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THE WALL AND INTERNATIONAL LAW

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THE WALL AND INTERNATIONAL LAW

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On February 6, 2001, Ariel Sharon was elected Prime Minister. “The same night,” recalls Professor Arnon Sofer, “Sharon’s people called me and asked if I could meet him as soon as possible, and they asked me to bring my maps with me”. Professor Sofer is an expertise of demographic issues regarding the Palestinian population and has been involved in discussions with Sharon the possibilities of building a wall in the West Bank. Sharon has also told the mayor of the settlement of Ariel that he had been thinking about the “project” since 1973.²

The Wall is justified by Israel in front of the international media as a means of preventing attacks on Israel; hence the Israeli government calls it a “security fence” while developing a strong campaign to justify the Wall and to show its “advantages”. In reality, the origin of the idea of the Wall did not coincide with these attacks but have been a part of Sharon’s plans for many years. The expression “for security reasons” instead has been adopted by Israel to justify this and other measures against the Palestinian people, even if contrary to international law.

The Wall is clearly illegal according to international human rights law and international humanitarian law (IHL). To show the Wall’s illegality, we can analyze it in, at least, two dimensions—one the Wall itself, and two its consequences. However, first addressing the legal framework applicable in the Palestinian case is necessary.

1. APPLICABILITY OF INTERNATIONAL LAW IN THE PALESTINIAN CASE

Firstly, Israel is a High Contracting Party of the Geneva Conventions of 1949. However, Israel refuses to apply the Fourth Geneva Convention. According to the international

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² “A Wall through their heart”. Yedioth Ahronoth, Meron Rappoport, May 23, 2003.

community³ it is not only possible but also necessary to apply all the rules contained in the Fourth Geneva Convention (relative to the Protection of Civilian Persons in Time of War), especially regarding occupied territories, as is the case of the Palestinian Territories. This “Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.⁴

Regarding to the applicability of IHL in Palestine, the International Committee of the Red Cross states: “the Geneva Convention is not concerned with the sovereignty of parties to a conflict. The Geneva Convention applies to all cases in which territory is occupied in the course of an armed conflict, irrespective of the status of that territory”.⁵

Secondly, Israel ratified several human rights conventions, most of them in 1991.⁶ It is important to note that the application of human rights treaties to an occupied territory by an occupying power does not imply sovereignty over the land. International law says: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.⁷ Palestinian Territories are not part of Israel but, in fact, they are within Israeli jurisdiction; Israel is a country signatory of these agreements and, consequently, has certain duties towards the occupied population.

Israel’s interpretations of some international human rights agreements are only possible by and according to the law, but only if consistent with other rights in the treaties.⁸

³ The UN SC Resolution 681, called on the Israeli government to “accept *de jure* application of the Fourth Geneva Convention” in Palestine (UN, 1990). In UN GA Resolution 56/60, UN reaffirmed that this Geneva Convention is applicable to Palestine Territories.

⁴ Art. 2, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

⁵ KRETZMER, David: “The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories” quoted in: PENGON: *Stop the Wall in Palestine*, Palestine, 2003, p. 80.

⁶ Israel has ratified treaties such as: International Covenant on Civil and Political Rights, (UN, 1966), International Covenant on Social, Economical and Cultural Rights, (UN, 1966), International Convention on the Elimination of All Forms of Racial Discrimination (1965), Convention Against Torture and Other Cruel, Inhuman or Degrading treatment or punishment (1984), Convention on the Elimination of All Forms of Discrimination Against Women (1979)

⁷ Art 2, International Covenant on Civil and Political Rights (UN. 1966)

⁸ See: Al-Haq: *The applicability of Human Rights Law to Occupied Territories: the case of Occupied Palestinian Territories*, Ramallah, 2003.

2. RIGHTS OF THE PEOPLE UNDER OCCUPATION

The occupied population is entitled to certain rights according to IHL:

*“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power”.*⁹

IHL also says: “Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”.¹⁰

These standards contained in the human rights law ratified by Israel, recognize certain human rights such as the protection of everyone “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹¹

Even, “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate”.¹²

3. THE WALL ITSELF

⁹ Art. 47, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

¹⁰ Art. 27, “Provisions common to the territories of the parties to the conflict and to occupied territories”, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

¹¹ Art. 2, International Covenant on Civil and Political Rights, (UN, 1966)

¹² Art. 55, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

The building of the Wall is illegal; the Wall is meant to ensure control of the Palestinian Territories through the usage of various measures.¹³ According to Hague's Law "Private property cannot be confiscated".¹⁴ To build the Wall the Israeli government has ordered vast expropriations and has destroyed homes, shops, schools, water networks, and agricultural land. The Fourth Geneva Convention states that:

"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations".¹⁵

The Hague's Law also says that "it is especially forbidden: (g) to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".¹⁶

It is important to comment that the above quoted "*except where such destruction is rendered absolutely necessary by military operations*" is, according to several experts in international law, not applicable in this context.¹⁷ For instance, the decision to include many settlements on the "Israeli side" of the Wall cannot be justified as a military necessity.

The Wall is affecting the entire Palestinian population and is therefore collective punishment. IHL says: "Collective penalties and likewise all measures of intimidation or of terrorism are prohibited... Reprisals against protected persons and their property are prohibited".¹⁸ In any case, "security reasons" have limits in human rights, but human rights cannot be limited by random security reasons.

¹³ B'TSELEM: *Behind the Barrier*, Jerusalem, March 2003. See pp. 6-11.

¹⁴ Art. 46, Convention IV, Respecting the Laws and Customs of War on Land (Hague, 1907)

¹⁵ Art 53, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

¹⁶ Art. 23 (g), Convention IV, Respecting the Laws and Customs of War on Land (Hague, 1907)

¹⁷ See, for instance, B'TSELEM: *Behind the Barrier... Op. cit.*

¹⁸ Art. 33, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

One of the goals of the Wall is to incorporate nearly all the settlements in the West Bank into the “Israeli side” of the Wall and *de facto* annex the most fertile land to Israel, leading to massive annexation of Palestinian land. “121,455 dunums of land¹⁹ —2% of the West Bank—is to be *de facto* annexed in the ‘first phase’ of the Wall under the Israeli self-declared ‘security zone’. Some 14,680 dunums of land have been razed for the footprint of the Wall... and some 11,550 people, from 16 villages are trapped between the Wall and the 1967 Green Line, in *de facto* annexed area which Israel now considers a ‘closed military zone’.”²⁰

The settlements, *per se*, are grave breaches of the IHL: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”.²¹ According to international law, the fact that the settlements are illegal renders it impossible to consider any measure to “legalize” them.²² Yet, the Wall will *de facto* annex some 50% of the West Bank justifying this measure overtly with settler presence in these areas; 98% of the settler population will be incorporated in *de facto* annexed territory.

As the Special Rapporteur of the Commission on Human Rights says, “the path of the Wall changes regularly in response to demands from settlers and other political interest groups within Israel. There is no transparency surrounding the construction of the Wall and its final course seems to be known only to an inner circle of the military and political establishment within Israel... Settlements in East Jerusalem and the West Bank are the principal beneficiaries of the Wall and it is estimated that approximately half of the 400,000 settler population will be incorporated on the Israeli side of the Wall. Needless to say, it is extraordinary that such action should be taken to incorporate illegal settlements that form the subject of negotiations between Israel and Palestine... The

¹⁹ One dunum = 1,000 square meters.

²⁰ PENGON / Anti-Apartheid Wall Campaign: Fact Sheet. “The Wall’s ‘First Phase’”, August 2003.

²¹ Art 49, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

²² It does not mean that measures to protect the people who are living in the settlements are illegal.

Wall must be seen in the context of settlement activity and the unlawful annexation of East Jerusalem”.²³

The Wall adversely affects one population: the Palestinians. According to B'tselem “the barrier will directly harm at least 210,000 Palestinians, who live in sixty-seven villages, towns, and cities”.²⁴ Nevertheless, at the same time, the Israeli government develops infrastructure projects in the Palestinian Territories (for instance, highways) to facilitate the mobility of the Israeli population. These different policies violate the International Convention on the Elimination of All Forms of Racial Discrimination (UN, 1965).

In line with past and current attempts to include within the negotiations, peace process and proposals new borders, the Wall in fact creates a new border between Palestine and Israel, disregarding not only the claims of the Palestinian people to their land but as well all the recommendations on the issue of borders by the United Nations.

The Charter of the United Nations has clarified that, “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”.²⁵ United Nations General Assembly has further declared “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 recognized as legal”.²⁶ It is important also to take in consideration the comment by the Special Rapporteur, “annexation of this kind goes by another name in international law - conquest. Conquest, or the acquisition of territory by the use of force, has been outlawed by the prohibition on the use of force contained in the Charter of the United Nations”.²⁷

²³ DUGARD, John: “Question of the violation of Human Rights in the Occupied Arab Territories, including Palestine” Report of the Special Rapporteur of the Commission on Human Rights. E/CN.4/2004/6, 8 September 2003.

²⁴ B'TSELEM: *Behind the Barrier... Op. cit.*, p. 9

²⁵ Art. 2,4, Charter of the United Nations (1945)

²⁶ United Nations General Assembly, Resolution 2625, October 24, 1970

²⁷ DUGARD, “Question of the violation... *Op. cit.*

The Wall is the combined product of the settlements and closure policies, adding a permanent barrier to the barriers already put in place through checkpoints. In addition, it is a permanent expropriation of private property.

4. THE CONSEQUENCES OF THE WALL

The Wall has already affected the living conditions of people; therefore, some of their rights have also been affected in the areas where the Wall has been built. There are no reasons to think that in the other communities where the Wall will be built, it will be any different. The “Bertini Report”²⁸, the most important and known report about the humanitarian situation in Palestine by the UN, has shown without a doubt how closures, sieges, curfews and checkpoints are strategies that have affected the access to health, education and work, and have also affected the right to the freedom of movement and property. The report states:

*“Palestinians are subject to a variety of closures, curfews, roadblocks and restrictions that have caused a near-collapse of the Palestinian economy, rising unemployment, increased poverty, reduced commercial activities, limited access to essential services (such as water, medical care, education, emergency services) and rising dependency on humanitarian assistance. The restrictions affect almost all activities, rendering most Palestinians unable to carry out any semblance of a normal life and subject to daily hardships, deprivations and affronts to human dignity (...) There is a consensus among all parties, and this report confirms, that the current regime of closures and curfews is having a devastating impact on the Palestinian population, both on their economy and the humanitarian situation”.*²⁹

The Wall is another step in the same strategy. Hence, it is possible to foresee and to affirm that the future consequences of the Wall regarding the rights of the people will be the same, if not worse. As is shown below, in the places where the Wall has been built,

²⁸ BERTINI, Catherine: *Personal Humanitarian Envoy of the Secretary-General. Mission Report*, 2002

²⁹ Comments 3 and 12, BERTINI, *Personal Humanitarian... .. Op. cit.*

the rights to freedom of movement, property, health, education, work, food, water and freedom of religion are not guaranteed as long as the Wall exists. Yet also, the destruction of the Wall itself will not be enough to guarantee these rights.

4.1. Right to Freedom of Movement

Human rights law states, “Everyone has the right to freedom of movement and residence within the borders of each State”.³⁰ And, “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”.³¹

The Fourth Geneva Convention states: “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”.³²

The limitations to the right of movement are clearly affecting all Palestinian activities. In relation to the IHL, the impact of the Wall in Qalqiliya, for instance, is comparable with a “mass forcible transfer” as the population has no possibilities to continue life. “Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter or leave through a single military checkpoint open from 7 a.m. to 7 pm”.³³

According to PENGON’s information “humiliation is a common experience at entrances to encircled cities or the ‘gates’ along the Wall; Israeli soldiers individually determine who is ‘permitted’ to cross and whether or and when not the gates will be open. There have already been documented instances of beatings, humiliation and physical abuses”. In the village Azzun Atma, in Qalqiliya district, one can cross through the gates of the Wall only twice a day for intervals less than 15 minutes and times are inconsistent. Furthermore, crossing is entirely dependant on Israeli military arrives to open the gates.

³⁰ Art. 13, Universal Declaration of Human Rights (1948)

³¹ Art. 12, International Covenant on Civil and Political Rights (1966)

³² Art 49, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

³³ DUGARD, “Question of the violation... *Op. cit.*

4.2. Right to Property

The Universal Declaration of Human Rights clearly states: “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property”.³⁴ The two most important covenants of human rights also recognize that “All peoples may, for their own ends, freely dispose of their natural wealth and resources”.³⁵

During the first phase of the Wall alone, 102,320 olives trees, as well as schools, 85 commercial buildings, some homes, and 30 kilometers of water networks have been destroyed a while 14,680 dunums of land have been razed or confiscated.³⁶ The Wall’s first phase affects over 65 communities.³⁷

Also, some 218 buildings have been demolished in the village of Nazlat ‘Isa, the majority of which have been stores; five homes have also been demolished for the Wall. At least an additional 75 stores, 20 factories, 20 homes, and 1 primary school have demolition orders, which are expected to take place in the very near future.³⁸

The land between the Wall and the Green Line was declared a “seam zone”, or closed military area, on the 2nd of October, 2003. The order prohibits the passage of all people into this area, but then immediately exempts Israelis from this restriction and clarifies that Palestinians will be permitted into the zone only during work hours if they obtain permits. This theft and annexation of Palestinian land to Israel has thus furthered Israeli control over the people. In defiance to the illegitimate attempt to annex their land the farmers of Barta’a ash Sharqiyya refused to apply for permits. As punishment for their defiance the military locked the gates of the Wall for 15 days, bringing the entire village under complete closure without access to food and water supplies.

³⁴ Art. 17, Universal Declaration of Human Rights (1948)

³⁵ Art 1, International Covenant on Economic, Social and Cultural Rights (1966) and art 1, International Covenant on Civil and Political Rights (1966)

³⁶ PENGON: *The Wall in Palestine... Op. cit.*, p. 15.

³⁷ PENGON: *The Wall in Palestine... Op. cit.*, p. 27

³⁸ PENGON / Anti-Apartheid Wall Campaign: Fact Sheet... *Op. cit.*

4.3. Right to Health

“The right of everyone to the enjoyment of the highest attainable standard of physical and mental health”³⁹ is contained in the International law. IHL says that, “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties”.⁴⁰

But, despite these clear duties of the occupying power, Israel does not fulfill them while also seriously violating the right to health. Regarding access to medical services, the Bertini Report says:

*“Access restrictions continue to prevent many Palestinians in need of medical treatment from reaching health services. This is especially the case for populations under curfew and the more than 60 percent of the population in the West Bank that lives in rural areas. They need access to the hospitals and other secondary and tertiary health care facilities in towns and cities, both in emergencies and for regular treatment, such as dialysis and chemotherapy. Many hospitals have reported a steep decline in access to services. For example, St Luke's Hospital in Nablus has seen a 49 percent decline in general practice patients, a 73 percent decline in specialty services and a 53 percent decline in surgeries”.*⁴¹

According to reports on the impact of the Wall in some communities, it is possible to conclude that these kinds of violations will become permanent due to the Wall. Right

³⁹ Art. 12, International Covenant on Economic, Social and Cultural Rights (1966)

⁴⁰ Art 56, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

now, due to the Wall, numerous villages and houses in these areas are not accessible to doctors and isolated from hospitals or health medical clinics. For instance, according to PENGON's information, "because of the Wall, the UNWRA hospital in Qalqiliya is closed off to all refugees in the northern West Bank (except Qalqiliya residents) to whom it was supposed to provide medical assistance". In Azzun Atma the restrictions were carried even further with limits placed on the visits of medical personnel to the community—the village doctor who once visited Azzun Atma twice a week is now restricted to a mere four hours per week.

4.4. Right to Education

The right of everyone to education is defined by the international law in the following terms: "...education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms".⁴² IHL says, "The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children".⁴³ Only in Tulkarem, "650 teachers out of 1,964 face difficulty reaching their classes when traveling".⁴⁴

The children of Ras Tira and Daba are often unable to attend their schools in neighboring communities as the Wall isolates their villages. In Jubara, north Qalqiliya, the opening of the gates is often delayed for hours affecting students. In Baqa ash Sharqiyya, in Tulkarem, written permission is demanded of school teachers to allow them to pass through the pedestrian gates on their walk to work. In Azzun Atma young students have been victims of harassment from Israeli soldiers to the point that some have withdrawn school.

4.5. Right to Work

⁴¹ Comments 34 BERTINI, *Personal Humanitarian... Op. cit.*

⁴² Art. 13, International Covenant on Economic, Social and Cultural Rights (1966)

⁴³ Art. 50, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

⁴⁴ WORLD BANK: *The impact of... Op. cit.*, p. 39

According to the Universal Declaration of Human Rights, "everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment".⁴⁵ The right to work includes "the right of everyone to the opportunity to gain his living by work".⁴⁶

With the construction of the Wall, the land with the main agricultural potential will be on the "Israel side". The October 2nd Israeli military order, previously discussed, now farmers in over 50 villages from reaching their crops which are isolated by the Wall which has amounted to severe economic losses in all communities. It is also reported that already some 600 shops and enterprises have closed in Qalqiliya as a result of the construction of the Wall.⁴⁷

According to PENGON's report "Nazlat 'Isa, which is trapped between the Wall and the '67 Green Line, has had its entire commercial market destroyed for the building of the Wall. East of the Wall's 'isolation barrier' that is being built in this area and a top of village lands will be the 'Trans-Israel Highway', connecting the network of Israel and settler roads....The land confiscation, destruction, and severe restriction of movement will mean the loss of at least 6,500 jobs". In Tulkarem due to the Wall, the communities cannot travel for employment, "which has caused the unemployment rate to swell from 18% in 2000 to 78% in the spring of 2003".⁴⁸ In Qalqiliya district the Wall's closure brought the demise of the guava harvest for most farmers while in Jubara village, south of Tulkarem, only those farmers with written permission have been allowed to cross to cultivate the land. In Jayyus, 116 farmers refused to apply for the permits, and Israel is completely prohibiting them from passing onto their land.

4.6. Right to Food and Water

"The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of

⁴⁵ Art. 23, Universal Declaration of Human Rights (1948)

⁴⁶ Art. 6, International Covenant on Economic, Social and Cultural Rights (1966)

⁴⁷ DUGARD, "Question of the violation... *Op. cit.*

⁴⁸ PENGON / Anti-Apartheid Wall Campaign: Fact Sheet... *Op. cit.*

living conditions... The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources".⁴⁹

As far as the plight of the farmers is concerned, "the main constraint, as in most other areas of employment and production, is access. Farmers are unable to access their fields because of blocked roads, including dirt roads that have been dug up by the IDF, threats and violence from nearby settlers, and new requirements for permits that in some cases are needed to reach fields on the other side of by-pass roads".⁵⁰ After the Wall, these kinds of constraints will be permanent, especially as Israel's proposal states that every farmer needs a special permit to cross to his/her own land. For instance, "approximately 20,000 individuals, in some 3,175 families, will be located east of the Wall but with their agricultural lands to the west, losing their livelihoods, sustenance, and heritage".⁵¹

In Barta'a ash Sharqiyya, soldiers have taken food away from farmers, arguing that only a certain quantity of food, determined by the size of the family, will be allowed through the check points. In this way the soldiers are deciding what amount of food is sufficient for each family.

The Wall has affected communities' access to water in the following ways: destruction of water pipes for the lands, destruction of water pipes that cannot be rerouted with the construction of the Wall, communities not able to access wells, tankers not able to access wells and communities, and destruction of cisterns and reservoirs.⁵²

⁴⁹ Art. 11, International Covenant on Economical, Social and Cultural Rights (1966)

⁵⁰ Comment 50, BERTINI, *Personal Humanitarian...* ... *Op. cit.*

⁵¹ PENGON / Anti-Apartheid Wall Campaign: Fact Sheet... *Op. cit.*

⁵² PENGON: *The Wall in Palestine...* *Op. cit.*, pp. 57-58

In the Wall's first phase, "36 groundwater wells and over 200 cisterns are isolated from their communities by the Wall with an additional 14 wells threatened for demolition in the Wall's 'buffer zone'. Upon laying the groundwork for the Wall, Israeli bulldozers have destroyed some 35,000 meters of water pipes and 25 wells and cisterns, which were for both agricultural and domestic use.

4.7. Right to Freedom of Religion

Human Rights Law says that, "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching".⁵³ And the IHL says: "The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities".⁵⁴ For instance, in Bethlehem because of the Wall, people cannot go to Rachel's tomb. The restriction to movement also affects access to sacred places and mosques.

5. THE WALL AS AN APARTHEID POLICY

Other people use the word Apartheid, as for instance they call the Wall the "Apartheid Wall". The definition of apartheid in international law is:

"The term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination...shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person: (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or

⁵³ Art. 18, International Covenant on Civil and Political Rights (1966)

⁵⁴ Art. 58, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

*to cruel, inhuman or degrading treatment or punishment; (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; (c) Any legislative measures and other measures calculated to prevent...the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence (d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof...*⁵⁵

There are numerous examples to show how the Wall is against this Convention. The Wall divides populations on the basis of race and ethnicity. The route of the Wall itself is not only segregating but also discriminating on racial grounds, as the interests of the Israeli illegal settler population are considered much higher than the interests and rights of the Palestinian population. In most cases farmers are denied access to their lands and merchants are cut off from markets while the Wall prevents customers from reaching them. Also in the first phase 16 villages are separated from the West Bank west of the Wall—deprived of movement for basic services such as health, education, or work.

6. IS THE WALL CONTRIBUTING TO GENOCIDE?

Can the word “genocide” be used in the context of the Israeli construction of the Wall in the West Bank? According to Human Rights Law:

“Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing

⁵⁵ Art. 2, International Convention on the suppression and punishment of the crime of Apartheid (1973)

*members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group”.*⁵⁶

Israel has signed and ratified this “Convention on the Prevention and Punishment of the Crime of Genocide” (UN, 1948). Two questions may arise regarding the use of this word in the context of the Israel’s treatment of the Palestinian people: First, is there an “intention to destroy” Palestinians on the part of the Israeli Government? Second, what exactly does the word destroy mean? Does it refer only to physical destruction or does it have a broader meaning, which might include killing people?

Regarding intention: “... Genocidal intent also applies to acts of destruction that are not the specific goal but are predictable outcomes or by-products of a policy, which could have been avoided by a change in that policy. Deliberate pursuit of any policy in the knowledge that it would lead to destruction of human group thus constitutes genocidal intent”.⁵⁷

Regarding the meaning of the word “destroy”, these authors also asked themselves: “Does ‘as such’ refer to the preceding word ‘group’, meaning the destruction of people as a communal group, but not necessarily destruction of the individual members?” One of the characteristics of the definition of genocide includes “forcibly transferring children of the group to another group” (category E). This practice does not kill members of the group but affects the survival of the group as a group, and it also is genocide.

The central problem is to demonstrate the *intention*. It is not enough to say that there is no intention. One possibility is analyzing this issue through the consequences of applied policies. According to the United Nations Security Council, “The necessary element of intent may be inferred from sufficient facts. In certain cases, there will be evidence of

⁵⁶ Art 2, Convention on the Prevention and Punishment of the Crime of Genocide (1948)

actions or omissions of such a degree that the defendant may reasonably be assumed to have been aware of the consequences of his or her conduct, which goes to the establishment of intent...”⁵⁸ For another author, “... genocide embraces those acts whose foreseeable or probable consequences are the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act.”⁵⁹

The daily violations of human rights by the Israeli Defense Force (IDF) are not punished by the State of Israel, which demonstrates the agreement of the State with its military measures. For example, “of the 2,235 Palestinians that have been killed by the IDF, indictments against soldiers have been handed down only eight cases. No one has yet been convicted”.⁶⁰ The Judge Advocate General, Major General Menahem Finkelstein, stated that “it is impossible to carry out 2,000 investigations into 2,000 cases of death when, in a large percentage of the cases, we are talking about military activity par excellence”.⁶¹ Therefore, he decides to stop investigating cases of killing, without any presumption of innocence of the victims.

Some other measures by IDF and the Israeli government show the targeting of Palestinians as a particular group, as such: use of racist slurs, attacks on sacred places, destruction of religious buildings, Palestinian home demolition, agricultural and land destruction, denial of residency rights, mass arbitrary arrests, illegal control and exploitation of Palestinian natural resources, verbal abuse with references to the Palestinian as a Palestinians, prevention of access to health services including prenatal, and postnatal care and massive restrictions on Palestinian construction... It is necessary to remark that IDF depends on the government and is its responsibility for action or omission. This impunity and these military measures indicate that there is the “intention to...”

⁵⁷ GELLATELI, Robert; KIERNAN, Ben: “The study of mass murder and genocide”, in: GELLATELI, Robert; KIERNAN, Ben (Eds.): *The Specter of Genocide*, Cambridge University Press, Cambridge, 2003, pp. 15-16

⁵⁸ United Nations, Security Council S/1994/674 - 27 May 1994

⁵⁹ RICARDA ROOS, Stefanie: “Development Genocide and Ethnocide: Does International Law Curtail Development-Induced Displacement through the Prohibition of Genocide and Ethnocide?”, *Human Rights Brief* (Washington, Volume 9 Issue 3). Spring, 2002.

⁶⁰ LEVY, Gideon, “When killing becomes routine”. *Haaretz*, editorial. July 13, 2003.

The Israeli government may not have explicitly declared as its goal the destruction of the Palestinian people, but the consequences of its actions—such as those from the Wall—contribute to the destruction of Palestinians as a group. This is genocide.

It is impossible to avoid the conclusion that the Israeli government is attempting to destroy Palestinian community as a community. Therefore, the category “genocide” can be applicable in the Palestinian case, even when referring to the impact of the Wall (categories B and C quoted).

7. THE WALL IS A CRIME

According to IHL the Wall is clearly a war crime. Such acts, such as the destruction of property, are recognized under IHL as grave breaches of the law, called “crimes of war”; acts “committed against persons or property protected by the present Convention: ...extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.⁶²

The “Convention on the Suppression and Punishment of the Crime of Apartheid” clarifies that Apartheid “is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security”.⁶³ Apartheid is, according to International Law, a crime against humanity and the States “declare criminal those organizations, institutions and individuals committing the crime of apartheid”.⁶⁴

Regarding genocide, “whether committed in time of peace or in time of war, is a crime under international law which they (the parties in the Convention) undertake to prevent

⁶¹ Quoted in: LEVY, Gideon, “When killing becomes routine”. *Haaretz*, editorial. July 13, 2003

⁶² Art. 147, IV Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)

⁶³ Art. 1, International Convention on the suppression and punishment of the crime of Apartheid (1973)

⁶⁴ Art. 1 (2), International Convention on the suppression and punishment of the crime of Apartheid (1973)

and to punish”.⁶⁵ The categories that have been punishable include not only genocide itself but also conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.⁶⁶

In addition, the Rome Statute of the International Criminal Court (ICC)⁶⁷ states that “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”⁶⁸ is a war crime.

8. DISCUSSION

After having visited the West Bank and having read several papers on behalf of various NGOs - both Palestinian and international - it is evident that the Wall is illegal, according both to International Humanitarian Law and International Human Rights Law. It is also evident that using words such as genocide or Apartheid while talking about the Wall is not a legal mistake.

The promise of security—for Israelis--through the building of the Wall is a ploy, as peace does not depend on military solutions or “security” measures but on an end to the Occupation and Israel’s acceptance of the internationally recognized rights of the Palestinian people. “...It is doubted by some who point to the fact that most suicide bombers have passed through checkpoints and that the Wall will not deter persons determined to cross into Israel to commit acts of terrorism”.⁶⁹ Other arguments against the notion of the Wall as security are the date of its original planning as a project since 1973, that the route of the Wall demarcated by the settlers, the construction of the Wall through the Jordan Valley, and the continued deviation from the Green Line. It is also very simple and naive to say that there is a conflict of rights: the right to life of the Israeli as opposed to the right to property of the Palestinians.

⁶⁵ Art 1, Convention on the Prevention and Punishment of the Crime of Genocide (1948)

⁶⁶ Art. 3, Convention on the Prevention and Punishment of the Crime of Genocide (1948)

⁶⁷ Israel signed the Statute but has refused to ratify it.

⁶⁸ Art. 8, War crimes, a, (iv), Rome Statute of the International Criminal Court (1998)

⁶⁹ DUGARD, “Question of the violation... *Op. cit.*

Israel explained and defended the construction of the Wall to the United Nations arguing that “land requisitions issued to enable the building of the Barrier are proportionate given the number of deaths and injuries sustained by Israeli citizens and are carried out in accordance with both international and local law” and maintains that, “the completion of the Barrier will in fact, allow the Israel Defense Forces (IDF) to reduce its presence in the West Bank and remove roadblocks and checkpoints, thereby improving overall humanitarian conditions in the West Bank”⁷⁰

All High Contracting Parties of the Geneva Conventions, including Israel, have the duty to ensure the application of IHL, which states “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.⁷¹ Since the Wall is illegal, all of the states, which are signatories of the Geneva Conventions, have the responsibility to intervene in stopping the Wall and its implications on Palestinians. Also, in the “International Convention on the suppression and punishment of the crime of Apartheid” all the States Parties have responsibility to prevent and punish the Apartheid policies and practices.

As the link between the Wall and Israel’s Apartheid policies are clear, it is important to remark that “International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State”.⁷² The individuals have to be punished “whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons”.⁷³ The States Parties of the Convention quoted, “may call upon any competent organ of the United Nations to take such action under the Charter of the United Nations as it considers appropriate for the prevention and suppression of the crime of apartheid”.⁷⁴

⁷⁰ UNITED NATIONS, General Assembly: “Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13”. November 24, 2003

⁷¹ Art. 1, Common to the Geneva Conventions (1949)

⁷² Art. 3, International Convention on the suppression and punishment of the crime of Apartheid (1973)

⁷³ Art. 4, International Convention on the suppression and punishment of the crime of Apartheid (1973)

⁷⁴ Art. 8, International Convention on the suppression and punishment of the crime of Apartheid (1973)

Despite these clear laws and duties under IHL and in the convention about Apartheid, the so-called “international community” continues to remain silent about the Palestinian situation and also about the Wall.

Consequently, the Special Rapporteur, “submits that the time has come to condemn the Wall as an act of unlawful annexation in the language of Security Council resolutions 478 (1980) and 497 (1981) which declare that Israel’s actions aimed at the annexation of East Jerusalem and the Golan Heights are ‘null and void’ and should not be recognized by States”.⁷⁵

Beyond the construction of the Wall, the worst consequences of its building would be the forced expulsion/transfer of the Palestinian population through unsustainable living conditions, as is rapidly happening through the Wall’s first phase and, as stated by the Special Rapporteur “The Wall will therefore create a new generation of refugees or internally displaced persons”.⁷⁶ The international community spends a significant amount of time talking about terrorism but forgets, sometimes deliberately, to talk about the Occupation. In the case of Palestine, those who do not want to talk about occupation do not have any moral right to talk about terrorism.

The current system of human rights is partially due to the Holocaust and other crimes committed during the Second World War. This system sought protects the victims of war: everyone through Universal Declaration of Human Rights (1948); civilian population, through the Fourth Geneva Convention (1949); European refugees, through the “Convention relating to the Status of Refugees” (1951); national, ethnical, racial or religious group, through the “Convention on the Prevention and Punishment of the Crime of Genocide” (1948). Despite of this great attempt to protect the dignity of the people, in the beginning of the new millennium, some practices, as the Apartheid policies, continue.

⁷⁵ DUGARD, “Question of the violation... *Op. cit.*

⁷⁶ DUGARD, “Question of the violation... *Op. cit.*

Recently there have been seen attempts by the international community for the termination of the Wall, as is the case of the failed attempt of the Resolution of the Security Council against the Wall, blocked by the veto of the United States, the Resolution of the General Assembly against the Wall (October 21, 2003)⁷⁷, the report by the United Nations confirming the illegality of the Wall (November 24, 2003), and the application of the General Assembly to the International Court of Justice which made a judgment on the legality of the Wall (December 7, 2003).

The cited report recognizes that in some places the Wall will be 22 kilometers away from the Green Line and looks to include 320,000 Israeli settlers. The report further remarks that the expropriations of land often take effect the same day the orders are signed and thus farmers are not given any prior notice. Many of the gates open only three times a day and for barely 15 minutes at a time. It concludes pointing out that up to this date, 30 towns have been separated from health services, 22 from schools, 8 from water sources, and 3 from available electrical service.⁷⁸

The Israeli State refuses to apply international law in the Occupied Palestinian Territories and also in Israel. The Israeli state, as a theocratic state, therefore as a no modern state, refuses to recognize both civil and political and social and economical rights of the Palestinian population. With two kinds of citizenship, the core of the rights does not depend of the relationship between individual persons and the state but religious persons and the state, which means the negation of the democracy.

Israel refuses recognize its condition as an occupier of the West Bank and Gaza Strip. If here is their promised land, how is it possible to be the occupant of their own promise land? The reason may be the most important to Israel: the application of the international law not only means more responsibility of expenditures under the Occupation, but the negation of Israel as a Jewish state. Beyond the Wall, the big

⁷⁷ UNITED NATIONS General Assembly resolution ES-10/13 “demands that Israel stop and reverse the construction of the Wall”. This Resolution had only 4 votes against (USA, Israel, Marshall Island and Micronesia).

⁷⁸ UNITED NATIONS, General Assembly: “Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13”. November 24, 2003.

dilemma is how to be modern state –with all of its consequences- and the same time to be a religious state. And the main victim of this dilemma is the Palestinians.