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B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories

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## **THE SEPARATION BARRIER: POSITION PAPER SEPTEMBER 2002**

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## **Introduction**

This position paper deals with Israel's decision to establish a barrier that will physically separate its territory from the West Bank. The barrier is intended to prevent Palestinian attacks on Israeli civilians. Thus far, the decision making process regarding the construction of the barrier has been characterized by a lack of transparency. Despite the fact that it is a long-term project which will cost hundreds of millions of shekels, most of the decisions have been made behind closed doors without any possibility for public debate.

This document focuses on the planned placement of the barrier and addresses the repercussions of constructing the barrier within the territory of the West Bank on the human rights of tens of thousands of Palestinians who live near the Green Line. This position paper is written from the perspective of international law, which binds Israel in its activities in the Occupied Territories. The principles of international law, along with principles set forth in Israeli law, establish the rights of the civilian population in the Occupied Territories. These principles also lay out the circumstances and considerations that justify the breach of those rights.

The implementation of the decision to construct the barrier is in its initial stages, therefore, most of the infringements of human rights described below are currently potential dangers. The objective of this document is to shed light on these dangers and prevent a situation in which the entire plan becomes unlawful because it violates international law.

## **Background**

The idea to erect a barrier that would physically separate the West Bank from Israel in order to limit unmonitored entry of Palestinians into Israel is not new, and has undergone various transfigurations in recent years. The barrier would be erected in what is referred to as the "seam area," a strip of land extending along the two sides of the Green Line.

In March 1996, the government decided to establish crossing points along the seam area. These points would serve as the only points of entry of Palestinians into Israel while alternative access routes were to be blocked. Following this decision, the Ministry of Internal Security decided, in 1997, to assign special Border Police units to operate along the seam area. The task of these units was to prevent the penetration of Palestinians into Israel. These decisions were implemented only partially and inefficiently and did not bring about the intended results.<sup>1</sup>

Following the outbreak of al-Aqsa intifada, in late September 2000, and as a result of the sharp increase in attacks in Israel committed by Palestinian residents of the West Bank, several decisions were reached that ultimately led to the current plan to erect the separation barrier.

In November 2000, the then prime minister, Ehud Barak, approved a plan to establish a “barrier to prevent the passage of motor vehicles” from the northwest end of the West Bank to the Latrun area. Implementation of this plan began many months after it was approved. In June 2001, the current prime minister, Ariel Sharon, established a steering committee, headed by the director of the National Security Council, to formulate a set of measures to prevent Palestinians from infiltrating into Israel across the seam area. On 18 July 2001, the Ministerial Committee for Security Matters (hereafter: Cabinet) approved the recommendations of steering committee. Among these recommendations was implementation of the November 2000 decision relating to the barrier to prevent passage of motor vehicles, and erection of a barrier directed at preventing pedestrian traffic in selected locations based on the threat involved.

Erection of the barrier to prevent the passage of motor vehicles began following the decision of June 2001. To date, the Department of Public Works and the construction department of the Defense Ministry have completed a metal security railing along the selected sector. However, as of April 2002, some nine months after the Cabinet’s meeting, almost no action has been taken to implement its decision on the barrier to prevent pedestrian traffic (hereafter: the barrier). On 14 April 2002, some nine months after the decision was reached, the Cabinet again discussed the matter. It decided to establish the barrier in the seam area and issued a directive to “begin immediate construction of a fence in the ‘Anin area... the Tulkarm sector and the Jerusalem

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<sup>1</sup> The figures presented in this section are based, unless stated otherwise, on the State Comptroller’s report, *Report on the Seam Area* (in Hebrew), Report No. 2 (Jerusalem, July 2002).

sector.”<sup>2</sup> To implement this decision, a “Seam Area Administration,” headed by the Director General of the Defense Ministry, was established. A few days later, and before the final placement of the barrier had been determined, the IDF took control of Palestinian-owned land in a number of areas in the north of the West Bank, and began to uproot trees and level the earth in preparation for construction of the fence.

In early June, the Seam Area Administration finished formulating the plan to build the first section of the barrier. The first stage was to span a distance of about 110 kilometers (approximately one-third of the length of the Green Line) from the northwest border of the West Bank, near the Israeli village of Sallem, to the area of Kafr Qasem in the south. The plan also dealt with a barrier spanning several dozen kilometers along the northern and southern borders of the Jerusalem municipality. After the Prime Minister and Minister of Public Security approved the plan submitted by the Seam Area Administration<sup>3</sup>, contracts were signed with a number of contractors, and infrastructure work on the barrier began in various sections along the course that had been approved for the placement of the barrier<sup>4</sup>. The estimated cost of executing this stage of constructing the barrier amounted to NIS 942 million, a cost of more than NIS 8 million per kilometer.

After a number of government ministers strongly objected to the placement that had been determined by the Seam Area Administration and approved by the Prime Minister and the Minister of Public Safety, the Cabinet met again, on 14 August, to discuss the matter<sup>5</sup>. At the end of the meeting, the Cabinet approved the proposed placement. Since maps of the placement of the barrier proposed by the Seam Area Administration and the placement ultimately approved by the Cabinet were never published, it is difficult to determine what changes, if any, the Cabinet made to the original plan. However, an examination of the decisions regarding one of the areas along which the barrier will run, (see below the discussion on the villages of a-Ras and Kafr Sur) indicates that certain changes were made. As of the beginning of September, infrastructure work was under way to construct the barrier along about 50

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<sup>2</sup> Decision 64/B, section E.

<sup>3</sup> Aluf Benn, “Sharon Approved: Separation Security Fence will be Erected along the Green Line,” *Ha’aretz*, 45 June 2002;

<sup>4</sup> Amnon Barzilai and Zvi Zarhiya, “Work on Erecting Fence on the Seam Line Begins,” *Ha’aretz*, 11 June 2002.

<sup>5</sup> Diana Bahor, “Separation Fence: All the Objections,” *Ynet*, 4 July 2002.

of the 110 kilometers that had been approved, not including the work that was going on in the Jerusalem area.<sup>6</sup>

Various obstructions were erected in a number of areas along the Green Line, unrelated to the barrier being discussed in this paper. Several years ago, the IDF constructed a wall to defend against gunfire between the communities of Bat Hefer and Shweika and between the communities of Matan and Habla. When the al-Aqsa Intifada broke out, the IDF Central Command began to erect blockades and obstacles preventing passage of motor vehicles in areas near the Green Line, particularly around the Jerusalem municipality and near Umm-el-Fahm. Several Israeli communities whose farmland abuts the Green Line erected fences to protect their farmland. The company that is paving the Trans-Israel Highway started construction of a defensive barrier against gunfire along sections of the road near Qalqiliya. It is presently unclear how these obstacles will be integrated into the plan that the Cabinet approved.

### **The (Partial) Placement of the Barrier and its Features**

The components of the barrier spread over a width of about thirty meters. The components of the barrier, from east to west, are a trench intended to create an obstacle against tanks, a dirt path that would constitute a “killing zone” onto which access is forbidden, an electric warning fence, a trace path to disclose the footprints of infiltrators, and a two-lane patrol road. However, several of the requisition orders given to Palestinian residents state that the width of the area seized for “military needs” may reach one hundred meters. Thus, it is possible that additional lands alongside the barrier will be defined as closed military zones, and will also be part of the barrier complex.

To date, none of the relevant bodies (i.e. the government, the Defense Ministry, the IDF, etc.) have published a map showing the placement of the barrier for the section that has been decided on. However, it is possible to reconstruct many parts of the placement (see Map 1) based on two principal sources of information. The first source are the orders for requisition of Palestinian-owned land on which the barrier is planned. The second is the list of the Israeli settlements that will be situated west of

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<sup>6</sup> Mazal Mualem, “Work Being Done on 50 of 115 Kilometers of Fence,” *Ha’aretz*, 4 September 2002.

the barrier, as published in the media.<sup>7</sup> This list includes ten settlements: Shaqed, Hinanit, Tal-Menashe, Rehan, Sal'it, Tzufim, Alfe Menashe, Oranit, Sha'are Tiqwa, and Elqana. The settlements inside the municipal area of Jerusalem may be added to this list. However, it is still unclear whether a barrier will be erected on the eastern side of the city.

One of the results of the construction of the barrier along several hundred meters – and even several kilometers – from the Green Line, on land within the West Bank, is the creation of a wedge between Palestinian farmers and their lands. The planned placement of the barrier leaves many lands owned by Palestinians living to the east of the barrier on the other side of it. As shown in Map 2, a substantial portion of the land adjacent to the Green Line is intensively cultivated with olive trees, vineyards, seasonal fruit trees, and various kinds of field crops.

For example, some 6,000 dunam [4 dunam = 1 acre] owned by residents of Qafin (a Palestinian town with 9,000 residents), which comprises sixty percent of the residents' agricultural land is expected to remain on the western side of the barrier. Most of this land contains old olive trees. In the case of a-Ras and Kafr Sur which have a total of 1,600 residents, seventy-five percent and fifty percent of the farming land respectively is expected to remain on the barrier's western side. These lands primarily contain olive trees, tomatoes, and spinach. In other villages, such as Zita, the planned barrier will separate only a small percentage of the village lands, but those families that are affected will be cut off from most or all of their farmland.

Another result of placing the barrier within the West Bank is that entire villages will be turned into Palestinian enclaves west of the barrier. These villages will be cut off, to various extents, from the rest of the West Bank. According to the placement approved by the Cabinet, eight Palestinian towns and villages, in which more than 10,000 people live, will be situated to the west of the separation barrier: Birta'a a-Sharqiya, Umm-a-Rehan, Khirbat 'Abdallah Yunis, Khirbat a-Sheikh Sa'ad, Ghaher al-Maliah, Beqa a-Sharqiya, Nazlat 'Issa, and Khirbat Jabareh (hereafter: the enclaves). In addition, thirty-five Palestinian families residing along the northern edge of Bethlehem are expected to remain on the northern side of the barrier in south

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<sup>7</sup> See, for example, Aluf Benn, "The Cabinet Approved a Security-Fence Alignment of 110 Kilometers," *Ha'aretz*, 15 August 2002.

Jerusalem, due to the decision to include Rachel's tomb inside the barrier.<sup>8</sup> The number of Palestinian residents included in the enclaves is liable to rise when a decision is reached on the placement of the barrier in other areas.

Three of the eight villages that will remain to the west of the barrier have urban links with villages within Israel: Bart'a a- Sharqiya (3,200 residents) is connected to Bart'a a-Gharbiya, and Beqa a-Sharqiya and Nazlat 'Issa (6,000 residents) are connected to Beqa a-Gharbiyeh. Over the years, this connection has led to social, business, and family ties between the residents on the two sides of the Green Line. Despite this, the legal status of the residents of these villages is no different from that of the rest of the residents of the West Bank and their entry into Israel without permits constitutes a criminal offence (in doing so they are considered "illegal aliens").

Without the right to enter Israel, the residents of these three villages, and those of the other five villages which are to remain to the west of the barrier, rely on services provided in nearby West Bank urban centers (Jenin, Tulkarm, and Qalqiliya), which are expected to remain east of the barrier. These services include health care, welfare services, higher education, acquisition of some goods and marketing of farm produce. Family and social connections also link the residents of these villages to other villages throughout the West Bank.

The negative effects of the barrier will not be limited to landowners and residents of enclaves. Places such as Qalqiliya (38,000 residents) and Zita (2,800 residents), are expected to be closely surrounded by the barrier on three sides. Movement in and out of these locations will be possible from the east only. The repercussions in the case of Qalqiliya may be particularly severe as the residents of the nearby villages rely on services supplied in the city. The barrier will make access for these residents difficult.

### **Potential Infringement of Human Rights**

Erection of the barrier as described above, along a route located several kilometers within the West Bank, raises significant potential of infringement of the human rights of tens of thousands of Palestinian residents. As the occupier of the West Bank, Israel is responsible for the lives and well-being of Palestinians. Some of these violations have already taken place and some are certain to occur. Others may potentially occur

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<sup>8</sup> Nadav Shragai, "De Facto Annexation of Rachel's Tomb Approved," *Ha'aretz*, 12 September, 2002.

depending on the decisions Israel makes regarding the placement of the fence in other parts of the seam area and the arrangements made for the passage of people and goods on both sides of the barrier.

So far, Israel has only addressed the issue of the infringement of property rights inherent in the erection of the barrier. However, it claims that this infringement is lawful because the barrier is intended to meet “imperative military needs.”

This paper will discuss the basic rights that are liable to be infringed as a result of the erection of the barrier. It will then examine whether these infringements are legitimate in light of the state’s claim of military necessity.

#### **A. The Infringement of the Right to Freedom of Movement**

In response to a petition submitted to the High Court of Justice against the requisition of land for the barrier in a-Ras, Kafr Sur, and Far’un (hereafter: *a-Ras*), the State Attorney’s Office stated that Israel intends to “reach an arrangement with the landowners that would enable them to cross the barrier, so that they can continue to cultivate their land.”<sup>9</sup> So far, no official statement has been made as to arrangements for the residents of the enclaves on the west side of the barrier. These would presumably resemble the arrangements that will be made for landowners.

Even if such arrangements are made, forcing the Palestinians residents into a position of dependency on the IDF opens the door to countless situations where the State’s commitment to the High Court of Justice will not be kept.

Some of the concerns regarding access to land stem from the uncertainty as to the arrangements made for passage from one side of the barrier to the other. It is unclear how many crossing points will be established and where; whether Israel will establish conditions for granting crossing permits, such as it imposed in the past for granting permits to work in Israel (age, family relationship, security clearance, etc.); whether workers hired to cultivate the land will be allowed to cross, or permission will only be given to landowners; whether the right of the residents of the enclaves to cross to the eastern side of the barrier will be limited and whether they will be given the right to enter Israel. Another cause for concern is the recent proposal which was raised in the Cabinet to amend the open-fire regulations to lessen the restrictions on soldiers in the

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<sup>9</sup> HCJ 3771/02, *A-Ras Village Local Council et al. v. Commander of IDF Forces in Judea and Samaria et al.*, sec. 31.

area of the barrier.<sup>10</sup> If this is done, there may be a life-threatening risk to Palestinians crossing the barrier or working lands near it.

Past experience regarding Israel's policy of granting permits for movement in the Occupied Territories strengthens these concerns. Many times during Israel's occupation, particularly since the first intifada (1987-1993), Israel has restricted the freedom of movement of residents of the Occupied Territories on an individual and collective basis for improper reasons and while relying on extraneous considerations.<sup>11</sup>

For instance, Israel has often imposed collective restrictions on movement to punish the population in a particular location for an attack against Israeli civilians or soldiers that is attributed to a resident or residents of that community. Israel has denied individuals permission to enter Israel or go abroad in order to pressure them into collaborating with its General Security Service. In some cases, military authorities agreed to issue permits to certain individuals only following intervention by human rights organizations or other outside bodies indicating that the initial refusal was arbitrary. Moreover, possession of a permit does not necessarily ensure that its holder reaches his or her destination. In many cases, Palestinians have come across soldiers or settlers who, using one pretext or another, ignored the permits presented to them and ordered Palestinians to turn around and go back.

From the perspective of the persons harmed, the reason for restricting their movement is irrelevant, whether it is done on a collective or individual basis, whether for arbitrary or substantive reasons, if to prevent the passage of hired workers, or if it creates a life-threatening situation while they work their land. The result of these restrictions is the same: infringement of their right to freedom of movement which, in

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<sup>10</sup> See the comments of Minister Effi Eitam, "The Cabinet Approved the Separation-Fence Alignment," *Ynet*, 14 August 2002.

<sup>11</sup> B'Tselem has documented this policy extensively over the years. See, for example, *No Way Out – Medical Implications of Israel's Siege Policy* (June 2001); *Civilians Under Siege – Restrictions on Freedom of Movement as Collective Punishment* (January 2001); *Builders of Zion: Human Rights Violations of Palestinians from the Occupied Territories Working in Israel and the Settlements* (September 1999); *Divide and Rule – Prohibition on Passage between the Gaza Strip and the West Bank* (May 1998); *Without Limits: Human Rights Violations under Closure* (April 1996); *Bureaucratic Harassment; Abuse and Maltreatment During Operational Activities in the West Bank in the First Year of the Declaration of Principles* (September 1994); *The Closure of the West Bank and Gaza Strip: Human Rights Violations against Residents of the Occupied Territories* (April 1993); *Collective Punishment in the West Bank and Gaza Strip* (November 1990); *Soldier's Trials and Restrictions on Foreign travel*.

turn, leads to infringements of many other rights and on their ability to maintain central functions of their lives including reaching their place of employment, maintaining social, family and business ties, receiving certain medical treatments, and obtaining a higher education.

The right to freedom of movement within the borders of the state of residence is enshrined in Article 13 of the Universal Declaration of Human Rights, and in Article 12 of the International Covenant on Civil and Political Rights. Israel's duty to safeguard the right to freedom of movement for residents of the Occupied Territories is also derived from Article 43 of the Hague Convention on the Laws and Customs of War on Land, of 1907 (hereafter: Hague Convention). This article obliges the occupying state to ensure, as far as possible, public order and safety in territory where its authority has been established and can be exercised. As the High Court of Justice has held in a number of cases, this duty relates to every aspect of life in modern society, including the ability to work and earn a living.<sup>12</sup>

### **B. The Infringement of the Right to Work and the Right to an Adequate Standard of Living**

Erection of the barrier within the West Bank will separate tens of thousands people residing near the Green Line from their sources of income. Residents of the enclaves will be harmed as well. Even if most of the lands they own will also remain west of the barrier, their ability to market their produce in the rest of the West Bank is likely to be severely curtailed. Residents of enclaves who work outside their villages may lose access to their places of employment.

Blocking tens of thousands of Palestinians from their sources of income is particularly grave considering the current economic situation in the Occupied Territories. Farming has always been a primary source of labor and income for Palestinians in the West Bank in general, and for those living in many of the villages, towns, and cities adjacent to the Green Line in particular. The relative importance of this source of income has grown since the outbreak of the al-Aqsa Intifada, as a result of Israel's closure policy, which prevents Palestinian workers from reaching their work sites within Israel, and from the drastic reduction in jobs in the West Bank, partially

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<sup>12</sup> H CJ 393/82, *Jim'at Askan Alm'almon v. Commander of IDF Forces*, *Piskei Din* 37 (4) 785, 798; H CJ 3933/92, *Barakat v. OC Central Command*, *Piskei Din* 46 (5) 1, 6.

because of the restrictions on freedom of movement and the general decline in consumption. Consequently, fifty percent of the work force in the West Bank is now unemployed, and the percentage of the population living under the poverty line (i.e., the people who live on less than two dollars a day per person) has reached fifty-eight percent.<sup>13</sup> According to a recently published study, the dramatic decline in income has also affected nutrition and led to a significant increase in malnutrition among Palestinian children.<sup>14</sup>

The International Covenant on Economic, Social and Cultural Rights obliges Israel to safeguard the right of the residents of the Occupied Territories to earn their living by work.<sup>15</sup> The Covenant also places a certain degree of responsibility on Israel regarding the right of every resident of the Occupied Territories to “an adequate standard of living for himself and his family including adequate food, clothing and housing, and the continuous improvement of living conditions.”<sup>16</sup> The anomalous situation characterizing the Occupied Territories since the establishment of the Palestinian Authority may make it difficult to determine the degree to which Israel has a duty to invest financially to ensure the realization of these rights mentioned in the Covenant. Despite this difficulty, it is certainly clear that Israel is forbidden to take measures that directly infringe these rights.

### **C. The Infringement of the Right to Property**

Erection of a barrier within the West Bank in the dimensions described above requires Israel to take control over thousands of dunams of privately owned Palestinian land. The legal tool chosen in order to achieve this is the issuing of “requisition for military needs” orders. Most of these orders are in effect until the end of 2005, however, they may legally be extended indefinitely.<sup>17</sup> Residents who claim ownership of seized land can demand compensation from the IDF for the use of their property.

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<sup>13</sup> UNSCO, *The Impact of Closure and Other Mobility Restriction on Palestinian Productive Activities*, 1 January 2002-30 June 2002.

<sup>14</sup> John Hopkins University et al., *Preliminary Finding of the Nutritional Assessment and Sentinel Surveillance System for West Bank and Gaza*, August 2002

<sup>15</sup> Article 6 (1) of the Covenant.

<sup>16</sup> Article 11(1) of the Covenant

<sup>17</sup> Regarding land within the jurisdiction of Jerusalem, the control is obtained by the Emergency Requisition of Land Law, 5710 – 1949. Although there are several differences between the procedures within the area of Jerusalem and the procedures applying to the rest of the West Bank, the differences are not meaningful.

Taking control of the land for military needs does not give Israel ownership of the land. However, the indefinite duration of the requisition and the fact that a vast amount of resources is being invested by Israel in erecting the barrier, increases the likelihood that the action is, in effect, a disguised expropriation of property. It should be recalled that Israel has used “requisition for military needs” orders in the past as a means to take control of Palestinian land to establish settlements. These lands were never returned to their owners. It is clear in this case that Israel’s intention is not to seize the land for a temporary period, but to expropriate it permanently.<sup>18</sup>

In addition, considering the possibility that Palestinians will not be allowed to reach their lands on the other side of the barrier, the injury to the right to property is even greater, and would amount to tens of thousands of dunams. In such a case, the only difference between taking official control by means of “requisition for military needs” and taking control in practice by blocking access to the farmland is that, in the latter case, the landowners would not be entitled to compensation.

The right to property is enshrined in both international and Israeli law. Article 46 of the Hague Convention requires the occupying state to respect the private property of residents of the occupied territory, and Article 17 of the Universal Declaration of Human Rights states that, “Everyone has the right to own property” and that, “No one shall be arbitrarily deprived of his property.” Article 3 of Israel’s Basic Law: Human Dignity and Liberty provides that, “There shall be no violation of the property of a person.”

#### **D. The Infringement of the Right to be Heard**

The requisition orders given to Palestinians go into effect on the day they are signed. However, current procedures require the IDF to give a waiting period of seven days before taking possession of the land. This period is granted to enable the residents to present their objections to the IDF. An additional week is given to those who wish to petition the High Court of Justice. Past experience, and proceedings that have already taken place with regards to lands seized for the barrier indicate that presenting objections to the IDF is nothing more than a formality which, in most cases, has no effect on decisions that have already been made.

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<sup>18</sup> For extensive discussion on this subject, see B’Tselem: *Land Grab: Israel’s Settlement Policy in the West Bank*, May 2002.

Moreover, as the State Attorney's Office argued in its response in *a-Ras*, "in cases where an urgent military operation during combat makes it impossible to issue a written order or provide the right to be heard before the act is executed, the requisition of land can be implemented prior to carrying out the said duties, and these duties will be fulfilled retroactively."<sup>19</sup> It is clear that the benefit of granting the right to be heard retroactively is often limited; although it is possible to return a land to its owner, certain damage to cultivated land is irreversible. In *a-Ras*, the requisition orders were issued a week after work on the barrier had begun, and the petition to the High Court was filed about two and a half weeks later - after the land had been leveled and hundreds of olive trees had been uprooted.

Another possible reason that the right to be heard is liable to be infringed stems from the difficulties Palestinian residents have in proving to the IDF authorities that they own the land, which is a pre-condition to filing an objection to requisition of the land. These difficulties are a result of the fact that, on the eve of the occupation, in 1967, about two-thirds of the land of the West Bank was not registered in the Lands Registry. Since then, Israel has frozen the registration procedure. To prove ownership of unregistered land, Palestinian residents must prove that they cultivated the land for ten consecutive years, and must attach a survey of the land prepared by a licensed surveyor.<sup>20</sup> The failure to meet these conditions, which is often impossible, is liable to result in denial of the right to voice an objection to the requisition of their land.

The right to be heard is one of the principles of natural justice and is enshrined in Israeli administrative law and in Supreme Court rulings.

### **Is the Harm Justified?**

In its response in *a-Ras*, the State Attorney's Office justified the harm to residents with the argument that, "requisition of the land is intended to create an obstacle in order to block terrorists and suicide-terrorists from leaving Tulkarm and its vicinity and entering the State of Israel."<sup>21</sup> The State's legal argument was based on Article

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<sup>19</sup> *A-Ras* Section 20.

<sup>20</sup> For extensive discussion on this subject, see B'Tselem, *Land Grab*.

<sup>21</sup> *A-Ras*, section 2 of the response

23(g) of the Hague Regulations, which allows the occupying state to seize private property if necessary for military needs in time of war.<sup>22</sup>

The State's treatment of the situation currently existing in the Occupied Territories as war, without restriction on time and place, is itself problematic. International law experts are in disagreement as to the legal definition of the current situation.

However, insofar as all the relevant laws mentioned above – the laws of occupation, the human rights conventions, and Israel's basic laws – allow, in certain circumstances, infringement of the relevant human rights, the question is what these circumstances are and whether they exist in the case of erecting the planned barrier.

Preventing the uncontrolled entry of Palestinians into Israel as a means to prevent, or at least reduce, attacks and suicide attacks against Israeli civilians is indeed a legitimate military objective. However, military needs cannot justify sweeping human rights violations. Even when legitimate military needs exist, Israel must still operate within the confines of international law. The central condition that must be met in order to justify human rights infringements is the lack of alternative action of comparable military value that results in a lesser infringement of human rights.

B'Tselem is unable to examine the question as to whether, and to what extent, the planned barrier will contribute to achieve the declared objective. However, it is possible to identify several facts that raise grave doubt that the primary considerations underlying the determination of the placement of the fence were related not to the military benefit anticipated and the minimal infringement of human rights, but rather stemmed from extraneous reasons.

#### **A. The State's Argument**

In its response in *a-Ras*, the state mentions the three principal considerations that ostensibly led the IDF to determine the placement of the barrier in the section between Far'un, which lies south of Tulkarm, and the Sal'it settlement:

1. Control of the topography that will enable observation from the patrol road;
2. Creation of a security area that will provide a period of delay that would enable the location of persons who crossed the barrier before they reach

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<sup>22</sup> *A-Ras*, Sections 27-28 of the response.

the Arab-populated town of Taibeh in Israel, where they are liable to find refuge among the residents;

3. Reduction of the harm to the cultivated farmland, such that “the placement chosen would be based, to the extent possible, on the existing road... In this context, uncultivated land was preferred over cultivated land; as for cultivated land, harm to seasonally cultivated land was selected in preference to the uprooting of trees.”<sup>23</sup>

B’Tselem toured the area where the infrastructure work for the barrier had already begun. At various observation points toured by B’Tselem’s researchers along this section, the first and third reasons mentioned above are not reflected on the ground.

The topographical consideration mentioned in the State’s response is illogical. In most of the areas, the barrier’s path passes along river beds or hillsides, and not necessarily the high points. Furthermore, the three largest villages along this section of the barrier – Far’un, a-Ras, and Kafr Sur – are located on hills. Thus, many sections of the planned patrol roads do not overlook them. Other sections, are inferior lookout points.

Actions taken by the security establishment in the area raise doubts that “reduction of the harm to cultivated land” played a major role in its considerations. As long ago as April 2002, the IDF began to level land on the barrier’s course in the area between Road 57 and Jabareh. On 20 August 2002, several days after the Cabinet decided on the final course, the IDF issued a new requisition order, which established another course, located about two kilometers east of the original one. The work on the original course ceased and no infrastructure was prepared.<sup>24</sup> This change was made after irreversible damage had been caused by the uprooting of hundreds of olive trees, some of them very old. In a significant number of places, the new course also ran across lands on which olive trees are planted. At the time when B’Tselem’s tour of the area was taken (11 September 2002) leveling of land and uprooting of trees had not yet begun on this course.

The second consideration mentioned in the response, that the placement of the barrier will give the security forces a period of time to locate terrorists who cross the it before reaching Taibeh, indeed seems to be a substantive reason that is reflected on the

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<sup>23</sup> *A-Ras* Section 16 of the response.

<sup>24</sup> Military Order n 24/02.

ground. Therefore, the question arises as to the existence of alternatives of comparable security value that would result in a lesser infringement of human rights.

Architects from the organization Bimkom submitted an opinion to the High Court that suggests an alternative placement for the barrier in the area of Far'un. The alternative placement is based on an existing path and only slightly harms the farmland of the village's residents. The opinion states that, "it is possible to increase the delay and warning capability of the barrier, in exchange for reducing the security area."<sup>25</sup> In other words, it is possible to provide the security forces with the same delay time from the moment when potential terrorists touch the electronic fence and the time they reach Taibeh, by making the barrier broader. This would increase the time necessary to cross it, equal to the delay time that was to be created by means of the security area. Making the barrier broader would entail higher costs, but the savings involved in not doing so is not a legitimate reason for infringing human rights. After the architect's opinion was submitted to the High Court, a supplemental response to the petition was filed by the State Attorney's Office. It did not relate to this aspect of the alternative proposed by the architects.

## **B. Political Considerations**

The idea to erect a barrier along the entire seam area was opposed by right-wing politicians in general, and by settlement officials in particular. One of the primary reasons was their belief that such a barrier is liable to soon become the political border separating Israel and the Palestinian state to be established. This was one of the reasons that the head of the YESHA [acronym for Judea, Samaria, and Gaza] Council, Bentzi Liberman, in June 2002 stated that, "if a separation fence is erected, we will break up the [government] coalition."<sup>26</sup>

In addition, it was claimed that construction of a barrier of such size on a route that follows the Green Line will constitute a political achievement for the Palestinians, as it would recognize the Green Line as a relevant point for discussion of separation between Israel and the West Bank. In the words of Israel Harel, a columnist identified with the right-wing and former head of the YESHA Council:

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<sup>25</sup> Opinion of architects Eli Ilan and Sazar Yehudkin

<sup>26</sup> Smadar Shmueli, "YESHA Council: A Fence Goes Up – End of Coalition," *Ynet*, 12 June 2002.

About two months after the IDF restored a significant portion of its deterrence capability in the battles of Operation Defensive Shield, the Israeli government, headed by Ariel Sharon, gave the strategic victory to Arafat. Exactly thirty-five years after the Six Day War, and after two years of a brutal and unceasing war of terror, Israel's government has decided that it is not meeting the feeble pressure of the public – and of past and present senior defense establishment officials – to establish a security separation line, that will essentially coincide with the cease-fire lines of 1949.<sup>27</sup>

Facing these objections and criticism, government ministers, and the Minister of Defense in particular, stated repeatedly that the barrier that would be constructed is purely for security reasons, and in no way constitutes a political border. One of the means that the government apparently uses to broadcast that the course is not a political border to opponents of the project is by establishing the placement in a manner that does not coincide with the Green Line.

For example, an article in *Ha'aretz* reported that, “[Minister of Defense] Ben Eliezer instructed the Seam Area Administration that the separation fence will be built on a course *that is not to be construed* as a political border, but as a barrier intended to increase security”.<sup>28</sup> Minister of Education Limor Livnat stated at a cabinet meeting that one of the “ principles that should guide construction of the fence is that it will be a security fence *and not be viewed* as a political border.”<sup>29</sup> In a document submitted by the Minister of the Interior, Eli Yishai, to the Prime Minister, he suggested that the “fence placement not coincide with the Green Line, but that it be as far away as possible so that it will indeed be a security, and not a political, separation fence.”<sup>30</sup>

Unlike government officials, who insisted on relating to the separation barrier and its placement as a purely security issue, the State Attorney's Office presented the matter of the barrier in a wider context. In its statement to the High Court, it stated that, “the issue raised in the petition is *a purely political-security issue.*” (i.e. not only

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<sup>27</sup> “Sharon Grants Victory to Arafat,” *Ha'aretz*, 13 June 2002.

<sup>28</sup> Amnon Barzilai and Zvi Zarhiya, “Work on Erecting the Seam-Line Fence Begins,” *Ha'aretz*, 11 June 2002. (emphasis added)

<sup>29</sup> Diana Bahor, “Separation Fence: All the Objections,” *Ynet*, 4 July 2002. (emphasis added)

<sup>30</sup> Mazal Mualem, “SHAS: Include more Communities West of the Fence,” *Ha'aretz*, 4 July 2002

security.)<sup>31</sup> In this statement, in which the State Attorney's Office requested that the High Court deny the petitioner's application to require the government to immediately erect a separation fence between the West Bank and Israel, the State Attorney's Office relied on numerous High Court rulings in which it refused to intervene in petitions that dealt with questions of a political nature.

Another indirect proof that political considerations were taken into account is apparent from the changes made in determining the placement of the barrier in the area of a-Ras and Kafr Sur, as mentioned above. The State's response in *a-Ras* states that, "the placement was selected following rapid work, including an examination of the alternatives... the placement was approved by the OC Central Command."<sup>32</sup> As mentioned above, on 14 August 2002, the Cabinet discussed the placement that was set by the defense establishment. On 20 August, the commanding officer signed the new requisition order that reflected a different placement in the a-Ras – Kafr Sur area. It can reasonably be assumed that the reasons for the change in the placement resulted from various considerations that were raised at a meeting of the Cabinet and not necessarily from a sudden change in the opinion of the OC Central Command.

The circumstances and statements mentioned above raise the likelihood that the decision on the placement of the barrier was not determined solely on the basis of purely military-security considerations, and that it was tainted by political considerations. Such considerations may not form a proper basis for infringing human rights in general, and for infringing the human rights of residents of the Occupied Territories in particular.

### **C. Perpetuating the Settlements**

Map 1 and media reports indicate that one of the considerations that the defense establishment and Cabinet took into account in determining the placement of the barrier in the section that has already been decided on was the inclusion of most of the settlements on the western side of the barrier as long as the action did not require inclusion of Palestinian communities. As a result, ten settlements have so far been included on the western side of the barrier.

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<sup>31</sup> Statement of the State Attorney's Office in H CJ 3460/02, *Dror Halevi v. Prime Minister et al.*, Section 5. (emphasis in the original)

<sup>32</sup> *A-Ras*, Section 2 of the state's response.

Protection of the settlements can seemingly be deemed a military need, thus justifying a certain degree of infringement of the human rights of residents of the Occupied Territories. On one side of the scale lies the protection of the right to life of the settlers, while on the other side lie the rights of the Palestinians to work, freedom of movement and property whose status are less than the right to life. However, the special circumstances involved turn what seems a simple conclusion into a misleading one.

The settlements established by Israel in the Occupied Territories are illegal under international humanitarian law. The Fourth Geneva Convention prohibits the occupying state to transfer a population from its territory to the occupied territory, while the Hague Regulations prohibit the making of permanent changes in the occupied territory unless the changes are to benefit the local population or are intended to meet military needs. Breach of these prohibitions led to the increasing infringements of the human rights of innocent local residents, carried out in the name of protecting the settlers from Palestinian attacks.

As the very existence of the settlements violates international law, Israel is required to dismantle all the settlements.<sup>33</sup> This solution also provides a response to the question of the existence of the alternatives that cause a lesser infringement of human rights. That is, evacuating the settlers into the Israel would provide a comparable level of protection – if not greater – of the lives of the settlers than would the alternative of including those settlements on the western side of the barrier. At the same time, it would reduce most of the violations of Palestinian human rights.

Even if this optimal solution is put aside, it is impossible to accept the argument that no other alternative to protecting the lives of those settlement's residents is available, other than to include them on the western side of the barrier. It should be mentioned that only a small minority of the settlements are included on the western side of the barrier, with most of them remaining on the eastern side. With the objective of protecting these settlements, the Ministry of Defense decided to erect "a new protection system that includes an electronic fence with deterrent means, and a staffed

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<sup>33</sup> For further discussion on the infringement of human rights resulting from the existence of the settlements, see B'Tselem, *Land Grab*.

central-control room.”<sup>34</sup> This protection system is set to be established in forty settlements initially. If a similar measure were implemented in the settlements that were included in the area west of the barrier, it would on one hand provide a reasonable solution to the security threat they face, and on the other hand would prevent infringement of the rights of the Palestinians that is liable to occur if the barrier is erected on land in the West Bank.

The existence of these two alternatives further sheds light on the real reason for the Cabinet’s decision: maximum protection of the settlers was not involved, but rather the underlying reason was to establish facts on the ground that would perpetuate the existence of settlements and facilitate their future annexation to Israel.

### **Recommendations**

This position paper has described the human rights that are liable to be infringed if the separation barrier decided on by Israel’s government is erected within the territory of the West Bank. An examination of the process that led to the determination of the placement of the first section of the barrier, and a study of the features of the placement itself, raise grave concern that extraneous considerations played a role in the decision making. This concern is intensified in light of the lack of transparency that has characterized the decision making process thus far.

Israel, as the occupying force, is obliged to safeguard the human rights of the residents of the territories under its control. Certain infringements on these rights are allowed only if they are done in order to benefit the local population or if they serve an urgent military need. In the second case, infringements are allowed only when no alternative which would lessen the infringement on human rights is available.

The human rights infringements resulting from locating the barrier inside the West Bank and the extraneous considerations taken in deciding on its placement are liable to turn the entire barrier project into a substantial breach of international law that binds the Israeli government. To prevent this from occurring, B’Tselem recommends that the Israeli government:

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<sup>34</sup> Alex Fishman and Yuval Karni, “Forty Settlements to be Surrounded by Electronic Fence,” *Ynet*, 9 July 2002.

- Decide that in principal the barrier will run along the Green Line, or, in the alternative, within Israel's territory. There must be a re-examination of the decisions made so far.
- Allow deviations from the above principle only in exceptional cases, based on only two considerations: benefit to the local population and Israel's military needs in the narrow sense of the term;
- If and when, as a result of one of these considerations, it is decided that a Palestinian community or Palestinian-owned farmland is to be located west of the barrier, Israel must ensure that all the conditions necessary are met to enable the residents affected to maintain their normal way of life;
- If and when, as a result of one of these considerations, it is necessary to take control of Palestinian-owned land, the landowners must be given a reasonable opportunity to be heard before a professional committee.