

HCJ

Supreme Court, Jerusalem

Sitting as High Court of Justice

**BRIEF OF AMICI CURIAE NATIONAL LAWYERS GUILD
AND INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS**

The Appellants:

1. AHMED ABU SULIEMAN ALDARAWI
2. SAMEEH AHMED ABU SATEH ALDARAWI
3. YOUSEF AHMED ABU SATEH ALDARAWI
4. NADER AHMED ABU SATEH ALDARAWI
5. ABU SATEH AHMED ABU SATEH ALDARAWI
6. OMAR AHMED ABU SATEH ALDARAWI
7. MAHMOUD AHMED ABU SATEH ALDARAWI
8. MAHMOUD MOHAMAD HUSSEIN SALEM
9. MOHAMAD MOHAMAD HUSSEIN SALEM
10. DAOUD ALI HUSSEIN SHAWARWA
11. FATMEH AHMAD ALI ALDARAWI
12. BADER SULIEMAN MOHAMAD ALDARAWI
13. NAWAL SULIEMAN MOHAMAD ALDARAWI
14. MOHANAD SULIEMAN MOHAMAD ALDARAWI
15. JAMAL SULIEMAN MOHAMAD ALDARAWI
16. ABED ALI HUSSEIN ATIEH
17. RADI ABED ALI HUSSEIN ATIEH
18. IBRAHIM ABU SATEH SULIEMAN ALDARAWI
19. JAMAL ALI HUSSEIN SHAWARWA
20. MAHMOUD ALI HUSSEIN SHAWARWA
21. KHADER AHMAD ABU SATEH ALDARAWI
22. JASSAN AHMAD ABU SATEH ALDARAWI
23. ALI IBRAHIM ABDALLAH ALDARAWI
24. SAMEEHA MOHAMAD ABU SATEH ALDARAWI
25. MOHAMAD IBRAHIM ABU SATEH ALDARAWI
26. MOHAMAD SULIEMAN MOHAMAD ALDARAWI
27. BILAL ABED ALI ATIEH
28. IYAD MOHAMAD SALEM

The Defendants:

1. State of Israel
2. Prime Minister of Israel , Mr. Ariel Sharon

3. Minister of Defense
4. The Israel Defense Forces

On behalf of Amici, Atty. Audrey Bomse, Elisha Street 14, Jerusalem, Israel, tel. 02-627-6768, and Stephen Goldberg, Chairman, National Lawyers Guild International Committee, 621 SW Morrison St., Suite 1450, Portland, Oregon, USA, tel. 01.503.224.2372.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Identity of the National Lawyers Guild

1. The National Lawyers Guild (“NLG” or “Guild”) is an organization of approximately 4000 lawyers, legal workers, and law students in the United States. Founded in 1937, the Guild was the first racially integrated bar association in the United States. During its 65-year history, the NLG has been an important part of the American people’s struggle for real democracy, for economic and social justice, and against oppression and discrimination based on race, ethnicity,

- immigration status, class, gender, or sexual orientation.
2. Since the NLG's inception, international work has been a critical focus of the Guild and its members. In the 1940s, Guild lawyers fought against fascists in the Spanish Civil War and World War II and helped prosecute Nazis at Nuremberg. The Guild was one of the non-governmental organizations ("NGOs") selected by the U.S. Government officially to represent the American people at the founding of the United Nations in 1945. The organization opposed apartheid in South Africa at a time when the U.S. Government still called Nelson Mandela a "terrorist." Guild lawyers were involved in monitoring the first democratic elections in South Africa in 1994 and advised those drafting South Africa's first constitution. Later in the 1990s, it sent groups of lawyers and law students to South Africa to monitor and report on the Truth and Reconciliation Commission. Guild members have participated in delegations to Cuba, El Salvador, Nicaragua, Vietnam, Colombia, Japan, the Basque territory in Spain. They have participated in several delegations to Israel and the Occupied Territories (hereinafter "OT").
 3. In the 1980s, the Guild used International Law in support of the anti-nuclear movement and to challenge the use of nuclear weapons under International Law. This eventually resulted in the World Court declaration that nuclear weapons violate International Law in a case argued by Guild lawyers more than a decade later. The NLG National Immigration Project worked systematically on immigration issues, spurred by the need to represent Central American refugees and asylum activists fleeing U.S.-sponsored "terror" in Nicaragua and El Salvador. The Guild organized "People's Tribunals" to expose the illegality of U.S. intervention in Central America that became even more widely known as the

“Iran-Contra” scandal.

4. In the 1990s, Guild members mobilized opposition to the Gulf War, defended the rights of Haitian refugees escaping from a U.S.-sponsored dictatorship, opposed the U.S. embargo of Cuba, and began to define a new civil rights agenda that includes the right to employment, education, housing, and health care. Guild lawyers pioneered legal theories based on early 19th Century statutes for holding foreign human rights violators accountable in U.S. courts. The Guild began analyzing the impact of “globalization” on human rights and the environment several years before the World Trade Organization Seattle demonstrations, and our members have played an active role opposing North American Free Trade Association and in facilitating the growing movement for “globalization of justice.” As the 20th Century came to a close, the Guild was defending anti-globalization, environmental, and labor rights activists from Seattle to Washington D.C. to Los Angeles. Guild members were playing an active role in encouraging cross-border labor organizing and in exposing the abuses in the *maquiladoras* on the U.S.-Mexico Border. The NLG’s Project for Human, Economic and Environmental Defense (HEED) and the Committee on Corporations, the Constitution & Human Rights began working on globalization issues and fighting against world-wide extremes in wealth and poverty.

National Lawyers Guild’s Interest in This Litigation

5. The Guild’s membership is diverse and historically has included many Jewish attorneys and others who were concerned about the situation in Israel and the Middle East. In 1977, the Guild sent a delegation of members to the Middle East. In 1978, the report of that delegation, *Treatment of Palestinians in Israeli-*

Occupied West Bank and Gaza: Report of the National Lawyers Guild 1977

Middle East Delegation, was issued. The report was the first comprehensive analysis of Israel's practices published by any non-governmental organization concerned with human rights. It documented violations by Israel, as a belligerent occupant of the West Bank and Gaza, of the 1949 Geneva Convention – issues raised by Plaintiffs in the context of the brief they have filed herein.

6. The Guild issued a second monitoring report in 1988 based on material compiled by human rights organizations, the United Nations and the press, and further based on inquiry missions to the occupied Palestinian territories by Guild members between December 1987 and October 1988. That report, titled *International Human Rights Law and Israel's Efforts to Suppress the Palestinian Uprising*, highlighted violations of rights of the Palestinian people during the 1988 intifada.
7. Further delegations went to Israel and the occupied territories in January 2001, specifically to explore the role of U.S. military and economic aid in the violation of Palestinian human rights, and in May 2002, to investigate actions by the Israeli military against the civilian Palestinian population during its raids of the region in April 2002, that resulted in the destruction of Palestinian culture and civil society. Both delegations issued reports on their findings. In these and other delegations, Guild members have met with Israeli and Palestinian attorneys as well as organizations such as Adalah, B'Tselem, the Association for Civil Rights in Israel, the Civil Rights/Human Rights Committee of the Israeli Bar Association, HaMoked, Law, Addameer, the Mandela Institute, the Palestinian Prisoners' Association, the Palestine Human Rights Monitoring Group, and others.

8. Guild law professors such as John Quigley have written extensively on international legal issues implicated in the occupation of the Palestinian territories.
9. The NLG filed for leave to submit an amicus brief to this Court in the matter of *The Public Committee Against Torture in Israel et. al. vs. State of Israel, et. al.*, HCJ 769-2, with the brief attached as an annex, and is waiting for the Court's decision.
10. Finally, as an association of United States lawyers, law students and law professors, the NLG has a particular interest in pointing out to this Court violations by Israel of U.S. law, in particular, the American law that bars U.S. loan guarantees from being used for West Bank settlement construction or support

International Association of Democratic Lawyers' Interest in This Litigation

- 11 The International Association of Democratic Lawyers (“IADL”) was founded in 1946 in Paris. IADL is a non-governmental organization with consultative status to the United Nations General Assembly, ECOSOC, and UNESCO.
12. IADL has members and member organizations in 96 countries. Its members are prominent lawyers and jurists, all of whom are united in the aims and goals of the IADL, which the IADL Constitution specifies as follows:
 - 1 To facilitate contact and exchange of views among lawyers and lawyers' associations of all countries in order to foster understanding and goodwill among them;
 - 1 To work together to achieve the aims set out in the Charter of the United Nations;
 - 2 To ensure common action by lawyers in the realm of law in the study and practice of the principles of democracy in order to encourage the maintenance of peace and cooperation among nations;

- 3 To restore, defend, and develop democratic rights and liberties both in legislation and in practice;
 - 4 To promote the independence of all peoples and to oppose any restriction on this independence, whether in law or in practice;
 - 5 To defend and promote human and peoples' rights;
 - 6 To promote the preservation of ecology and healthy environments;
 - 7 To struggle for strict adherence to the rule of law and the independence of the judiciary and legal profession;
 - 8 To defend peoples' rights to development and for conditions of economic equality and the enjoyment of the fruits of scientific progress and natural resources.
13. Since IADL's founding, its members have used their legal skills to oppose violations of human rights of groups and individuals, as well as threats to international peace and security. From its inception, IADL members throughout the globe have protested racism, colonialism, and economic and political injustice wherever they interfere with legal and human rights – often at the cost of their personal safety and economic well-being.
14. Through their efforts, IADL lawyers have helped to establish fundamental concepts of international and domestic law, including: the declaration of apartheid as a crime against humanity; the provision of prisoner-of-war status to combatants from liberation movements; prohibition of the use of unilateral force by one nation against another; the recognized legal right of peoples to self-determination; the recognized legal rights of women and children, and the almost universal public policy acceptance that there should be legal remedies for racial, religious, economic, and cultural discrimination and persecution.

15. The National Lawyers Guild is an affiliate of the IADL in North America and has reported many of the actions stated in its statement of interest to the leaders and members of the IADL. The IADL previously joined with the Guild in filing for leave to submit a joint amicus brief to this Court in the case of *Public Committee Against Torture in Israel et. al. vs. State of Israel, et. al.*, HCJ 769-2 and is waiting for the Court's decision.
- 16 The IADL joins the NLG in this amicus brief because of its belief that construction of the separation Wall between Israel and the West Bank, as evidenced in this case, involves so many gross violations of the human rights of so many Palestinians, as recognized under international law, that we must add our voice to those who oppose this policy.
- 17 The interest of National Lawyers Guild and the International Association of Democratic Lawyers goes far beyond the issue of the effect of the construction of the Wall on the land and residents of Masmuria. Amici are concerned with, and would like to bring to the attention of the Court, the overall effect of and the many human rights violations resulting from construction of this medieval-like fortification separating Israel from the West Bank. Opposition to discrimination based on race, ethnicity and/or national origin has been a consistent focus of both the NLG and the IADL. Amici are therefore also concerned with and would like to focus the Court's attention on the racism that is being fostered by the Wall.
- 18 The National Lawyers Guild and the International Association of Democratic Lawyers would both prefer using the skills and talents of their members to promote peace between Israelis and Palestinians, rather than trying to convince the Court that construction of walls is a medieval practice, and that this Wall,

together with its inevitable consequences, including land confiscation, home demolition and eventual population transfer, as well as various other human rights violations, have no place in a democratic society based on the rule of law.

Statement of Issues Presented

19. Does the separation Wall between Israel and the West Bank inevitably violate so many Palestinian human rights and so much international law that it should be halted immediately? Are there other courses of action available, including ending the Occupation, to achieve the same security objective, without causing the wholesale violation of Palestinian human rights? Does construction of the Wall violate the American law that bars U.S. loan guarantees from being used for West Bank settlement construction or support as well as the Road Map, sponsored by the U.S. and other members of the Quartet? Does the Wall promote racism and lead to a ghetto mentality?

Statement of Facts

- 20 Amici adopt the statements of facts contained in Plaintiffs' briefs.
- 21 In June 2002, the government of Israel decided to erect a separation barrier around the entire West Bank, ostensibly to ensure the safety of Israelis living within the Green Line by controlling the entry of Palestinians into Israel. The effect of the Wall, however, is much broader than the protection of Israeli citizens for it will have a profoundly negative impact on the lives of many thousands of Palestinians. The Wall is to be built in three states. To date, only Stage 1 of the Wall has been completed; it is approximately 130 kilometers long and runs from Salim in the

north to Elkana in the south. It spans the three districts of Jenin, Tulkarm and Qalqiliya, which have a combined population of over 50,000 people. The Seam Area Administrator estimated the cost for Stage 1 of the barrier would be about NIS 8 million (almost \$2 million) per kilometer. According to UNWRA, the cost is approximately NIS 10 million per kilometer. The second stage is due to be completed by the end of 2003. In addition, a "security envelope" is being constructed around Jerusalem. The plan includes a second Wall along the Jordan Valley, running somewhat parallel to the first Wall.

- 22 Money from the United States, part of the \$9 billion loan guarantees passed by the U.S. Congress, was and is being used to construct the Wall, in part, to protect the West Bank settlements.
- 23 The terms "barrier," "fence," or "wall" are all grossly insufficient to describe the structure that is being built: a concrete wall, eight meters high, wire fences and electronic sensors, ditches four meters deep on either side, a dirt path to reveal footprints, an area into which entry is forbidden, a two-lane road for army patrols, and watchtowers and firing posts every 200 meters along the entire length. The Defense Ministry has said that the average width of the barrier complex will be 60 meters, though at points with especially difficult topography, it could eat up as much as 100 meters. The projected length of the Wall is now 630 kilometers - almost twice the length of the Green line itself. It is a work of monumental proportions, twice as long and three times as high as the Berlin Wall.
- 24 Most of the fortress-like barrier's route does not run along the Green Line, but snakes through the West Bank, at points up to six kilometers, effectively confiscating substantial amounts of Palestinian land. At no point does the Wall

follow a course on the Israeli side of the Green Line. While the rationale for constructing the Wall is to separate and "isolate" Palestinians from Israelis, in fact, the Wall separates Palestinians from other Palestinians.

25 Plans are for the Wall to veer repeatedly eastward from the Green Line to take Jewish settlements into its embrace - including the large settlement of Ariel, 20 kilometers east of the Green Line. The basic principle followed by Colonel Dani Tirza, Seam Administration official responsible for mapping the exact path of the Wall, is that it should run where "there will be the maximum number of Palestinians and a minimum number of Israelis beyond it." Tirza admits: "If I've got an Israeli settlement, I'll go around it." Eleven Israeli West Bank settlements, including Ariel, Kedumim and Immanuel, will be located on the western side of the barrier. The Jerusalem "envelope" will include, in addition to all of Jerusalem, as defined by Israel after it annexed East Jerusalem in 1967, the two large Israeli settlement blocs of Givon and Adumim, which are outside the previously annexed area.

26 In order to construct this huge fortification, Israel has taken control of extensive areas along the planned route. The first phase of the Wall has affected 161,700 dunam, 2.9 percent of the land area of the West Bank, which are now isolated on the Israeli side of the barrier. Most of the land taken was privately owned by Palestinians. Much of it is prime agricultural land containing water sources, orchards, field crops and greenhouses. The legal justification used to take control of this land is "requisition for military needs." Most of the requisition for military needs orders are in effect until the end of 2005, but they can legally be extended

indefinitely. Although residents who claim ownership of seized lands could demand compensation from the IDF for use of their property, they do not, because doing so would legitimize the State's actions. By law, the seizure orders do not transfer ownership of the land to Israel. However, the indefinite duration of the requisition, in addition to the huge amount of resources being invested by Israel to build the Wall, is evidence that what is occurring is a disguised expropriation of property.

27 The residents of Masmuria are presently facing eviction from their land and homes because of construction of the Jerusalem "security envelope." When Israel first annexed East Jerusalem in 1967, implementing a policy of trying to gain control over as much land as possible, while at the same time trying to minimize the percentage of Palestinians in the total population of Jerusalem, the Israeli authorities decided to include the land of Masmuria in annexed East Jerusalem but not to grant its inhabitants residency status and rights. Now with the building of the Jerusalem envelope on West Bank land beyond the old Jerusalem municipal borders, and the inclusion of Masmuria in the expanded "greater Jerusalem," that situation is no longer tenable. Faced with having to decide between setting a precedent and allowing an entire village of West Bank ID holders to live within the greater Jerusalem borders, or granting the inhabitants of Masmuria residency status and thus increasing the number of Palestinians in the city, the Israeli Authorities have opted for a third solution: they are attempting to expel the inhabitants of Masmuria from their lands. Over the past few months, the Israeli Authorities have repeatedly tried to pressure the inhabitants to leave their homes. First, they sealed the village off on all sides, thus cutting its residents off

from the outside world. After this policy failed, the Authorities began repeatedly arresting all of the men in the village in the middle of the night, terrifying entire families in the process, holding the men for hours without any charges, and then releasing them miles away from their homes. Although this is occurring on a nightly basis, to-date the residents of Masmuria are still refusing to give in to this policy of intimidation.

28 For the first time since the 16th century, the city of Jerusalem is being walled in.

Continuing the expansion of the borders of "Greater Jerusalem," the Wall will further the complete isolation of the heart of Palestine. Once the commercial, social, religious and historical center of the West Bank, this city will become inaccessible to the majority of Palestinians living in the Occupied Territories. The Jerusalem "security envelope" will destabilize East Jerusalem; it will alter the demographics of the entire City. After construction of the Wall, over 20,000 Palestinian Jerusalem residents will be outside the city, cut off from their family, friends, jobs and public services, while about 50,000-70,000 West Bank ID holders will be inside - illegally.

29 The Northern Jerusalem Wall that is being built alongside the Qalandiya checkpoint spreads on the lands of the villages of A-Ram, Qalandiya, Kufr Aqan, Al-Bira and Rafat. In this area alone, the Wall will be 8 km in length, taking 800 dunams of land, 500 of which will be isolated behind the Wall and another 300 of which will be in the Wall's buffer zone. It will be 40-100 meters wide, with paths for military vehicles, sensors, watchtowers and additional buffer zones.

30 The human tragedy being created by the northern Jerusalem Wall is exemplified by the situation facing the Assad family, residents of Qalandiyah. Their land, which

is adjacent to the northern edge of the airfield at Qalandiyah (Atarot), was purchased by Dr. Sami Assad's family in the 1950s. His wife, Fatma Assad, is a 50-year old math teacher at a girls' school in Beit Hanina and a member of the Israel Teachers' Union. She and her 16-year old daughter both hold Jerusalem identity cards. Dr. Assad, a 52-year old orthopedist, does not hold an Israeli ID card because he was studying abroad when Israel held a census of residents in his neighborhood. The Assads pay Jerusalem municipal taxes every year. The separation Wall enclosing the greater municipal area of Jerusalem is currently being erected some 30 meters from the Assad's yard, leaving the family home on the non-Jerusalem side of the divide. In addition to losing their Jerusalem residency, the Assads fear the Wall will threaten their physical safety, given the prevailing open-fire orders, if they are on their property and someone else approaches the Wall.

31 In Bethlehem, also a religious and cultural center in Palestine, the Wall is severing the city's connection with Jerusalem and the rest of the West Bank, and is cutting connections among communities in the area. The Bethlehem Wall is a 15 km shackle that will consist of fences (some electric), buffer zones, trenches, barbed wire, sensors, and an 8-10 meter high wall. Most of the Wall in this area will be layers of fences surrounding the northern part of the city and, in-between the fences will be a major bypass road connecting the settlements in the area. The Bethlehem Wall is annexing entire communities, as well as religious/historical sites and large tracts of land, and will affect the lives of tens of thousands of people. From Beit Jala to Beit Sahour, the 15 km electric fence-road with a buffer zone of approximately 100 meters, will connect Road 60/Gilo Settlement with the

Har Homar settlement. A second part of the Wall here will encircle the area around Rachel's Tomb. The new checkpoint for Bethlehem will be some 200 meters further south of the prior one. This area will be a combination of an eight-meter high wall, fences and road, and will isolate tens of homes, shops, a church and waqf property into a non-man's land. Thirty-five multi-story houses, in which approximately 400 Palestinians live, will be north of the Wall, isolated from Bethlehem. These people will not receive Israeli resident status and they will not be allowed to enter Jerusalem.

- 32 The havoc caused by the construction and destruction of the Wall's first stage is already evident in the Qalqiliya, Talkarm and Jenin districts. Fifteen Palestinian villages are between the Wall and the Green Line in areas that have been declared closed by the Israeli military. In several areas, the Wall's route creates a loop that surrounds towns, such as Qalqiliya, on all sides, thus effectively imprisoning their residents behind concrete and barbed wires. Part of the barrier surrounding the city of Qalqiliya in order to protect Israeli settlements to the east is a fence and part is an imposing, eight-meter-high Wall. The encirclement leaves this city of 45,000 residents with a single gate for entry or exit, and has cut it off from most of its agricultural land, among the most fertile in the West Bank. In the words of Qalqiliya Mayor Ma'aruf Zaharan: "Once a thriving commercial center for its entire region, our city has been reduced to destitution."
- 33 The Wall has become a noose encircling and strangling the villages of Habla and Ras 'Atiya. The residents of these imprisoned enclaves have been cut off from Qalqiliya, where they received services. Habla is only 200 meters from Qalqiliya, yet after construction of the Wall, its residents must travel 20 kilometers to get to

Qalqiliya - assuming that they are allowed to drive on the road. The route of the Wall in this area was chosen so that the Alfe Menashe settlement would be west of the barrier.

34 The medieval fortification separates thousands of Palestinians in towns and villages along the route from their lands and water, from the nearest city and from neighboring villages. It stands between children and their schools, between students and their university, between patients and their doctors, between peasants and their fields. The Wall is a scar upon the land that is tearing populations apart. Thousands of people have already lost their lands, their livelihood and their savings. According to the World Bank, the number of Palestinians who will eventually be directly harmed by the Wall is between 95,000 and 200,000. B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories estimates that the barrier will likely cause direct harm to at least 210,000 Palestinians residing in 67 villages, towns and cities.

35 In the first phase of the Wall alone, at least 50 wells, mainly in the Qalqiliya and Tulkarm districts, were directly affected, meaning that they are either isolated west of the Wall or in the "buffer zone" east of the Wall. This does not include the wells that irrigate land that will be on the opposite side of the Wall. Additionally, over 200 cisterns and tens of wells are isolated from communities by the Wall. Construction of the Wall has already caused severe damage to water; over 30 km of irrigation pipes and 25 wells and cisterns have been destroyed. Water, as a basic life source, is of vital importance to the lives and livelihoods of Palestinians in the affected areas. The separation of wells from lands and communities means that lands will soon dry up and be unable to be cultivated.

"Uncultivated lands" can be confiscated for the State of Israel. The Wall also deprives many communities of their source of drinking water, endangering their very existence.

36 Thousands will become dependent on Israel's approval to cross the barrier to get to their land, or their wells, or to visit their families. The plan calls for 5 main crossing points and 26 agricultural crossings along the route to enable passage of people and goods, although apparently, insufficient funds were allocated in the 2003 budget to erect the 5 main crossings. No official notice has been issued concerning the workings of these crossing- points nor the criteria for obtaining permits. Officials in the Tulkarm DCL publicly confirmed that farmers would be given permits for access through the nine gates in the Tulkarm governorate, "two or three times a day" and that one of these planned crossing points would be at Qafin. However, according to the mayor of Qafin, there are no openings in the completed concrete part of the barrier for a crossing point in the Qafin area.

37 A typical crossing gate is the one separating the fields of Zeita from the farming village of Zeita, north of Tulkarm. More than 100 acres of Zeita's 500 acres of agricultural land is caught between two fences. Barbed wire, electric sensors, iron posts and dirt trenches have come between the caged-in farmers and their fields. A sign over the fence reads: "Danger, Military Zone. Anyone crossing or touching the fence does so at his own risk." Some of Zeita's greenhouses are on one side of the fence, some on the other side. The gate between them is opened by five armed Border Policemen, in head-to-toe protective gear, who arrive by jeep twice a day and keep the gate open for 20 minutes each time. The final opening of the gate is between 5:30 P.M. and 6 P.M., whenever the police jeep shows up. Whoever is

there, makes it through; whoever is not, must spend the night in a greenhouse. Vehicles are prohibited from crossing, which makes the transport of crops problematic. One resident of Zeita, Muayyad Mari, related to *Haaretz* reporter Gideon Levy that he wanted to take his tractor across to his fields, but the policeman asked for permits and insurance papers, which Zeita farmers do not have. He ended up having to pay a fine of NIS 450 on the spot, or forfeit his tractor. Some of Zeita's residents received notice of the expropriation of their land only verbally; written notices were posted on walls and telephone polls or were thrown on the ground. They were given one week to administratively appeal the expropriation of their lands for the fence, but this was during a 14-day curfew closing off Tulkarm, the city where the appeal had to be filed.

38 Palestinians in all the towns and villages affected by the Wall who want to pass through its gates are subject to the whims of the Israeli police or soldiers manning the opening. Another Zeita resident told Gideon Levy that if someone touches the fence, the army won't open the gate at all that day. This is collective punishment. Some times those manning the gate only let some of the farmers go through. Some times they curse them and at times, they beat the farmers.

39 Families imprisoned between the Wall and the Green Line will find themselves in an untenable situation and have to move. Many farmers who are separated from their land and means of livelihoods will also be forced to move out of their villages. Some already have. Suheil Salman, chairman of the National Committee for the Struggle Against the Separation Fence in the Northern West Bank, reports a migration of people eastward because of the hardships the fence has caused. It is not yet clear yet how sizeable the migration is. Jamal Othman, a resident of

Jarushiyeh, near Tulkarm, whose property the Wall runs through and whose access to water it destroyed, who lost a 450 dunam grove of olive and almond trees, told Gideon Levy that he knows he cannot remain in his house by the fence for long.

40 The A'ameer family live in the village of Mas'ha, Salfit region. Ten meters behind their house is the Elkana settlement fence. The Wall is being built approximately ten meters in front of their house, effectively imprisoning the family on less than 100 square meters within the "security perimeter." To leave their house and yard, Mr. And Mrs. A'ameer and their six children will need a permit from the army; nobody will be allowed to visit them. The effect, if not the intent of constructing the Wall in this location will be to drive the family out - if they have any place to go. Thus, the Wall will lead to population transfer.

41 By constructing this Wall, Israel is unilaterally imposing a new border between itself and the West Bank, radically changing both the geographical and political landscape of the Middle East. As Col. Dani Tirza, Seam Administration official admits, the Wall "is something that will apparently last for many years," becoming the "reference line" for any peace talks, if not the final line. By constructing the Wall in its present location, Israel is *de facto* annexing approximately 10 percent of the West Bank - some of the richest farmland and aquifers in Palestine. As U.S. Secretary of State Colin Powell suggested in an interview in the newspaper Maariv, Israel is using the Wall to appropriate land: "The fence snakes through in a very interesting way and crosses through very interesting areas. Here there is a nice Palestinian village, with agricultural lands and access to them, and suddenly they have nothing." John Dugard, the United

Nations expert on the Palestinian territories, has dismissed Israeli claims that the Wall is a necessary security measure, stating that "the reality is that this is a creeping form of annexation." As the map looks now, after completion of the Wall, the Palestinians would be left holding only 48 per cent of the West Bank, compared with the 52 per cent that would remain under Israeli control - including a large part of the eastern West Bank. While the final, definitive map of the Wall's route has not been made public, one possible course of the completed barrier would divide the Palestinian areas into two distinct cantons, without contiguity between them. Israel's decision to construct the Wall in the Occupied Territories represents the creation of 'facts on the ground' that impede the realization of the right of self-determination of the Palestinian people by preventing the territorial contiguity necessary for the establishment of an independent Palestinian state.

Summary of Argument

- 42 Construction of this monstrous fortification has and will continue to violate a whole range of fundamental human rights of the Plaintiffs, residents of Masmuria, as well as of residents of other West Bank areas through which the Wall will run, including the right to property and the right to freedom of movement.
- 43 The Wall, as it is currently planned, is illegal under international humanitarian law. Even in war, military needs do not prevail over all other considerations and the violation of human rights is lawful only if there are no other alternative. It is the Occupation of Palestinian land which has led to the resistance to it and ending the Occupation would end Palestinian attacks - thus eliminating the need for a separation Wall.

- 44 Annexation of land, transfer of population and collective punishment are all illegal, either during war or peacetime.
- 45 Construction of the Wall with money that is part of the \$9 billion in U.S. Government loan guarantees violates the American law that bars this money from being used for West Bank settlement support.
- 46 The demolition of Palestinian homes necessitated to make way for the Wall is specifically prohibited by the Quartet's Road Map, to which Israel has agreed.
- 47 Constructing a Wall to separate Jews from Arabs will serve to promote racism in Israel and will only increase Israelis' perception of threat. It will lead to a ghetto mentality which will block the road to peace.
- 48 Amici respectfully urge this Court to halt construction of the Wall below the village of Masmuria and to halt *all* construction of the separation Wall until such time as its construction is shown to be the least intrusive alternative to providing Israel with the security it seeks and its route is altered to conform with the Green Line. Amici also respectfully request this Court to take all actions available to ensure that the residents of Masmuria and other Palestinians whose property and human rights have been violated by construction of the Wall are justly compensated.

ARGUMENT

I. The Wall Violates a Panoply of Human Rights

- 49 Erection of the separation Wall within the West Bank and around "Greater Jerusalem" violates numerous fundamental human rights of hundreds of thousands of Palestinians, from the right to property to the right to receive

medical treatment. Most of the infringements, including on the right to earn a living, the right to an education and the right to obtain medical treatment, are derived from the Wall's impact on the residents' right to freedom of movement.

The Right to Own Property

50 In order to construct the Wall, the state of Israel has already take control of extensive areas along the route and will take more. The legal justification used to take control of this land, most of which was privately owned by Palestinians, is "requisition for military needs." Although by law, the seizure orders do not transfer ownership of the land to Israel, the indefinite duration of the requisition, as well as the huge amount of resources being invested to build the Wall, lead to the conclusion that what is occurring is a disguised expropriation of property. Requisition for military needs orders were previously used by the State of Israel to take control of Palestinian land in order to establish settlements. These lands were never returned to their owners and it is now eminently clear that Israel never intended to seize the land temporarily, but to expropriate it permanently.

51 The route that the Wall takes is evidence of the annexationist policies behind its construction. In Qalqiliya, for example. The Wall is built entirely in the West Bank, although the Green Line is only a short distance away. Since the creation of the state of Israel, there have been repeated attempts to annex Qalqiliya and the neighboring village to Israel.

52 In addition to the absolute violation of the property rights of landowners on whose property the barrier will be erected, the property rights of owners of tens of thousands of dunam located west of the barrier will be harmed, depending on how much their freedom of movement is restricted. Because of the difficulty in reaching their land,

owners might stop or reduce cultivation of the land. Because of the law declaring that land in the West Bank is "state land" if it is not cultivated for three consecutive years, these property owners could eventually lose their land entirely.

53 Additional infringement upon the property rights of Palestinians living near the Wall takes the form of uprooting crops, primarily olive trees, and greenhouses. There is widespread theft of olive trees by the contractors doing the infrastructure work on the Wall, and the Civil Administration officials are aware of, and cooperate in the theft and illegal sale of the olive trees, which are then brought into Israel.

54 The Universal Declaration of Human Rights proclaims: "Everyone has the right to own property alone as well as in association with others." UDHR, Art. 17. The Regulations Attached to the Hague Convention Respecting the Laws and Customs of War on Land of 1907, mandate that "[p]rivate property cannot be confiscated." Article 46, para. 2. Article 53 of the Fourth Geneva Convention (the Convention) prohibits the destruction of real or personal property "except where such destruction is rendered absolutely necessary by military operations." The core of Article 53, which originates in Article 46 and Article 23(g) of the Hague Regulations are rules of customary international law.

55 Article 147, the Grave Breaches provision of the Convention defines "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," to be a grave breach if committed against property protected by the Convention. To constitute a grave breach, "such destruction and appropriation must be extensive."

56 Moreover, Article 52 of the Hague Regulations allows for the requisitioning of property in occupied territory if it is "for the needs of the occupying army." The

requisition orders pertaining to land upon which the Wall is being built fail to satisfy this test: the Wall is not being built for the "needs of the occupying army," but rather, at best, to serve the broader "security" policy of the Israeli state. At worst, it is a cover-up for annexation of land and the establishment of 'facts on the ground.'

57 Israel's extensive taking of private property to build the Wall is a gross violation of international human rights and humanitarian law.

The Right to Freedom of Movement

58 The right to freedom of movement is well established in international law. The Universal Declaration of Human Rights, Art. 13(1) states: "Everyone has the right to freedom of movement and residence within the borders of each State." The International Covenant on Civil and Political Rights mandates that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." ICCPR, Art. 12(1).

59 The land between the Wall and the Green Line, as well as between the Wall and the municipal boundaries of Jerusalem will be declared "closed military areas." While permanent crossing permits will be issued to residents of these enclaves, other West Bank residents will generally not be allowed to enter these areas for any purposes, unless they obtain a special permit. Palestinians who live east of the Wall and own land to the west of it will need special permits to pass through "farmers gates." Movement from the enclaves to other areas of the West Bank, and back again, will be allowed only through the specially established crossing points and checkpoints. Whatever the crossing arrangements will be, it is clear that hundreds of thousands of Palestinians will be dependent on Israel's security system to cross the Wall from

either side. That dependence will increase the existing difficulties they currently face (including checkpoints, roadblocks and curfews) in going from one place to another in the West Bank. Past experience raises the fear that the crossing points along the Wall will be closed for prolonged periods of time and the passage of Palestinians may, at times, be completely prohibited.

The Right to Work and Earn a Living

60 The Wall has already separated many Palestinians from their land and place of work and is expected to separate tens of thousands more, clearly reducing the ability of many to work and earn sufficient income to ensure a minimum standard of living. It will tear apart the local Palestinian economy, causing a sharp rise in unemployment and stifling business. Even assuming that agricultural crossings will be operational at all times, the process of crossing the Wall - particularly where vehicular traffic is not allowed - will greatly increase transportation costs and reduce profits. Farming is a major source of income in the communities affected by construction of the Wall. The areas involved are among the most productive in the West Bank and have a plentiful supply of fresh water. Harming the farming sector of this area will have grave consequences for the entire local population.

61 The restrictions on movement will also economically harm people working in sectors other than farming, whose workplaces are outside their community. This is especially so in the villages surrounding Jerusalem, most of whose residents are dependent, directly or indirectly, on work in East Jerusalem. The barrier will also seal the end of Palestinian migrant labor in Israel from northern border towns and villages near the Green Line, like Qalqiliya and Tulkarm.

62 The effect of these restrictions is to violate the right to work, which is enshrined in

the International Covenant on Economic, Social and Cultural Rights, in which Israel, as a signatory, accepts responsibility to "take appropriate steps to safeguard this right." ICESCR, Art. 6(1). In Article 11 (1) of the ICESCR, Israel recognizes "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 living conditions.

63 The harm to Palestinians' ability to work and earn a living is especially grave in light of the increased economic hardship suffered by Palestinians since the beginning of the al-Aqsa intifada. In the first half of 2002, according to B'tselem, real unemployment in the West Bank reached 50 per cent of the workforce, with unemployment in Tulkarm and Qalqiliya being significantly higher than the average. According to UNSCO, the percentage of people living in poverty in the West Bank (defined as per capita consumption of less than two dollars a day) has reached 50 per cent. Gideon Levy reported in Haaretz that about 100 children from Yatta, near Hebron, currently spend their days rummaging through the garbage dump for items to eat and sell. This is not an isolation problem. Reduction of sources of employment and income due to erection of the Wall could force additional thousands of Palestinian families into poverty.

The Right to Obtain Medical Care and the Right to Education

64 The State of Israel, in signing the International Covenant on Economic, Social and Cultural Rights, recognized "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health," as well as "the right of everyone to education." ICESCR, Arts. 12(1), 13(1).

65 The Wall will adversely affect the rights to adequate medical care and education of

whole Palestinian communities. The residents of the enclaves west of the Wall will be most affected. However, many residents of villages east of the Wall who depend on services from one of the three main cities (Tulkarm, Qalqiliya and East Jerusalem), which will be isolated from the rest of the West Bank, will also be affected. For example, nine of the villages that will be enclaves west of the Wall (Umm-a-Rihan, Khirbet Jubara, Ras a-Tira, Khirbet a-Dab's, and Arab a-Ramadeen al-Janubi) do not have a medical clinic. Other communities, according to the Palestinian Ministry of Health, have access to basic and preventive medical care, but rely on the three cities for emergency care and hospitalization.

66 The Wall will have a harmful effect on education, again by compounding existing difficulties caused by movement restrictions. Teachers already face problems in reaching their work places and many have had to be reassigned to schools near their homes. Across the three governates of Qalqiliya, Tulkarm and Jenin, an estimated 7,400 students will be directly affected by the Wall. Dab'a, which will be completely encircled, has a school only to the grade 7; for grades 8-10 pupils must travel to Ras Atiya and for grades 11-12 to Habla; tertiary education is available in colleges in Qalqiliya or Nablus, and trips to the latter can take up to six hours. In Ras Atiya, with a population of about 1,400, the barrier will pass within 10 meters to the north and east of the local school, a coeducational institution of 450 students, constructed through Swiss funding. Requests to move the barrier to a more reasonable 100 meter distance were refused on 'security grounds'. The explosives used in blasting rocks, and the dynamiting has already caused cracks in the outer wall. Sixty pupils and 20 out of 25 teachers are from outside Ras Atiya and the Wall, which will cut the road to Dab'a and isolate nearby Khirbets Tira, will make access extremely difficult, if not

impossible, for all concerned.

International Human Rights Law Remains Binding

67 Since the beginning of the al-Aqsa intifada, the State of Israel has argued before this Court and in international forums that the situation in the Occupied Territories is "an armed conflict short of war," and that the relevant provisions of international law are thus the laws of warfare. This Court recently sanctioned this position in *Ajuri v. Commander of IDF Forces in the West Bank et al.*, HCCJ/7015/02. Amici join the many legal organizations and jurists in Israel and throughout the world who argue that even after the transfer of the West Bank and Gaza to the Palestinian Authority, Israel remains the Occupier in these areas. The combat actions that have taken place do not justify the sweeping definition of events as a war and do not allow Israel to ignore its duties as the Occupier. These duties require Israel to protect the civilian population and ensure their safety. The International Committee of the Red Cross, which is charged with implementation of the Geneva Conventions, has held that "even in the present violence," Israel remains the occupying power in the Territories and therefore must comply with the provisions of the Fourth Geneva Convention and other rules relating to occupation.

68 Moreover, application of the laws of occupation does not nullify international human rights law, which remains binding on Israel in its actions in the Occupied Territories. The UN committees in charge of implementing international human rights law have repeatedly and categorically stated that Israel must comply with the provisions of the human rights conventions in all the territories under its control, including the West Bank and Gaza, and that this obligation applies also in the circumstances prevailing

following the outbreak of the al-Aqsa intifada.

II. Construction of the Wall Violates International Humanitarian Law

69 International law does not provide absolute protection for all human rights. There are circumstances in which infringement of certain human rights is lawful. However, violations of human rights are lawful only where certain conditions, as established in international law, are met. Thus, even accepting Israel's definition of the prevailing situation in the Occupied Territories (OT) as one of "armed conflict short of war," Israel is not entitled to do whatever it wishes and without limitation. Even in war, states are required to act in accordance with international law. Military needs do not prevail over every other consideration in wartime.

70 Assuming, *arguendo*, that there is imperative military reason to construct a massive fortification separating Israel and Jerusalem from the West Bank, military reason is a necessary but not a sufficient condition for infringing on the rights and disrupting the lives of tens of thousands of Palestinians. The infringement of human rights is not justified if other courses of action are available to achieve the same objective without causing such infringement. This principle is well established in international humanitarian law, which deals with war and occupation. Article 57(3) of the First Additional Protocol to the Geneva Conventions, for example, unequivocally states:

When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that which may be expected to cause the least danger to civilian lives and to civilian objects

This same principle is also well-established in international human rights law, as well as in the decisions of this Court, as evidenced in *Sagy Tsemach et al. v. Minister of*

Defense et al., Piskei Din 53(5) 241.

71 It is impossible to discuss Palestinian violence or how to halt it without considering the fundamental relationship between occupying state and occupied people. The phenomenon of suicide bombings and other attacks against civilians, which construction of the Wall is designed to counter, arises from the deep misery, humiliation and frustration of Palestinians. Living under military domination over the past 35 years, Palestinians have been subject to curfews, checkpoints and closures, have had their lands confiscated, while Jewish settlements (which the international community, including the U.S., considers to be illegal) were built all around them, have had their homes demolished, their water resources used up, their leaders assassinated, their jobs taken away and every aspect of their lives controlled by the occupiers. They have tried - without success - to end the Occupation through various different methods. There were no suicide bombings before the Oslo Peace Process. Suicide bombings are alien to Palestinian culture and only became a regular phenomenon in the last few years, with the total collapse of the peace process. The Occupation has led to resistance, which in turn has led to harsher Israeli measures, which caused Palestinians to increase their resistance - by any and all means, including those which are clearly in violation of international law and morality. Palestinians lost the ability to dream of a better life. Traumatized, brutalized and eventually dehumanized by the Occupation, some reached the conclusion that they had no options and nothing to lose. As the late Israeli Prime Minister Yitzhak Rabin recognized, terrorism is "the weapon of the powerless." Ending the Occupation of the West Bank and Gaza would end the attacks, as it would eliminate the conditions that cause them.

72 Building the Wall is a simplistic and populist attempt to satisfy the needs of the Israeli public for personal security, without giving much thought to its consequences and implications. It is a substitute for the renewal of serious political negotiations aimed at reaching an agreement on the unresolved issues of the Israeli-Palestinian conflict. Such a unilateral step will not solve the longstanding underlying problems of the conflict, such as the Occupation, the settlements and the status of Jerusalem. On the contrary, it will fuel the conflict, will further humiliate the Palestinians by caging the whole population behind walls, and will only increase the hostility, and the motivation to continue the violence. It is not walls that are needed now, but bridges. Only serious and well-intentioned political negotiations and conflict resolution can ensure that Israelis and Palestinians will live in peace, security and prosperity. This is the only path that can eventually bring about the badly needed reconciliation between these two nations that need to change the current confrontational course of events for their mutual well being

73 Amici are firmly convinced that lasting security will only be obtained when Israel evacuates the settlements and ends its Occupation. However, if rather than conflict resolution, the State of Israel is determined to unilaterally separate itself from the Palestinians, there are less intrusive ways to do so. A study done by the Israeli State Comptroller, published in July 2002, indicates that that there are at least two alternatives to the separation Wall that would result in less extensive violations of Palestinian human rights than that caused by construction of the Wall: improvement of the faulty operations at the checkpoints along the Green Line and changes in the manner of IDF deployment in the open areas along the seam zone. Amici wish to emphasize that they do not advocate these alternatives, which although less violative

of Palestine rights, will nevertheless contribute to the mounting tension between Israel and the Palestinians.

- 74 The decision to build the fortification separating Israel from the West Bank to prevent attacks within Israel is based on the assumption that those who commit the attacks enter Israel through the open areas between checkpoints and not through the checkpoints, which ostensibly check the people crossing into Israel. According to the State Comptroller's report, that assumption is wrong. Thirty-two checkpoints exist along the Green Line, through which entry into Israel is possible. The State Comptroller found that "IDF documents indicate that [since the beginning of the current intifada] most of the suicide attackers and the car bombs crossed the seam area into Israel through the checkpoints, where they underwent faulty and even shoddy checks." State Comptroller's Report, p.35. The report pointed out significant procedural defects at the checkpoints, such as lack of a specific command from brigade headquarters "that classifies the assignments at the checkpoints and coordinates the procedures for its operation." It also pointed out that the "checkpoints do not have proper equipment and infrastructure to conduct security checks of vehicles, individuals and merchandise." The State Comptroller concluded: "The existing checkpoints in the seam area are not organized to properly check vehicles, freight and people and there is an urgent need to improve inspections at checkpoints by having permanent and skilled personnel check vehicles, using technological means, and institutionalizing the crossing points." Report, p. 36.
- 75 No meaningful changes have been made at the checkpoints along the Green Line to address even some of the problems mentioned by the State Comptroller. Although adding sophisticated inspection equipment and skilled personnel at the checkpoints

could have been implemented immediately, at considerably less expense, the State of Israel preferred the far more extreme alternative of constructing the separation barrier.

76 Moreover, erection of the Wall will increase the number of checkpoints between Israel and the West Bank, magnifying existing problems. There are five checkpoints and 26 agricultural gates built along the Wall in Stage 1 alone. If the effectiveness of the checkpoints is not improved, a paradoxical situation will be created in which the Wall could increase - rather than decrease - the danger of attacks within Israel. There is thus a lack of connection between the problem of security and the solution proposed by the State of Israel, making it likely that the real impetus behind the construction of the Wall is political, rather than military.

77 The State Comptroller also examined IDF deployment along the seam area to prevent Palestinians without permits from entering Israel through the open areas. According to the State Comptroller's report, the IDF formulated a "new concept" for action in the Occupied Territories in January 2002, giving up special deployment in the seam area and disbanding the "task command" that had been set up in July 2001 to coordinate IDF activity in that area. The changes coincided with changes in the IDF's objectives.

As the State Comptroller found in his report, pages 21-22:

The IDF's new concept in Judea and Samaria led to shifting the responsibility of most of the forces active in the seam area to the task of guarding roads on which Israeli vehicles travel, on-going security activity near Israel communities in Judea and Samaria, and thwarting hostile terrorist activity within Judea and Samaria, primarily in the Palestinian cities. The IDF forces' operation did not focus on preventing movement of individuals and vehicles from Judea and Samaria into Israel in areas other than the designated crossing points.

Implementation of the IDF's new concept in the seam area had the effect, *inter alia*,

of significantly reducing activity to prevent unauthorized Palestinians from crossing from the West Bank into Israel, in particular, reduction in the IDF presence in unpopulated territories along the seam area. According to the State Comptrollers' Report, observation posts had not been set up to cover a great part of the seam area and the IDF lacked the technological means to locate infiltrator.

78 Even assuming, *arguendo*, that a separation Wall is the only way to prevent Palestinians from entering Israel to commit attacks, Israel is obligated to plan the route of the barrier so that it harms human rights to the least extent possible. Construction of the Wall along the Green Line would be far less intrusive and far less damaging to Palestinian lives, land and livelihoods and yet would achieve the same objective of providing security to Israel. It is apparent that Israeli policy-makers failed to make human rights a decisive factor in determining the route of the Wall. Israel must - but did not - provide separate justifications for each section of the Wall's route that results in human rights violations. Instead, as it stated in its response in the High Court in *al-Hadi*, sections 18-19, in addition to "operational considerations," Israel only looked at including as many settlements as possible west of the barrier. "The fear is that erection of the barrier will channel the attacks to these communities, so it was decided to have the fence pass east of these settlements in order to provide protection for them and for the access roads that reach them."

79 Clearly, including settlements west of the barrier is not an imperative military need justifying grave violations of human rights. It is an illegitimate consideration. Moving the settlers to areas within Israel would give them comparable - in fact, better - protection than including them west of the Wall. This solution would also prevent additional violations to Palestinians human rights.

80 Indeed, the existence of these alternatives, which the State of Israel has chosen to ignore, reveals that the true objective of the Wall is, as Prime Minister Ariel Sharon admitted, political: "The idea [to build the Wall] is populist and intended to serve political objectives." The real reason behind Israel's decision on the Wall's route is to establish "facts on the ground" that would perpetuate the existence of the settlements and facilitate their future annexation into Israel. Although it is being built on territory that is occupied by the Israeli military, the decision to build the Wall was not made by the Israeli military, but rather by Israeli politicians. This is significant because the Israeli Courts have made a distinction in the past between military and political decisions regarding property requisitioning in the OT and also because Israel cannot justify the destruction of Palestinian land in the OT under the rubric of military necessity if the destruction results from a political decision

81 This Court has, in the past, rejected claims of 'military necessity' made by the Israeli Military. In the Elon Moreh case, H CJ 390/79, *Azar Muhamad Mustafa Dweikat et al. v. Government of Israel*, 34:1 Piskei Din (1980), pp 1-28, this Court invalidated the military order requisitioning Palestinian land (for a settlement), holding that, under Israeli administrative law, political grounds are an improper purpose for a decision by the military. The Court held that the dominant consideration for the military order had been political, and therefore even if the military subsequently supported the decision for military reasons, the order was invalid. The political authorities had initiated the settlement and only later had the military given its approval. In addition, recognizing that the land had, in fact, been confiscated rather than requisitioned, the High Court found that the decision to establish the settlement met "an insuperable obstacle, because no military government may create in its area

facts for its military purposes that are intended from the very start to exist even after the termination of military rule in that area, when the fate of the territory after the termination of the military rule is unknown."

82 In a similar manner, construction of the Wall was initiated, developed and approved by Israeli politicians. It was Prime Minister Sharon who decided that the Wall would not run along the Green Line. For example, after being lobbied by the Alfe Menashe settlement council to include the settlement to the west of the wall, Sharon, during a visit to the settlement, announced that the original route of the Wall would be changed to bring the settlement to the west. The decision to include Rachel's Tomb within the folds of the Wall came as a result of an Israeli Cabinet decision. The Prime Minister has declared that the route of the Wall will even stretch along the east of the West Bank, up the Jordan Valley. It is inconceivable that this construction is necessary for security reasons, as it is impossible to access Israel from that direction - rather this part of the Wall is intended to act as a border for a Palestinian state over which Sharon wishes to retain control

83 State officials have stated that protection of underground antiquities was one consideration in determining the route of the Wall. In one of its responses to the High Court in the *al-Hadi* case, sec, 30, the State Attorney's Office stated that the decision to move the Wall's route in the area north of Shweikeh, Tulkarm, a few kilometers to the east was made "to protect antiquities." When members of Kibbutz Metzger requested that the Ministry of Defense shift the route and take kibbutz land, so that it would run along the Green Line and thereby not interfere with access of residents of the neighboring Palestinian town of Qafin to their fields, Col. Tirzah, Seam Administration official in charge of planning the route, told the kibbutz that the route

could not be changed because the area contains antiquities and there was not enough time to excavate them. As occupier of the West Bank, Israel must safeguard cultural and historic sites in the occupied territory. However, this reason does not justify the violation of human rights that resulted from moving the route a few more kilometers inside the West Bank, especially since not changing the route would not have destroyed the antiquities, but would merely have delayed construction work on the Wall until excavation of the antiquities was completed.

84 The Wall's route in the southern part of the Jerusalem envelope was changed in September 2002 by Israel's Cabinet after political pressure to move the route a few hundred meters south, which would *de facto* annex Rachel's Tomb into Jerusalem. This, despite the fact that Rachel's Tomb lies at the northern tip of Bethlehem, 500 meters south of the checkpoint separating Bethlehem from the jurisdictional boundary of Jerusalem. Rachel's Tomb is a sacred site in Judaism and many Jews go there to pray. However, under international law, the entry of Israelis into the Occupied Territories to worship is not a legitimate consideration in determining Israeli policy, especially if it results in grave violations of the human rights of hundreds of local Palestinian residents.

85 Israel, as the occupying power, is obliged to safeguard the human rights of the Palestinians living under its control. Israel's duty to protect the lives of its citizens does not release it from its obligation to protect Palestinian human rights. In erecting the separation Wall, Israel completely disregards this obligation, and in doing so flagrantly breaches international law.

III. Expropriation of Private Property, Even for Military Needs, Violates International Law

87 To justify taking control of private Palestinian land, Israel, in the past, has relied on Article 23(g) of the Regulations Attached to the Hague Convention Regarding the Laws and Customs of War of 1907, contained in Part 2 of the Convention, under the heading "Hostilities." Article 23(g) provides that the destruction or seizure of an enemy's property is "especially forbidden" unless "imperatively demanded by the necessities of war." Reliance on an article from the Hostilities section of the regulations is misplaced. It is based on Israel's interpretation of the current situation in the Occupied Territories as "armed conflict." But the Occupation has not ended. Article 46 of the Hague Regulations, located in the part of the Convention that deals with occupied territory, unequivocally states that "it is prohibited to expropriate private property," even for military needs. Article 52 states that an occupying power may not requisition property unless it is for "the needs of the army of occupation." While Israel argues that it is only taking control of the land temporarily (only until 2005), the military legislation does not prevent indefinite extension of the orders, and Israel has, in the past, extended such orders indefinitely in cases of land taken to establish new settlements and bypass roads. The permanent nature of the Wall, together with this past experience with Israel's "temporary" seizures of lands, leads to the conclusion that its "taking control of land" is in fact expropriation, which is illegal - even if the Court accept Israel's argument that construction of the Wall along the proposed route is the only way to prevent Palestinians from entering Israel to commit attacks.

IV. Annexation of Land, Evacuation and/or Transfer of Protected Persons and Collective Punishment are All Prohibited by International Law

88 Customary International Law (“*jus cogens*”), including the customary international law of belligerent occupation, prohibits annexation of another nation's land, as well as transfer and collective punishment of its people. These precepts are so firmly established in international law that they should require no argument. In addition, this Court has held that the Hague Regulations are part of customary international law enforceable in Israeli courts. H CJ 606/78, *Suleiman Tawfiq Ayyub et. al. v. Minister of Defense et. al.*, at 6 (1978). Unlike treaty-based law, customary law is binding on all states, regardless of whether they ratified the treaties.

89 Furthermore, the State of Israel is a signatory to the Geneva Conventions and consequently is bound by their terms and conditions. Although Palestine is not a state, Palestinians, because they live under occupation, by definition are “protected persons” under the Geneva Conventions. Despite the refusal of the Israeli Government to acknowledge the formal applicability of the Fourth Geneva Convention, Israeli authorities have repeatedly stated their intention to respect unspecified "humanitarian provisions" of the Convention. While this Court does not accept that Israel is bound as an occupying power to the Fourth Geneva Convention, it has on several occasions examined the compatibility of Israeli government activities in the West Bank and Gaza.

90 The Fourth Geneva Convention provides protection for civilians. Article 47 mandates:

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, nor by any *annexation* by the latter

of the whole or part of the occupied territory. (Emphasis added)

91 Article 49 of the IV 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. (Emphasis added)

Partial evacuation of an area is permissible if

imperative military reasons do demand... Persons so evacuated should be transferred back to their homes as soon as hostilities in the area have ceased.

91 Article 33 of the IV Geneva Convention, prohibits collective punishment:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited... Reprisals against protected persons and their property are prohibited.

Collective punishment is also forbidden by the Hague Regulations.

93 Derogation from these conventions due to emergency situations is not acceptable since, by nature, the conventions were designed specifically to apply in emergency situations, unlike other human rights conventions.

V. Construction of the Wall to Protect Israeli Settlements Violates Restrictions Placed by the U.S. Congress on the Use of U.S. Government Loan Guarantees

94 When the U.S. Congress approved \$9 billion in loan guarantees to Israel, intended for housing and commercial projects, it placed a specific restriction upon use of the money: none of it is to be spent to help Israeli settlements in the West Bank and Gaza. Furthermore, the U.S. Congress required that if Israel spends any money on such settlements, the loan guarantees must be reduced by that amount.

- 95 The path of the Wall has, as admitted by Col. Tirza, has been determined by the location of Jewish settlements. The Wall will veer 20 kilometers east of the Green Line in order to encompass the large Ariel settlement and will include 10 other West Bank settlements on the Israeli side. It twists and turns, encircling and strangling villages, such as Habla and Ras 'Atiya, in order to include the settlements west of the barrier. The Jerusalem "envelope" includes the two large settlement blocs of Givon and Adumim. The Bethlehem section of the Wall is being built so as to connect Road 60/Gilo settlement with the Har Homar settlement. All the money being spent to build the Wall in this manner constitutes money spent by the State of Israel in an illegal way.
- 96 The Bush administration is reportedly already considering reducing the loan guarantees in proportion to the costs of the barrier, or at the very least, in proportion to the part of the barrier that is constructed to protect settlements.

VI. Demolition of Palestinian Homes is Non-Compliance with the Road Map

- 97 Demolishing Palestinian homes which lie along the route of the Wall is wholesale non-compliance with the Road Map's requirement to end the pattern of house demolition, to which Israel has agreed:

"The Government of Israel takes no actions undermining trust, including... confiscation and/or demolition of Palestinian homes and property, as a punitive measure or to facilitate Israeli construction..."

VII. Constructing a Wall to Separate Arabs from Jews Promotes Racism and will only Increase Israelis' Perception of Threat

- 98 The right not to suffer discrimination is a fundamental principle of international

human rights law. Discrimination is an attack on the basic underlying principles of the Universal Declaration of Human Rights. Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD), to which Israel is a signatory, prohibits states from permitting public authorities or public institutions to promote or incite racial discrimination.

99 By building a monstrous barricade to keep Palestinians out, the State is promoting racism and reinforcing Israelis' fear of "the other." This is particularly inappropriate at a time when the Or Commission has found a pattern of government "prejudice and neglect" towards Israeli Arabs. The fear that is being whipped up is not only about suicide bombers, but also about being inundated by foreign hordes, who, together with Israeli Arabs, will destroy Israel. To people like Yehiam Prior, chair of the Movement for Unilateral Separation, the purpose of the Wall is not so much physical security, but protecting Israel's demographics. Prior talks about the "already more than 150,000 Palestinians illegally in Israel," having crossed the "non-border." His concern is the fact that "[a]t this rate, within a few years and without any official declaration, the Palestinians will realize their right of return and inundate the country." Prior and his ilk therefore call for construction of an "impassable border," whose route should be determined by current demographics, and construction of a "fence that will prevent any entry into Israel." In Prior's view, "[I]t's easy to explain the need for a border in a period of suicide bombings, but separation is even more vital if our relations with Palestinians comes to resemble the relations between Holland and Belgium..."

100 It is no coincidence that at the same time as it is erecting the Wall, Israel just passed a new Citizenship Law, preventing the granting of citizenship to Palestinians who

marry Israelis. The legislation, which denies Israeli citizens the right to family reunification only because they are Arab, has been justified on both security and demographic grounds. Gideon Ezra of Likud called family reunification a "creeping Law of Return." Of course, everyone knows who is creeping and what to do to someone who creeps. Although no more than 20,000 Palestinians have come to Israel for family reunification in the past 10 years, there has been much talk about Israel needing to "protect itself" from a Palestinian effort to move hordes of people into Israel to change the demographic balance. MK Yuval Steinitz also of Likud told Haaretz: "We have no opposition to letting families live together, as long as families of Palestinians live in a Palestinian state and families of Jews live in the State of Israel. It really isn't racism. I certainly don't deny their right to choose a life partner, but only the right to bring him or her to live in Israel" So Arab Israelis must now leave the country in order to marry.

101 Israelis' fear of Palestinians and of suicide attacks will only grow with the Wall's construction. As Mike Davis, an American expert on the phenomenon of "gated communities" in the United States commented concerning Americans' fear of crime and their attempts to insulate themselves from it : "Fear proves itself. The social perception of threat becomes a function of the security mobilization itself, not the crime rate." Edward Blakely, an U.S. urban planning professor argues that the use of walls and gates to keep criminals at bay is largely perception, not reality: "There is no question people living inside the gates feel they are more secure, but the evidence suggests that's not the case. In some instances, crime rates were actually higher [than in surrounding neighborhoods] because residents took fewer safety precautions, enabling easier access for criminals." Walls and

gates become a dangerous substitute for communal interaction.

102 To eliminate terror, it is necessary to create conditions in which people do not want to be terrorists. Building walls does the opposite. Even long and high walls do not guarantee of protection. The Wall imprisoning Qalqiliya, which is marked every 50 meters by watchtowers from which Israeli soldiers can shoot invaders, did not stop militants in mid-June 2003 from cutting through metal grating in the Wall, firing at cars travelling on the new Trans-Israel highway, and killing seven-year-old child, as her family home from Jerusalem. Other means of mutual protection must be found.

103 A state that surrounds itself with a wall is nothing more than a ghetto state - an armed and strong ghetto, to be sure - but a ghetto, nevertheless. Peace will never be achieved until this ghetto mentality is overcome.

CONCLUSION

49 For all these reasons, Amici respectfully request this Honorable Court to order an immediate halt to all construction on the separation Wall along its present route. Amici also respectfully request this Court to take appropriate action to ensure that the residents of Masmuria and other Palestinians whose property and human rights have been violated by construction of the Wall are justly compensated.

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