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REQUEST

For advisory opinion

**Transmitted to the Court pursuant to General
Assembly resolution A/RES/ES-10/14 (A/ES-10/L.16)**

Of 8 December 2003

**Legal consequences of the construction of a wall in the
occupied Palestinian territories**

**A memorandum presented by the Syrian Arab Republic
in implementation of Section (2) of Article (66) of the
International Court of Justice statute and the Court decision
of 19 December, 2003.**

Can the “Occupying Power” build a wall in the occupied territories for the sake of protecting settlements in said territories? Is it not in contradiction to Articles (49) of the Fourth Geneva Convention and (85) of the First Protocol?”

In implementation of the “de facto policy” that is being implemented by Israel (the Occupying Power), the Israeli Prime Minister “Sharon” renewed recently his defiance of the international community by announcing his intention to continue with his settlement expansion project which he had launched on the 4th of June, 2003 inside the Palestinian territories occupied by his forces since June 5, 1967. However, the Israeli government claims that it is constructing a so called “security wall” to protect its people from the Palestinian resistance which is standing tall against the Israeli occupation.

As an expression of the will of the international community, the United Nations General Assembly in its extraordinary emergency session no.10 adopted resolution no. A-RES-ES-10/13 of 21 October, 2003, by which the General Assembly requested Israel to cease and to abort the construction of the wall in the Palestinian territories, including East Jerusalem and its surroundings. This act is considered a violation of the Truce Line of 1949, and a violation of the United Nations resolution /181/ of 1947. This act is also in contradiction to the rules of the international laws and conventions.

In implementation of the resolution A-RES-ES-10/13 of 21 October, 2003, the Secretary-General’s report A/ES-10/248 concluded that Israel is not in compliance with the demand of

the General Assembly that requests Israel “to cease and to abort the construction of the wall in the occupied Palestinian territories”.

The General Assembly requested the Secretary General to deliver a periodical report to show how far the terms of the resolution A-RES-ES-10/13 are being carried out. The preliminary report should focus on the compliance with the terms of the first section of the resolution “we demand Israel to seize and to abort the construction of the wall inside the occupied Palestinian territories.”

Due to Israel’s non-compliance with the Secretary General’s report and because of its obstinacy and insistence in continuing to build the “wall of separation” that is biting into the occupied Palestinian territories, Israel prompted the international community, empowered by the General Assembly resolution adopted in its emergency exceptional session no.10 A-RES-ES-10/14, to request the International Court of Justice to issue a legal opinion regarding the following issue:

“What are the legal consequences arising from the construction of the wall being built by Israel (the Occupying Power) in the occupied Palestinian territories, including in and around East Jerusalem, as described in the report of the

Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and the relevant Security Council and General Assembly resolutions?”

After looking into the legal consequences resulting from the ‘wall’ that Israel (the Occupying Power) is building, we would like to begin with the United Nations Charter in letter and spirit, especially Article (1), section (2), that calls for respecting the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

We would like also to start with the fundamental principles declared by the International Legislations of human and peoples rights, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, and the international agreements aiming at eradicating all kinds of racial discrimination which describe the policies of ethnic isolation and discrimination, as crystal clear crimes against humanity.

Emphasizing that building the “wall of separation” in the Palestinian occupied territories, will leave catastrophic effects on the Palestinian people, and it will impose a de facto policy on

the Palestinian occupied territories, all of that is against all the International laws and regulations especially The Fourth Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949, and the Rules of The Hague of 1907. Also, it is against all the declarations and the international agreements related to human rights, the right of peoples to self-determination, and the rights of the regions that do not have the privilege of self-governing. It is the duty of the international community to stand firm to eradicate all kinds of racial discrimination, to eliminate discrimination and consider it as a crime, and punish those who commit these crimes.

i There is no legitimacy in confiscating the territories and demolishing properties

1. Article (47) of the Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949 states that “Protected persons who are in occupied territories 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 territories, into the institutions or government of the said territories, 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 territories”.

According to this Article, military orders and the building of the so called “security wall” are clear violations of the fundamental principles of the International Humanitarian Law and Human Rights. Israel (the Occupying Power) has trespassed what the Occupying Power is authorized to do according to the International Humanitarian Law. It has done so through confiscating more lands and demolishing more houses for the sake of building that “wall”.

2. Israel (the Occupying Power) claims that Article (52) of the Rules of The Hague of 1907, gives Israel the right to confiscate more territories in order to build the so called “security wall”. But this Article does not give it the right to confiscate immovable properties such as pieces of land, buildings...etc, owned by people who are under protection.

Article (53) of the Rules of The Hague of 1907, allows an army of occupation to confiscate movable properties that the State may use for military operations including arms and

supplies, which proves that Israel (the Occupying Power) does not have the right to confiscate land and demolish properties, to build the wall of separation.

Also article (55) of the Rules of The Hague of 1907 states that the Occupying State should remain as “usufructuary” of public buildings, real estates, forests, and agricultural estates belonging to the hostile State and it must safeguard and administer the capital of these properties in accordance with the rules of usufruct. And even when the occupying army declares that confiscating and demolishing the properties of the enemy is part of war requirements; the issue of retaining territories and movable properties remains the civil responsibility of the Occupying Power. Furthermore, we have to differentiate between public properties and private ones in the occupied territories, such that Article (46) of the same Rules prohibits the confiscation of private property. Thus the occupying army has surpassed all the authorities given to it in accordance with the International Law. Therefore, the “wall of separation” is considered illegitimate and Israel (the Occupying Power) has failed to give any legitimate justification to the destruction and the confiscation of territories and properties in the occupied territories. It is evident that building the “Israeli” wall of separation requires confiscating land and demolishing properties in the occupied territories, and that would obviously lead to

changing its structures permanently, in addition to the immense negative effects on the Palestinians.

ii De-legitimizing the collective punishment of Palestinians

The Israeli Occupying Power claims that there are security reasons behind building the racial wall of separation, whereas destroying and confiscating territories are measures of collective punishment, affecting in particular those people whose lands and properties are detained permanently. It is worth noting that the International Humanitarian Law forbids collective punishment. Also, Article (53) of the Fourth Geneva Convention states that it is forbidden to demolish any properties in the occupied territories. Furthermore, demolishing the properties is a collective punishment that Article (33) of the Fourth Geneva Convention forbids; and it is an extra judicial act, and is considered an infringement on properties and domiciles. However, this huge destruction of assets that is intentionally carried out, and which has no military necessities is a mere violation of Article (147) of the Fourth Geneva Convention and thus, it is a war crime. Annexing and confiscating territories is a crystal clear violation of the general principles of the international law, which the United Nations Security Council resolution no. (242), had emphasized.

iii The Security Wall is a Form of Racial Discrimination

1- The Israeli so-called “security wall” is one form of racial discrimination inherent in the racist, colonialist system imposed on the West Bank and the Gaza Strip. The International Convention on the Elimination of all Forms of Racial Discrimination defines this discrimination as a crime against humanity; and those who establish such a system are punished by the parties to that treaty in a special international tribunal.

This definition in its broad sense is covered by the first protocol of the Geneva Conventions, the rules of procedure of the International Criminal Court (1998), and the International Convention on the Elimination of all forms of Racial Discrimination (1966). These conventions and treaties define racial discrimination as “an institutional system based on racial discrimination in order to ensure the control and repression of one ethnic group by another ethnic group.”

The elements of this definition apply to the “Israeli” policies and measures, which include violating the right to life and personal freedom, deliberate murder, inflicting physical and

mental damage, torture, humiliating treatment, arbitrary detention and the application of measures aimed at the destruction of the people, totally or partially. They also include measures preventing people from taking part in economic, political and cultural life, and violating their basic human rights, such as the right to education, work, return, and freedom of expression. They include legislative measures aimed at the creation of racial discrimination between two peoples, preventing inter-marriage, while allowing the confiscation of land and property, exploiting the work force, prosecuting and punishing individuals who oppose this discrimination.

- 2- The “Israeli” so-called security wall aims at dividing the population, discriminating against Palestinian citizens on an ethnic basis, hampering their movement through curfews, closures, and confiscating thousands of acres of Palestinian land and property, the only source of livelihood for hundreds of Palestinian families.

Furthermore, the people trapped between the security wall and Israel on the one hand, and the West Bank on the other, are exclusively Palestinian. This affirms the presence of a racial motive behind the choice of the location of the wall. The deliberate choice of the best agricultural Palestinian lands as a

location for its construction creates small “cantons” between the wall and the West Bank on the one hand, and “Israel” on the other. Such cantons deprive Palestinian citizens of their land and sources of livelihood. For example, Qulquilia has been transformed into a besieged canton to accommodate the needs of a small group of illegal Jewish settlers, living on illegally confiscated Palestinian lands, at the expense of the freedom and lives of Palestinian citizens. An honest observer to the path that the wall took, and will take, cannot but notice that it passes through certain areas in a way such as to annex blocks of settlements in order to protect the illegal settlements in the occupied Palestinian territories. Consequently, this is a consolidation of occupation and a violation of dozens of international legitimacy resolutions, which established the illegitimacy of settlements in the occupied territories. The security wall hampers the movement of Palestinians, but does not affect the movement of Jewish settlers who live in illegal settlements on the West Bank. Thus, the wall practically segregates two ethnic communities, with devastating effects on one community, namely the Palestinians.

The wall of segregation also divides Palestinian families and groups, and it hinders and prevents their movement, because it consolidates a special permit system to control the movement of Palestinian citizens. The projected wall is a unilateral Israeli

imposition of boundaries between “Israel” and the future Palestinian State, which entails serious dangers to the Peace Process, contradicts the relevant United Nations resolutions, and would prejudice the results of negotiations.

3- The wall of segregation does not give any consideration to the lives, lands and water resources of the Palestinians. Instead, it reflects Israel (the Occupying Power) desire to confiscate land and water resources through illegal means. The Israeli Supreme Court has failed to convince the Israeli government to adhere to its obligations according to international law. Consequently, the “Israeli” army has a free hand to confiscate land through illegal means, while hundreds of thousands of Palestinians are being squeezed, amid international silence. This wall of segregation has two basic features, namely, squeezing an ethnic community, and separating it from its own water resources. This, in itself is racial discrimination, and is in violation of the Fourth Geneva Convention and the “Israeli”-Palestinian agreements.

4- It should be noted here that according to the international humanitarian law based on customs, Israel has the obligation of ensuring the welfare of the West Bank population, according to Article (43) of the Rules of The Hague of 1907 concerning land war. Israel also has the obligation of safeguarding the passage of emergency medical services, respecting sick people, allowing

the delivery of food and medical supplies, and facilitating education (Articles 16, 20, 25, 50, 55 and 59 of the Fourth Geneva Convention). Conventional law prohibits Israel from making permanent changes that do not benefit the local population in the West Bank (Article 55 of the Rules of The Hague, of 1907). The same law also prohibits Israel from transferring its own civilian population to the occupied territories (Article 49 (6) of the Fourth Geneva Convention).

5- Israel has ratified several human rights treaties that commit their signatories to the respect and consolidation of the right of free movement, access to education, health care, work, and water. These treaties include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the agreements on the Rights of the Child. In August 2003, the UN Human Rights Commission found that, in the current conditions, the provisions of the International Covenant on Civil and Political Rights are applicable in a manner favorable to the population of the occupied territories in relation to all forms of conduct practiced by Israel (the Occupying Power) or its agents in those territories. This conduct prejudices and adversely affects the enjoyment of the rights provided for in the said Convention. And it comes within the framework of the responsibility of

“Israel”, according to the principles of the general international law.

iv The Israeli claims concerning the racial wall of separation:

1. "Israel" (the Occupying Power) claims that the Palestinian interests are served by building the wall of separation, because the army will not resort to reoccupation, nor to installing check points, nor closures, nor any other mean of collective punishments and violation of human rights in order to safeguard the security of "Israel" (the Occupying Power). The same argument has been used in the past to justify the periphrastric roads in the West Bank and Gaza Strip that are built on illegally confiscated Palestinian territories. Thus, on the basis of this vain and illegal argument, the Israeli settlers will have security exclusively through the roads dedicated to them (which constitutes clear racial discrimination, for the Palestinians are deprived of using these roads).
2. Building racial segregation roads dedicated exclusively to the "Israelis", and contrary to the Israeli claims, did not absolutely reduce the occupying military Israeli existence in the West Bank or Gaza Strip or East Jerusalem. On the contrary, the forces were increased and new equipments were

installed on the Palestinian confiscated territories after the year /2000/.

It was quite clear, right from the beginning that the racial wall of separation will not reduce check points, curfews, arbitrary firing against civilians, closures, and that all these practices will continue because they were originally imposed as an “Israeli” principle to intimidate and humiliate Palestinians, and not simply to accommodate “Israeli” concerns towards infiltration. This is why in spite of those illegal measures, the “Israeli” army is behaving in an increasingly irresponsible way without being held accountable and enjoying immunity, and is supported by the “Israeli” government, and the carelessness of many international communities. Closures, curfews, and the arbitrary firing against civilians will continue while "Israel" (the Occupying Power) refuses to dismantle the illegal Israeli settlements within the racial wall of separation.

3. "Israel" (the Occupying Power) claims that the wall is necessary for its security, but it is quite clear that the wall is being used as a pretext for illegal confiscation of more territories. Moreover, even if any real security concerns for building the wall of separation were presented, Israel is obliged to act within the international law. The justifications for building the wall of separation to separate the West Bank from "Israel" (the Occupying Power) could be compared to the security justifications used to justify other harsh and

illegal measures such as complete closures. In March 2002 “John du Gard” the special United Nations rapporteur for the Palestinian occupied territories, and in relation to the restrictions on movement and transportation said “ this wall is not to avoid the security risks through the check points... but rather to humiliate the Palestinians and press them to stop resisting the Israeli occupation”. In September 2002, he added: "Even though there is no doubt that “Israel” has security concerns...It is necessary to ask if the measures taken by "Israel" (the Occupying Power), especially those related to the curfews and closures, had always served security purposes. They often appear as inproportionate and very far from the security purposes, which leads us to ask whether they are, to some extent, used to punish, humiliate, and subordinate the Palestinian people. The demands of "Israel" (the Occupying Power) should be balanced with the humanitarian legitimate needs of the Palestinian people. From Mr. Du Gards’ point of view, it seems that there is no such balance. Human rights have been sacrificed for the sake of security. This in turn will lead to more threats to Israeli security: When desperation is stubbornly transformed to suicide bombings and other acts of violence against the Israelis.

"Israel" (the Occupying Power) claims that article 52 of the rules of The Hague of 1907 gives it the right to confiscate territories for the sake of building a security wall, but this article does not give it the right to confiscate immovable properties such as the territories owned by legally protected persons. Article 53 of the rules of The Hague states the occupying army is allowed to take possession of cash, funds, and properties that the state may use in military operations, which includes arms and ammunition. Even when the occupying army declares that confiscating and destroying the properties of the enemy is a requirement of war; safeguarding the territories and immovable properties remains the civil responsibility of the occupying state. Article (55) of the Rules of The Hague of 1907 states that the Occupying State should remain as "usufructuary" of public buildings, real estates, forests, and agricultural estates belonging to the hostile State and it must safeguard and administer the capital of these properties in accordance with the rules of usufruct. Furthermore, we have to differentiate between public properties and private ones in the occupied territories, such that Article (46) of the same Rules prohibits the confiscation of private property. Thus the occupying army has surpassed all the authorities given to it in accordance with the International Law. It has also violated the 1967 borders of the future Palestinian State which are in conformity with the Security Council resolutions /242/ (1967) and /338/ (1973). However, in the

Secretary General's report that was submitted in compliance with the General Assembly A-RES-ES-10/13 dated 21 October 2003 regarding Jerusalem: "The current barrier and the foreseen direction around Jerusalem exceeds the green line, and in some cases it exceeds the Eastern borders of Jerusalem which Israel has annexed and therefore, this is a clear breach of resolution /478/ (1980) which considers that Israel's annexation of East Jerusalem null and void. Moreover, the relevant United Nations resolutions emphasize that the acts of Israel (the Occupying Power) to change the status of East Jerusalem and its demographic structure are have no legal validity, and are null and void". Consequently, the racial wall of separation is considered to be illegal and should be abolished. "Israel" (the Occupying Power) has failed in justifying the destruction and confiscation of territories and properties in the occupied territories. Building the "Israeli" wall of separation requires confiscating land and demolishing properties in the occupied territories, and that would obviously lead to changing its structures permanently, in addition to the immense negative effects on the Palestinians.

v. The limit of using the pretext of emergency means to justify building the wall of separation:

Necessity, in general, is a contradiction between two legal interests; one is sacrificed for the sake of upholding the other. In

the framework of the international law, it applies if the state in question is an existing or would be which exposes its existence, i.e. its or identity or independence to danger. This danger should not be possible to remove unless by violating the rights that are protected by the international law.

There is no doubt that the idea of emergency measures constitutes a great danger to the stability of the international relations, because if every country is allowed to use it to justify the violation of its international commitments. i.e. circumstances that threaten its right in existence therefore to protect itself and its own interests, then this will lead to the acknowledgement of every country not to comply with the rules of the international law and to attribute its violation to protecting interests. This will in turn lead to more international chaos. Every country will try to pursue its interests even if it may harm the interests of other countries on the basis that the emergency measures necessitates this violation.

Thus it is quite logical not to use the state of emergency measures as a justification to commit international crimes, and to consider the use of arms, using this justification a deliberate aggression. The state of emergency is something strange to the principles of the international law and does not harmonize with its rules and terms.

The following are the basis for refusing the pretext of emergency measures that may be used by states as a justification in the international law:

A. International law does not recognize the basis and rules that required the existence of the case of emergency in the framework of the domestic law:

because the first essential idea which entails the existence of the case of emergency in the internal law is that when law was made to organize the human conduct, could not require bravery and sacrifice when their vital interests contradict with the interests of others because man's inclination to protect his interests – when endangered – is a natural instinctive based on survival drive which is tolerated by law. This generalization is not applicable for states as entities lacking the natural instincts of individuals.

B. In addition to this, what entails the existence of the rule of necessity in the internal law is the principle of the upper interest, where a legally-protected interest is sacrificed for the sake of other more important interest, that is because the domestic is graduate in protecting the legal interests. This idea is not applicable in the international relations, because international law protects all interests and calls for peaceful coexistence among peoples and countries,

while if the idea of upper interest is applied, then it means to shed the rights of peaceful countries for the benefit of the aggressive ones. Moreover, taking this rule may lead to shed the rules of the international law themselves.

C. Moreover, what justifies not apply the rule of necessity is the fear that a country may exploit the rule of emergency to practice aggression on the other countries. In the absence of an international judicial authority that could get sure of the availability of the urgent case conditions, a state may interpret the urgent case conditions in a way that harmonizes with its interests, which will lead to chaos and confusion in the international community.

D. Finally, taking the rule of emergency leads to a contradictory stance, for when we admit the right of the state to practice an aggressive act against another innocent state because of emergency, we have to acknowledge first that this state has the right to respond to the aggression that occurred against it as it legally has the right to defend. Here we have a contradiction where we allow the aggression as an emergency state then we allow the reaction to it – as a legal defense – moreover, this will lead to a war

between the countries, which is a bad result that the international law can not aim at in any way.

This issue was raised in front of the international law committee on many occasions, hence the third article of draft of the countries' rights and duties announcements presented to the international law academy in 1970 states to refuse the pretext of the existence of emergency, stating: (no state is to do anything against another state or threaten it, even if it were to rescue the same country that is doing it).

Then the issue was raised in front of the international law committee in the year 1980 when adopting the draft articles related to the states responsibilities, hence the 33rd article of the draft states:

1. No state is allowed to have the pretext of emergency as a justification to negate the non legality of an act done by it that does not harmonize with its international commitments but in two cases:
 - a) If this act is the only means to save a major interest of the state that has the commitment.
 - b) If this act does not harmfully affect a major interest of the state that has the commitment.

2. Any way, no state is allowed to have the pretext of emergency as a justification to negate the non legality:
 - a. If the international commitment that does not harmonize with the state's act streams from an absolute rule of the general rules of the international law or:
 - b. If the international commitment that does not harmonize with the state's act is not stated in a treaty that clearly or implicitly negate the possibility of having the case of emergency as a pretext for that commitment or:
 - c. If the concerned state has participated in the occurrence of the urgent case.

It seems, through out the text of this article, that the international law committee is convinced by the opinion claiming the necessity of adopting the state of emergency in the international law.

What we mind in the framework of this research is to refer that the committee has absolutely refused relying on the existence of the urgent case to justify any aggression or international crime similar to what Israel commits at present by building the wall of separation. This is to be understood in two different places in the article /33/:

The first: article 1/b: conditions the trueness of the acknowledgment of the existence of the emergency case and the acceptance of its justification that the – illegal – act that the state has committed under the pretext of emergency does not severely and harmfully affects a major interest of the state that has been exposed to the illegal act. **This does not apply here in any way in the case of "Israel" (the Occupying Power) because the affected and touched interest is the sovereignty and independence of the targeted state, which is one of the most important interests that countries aim at maintaining, and are very affected by the mere touching of them.**

The second: is what the second article referred to when excepting three cases in which the state could not have the state of emergency as a pretext. The first of these cases refers that it is not allowed to have the state of emergency as a pretext to violate a clear rule of the international law. These rules are not to be disobeyed for any reason. **Consequently, we say here that catching the others' territories by force, settling, imposing the public punishment policy and adopting racial separation policy are on top of clear international rules that could not be violated or disobeyed with the pretext of the existence.**

*on behalf of the Syrian Embassy
to the Netherlands*

Alamouni²⁴

*Chargé d. Affaires
30-01-04*