the demographic composition of the occupied territory. Israel, for their part, claims that the sole purpose of the wall is to enable it effectively to combat terrorist attacks launched from the West Bank and they claim that the wall is a temporary solution, as soon as the Palestinian terror ends, the wall is unnecessary.

The Court starts by establishing that the principle prohibiting the acquisition of territory by the use of force is customary law. They continue with the issue of self-determination, where the Court first certifies that the Palestinians’ right to this has been recognised on several previous occasions, and it is therefore not disputed that they have that right. The Court then proceeds to the issue that Israel transfers parts of its own population into the occupied territory, which is prohibited according to article 49, paragraph 6, of the fourth Geneva Convention. Israel has conducted this policy with settlements in the occupied territories since 1977. The Court finds that policy being in breach of international law. Regarding the issue of annexation the Court finds that, even though Israel has given assurance that annexation is not in question, the measures taken by Israel could well become permanent and since large parts of the wall are situated on occupied territory, large parts of the Palestinian areas, about 16 per cent, risks being annexed to Israel. In conclusion the Court finds that the wall severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of international law.

83 Supra note 38, paragraph 102
84 Legal Position of the Palestine Liberation Organization, UN Secretary General's Summary to UN General Assembly, 24th November 2003, Summary
85 Supra note 38, paragraph 122
ICJ then finds that it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of articles 46 and 52 of the Hague Regulations and of article 53 of the fourth Geneva Convention.

The Court further concludes that the construction of the wall, the founding of the so-called closed area between the wall and the Green Line, the wall itself and the establishment of enclaves, have led to restricted freedom of movement for those living on the occupied territories. ICJ means that these restrictions are enhanced “by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied.”

The Court goes on and finds that there have been severe negative effects for the agricultural production. This is due to the fact that “much of the Palestinian land on the Israeli side of the wall consists of fertile agricultural land and some of the most important water wells in the region and many fruit and olive trees had been destroyed in the course of building the barrier.”

The construction furthermore “cuts off Palestinians from their agricultural lands, wells and means of subsistence” and have “led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water.”

The Court establish that, as the wall will cut off Palestinian communities from their water and land, without giving them other means of subsistence, “many of the Palestinians living in these areas will be forced to leave. In this respect the construction of the wall would effectively deprive a significant number of Palestinians of the freedom to choose their residence.”

Auxiliary, the Court finds that, “since a significant number of Palestinians have already been compelled by the construction of the wall, 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 territory.”

The Court is of the opinion that the construction of the wall and its associated rule impede the liberty of movement of the inhabitants of the occupied Palestinian territory as guaranteed under article 12, paragraph 1, of the ICCPR. The construction also impedes the exercise of the right to work, to health, to education and to an adequate standard of living, rights found in the ICESCR. Lastly, the construction of the wall and its associated rule, by contributing to the demographic changes, contravene article 49, paragraph 6, of the fourth Geneva Convention. With regard to forcible transfers of population and deportations, which are prohibited under the Geneva Convention, there is an exception with regard to the security of the population or imperative military reasons. This exception does not apply to paragraph 6 of that article, which prohibits the occupying power from deporting or transferring parts of its own civilian population into the territories it occupies. As to article 53, concerning the destruction of personal property, it provides for an exception where such destruction is rendered absolutely necessary by military operations.

In summary, ICJ is not convinced that the route Israel has chosen is necessary in order to accomplish its security objectives. The Court states that “the wall, along the route chosen, and its associated rule gravely infringe a number of rights for Palestinians residing in the occupied territory, 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 several of its obligations under the applicable international humanitarian law as well as under human rights law.”

86 Supra note 38, paragraph 133
87 Supra note 38, paragraph 133
88 Supra note 38, paragraph 133
89 Supra note 38, paragraph 133
90 Supra note 38, paragraph 133
91 Supra note 38, paragraph 133
4.2.1.3. Self-defence and the state of necessity-claim

Israel claims that the construction is in conformity with article 51 of the UN-Charter, the right to self-defence. Article 51 reads “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The UN thus recognizes the right to self-defence in the case of armed attack by one state against another state, but Israel does not claim that the attacks against it are imputable to a foreign state. In addition, Israel exercises control in the occupied areas and that, as they themselves state, the threat, which it regards as justifying the construction originates within, and not outside, that territory. Thus, article 51 has no relevance in this case.

Israel also claims a state of necessity, which would preclude the wrongfulness of the construction. Regarding this argument the Court considers what was stated in the 1994 case called the Gabčíkovo-Nagymaros Project. There the Court determined that the state of necessity is a ground recognized by customary international law, which only can be accepted, on an exceptional basis. Further, the claim can only be invoked under certain strictly defined conditions, which must be cumulatively satisfied and the State concerned is not the sole judge of whether those conditions have been met. One of the conditions set up is that the act challenged is the only way for the state to safeguard an essential interest against a grave and imminent peril.

The Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the threat, which Israel has invoked as justification for the construction of the wall. The Court therefore finds that Israel cannot rely on neither the right to self-defence nor on a state of necessity-claim, in order to “preclude the wrongfulness of the construction”. The Court conclusively finds that “the construction and its associated rule, is contrary to international law”.

4.2.1.4. Legal consequences of the construction of the wall

ICJ examines the consequences of the violations by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the UN. The Court determines first that Israel is under an obligation to comply with international obligations, such as humanitarian law and human rights, to respect the right of the Palestinian people to self-determination and to ensure freedom of access to holy places. Then they turn to the well-established principle of the obligation of a state responsible for an internationally wrongful act to put an end to that act. Israel must therefore cease forthwith the works of construction and the associated rule. Israel finally has the obligation to make reparation for the damage caused to all the natural or legal persons concerned.

Certain obligations violated by Israel include obligations erga omnes; these are for example the obligation to respect the right of the Palestinian people to self-determination. Such obligations are by their very nature the concern of all states and all states can have a legal interest in

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92 International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1994
93 The International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, 2001, article 25
94 Supra note 38, paragraph 140
95 Supra note 38, paragraph 142
96 Supra note 38, paragraph 142
their protection. ICJ finds that because of the character and importance of the rights and obligations involved, all states are under an obligation not to recognize the illegal situation resulting from the construction of the wall and also under an obligation not to render aid or assistance in maintaining the situation created by the construction. In addition, all states parties to the fourth Geneva Convention are under the obligation, according to the Geneva Convention article 1, to ensure compliance by Israel with rules of international humanitarian law embodied in that Convention.

Finally the Court finds that the UN has an obligation to consider what further action is required to bring an end to the illegal situation that has arisen due to the construction of the wall and what further actions they need to take to put an end to the conflict between Israel and Palestine in order to make it possible for them to live side by side in peace and security.

4.2.2. Israeli High Court of Justice’s decision of September 15, 2005

The village in question in this case is Alfei Menashe, an Israeli town in the Samaria area. It was established approximately four kilometres beyond the Green Line. Pursuant the military commander's orders, a separation fence were built, surrounding the town from all sides, and leaving a passage containing a road connecting the town to Israel. A number of Palestinian villages are included within the fence's perimeter. The separation fence cuts them off from the remaining parts of the Judea and Samaria area. An enclave of Palestinian villages on the "Israeli" side of the fence has been created. Petitioners are residents of the villages. They contend that the separation fence is not legal. This contention is based upon the judgment in the Beit Sourik Case and relies also upon the Advisory Opinion of the ICJ. The question before the Court is therefore if the separation fence is legal.

On September 15, 2005, a panel of nine justices ordered the state of Israel “to reconsider, within a reasonable time, alternatives to the route of the Barrier by Alfei Menashe”99. This was the first time the Israeli Court voided a section already built, by stating that the consisting route of the barrier disproportionately violates the human rights of Palestinians living in that area. The Court also directed Israel to consider an alternative solution and stated that the military commander in the West Bank must protect the lives and ensures the safety of the settlers, and that the construction of the wall in general, therefore is lawful. This ruling directly contradicts the conclusion reached by the ICJ. The ICJ found that the settlements breach international law and that Israel therefore is forbidden to take measures that perpetuate or annex them, according to the ICJ, the sections of the barrier intended to achieve these ends are illegal.

4.2.2.1. Background to the case and the petition

In September 2000 the second intifada broke out. A high number of terrorist acts committed by the Palestinian side have led Israel to take security steps of various levels of severity. Despite these measures, the terror did not come to an end. This is, according to the Israeli state, the background behind the decision to construct the separation fence. Israel further claims that the fence is a means of security and that it does not reflect a political border, or any other border. Under the circumstances that the fence is built on private land, there is an administrative process of issuing an order of seizure and payment of compensation for the use of the land.

98 H.C.J. 7957/04, Mara'abe v. The Prime Minister of Israel, Introduction
99 High Court in precedent-making decision: Dismantle section of the Separation Barrier, Retrieved October 20, 2005 from http://www.btselem.org/English/Special/20050916_Ruling_on_Alfei_Menashe_Enclave.asp
The seizure order can be appealed to the military commander. If the appeal is rejected, the landowner is given a seven-day period to petition the High Court of Justice. The fence circumscribes Alfei Menashe and five other Palestinian villages. There is one crossing and three agricultural gates in the fence surrounding the enclave.

Petitioners contend that the separation fence is illegal, and should be dismantled and that the separation fence does not satisfy the standards determined in the Beit Sourik case. Petitioners argue that the fence is disproportionate and discriminatory. On the merits, they argue, based on the Advisory Opinion that the military commander is not authorized to make the decision to erect a separation fence, as ruled in the Beit Sourik case.

4.2.2.2. The normative outline in its case law

The state of Israel holds the area, in which the Alfei Menashe enclave is situated, in belligerent occupation. The long arm of the state in that area is the military commander, who gets his powers from public international law. The legal meaning of this view is that Israeli law does not apply in these areas since the areas are not annexed to Israel and that the legal rule in these areas is determined by public international law; mainly the Hague Regulations and the fourth Geneva Convention. Since Israel has stated their intention to follow the rules in both regulations the Court finds no need to examine that issue deeper. A third set of rules that also applies is the basic principles of Israeli administrative law, which set out the rules for a public official's governing power. These principles include for example rules of substantive and procedural fairness, the duty to act reasonably, and rules of proportionality.

The next issue before the Court is the military commander’s authority to, under the laws of belligerent occupation, order the construction of the barrier. The Court has answered this question negatively in the previous Beit Sourik case, if the reason behind the construction is a political goal of annexing certain territories. If the reason instead is security, the commander is authorized. The Court states that a military commander only has temporary authority, since belligerent occupation is inherently temporary. The commander cannot deal with permanent arrangements. In this area the occupation has lasted for many years and that fact affects the scope of the commander’s authority. The Court finds that that fact cannot allow the commander “to take into account considerations beyond the proper administration of the area under belligerent occupation”. The commander is also authorized, if it is necessary for military needs, to take possession of land belonging to Palestinians, as long as the commander takes into account the needs of the local population and provide compensation. To the extent that the fence is a military necessity, infringement of private property rights cannot, negate the authority to build it. The Court then determines that the construction is not related to expropriation or confiscation of land, prohibited in the Hague Regulations and that the construction does not involve transfer of ownership of the land upon which it is built. Instead, the construction is done by taking of possession, which is temporary and accompanied by payment of compensation for the damage caused. Such taking of possession is permissible according to the law of belligerent occupation (articles 43 and 52 of the Hague Regulations and article 53 of the fourth Geneva Convention). Pursuant to article 53 of the fourth Geneva Convention, the taking of possession must be rendered absolutely necessary by military operation. The key question is whether taking possession of land is rendered "absolutely necessary by military operation". This issue is for the military commander to decide. The Court concludes that they can leave this issue for decision at a later opportunity. The underlying principle behind the military commander's authority to construct a separation fence for security and military rea-

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100 Supra note 98, Introduction, Arguments of the Israeli state, My own summary
101 HCJ 2036/04, Beit Sourik Village Council v. The Government of Israel
102 Supra note 98, paragraph 15
sons includes, first and foremost, the need to protect the army in the territory under belligerent occupation but it also includes defence of the State of Israel. The next question the Court turns to is therefore if the commander also has authority to construct a separation fence in order to protect the lives and safety of Israelis living in Israeli communities (settlements) in occupied areas. This question arises in light of the fact that Israelis living in those areas are not protected persons, according to article 4 of the fourth Geneva Convention. The Court answers this question in the affirmative; the authority is general and covers any person present in the territory held under belligerent occupation.

In determining the route of the fence the commander has to consider certain things. The first is the security-military consideration, by force of which the commander is permitted to weigh considerations of the security of the state, the security of the army, and the personal security of all present in the area. The second is the good of the local Arab population; the commander must defend the human dignity of every member of the population. Therefore the commander has to weigh security needs on the one hand and the needs of the local population on the other, and by balancing them, reach a solution. This balance needs to be done with regard to proportionality; first between goal and means, then which alternative is the least harmful and thirdly that the damage caused to the individual by the means employed must be of appropriate proportion to the benefit stemming from it.

4.2.2.3. Comparison with the Beit Sourik case

In this case the legality of the construction of a part of the separation fence was discussed. Most of it was built east of the Green Line and included in its Israeli part, a number of Israeli settlements, which were built on occupied territory, near the line. The Court first discussed whether the military commander was authorized to order the construction of the fence, in light of petitioners' argument that a political consideration, and not a military one, lies at the foundation of its construction. The Court held that the military commander's authority is limited to military-security considerations. He is not authorized to take political reasons into account. The Court examined the facts before it and determined that the reason for erecting the fence was a security reason, the commander was therefore authorised to take the decision. The second question regarded the legality of the orders issued in order to take possession of the land upon which the fence was built. The Court found that there had been no defect in the process of issuing the orders or in the process of allowing the submission of appeals. The Court determined that the military commander was authorized, according to the international law that applied in the area, to take possession of land, needed for military purposes, subject to his duty to pay compensation. The third question discussed by the Court was the legality of the route chosen for the construction. The Court discussed the need to achieve a balance between the security-military needs and the rights of the protected residents. In the discussion of the appropriate balance, a large part of the judgment was devoted to the question of proportionality. A comparison was made between the intensity of harm to security (without the security fence) and the harm to the local residents (caused by the security fence). The Court examined the five segments of the fence separately, but also the compound harm caused to the lives of the local population by all the segments together. Some of the segments were found to be proportionate, others disproportionate. After the judgment in this case was handed down, the issue went back to the military commander. He re-examined the route that had been under discussion and made alterations to it, which, in his opinion, implement the content of the judgment. Eight petitions against the legality of the new route are still pending, awaiting the Court’s interpretation of the Advisory Opinion.
4.2.2.4. The differences between the Advisory Opinion and the Beit Sourik case

The Israeli Court concluded that the Advisory Opinion is not binding for the states but that the ICJ is the highest judicial body in international law and that the opinion therefore deserves and shall be given, appropriate weight. The Court finds that almost all the facts in the two cases are similar; despite this the two courts came to different solutions. The ICJ held that the building of the wall is contrary to international law, while the Court in the Beit Sourik case held that each segment of the route should be examined. Regarding some segments of the fence, it was held that their construction did not violate international law and regarding others that they did. Against the background of this difference, two questions arise. The first, what is the basis of this difference, and how can it be explained? The second, how does the explanation of the difference between the conclusions of the two courts affect the approach of the Supreme Court of Israel regarding the question of the legality of the separation fence according to international law generally, and the question of the legality of the separation fence in the Alfei Menashe enclave, specifically?103

The ICJ is not persuaded that the route of the wall is necessary to achieve the security objectives contended by Israel while in the Beit Sourik case the erecting, in most parts, was found to be necessary. The main difference between the legal conclusions originates from the difference in the factual basis.

The first difference regards the security-military necessity to erect the fence. In the Beit Sourik case the Court found that there were no political reasons for the fence, just ones of military necessity, while ICJ found that neither the wall nor the route chosen are necessary, they imply that there are political goals, to annex parts of the occupied areas to Israel, instead of military necessity. The second difference between the two judgments regards the factual basis of the scope of the impingement of the local residents' rights. The Israeli Court found that the impingements are extensive and in the light of the military needs, the Court decided which segments that illegally violate the rights of the local population and which do not. ICJ, according to the Israeli High Court, gave a lot of weight to the issue of impinged rights while no weight was given to the security-military needs, and therefore the questions of the proportionality of the impingement were not discussed at all. Another difference is that in ICJ, the parties to the case did not participate while in the Beit Sourik case they did and furthermore, the Israeli Court criticises ICJ for the fact that they did not examine the wall segment by segment, but only considered the construction as a whole. The Israeli Court finally states that they will give the Advisory Opinion appropriate weight but that they continue to consider each segment’s legality according to the proper balance between security-military needs and the rights of the local population.

4.2.2.5. The legality of the separation fence in the case of Alfei Menashe

Petitioners contend that the fence route around the enclave causes damage, which is disproportionate while the state claims that the construction of the fence is a security act intended to provide a temporary solution to the terrorism offensive, both in Israel and in the enclave.

The military commander is authorized to order the construction of the separation fence in the area, if the reason behind it is a security-military one. He is not authorized to order the construction of the fence, if the reason is of political character. The Court has reached the conclusion that the reason behind the decision to erect the fence is a temporary security reason, the protection of Israeli communities against Palestinian terrorism. The Court finds that this is the case regarding the separation fence in general, and also in this specific case. Their

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103 Supra note 98, paragraph 58
conclusion is therefore that the decision to erect the separation fence at the Alfei Menashe enclave was made within the authority of the military commander. The Court then proceeds to the question whether the commander's authority to erect the security fence has been exercised proportionately.

First, the Court looks at the scope of the injury to the local residents regarding education, health, employment, movement and social ties. Petitioners claim that most of the children in the enclave villages attend the schools located on the other side of the separation fence. There are no hospitals or clinics in the enclave villages. After the construction of the separation fence, the inhabitants are forced to prearrange any visit with a doctor, who must pass through one of the fences, during fence opening hours. There is no solution in the case of an urgent medical situation. Due to the separation fence, many inhabitants have difficulties reaching their place of work and many of the workers who worked in agriculture lost their jobs, due to their inability to reach their jobs at the times necessary for agriculture. Petitioners claim that the separation fence severely damages the ties between the enclave villages and Qalqiliya and Habla. Prior to the construction, it was possible to reach the villages within a few minutes but after the construction, the journey takes several hours.

The Court then looks at the question whether the injury to the residents of the Alfei Menashe enclave villages is proportionate. Proportionality is tested according to three subtests. The first subtest holds that the injury is proportionate only if there is a rational connection between the desired objective and the means being used to achieve that objective. The second subtest determines that the injury is proportionate only if there is no other less injurious means, which can achieve the desired objective. The third subtest holds that the injury is proportionate only if the impingement upon human rights is of appropriate proportion to the benefit gained from it. The Court finds that the separation fence creates a separation between Palestinian terrorists and Israelis and from that standpoint they conclude that the required rational connection exists. Then the Court examines whether it is possible to ensure the security of Israelis through a different fence route, whose impingement upon the rights of the local residents would be a lesser one. The Court finds that the existing route of the fence seems strange and is not convinced that the fence route creating the Alfei Menashe enclave has satisfied the second subtest of proportionality. Respondents must reconsider the existing route. The Court determines that there is no need to examine the third subtest since they reached a decision in the second subtest. The Court therefore orders a reconsideration of the various alternatives, which injure the fabric of life of the residents of the villages of the enclave to a lesser extent.

4.3. Relevant resolutions from the Security Council

As early as November 22, 1967, the Security Council unanimously adopted resolution 242, which emphasized the inadmissibility of acquisition of territory by war and called for the withdrawal of Israeli armed forces from territories occupied in the recent conflict and termination of all claims or states of belligerency. The resolution was taken under Chapter 6 of the Charter, as a recommendation, instead of under Chapter 7, as binding for its member states. Israel did not follow the resolution, but instead, increased their acquiring of land. On October 22, 1973, the Security Council adopted resolution 338, which calls for an immediate cease-fire and an ending of all military activity. The resolution also calls for the implementation of the previous resolution 242. These two resolutions constitute the ground for a comprehensive solution of the conflict and are probably the most important ones of all the many resolutions taken. In 2002 resolution 1397 was adopted. For the first time ever, the Security Council adopted a resolution that explicitly supports the founding of a Palestinian state. The U.S., who previously had blocked similar initiatives by threatening with their veto, presented it. The
resolution presents “a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders”. Furthermore, it demands an immediate seizure of all acts of violence, including acts of terror, provocation, incitement and destruction and that the peace negotiations must be resumed. This resolution was the first one to mention the two-state solution with the state of Israel and Palestine and that is an important step in the right direction.

5. Analysis

The wall constitutes both humanitarian and legal issues. Among the humanitarian are the destruction of Palestinian houses and the increased difficulties for the Palestinians to reach places for education, work and medical care. Among the legal ones is the fact that the wall is placed partly on Palestinian land. Had the wall been placed along the Green Line, the discussion, as well as the conclusion of the legality of the wall, might have been different. As a reminder, Israel is, as a member of the UN, bound to follow international conventions and the international humanitarian law.

5.1. Violations of international law

When determining whether there are any violations, I have to take into account all aspects of international law. This means that I will look at humanitarian law; The Hague Regulations, the fourth Geneva Convention and the UN-charter, human rights law; ICCPR and ICESCR, and finally principles in international law, such as the principle of self determination, prohibition of acquisition of territory by the use of force and the principle of proportionality.

5.1.1. The Hague Regulations of 1907

In article 55 in the Hague Regulations, there is a prohibition for the occupying power against making permanent changes to the occupied area. Israel has violated this with their policy with the settlements, as well as the system with passages built on Palestinian land to bind the settlements to each other and Israel. By constructing the wall partly on Palestinian land, Israel is again violating this article as they risk permanently changing the occupied area. Israel is in fact drawing up a new border towards the occupied territories, making those territories smaller.

5.1.2. The Fourth Geneva Convention of 1949

One of the articles in the Convention, article 33, contains a prohibition on collective punishment. Israeli actions on occupied areas have often the character of collective punishment where residential houses that belong to, what the Israelis refer to as guilty, families, are torn down. Israel is therefore in breach of this article as no person may be punished for an offence, which he or she did not personally commit.

According to article 47, benefits or rights given to protected persons, according to the Geneva Convention, living on occupied ground must not be deprived these due to changes of the occupation, for example that the occupying power partly annexes the occupied area. This means that regulations in the Convention, such as the prohibition on forced movements, are absolute and must never be violated. Israel is violating this article for example by not re-

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specting the protected person’s right not to be moved according to article 49 and by destroying their houses and their land, article 53.

Another prohibition found in this Convention, is the prohibition against forced movement or deportation of persons from occupied territory to the territory of the occupying state and the prohibition of the occupying power to move its own population to occupied areas, article 49. Israel has on several occasions violated this prohibition, for example by placing their own population on occupied ground in settlements. According to the article, it is not allowed to move the own (Israeli) population to occupied Palestinian territory. Israel has furthermore violated this article by deporting Palestinians. The construction of the wall has meant that Palestinian population are being deported since the wall extends to Palestinian land, they have not been able to remain in their homes. In his report from August 2004, John Dugard, finds that 80 per cent of the settlers on the West Bank will be incorporated in Israel. Benjamin Netanyahu has also confirmed that this in fact is a conscious policy.105 More than 13,500 Palestinians that live on the wrong side has, according to Dugard, applied for permits to live in their own homes, these permits sometimes have to be renewed every other week. This is why Dugard calls this policy a forced movement-policy.106 The illegality of the settlements and the construction of the wall to protect them have also been confirmed by ICJ in their Advisory Opinion.

Article 52, the support of the occupying power towards the workers in occupied territory, states that every measure taken in purpose of cause unemployment or restrict the work opportunities for them, is prohibited. By constructing the wall, many Palestinians experience increased difficulties in reaching their places of work due to the restricted hours passage is allowed through the wall. In addition, even if you have a passing permit you cannot be sure that you will be allowed to pass since the allowances to pass are used in an arbitrary manner. Farmers who have their land on the other side of the wall are often not allowed to pass at the early hours they need. Because of this, it is often likely that they will be forced to quit working with agriculture, which leads to unemployment for them.

According to article 53, extensive destruction of houses, not directly motivated by an immediate need in battle, is illegal and considered being a war crime. Israel has also violated the prohibition against destruction of property, article 53, as they, by the construction of the wall, takes a lot of Palestinian personal property located on the occupied area in demand. Israel has, for a long time, been using demolition of houses in its policy towards Palestinians. The result for the people affected can be a destruction of the family unit, a decline in the standard of living and, for children in particular, a severe psychological impact. During the second intifada in 2000, the demolition was intensified. About 15 per cent of the demolition is towards the family or neighbours of Palestinians who have carried out, or are suspected of carried out attacks against Israel. These punitive demolitions constitute serious war crimes, in art. 53 in the fourth Geneva Convention there is a prohibition for the occupying power against destruction of civilian property unless rendered absolutely necessary by military operations. These demolitions do not meet up to the demands of the commentary of the ICRC, they are not carried out in the context of hostilities with a view to combat, they are not a part of a military operation and they are not absolutely necessary.

In the occupied territories, more than every fifth child under the age of five suffers from malnutrition and more than half of the Palestinian families can only eat one meal a day. According to article 59 in the convention, the occupying power has a responsibility to make sure

106 Supra note 37
107 Military needs are not to be interpreted widely, preventive demolition is not allowed.
that the people living under occupation has access to food and water and must not prevent the populations own access to that. Israel does not live up to these demands.

5.1.3. The UN-charter

The UN-charter is, in large parts, regarded as customary law and Israel is a member of the UN, the Charter therefore binds Israel. Article 2 (4) contains the prohibition of use of force and article 51 the right to self-defense. The prohibition in article 2 (4) must be interpreted extensively and is consequently almost absolute. Only two exceptions to the prohibition exist; a state’s right to self-defense, a right that must be transferred to the Security Council as soon as possible, and the Security Council’s right to decide on armed sanctions to maintain international peace and security according to the Charter’s chapter VII.108 This means that any unilateral use of force not sanctioned by the UN is unlawful, unless the issue of self-defense according to article 51 is involved. Israel is using force as they take land by use of the military in order to be able to build the wall and is therefore violating article 2(4). The definition of the prohibition has extra strong meaning in the occupied areas, where the definition has strengthened the principle “no fruits of aggression”. This means that states must not recognize situations achieved through acts of aggression. An occupation that does not cease gets the character of illegal use of force or threat of use of force against the occupied people.109 The present situation in the occupied areas can consequently be regarded as an act of aggression, a violation of article 2 (4) in itself.

The prohibition of acquisition of territory by the use of force is a principle that is based on the thought that an illegal act cannot give birth to a right in law. Despite this, the international community has accepted the results of illegal aggression in several cases. Conquest does not constitute a basis for title to the land, but it does give the victor certain rights under international law, the rights of occupation. Sovereignty does not pass by conquest to the occupying part and complex situations may arise if the legal status of the occupied territory is in dispute, such as in the Palestinian - Israeli case. Conquest can result from an illegal or legal use of force, it is not the successful use of violence that constitutes the valid method of acquiring territory in international law. An annexation proclaimed while a war is ongoing is not valid, the judicial status of the territory can only be finally determined after the war is concluded. After the Second World War, the Nuremberg Tribunal declared that annexation taking place before the conclusion of a war was ineffective and invalid according to international law.110 Today it is clear that acquisition of territory by force is illegal under international law, support for this can be found in the UN-charter article 2(4), state practice, in Security Council resolution 242 (see under 4.3.) and 662 (1990) and also in the 1970 Declaration of Principles of International Law adopted by the General Assembly111. Any acquisition of land by use of force needs a further action of international nature beside domestic legislation to annex, this action must also be recognized internationally. The taking of Palestinian land by the construction of parts the wall on Palestinian land constitutes an illegal annexation of these occupied areas by use of force.

The only exception to article 2 (4) is article 51. Since it is an exception, the right must be interpreted narrowly.112 The right to use self-defense is dependant on the occurrence of an

108 Supra note 32, p 73
109 Supra note 32, p 85
111 The declaration reads in the preamble, paragraph 1: "The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal."
112 Supra note 32, p 186
armed attack. An armed attack does not have to be a massive military operation, an effort against one airplane or one ship is enough as long as the defense is reasonable and proportionate. To have the right to self-defense, the armed attack has to be on a certain level and of certain intensity. A state’s right to self-defense is limited by the principle of proportionality. This principle does not regulate the right to self-defense but the ways in which self-defense can be exercised. The principle is: no more violence than military necessity demands.

The question in the case of the wall is therefore 1) does Israel have a right to self-defense and 2) is the wall a disproportionate measure. In order to answer question number one, I first have to determine whether Israel is under an armed attack. I believe that it is safe to say that, due to the many attacks by Palestinian suicide bombers, Israel is under armed attack and has, therefore, right to self-defense. But, has Israel used more violence than necessary in order to protect themselves against the suicide bombers? The answer to this question depends on how you value innocent Israeli lives against the restrictions the wall brings for the Palestinians; their access to food, job, medicine and so on.

As a matter of course, Israel has the right and duty to protect its citizens from attacks. However, the building of the wall as a means to prevent attacks inside Israel is the most extreme solution that causes the greatest harm to the local population. Therefore I find that the wall is not the ultimate solution. There has to be a solution that is less impinging for the Palestinians. It is not realistic that they cannot reach their schools, their own land, their job and hospitals, there has to be other means to stop the bombers. Even if the suicide attacks have dropped radically, attacks still occur. The decline in suicide attacks is primary dependant on the fact that Hamas has had two extensive cease-fires on these bombings during one year. This proves that the wall is not the proper way to stop the attacks. The wall is disproportionate and therefore illegal according to article 51 and the building must immediately end and the parts already built, must be torn down.

The idea that people have an inherent right to decide over their own destinies can be derived back to the days of the French revolution. After the Second World War, it was decided that the defeated parties, Germany and Turkey’s, colonial empires, would be terminated in favor of the League of Nations mandate system. The mandates were divided in A, B and C mandates, where A meant that it would lead to total political independence. The British mandate over Palestine was in fact an A mandate but did not lead to self-determination for the Palestinian people.

The principle of a people’s right to self-determination is asserted in article 1 (2) and article 55 in the UN-charter. It can also be found in the ICCPR and ICESCR article 1 (1). The principle can be regarded as a rule in international law. Self-determination can be realized in at least two ways; either through a development towards self-governing or through development towards full political independence. Article 2 (7) in the UN-charter works as a protection of a territorial status quo and the Charter’s article 2 (1), regarding a state’s sovereign equality, works in the same way. This right has later been confirmed in a resolution (1514) from the General Assembly in 1960 and in the General Assembly declaration from 1970, called the Friendly Relations declaration (FRD). In the resolution it is clarified that the principle of self-determination is the people’s right to self-determination. In the declaration, the principle was specified, people now had the right to freely and with no outer involvement decide over their political conditions and every state were given a duty to respect this right according to the

113 International Court of Justice, April 9, 1949, The Corfu Channel case
115 Supra note 32, p 187
116 Supra note 32, p 189
117 Supra note 110, p 444
Charter. In order to know who successfully can claim self-determination, it had to be established what constitutes a people. It is hard to set up clear features as to what constitutes a people, but it can for instance be distinguishing features such as language, culture, history and ethnicity. There is a difference between external and internal right to self-determination. The internal part regards legitimate demands on certain circumstances within an existing formation of a state, for example demands on autonomy, while the external part regards new states that previously have been denied political independence. The external part concerns three different people; those oppressed by a colonial power, those obeying a racial regime (meant to be applied to the black community in South Africa) and those obeying under foreign dominance (meant to be applied towards the Palestinians living on occupied territory). The right to self-determination can only be assumed if the people in question are regarded, by themselves and the international community, as a nation. The Palestinian people take a unique position because of the recognition of Palestine/PLO as state, nation or international actor. Other areas, where the reaction in the world around is weaker than the case of Palestine, are for example Kurdistan and Tibet. Ever since 1947, the General Assembly has been involved in the Conflict in the Middle East. They have always stated that the solution to the conflict lies in giving the Palestinian people their right to self-determination.

5.1.4. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

According to article 12 in the ICCPR, everyone shall have the right to liberty of movement and freedom to choose his residence. One of the most obvious expressions for the Palestinians of the occupation is the extensive restriction on their freedom of movement. The restrictions can be within the West Bank and Gaza or between Israel and the West Bank/Gaza. Examples of restrictions on the West Bank are the system with permits, checkpoints and curfews, separate roads, prohibited for use by Palestinians, linking settlements to each other, also aggravate travel within the area. All the systems are operated arbitrarily. As a result of these restrictions the unemployment is more than 50 per cent and the number of people living in poverty is also over 50 per cent, the restrictions also leads to humiliation, suffering, and inconvenience for the Palestinian people and the decline of the Palestinian economy. The permit systems can be compared to those “pass laws” used to determine the right of Africans to move and reside in the so-called white areas during the apartheid regime in South Africa. The difference is that these laws were administrated uniformly, the Israeli laws are not. In article 12 there is an exception, which says that these rights can be limited according to law if necessary in order to protect national security, public order, public health care or to protect other persons’ rights according to this convention. The question here is therefore if these restrictions are necessary. That question have to be answered in the negative, there can be no reason that justifies these very severe restrictions that leads to high unemployment and a decline in the whole Palestinian economy. The fact that the restrictions in addition are administered in an arbitrary manner, speaks furthermore to their illegality.

Article 17 is a protection against arbitrary or illegal intervention in ones private and family life. By taking Palestinian land, tearing down their homes and by building the wall so that it separates families and relatives from each other, Israel is violating this article. In article 6 in the ICESCR, the right to work is protected. The protection includes an obligation for the state to take measures to secure this right. Israel has done all but securing this

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118 For reasoning see Bring, FN-stadgan och världspolitiken, p 202-203
119 Supra note 37
120 Supra note 6, p 17
right. By cutting farmers from their land and by cutting off the road to Palestinian persons working places with the wall, Israel is violating article 6.

Article 11 contains the right to an adequate standard of living. This includes getting access to enough food and clothes and an adequate place to live. Israel is taking possession of many Palestinian homes to be able to build the wall. That is a violation of this article. In addition, the wall makes it harder for the Palestinians to reach places for purchasing food and clothes. That is also a violation of this article. Due to the Israeli control over water resources and restrictions on watering in agriculture on occupied land, the percentage of the Palestinian income from agriculture had in 2002 dropped from the 1993 level 27 to 7 per cent.\footnote{Supra note 105, p 29}

The right to enjoy the best achievable health is protected in article 12. Because of the wall, Palestinians have difficulties in reaching hospitals and medicine in time. Every visit to a doctor has to be planned in advance since there is no room for emergencies when the walls are closed. This shows lack of respect for medical care and is therefore a violation of this article.

Finally, article 13 recognises the right to each and every one to education. The restrictions in opening hours of the wall have led to the closing of 1,289 schools. This is a direct result of the inability for teachers as well as students to get to school. Israel is consequently violating article 13 in the construction of the wall.

6. Conclusions

The UN special rapporteur on the situation of human rights in the occupied Palestinian territories, John Dugard, have, in several reports, examined the consequences of the construction of the wall on human rights. In the first report Dugard focuses on the consequences of military incursions into the Gaza Strip, particularly the demolition of homes; the violations of human rights and humanitarian law arising from the construction of the wall; and the pervasiveness of the restrictions on freedom of movement. But he also stresses that there are many other violations of human rights regarding killings and injuries, assassinations, incursions, prisoners, curfews, poverty and unemployment.\footnote{Supra note 6, p 7-8} As I can see from my previous chapter, Dugard is right, the construction violates many international rules and has severe humanitarian consequences for the Palestinian people. In addition to the consequences arising from the construction, it is worth mentioning the issue with the settlements. The settlements, in itself forbidden according to humanitarian law, have serious humanitarian consequences for the Palestinian population. Palestinian homes/houses have been destroyed, roadblocks have been set up, land- and water resources have been confiscated and curfews have been initiated. All these circumstances make it harder for the civilian population to live a normal life. The difficulties in reaching hospitals, schools, working places and religious places have had major economical consequences for the Palestinian people.

6.1. The relationship between the wall and the Green Line

Israel preferred the solution with the wall to alternate options that most likely would have caused less harm to the Palestinians. Even if we accept Israel’s claim that the only way to prevent attacks is to erect a barrier, it must be built along the Green Line or on Israeli territory.

The present situation is that the extension of the wall follows only to 15 percent the Green Line and is twice as long as the line. (How the wall is being built in comparison with the Green Line, see appendix 8.) Much of the Palestinian land that is now on the Israeli side is
fertile land and major important water sources. The Israeli human rights organisation B’Tselem calculates that 875,000 Palestinians will be affected in a negative way by the construction and OCHA calculates that 93,000 will be trapped between the wall and the Green Line or be totally surrounded by the wall.\textsuperscript{123} In a UN report from 2004 it is stated that; of 55 openings, 34 are closed for Palestinians, 85 per cent of the present and planned wall is built on occupied ground and that it is necessary to have a permit, 12 different are available, to be able to pass the wall.\textsuperscript{124} On the many places where the wall does not follow the Green Line, it prevents Palestinians access to water, health care, education and their ability to support themselves. Israel has a right to take measures to defend their civilian population, but the measures have to be in conformity with humanitarian law. ICRC means that the wall, where it does not follow the Green Line, violates humanitarian law, as Israel does not live up to their responsibility to treat the population in the occupied territories humanely. ICJ, in their Advisory Opinion, decided that the wall placed on occupied territory is illegal and that Israel has to tear those parts down and compensate those affected.

The wall will most likely be seen as the new border between Israel and Palestine, instead of the Green Line. The fact that the new route follows the Court decision in the Beit Sourik case, gives the route legitimacy.

6.2. Israel’s response to the Advisory Opinion

According to the Advisory Opinion, the wall is illegal. The government of Israel refused to accept the opinion and their initial response was to reject it completely. Instead of following the ICJ, the government followed the decision in the Beit Sourik case, which required that the route must reflect proportionality between Israeli security needs and Palestinian humanitarian needs. Unlike the ICJ, the Israeli Court stated in this case that Israel, as the occupying power, has a right to construct the wall as a security measure. As a result of this decision, the wall was built nearer the Green Line. In September 2005, the case of Mara’abe v. The Prime Minister of Israel came, which, along with other cases, resulted in a suspension of the building in certain areas, but in most parts, the construction continued. The General Assembly has approved the Advisory Opinion and Israel is therefore obliged to follow the opinion and dismantle the wall and pay compensation.\textsuperscript{125} If the Israeli government declines to do this, it should at least honour its own High Court judgment in the Beit Sourik case, which states that the parts of the wall that does not comply with the principle of proportionality should be dismantled. Failure to discontinue the illegal construction will provide evidence of Israel’s intent to annex occupied territories and jeopardize a fragile truce.

6.3. My personal thoughts

After the analysis of international law in the previous chapter I find it clear that, the construction of the wall violates a number of rules in humanitarian law and human rights law. Some of the worst is, in my view, that they do not respect the Palestinian peoples’ right to self-determination and the prohibition on forcible acquisition of territory. As stated earlier, the right to self-determination is closely linked to the notion of territorial sovereignty. It is accordingly

\textsuperscript{123} Supra note 105, p 15
\textsuperscript{124} The Humanitarian Impact of the West Bank Barrier on Palestinian Communities, September 1, 2004, UN
\textsuperscript{125} Committee on the Exercise of the Inalienable Rights of the Palestinian People, 27 May 2005, UNITED NATIONS INTERNATIONAL MEETING ON THE QUESTION OF PALESTINE, United Nations Office at Geneva, 8 and 9 March 2005, Theme: Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society
impossible for the Palestinian people to exercise this right since they do not have a territory. A violation of a principle of customary law is a very serious violation. In my view, what the Israelis are doing, looks dangerously alike annexation of the occupied areas, mainly because it seems as if Israel is trying to change the demographic order of the area as the way of the wall risks becoming the new border between the West Bank and Israel. Annexation, also known as conquest in international law, is prohibited by art 2, paragraph 4 in the UN-charter, a principle of customary law. The wall also has serious implications for human rights. I believe that the worst is the restriction of the freedom of movement for the Palestinians, which worsens their access to health and education facilities. The restraints imposed for the Palestinians on the movement of goods and persons, give rise to unemployment, poverty, poor health care and interrupted education. Checkpoints, closures and curfews have had a major impact on the Palestinian economy. The number of unemployed in the occupied territories is now 40 per cent and 60 per cent of the people live on less than 2 USD per day, which is the UN limit for poverty. There has also been a drop in health standards, due to inability to access hospitals and clinics. The obstruction of ambulances at checkpoints is also a big problem, since ambulances are often held up and sometimes even denied passage. According to B’Tselem, at least 38 persons have died as a result of the Israeli soldier’s denial of access. This is totally unacceptable; people have to be able to reach hospitals in emergencies. In international law, ambulances are given a certain right to travel without serious obstruction.

The Government of Israel has justified its actions on the grounds of self-defence and portrayed them as anti-terrorism measures. We can all agree that Israel has legitimate security concerns, mostly due to previous suicide bombers, but there has to be a limit on the violation of human rights. A fair balance between military necessity and infringement on human rights, by using the principle of proportionality, recognized by international humanitarian law, must be struck. I do not believe that building a wall is the (proportionate) solution, of course the aim of keeping Palestinian suicide bombers on the other side will be achieved, but there has to be a more reasonable, less infringing solution.

Israel claims that the purpose of the wall is to secure Israel from terrorist attacks and draws attention to the fact that terrorist attacks within Israel have dropped, from the first half of 2003 to the first half of 2004, by 83 per cent. But, two objections can be made against this. Firstly, there is no evidence to prove that the same result could not have been achieved by building the wall along the Green Line, secondly, the evidence that the course of the wall within Palestinian territory is required by security considerations is not conclusive. Three more likely explanations as to why the wall is being constructed on occupied territory are; to incorporate settlers within the state of Israel, to seize Palestinian land and to encourage Palestinians living between the wall and the Green Line to leave their homes and move elsewhere, by making life intolerable for them.

Firstly, statistics show that over 80 per cent of the settlers on the West Bank will be included on the Israeli side of the wall. Netanyahu also wrote that the objective of the chosen route of the wall is in fact to incorporate as many settlers as possible into Israel in an article in 2004. The settlements are unlawful under international law and consequently, the parts of the wall that are built to protect these settlements, are also unlawful.

Regarding the second possible objective, the seizure of Palestinian land, lots of rich agricultural land and water resources lying along the Green Line, has been incorporated into Israel. Owners to this land are often Palestinians, living on the other side of the wall, they are fre-

126 Supra note 37
127 Supra note 37, paragraph 17
128 Supra note 105, p 26
129 Supra note 6, p 12
130 International Herald Tribune, July 14, 2004
quently denied access to them. Due to this, there is a danger that these lands will be aban-
doned by their owners, and seized by settlers instead. In the case of Jerusalem, the seizure of
Palestinian land is most obvious. After the Israeli occupation in 1967, east Jerusalem was in
1980 illegally incorporated in Israel. This territory amounts to 1.2 per cent of the West Bank
and has a Palestinian population of 249,000 and there are 12 illegal settlements with 180,000
Israelis living in them. As a result of these settlements Palestinians with homes in East Jeru-
salem, have been forced to build new homes outside the limits of East Jerusalem. The wall is
now being built along this illegal border of Jerusalem and this has a lot of serious conse-
quences; it gives effect to an illegal annexation of parts of Jerusalem into Israel, it separates
Palestinians from each other, it threatens to deprive Palestinians of their residential rights in
Jerusalem and it will worsen the access for Palestinians that has ended up on the other side of
the wall to facilities, such as hospitals, schools, universities, employment and places for shop-
ping, situated in East Jerusalem.

The third possible purpose, to encourage Palestinians living between the wall and the Green
Line (the closed zone/the seam line area) to leave their homes and move elsewhere, was con-
firmed by the Advisory Opinion when it stated that the wall is “tending to alter the demo-
graphic composition of the Occupied Palestinian Territories”[131]. One example of the restric-
tion of movement for those living there is the system of permits. Palestinians living in the
closed zone are obliged to have permits to live in their own homes and Palestinians living
within the West bank with farms in the closed zone need permits to pass into the zone. A
study done by the Israeli human rights organisation B’Tselem shows that the permit system is
arbitrarily applied, some get permits for a few weeks while others get for several months, a lot
of requests for permits are denied without reason and finally the gates are not open as sched-
uled.[132]

Israel further claims that the wall is a temporary solution. At the cost of 2.8 million USD per
km[133] and a total cost of approximately 1.4 billion USD, I find it hard to believe that the wall
is temporary. The wall has all the features of a permanent structure.

The Palestinians call the wall an Apartheid wall. They claim that under art 1 of the Interna-
tional Convention on the Suppression and Punishment of the Crime of Apartheid (1979), the
wall constitutes a crime against humanity. This is based on the notion that the wall divides
populations on the basis of race and ethnicity, it is true that the wall separates Israelis from
Palestinians. The wall falls under the definition of apartheid and is therefore illegal according
to this Convention.

6.4. Final words

The underlying reason for the conflict is the Israeli occupation. In order to break the spiral of
violence, Israel, as the stronger part, has to take their responsibility. By ending the occupation
and securing respect for human rights, peace can be achieved and Israelis and Palestinians can
live peacefully side-by-side, in freedom and security. A two-state solution, with a democratic
Palestinian state, is therefore the only solution to the conflict; both Israel and Palestine can
then enjoy sovereignty. For this to work both Israel and Palestine needs to get guarantees of
security and Jerusalem have to be the capital for both states. The issue with the Israeli settle-
ments must also be settled. There is a solution that already exists, the Geneva initiative,

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[131] Supra note 38, paragraph 133
[132] Not All it Seems - Preventing Palestinians Access to their Lands West of the Separation Barrier in the
Tulkarm-Qalqiliya Area, B’Tselem Publications June 2004, Retrieved 25 November 2005 from
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launched in December 2003. That solution would give the Palestinians almost all of the West Bank and the Gaza Strip and part of Jerusalem. This means that Israel's borders will be drawn close to what existed before the 1967 war, instead of as they are now. Of the UN partition plan from 1947, only 42 percent of what was supposed to be the Palestinian state remains. In return for removing most of the Israeli settlements in those areas, the Palestinians would have to limit their right to return to Israel to a specified number and they will also have to drop other claims and demands on Israel. The plan has support both by the Israeli and Palestinian people, unfortunately not by the ruling part on either side.

The wall makes the founding of a Palestinian state impossible. Palestine has a right to their state according to what they are entitled to and they do not have to accept a substantially smaller Palestine due to the direction of the wall. The Palestinian people, or any other people, cannot be expected to live in a Palestinian state/area with a wall surrounding them. Consequently, Israel must immediately comply with the Advisory Opinion of the ICJ, and stop the building of the wall and remove the parts already built. In conclusion, according to international law, the Palestinians are in my view right; their struggle for independence, self-determination and being able to return is justified.

134 Supra note 105, p 17
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Documents from UN General Assembly

UN General Assembly Resolution 181 (1947)

UN General Assembly Resolution 2625, 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations

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Other sources

*Den gäckande freden (Elusive Peace, BBC)*, Dokument utifrån, SVT, 2005
The designations employed and the presentation of material on this map do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.
Relative sizes of the Berlin Wall and Israel’s Apartheid Wall

This graphical representation accurately shows relative height and length of the Berlin Wall next to Israel’s Wall, although the vertical/horizontal orientations within each graphic are not to scale.

Berlin Wall
96 miles long (155 kilometers). Average height 11.8 feet (3.6 metres).

[Diagram of Berlin Wall]

Human height

Israel’s Wall
To be at least 403 miles long (650 kilometers). Maximum* height 25 feet (8 metres).

[Diagram of Israel’s Wall]

Human height

*It is not clear whether the shorter fence sections are a first or final stage of construction

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International law
   based on treaty law and customary law

Public international law
   International humanitarian law
      Hague Regulations
      Geneva Convention
   The laws of war

Private international law
   Human rights law
      Humanitarian law on the battlefield
         The law of neutrality
         The law of occupation