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מתכננים למען זכויות תכנון

Planners for Planning Rights

Under the Guise of Security: Routing the Separation Barrier to Enable Israeli Settlement Expansion in the West Bank

Executive Summary

The fact that the Separation Barrier cuts into the West Bank was and remains the main cause of human rights violations of Palestinians living near the Barrier. Israel contends that the Barrier's route is based solely on security considerations. This report disputes that contention and proves that one of the primary reasons for choosing the route of many sections of the Barrier was to place certain areas intended for settlement expansion on the "Israeli" side of the Barrier. In some of the cases, for all intents and purposes the expansion constituted the establishment of a new settlement.

The report provides an in-depth analysis of the expansion plans of four settlements – Zufin, Alfe Menashe, Modi'in Illit, and Geva Benyamin-Neve Ya'akov – and the connection between the plans and the route of the Separation Barrier. The report also presents the principal findings in eight other cases in which the settlement's expansion plans significantly affected the Barrier's route: Rehan, Sal'it, Oranit, Ofarim, Ari'el, Qedumim, Gevaot, and Eshkolot. Construction of the Barrier around five of the twelve settlements discussed in the report ended some two years ago, in two cases the construction is near completion, and in the remaining four cases, the construction work has only recently begun.

The considerations in setting the route: The official Israeli version

The protection of settlements and settlers is not mentioned in the cabinet's decision of June 2002, which approved the start of construction of Stage 1 of the Barrier. The decision even gives the impression that the Barrier is not connected in any way to settlements or settlers. The decision states that the Barrier "is intended to reduce the entry of terrorists from Judea

and Samaria to carry out attacks in Israel.”¹ In a similar spirit, the Ministry of Defense stated on the homepage of the "Seam Zone" website, which was launched to supply information about the Barrier, that:

The "seam zone" plan is intended to reduce the ability of terrorists to infiltrate the territory of Israel from the territory of the Palestinian Authority, whose number has risen since September 2000 following the increase in the phenomenon of suicide terrorists.²

The State Attorney's Office, on the other hand, expressly stated the connection between the route and the settlements in a response it submitted to the High Court of Justice:

Indeed, part of the route was planned with the goal of providing protection also for Israeli residents living in Judea and Samaria, who also suffer from terror attacks.³

From these responses, one assumes that the settlers who are being protected by construction of the barrier inside the West Bank are settlers living in existing settlements, and not settlers who will live in settlements not yet built.

The State Attorney's Office also justified constructing the Barrier on West Bank territory on the basis of two security-related considerations. The first is the need to create a "buffer zone" by distancing the Barrier from the homes of Israelis living nearby, whether they be in communities in Israel or in the settlements. According to the State Attorney's Office, "this buffer zone is vital to strike against terrorists who are liable to cross the Barrier before carrying out their scheme."⁴ The other consideration cited is the to "defend the forces protecting the barrier by running the route in areas that cannot be controlled [topographically] from east of the barrier."⁵ Due to the topography of the area, running the entire Barrier along the Green Line, the State Attorney's Office contends, "would not enable protection of the soldiers patrolling the Barrier, who would find themselves in many cases in a lower topographical position. Also, a route along the Green Line would not enable keeping watch in the direction of Judea and Samaria, and would leave IDF forces in an inferior operational position to that of the terrorists waiting on the other side of the Barrier."⁶

¹ Cabinet Decision 2077, of 23 June 2002, Section B.3.

² The website can be found at <http://www.seamzone.mod.gov.il>.

³ HCJ 4825/04, *Muhammad Khaled 'Alian et al. v. The Prime Minister et al.*, Response, Section 469.

⁴ *Ibid.*, Section 64.

⁵ *Ibid.*, Section 60.

⁶ *Ibid.*, Section 64.

Time and again, Israeli government and legal officials have emphasized that the Barrier is only a means to protect against existing security threats, the Barrier being a temporary measure of protection. Proof of the temporary nature of the Barrier, according to the State Attorney's Office, is that in the past, security fences built along borders with Arab countries have been dismantled following peace agreements and political decisions.⁷

It should be mentioned that in defending against petitions filed with the High Court, the state was compelled to admit in some cases that expansion plans of settlements were taken into account in setting the route of certain sections of the Barrier.⁸ However, despite these admissions, the primary justification for the Barrier's route and human rights violations resulting from the route is still expressed in terms of pure security considerations, that is, preventing entry into Israel and operational considerations.

The comments of Lt. Col. Dan Tirza, head of planning of the Barrier in the Seam Zone Administration, in an interview with Haim Yavin clearly demonstrates Israelis public relations approach regarding the Barrier's route.⁹ When asked why the Barrier was not run along the Green Line, or at least closer to it, Tirza said that, "Doing so would create an immediate danger to Israeli citizens. And when we are talking about rights, the right to life is more important than the right to get to farmland." When asked if the fence's route was intended to steal land from Palestinians and enable the establishment of new settlements, Tirza responded:

I did not take land. The land is theirs [the Palestinians] and they can get to their land and continue to work it. We did not steal even one meter of land. The people continue to own the land, and when that time comes and the situation changes, the land will be returned to its owners. The fence does not give one centimeter to the settlements. The land for the settlements is determined by other means, in other places, and not by the fence's route. I have a mission: I have to prevent terrorists from crossing.

Is it really only security considerations that are taken into account?

The currently approved route of the Barrier leaves fifty-five settlements, twelve of them in East Jerusalem, separated from the rest of the West Bank and contiguous with the State of Israel. Study of a map of the route indicates that in most of the cases discussed in this report,

⁷ Ibid., Section 54.

⁸ See, for example, the state's admission that it took into account the expansion plan for Givat Ze'ev in setting the Barrier's route: HCJ 2056/04, *Beit Sourik Village Council et al. v. Government of Israel et al.*, Section. 80 of the judgment.

⁹ "The Land of the Settlers," Segment 3, broadcast on Channel Two television, ?? June 2005.

the Barrier's route was set hundreds, and even thousands, of meters from the houses at the edge of the settlement. The route of the Separation Barrier running near each of the twelve settlements discussed in the report more or less follows the borders of the outline development plan for the particular settlement, making it impossible to argue there is no connection between the route and the plan. Thus it is clear that contrary to the picture portrayed by the state, the settlement-expansion plans played a substantial role in the planning of the Barrier's route.

The lack of transparency regarding the connection between the Barrier and the settlements is clear from the change in claims made by the state regarding the section of the Barrier around the settlement Zufin. In October 2002, Palestinian residents of 'Azzun and a-Nabi Elyas petitioned the High Court against a section of the Barrier that was to be built east of Zufin, which threatened to cut them off from their farmland located west of the Barrier.¹⁰ In her decision, Justice Dorit Beinisch accepted unchallenged the state's contention that running the Barrier inside the West Bank was necessary to create a "warning space." Accordingly, the High Court rejected the petition, and the Barrier was built along the route as it was initially planned.

However, in light of the severe difficulties in accessing their lands since construction of the Barrier in July 2003, residents of 'Azzun and a-Nabi Elyas again petitioned the court. Represented by HaMoked: Center for the Defence of the Individual, the petitioners requested that the court order the dismantling of the Barrier or that it be moved such that it does not block access to their farmland.¹¹ Unlike its response to the previous petition, the State Attorney's Office emphasized that the Barrier needed to be built along the chosen route "to protect the southern and eastern parts of the Israeli community Zufin."¹² Furthermore, the State Attorney's Office went further and admitted that, "In planning the route in the area, consideration was given to the existence of a plan that is under preparation, but has not yet gained official approval."¹³

Security considerations versus settlement considerations

¹⁰ HCJ 8532/02, *Rashid 'Abd Alsalam et al. v. Commander of IDF Forces in the West Bank et al.*, *Takdin Elyon* 2002 (4) 1078.

¹¹ HCJ 2732/05, *Head of the 'Azzun Local Council et al. v. Government of Israel et al.*

¹² *Ibid.*, Response of the State, Section 14.

¹³ *Ibid.*, Section 17.

Israel's unwillingness to fully admit that the expansion plans for many settlements were the most important consideration in choosing the Barrier's route results at least in part, from the conflict between this consideration and other aspects of the security argument.

Firstly, admission that settlement expansion was taken into account largely negates the contention that the Barrier is temporary, which is one of the primary elements of the security argument. The implementation of a real-estate development project depends, among other things on demand for the homes that will be built. Isolating the planned development from nearby Palestinian communities is crucial in creating that demand. Also, in at least some of the cases, inclusion of area intended for expansion west of the Barrier is not just "another" factor to improve sales, but is decisive in determining whether the project is ultimately built at all. Therefore, even if the security situation changes, which would enable the Barrier to be dismantled, one would think that the new "neighborhoods" would not be evacuated and dismantled along with the Barrier. Rather, it is likely that Israel would treat the settlements as facts on the ground that cannot be disregarded, and which, at best, should be discussed only in the final-status negotiations.

Secondly, the intention to expand a settlement by building in the area between a settlement's currently built-up area (or the fence around the settlement) and the Barrier directly contradicts the contention that settlement expansion eastward results from a security need for a "buffer zone" that enables security forces to chase after terrorists who managed to cross the Barrier, before they reach a community in which Israelis live. A "buffer zone" is by definition, empty space, and any attempt to use it to justify the Barrier's route (and the resulting human rights violations) running on the far side of the proposed area for expansion is deceitful.

Thirdly, the further that the Barrier is situated from the Green Line, the greater the amount of Palestinian farmland located in the "seam zone." The greater amount of land means that more Palestinians are entitled to permits in order to enter the "seam zone," and there is no physical Barrier that blocks access from the "seam zone" to Israeli territory. Thus, taking into account settlement expansion in setting the Barrier's route means increasing in the number of Palestinians holding permits to enter the "seam zone" who can, if they wish, enter Israeli territory unimpeded. Settlement expansion of this kind contradicts the security objective of the Barrier, as defined by the government, which is to limit the entry of Palestinians into Israel unless they have a permit.

Fourthly, the state argues that to protect security forces that patrol the Barrier, a route was chosen that provides topographic "control" of the area to the greatest extent possible. However, the desire to surround areas intended for settlement expansion conflicts with the desire to protect the security forces. In other words, the optimal topographic route in certain

areas may be along a line closer to the existing built-up area of the settlement. This is the case east of the Zufin settlement, in which concern for the expansion plans led to a route that is completely controlled by [i.e. lower than] the nearby Palestinian village of Jayyus.

The resulting patterns of human rights violations

Concern for the settlements' expansion plans in planning the Barrier's route has led to more extensive violations of the human rights of Palestinians living in nearby villages than would have occurred had protection of the existing settlement been the relevant consideration. The cases described in the report indicate three primary patterns of human rights violations.

The most common pattern arises when the Barrier is built immediately alongside the houses in Palestinian villages, with the objective of including on the western side of the Barrier the land within the outline plan intended for the settlement's expansion, while increasing the amount of Palestinian farmland that is separated from their owners. The Zufin settlement provides an instructive example of this pattern. In order to include west of the Barrier the land covered by Plan 149/2, in which 1,200 housing units are to be built (six times as many homes as currently exist in the settlement), and the land area involved in Plan 149/5, which is slated to become an industrial zone, residents of the neighboring Palestinian village of Jayyus were separated from 9,000 dunams of their farmland (seventy percent of the village's farmland). Access to the farmland on the other side of the Barrier requires a permit issued by the Civil Administration. The president of the Israeli High Court of Justice, Aharon Barak, described the harm resulting from the separation of farmers from their land:

... This state of affairs injures the farmers severely, as access to their lands (early in the morning, in the afternoon, and in the evening), will be subject to restrictions inherent to a system of licensing. Such a system will result in long lines for the passage of the farmers themselves; it will make the passage of vehicles (which themselves require licensing and examination) difficult, and will distance the farmer from his lands (since only two daytime gates are planned for the entire length of this segment of the route). As a result, the life of the farmer will change completely in comparison to his previous life. The route of the Separation Fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired. The difficult reality of life from which they have suffered (due, for example, to high unemployment in that area) will only become more severe.¹⁴

¹⁴ *Beit Sourik*, Judgment, Section 60.

The second pattern of violations occurs when land designated for settlement expansion encloses Palestinian villages in enclaves between the Barrier and the Green Line, separating them from the rest of the West Bank. An example is found in the case of Alfe Menashe. In order to leave on the "Israeli" side the land encompassed in Plan 115/8 ("Givat Tal"), in which 1,400 housing units are planned, and Plan 115/9 ("Ilanit"), on which 240 units are to be built, the Palestinian villages Ras a-Tira and a-Dab'a (which have 650 residents) were turned into an enclave. The route of the Barrier has affected almost every aspect of their daily lives. Being small villages, the residents rely on access to nearby Palestinian towns and villages to obtain services and to purchase goods to meet their household and farming needs. Following completion of the Barrier, reaching one of the nearby communities entails going through a gate in the Barrier, which requires a permit, a physical check, and waiting in line, and that the resident must schedule their travel for a time when the gate is open. When an ambulance team stationed in Qalqiliya receives an emergency call from a resident of the enclave, they have to coordinate entry with the DCO in Qalqiliya, a procedure that is liable to take a long time and ultimately affect the patient's health.

The ability of the residents in the enclave to earn a living has also suffered greatly. For example, the grazing land for the sheep and goats belonging of the enclave's residents is on the other side of the Barrier. As a result, the residents have been forced to buy fodder for their animals, which in turn affecting the economic feasibility of keeping these animals. Some residents have sold their flock at a substantial financial loss.

The third pattern of human rights violations occurs when the Barrier is located right next to the houses in the Palestinian villages, completely blocking any possibility for the villages' urban development. The expansion of the Geva Binyamin settlement (Adam) provides one example. The settlement, as it exists today, lies outside (east of) the Barrier. However, a substantial part of its jurisdictional area to the west of the built-up area is included on the "Israeli" side of the Barrier, in complete contiguity with the Neve Ya'akov settlement, which is in East Jerusalem. The purpose was to leave the area of Plan 240/3, on which an Ultra-Orthodox Jewish neighborhood with 1,200 housing units is to be built, contiguous with the existing religious neighborhood in Neve Ya'akov. Surrounding this area with the Barrier blocks the only possibility available to the nearby Palestinian village a-Ram (58,000 residents) – which is blocked on all sides by the Jerusalem municipal border and by Route 45 that Israel built – to develop. As a result, the planning rights of the residents of a-Ram have been dealt a deathblow.

The Barrier's route is illegal under international law

The settlements that Israel established in the Occupied Territories are illegal and breach international humanitarian law, primarily because the Fourth Geneva Convention forbids the occupying state to transfer its civilian population to occupied territory.¹⁵ In addition, the settlements cause the violation of a long list of rights enshrined in international human rights law, among them the right to equality, property, and freedom of movement. The breach of international humanitarian law that results from establishment of the settlements is a continuing one, and not only a one-time forbidden act that occurred when the settlements were established. Therefore, an act intended to perpetuate the settlements is by definition, a breach of international law. The decision to build the Separation Barrier within the West Bank and the creation of territorial contiguity between it and Israeli territory is clearly intended to achieve this purpose. For this reason, the route of the Separation Barrier is illegal.

Furthermore, even if sections of the barrier that surround the settlements would not directly violate the Palestinians' human rights, they cannot be justified on grounds of military need, in that the transfer of a civilian population to occupied territory is absolute, and cannot be justified even by military necessity.¹⁶

This does not lead to the conclusion that Israel is not allowed to defend the settlers. Quite the contrary. International humanitarian law requires Israel to ensure public order in the territory under its effective control, and this includes protecting the lives of all persons in the territory, regardless of the legality of their presence in the area.¹⁷ However, the means that Israel is permitted to use to carry out this obligation are limited in relation to those means that it may take to meet a legitimate military need. Nonetheless, insofar as the settlers are not "protected persons" within the definition of this term in the Fourth Geneva Convention, Israel may take actions to protect them by means that could not be used if "protected persons" were involved.¹⁸ For example, Israel may prevent its citizens from entering the occupied territory if it believes that entry would endanger their lives, and it has exercised this authority regularly

¹⁵ Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 1949, Article 49.

¹⁶ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, Par. 135.

¹⁷ Regulations attached to the Hague Convention Respecting the Laws and Customs of War on Land, 1907, Article 43.

¹⁸ Fourth Geneva Convention, Article 4. The State Attorney's Office accepts this conclusion as well, as which stated that the settlers "are not protected persons for the purposes of the Geneva Convention." HCJ 1661/05, *Gaza Coast Regional Council et al. v. The Knesset et al.*, Response on Behalf of the Respondents, Section 36.

since the beginning of the occupation.¹⁹ Furthermore, Israel is also allowed to evacuate civilians from the occupied territory and return them to Israel, as it did recently in implementing the disengagement plan.

In other words, although protecting the settlers is a legitimate objective, achieving it by running the Barrier along a route that perpetuates the settlements or involves expressly forbidden acts, such as destruction of private property, is illegal. The severity of the action is aggravated insofar as the primary goal in setting the Barrier's route - expanding settlements and protecting the economic interests of Israeli real-estate developers - is itself illegal.

¹⁹ For a discussion on the power to prevent the entry of Israelis into the Gaza Strip during the period prior to implementation of the disengagement plan, see B'Tselem and HaMoked: Center for the Defence of the Individual, *One Big Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan*, March 2005, Chapter 3.