

## HAGUE INTERNATIONAL TRIBUNALS

# The *Construction of a Wall* between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation

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### Abstract

The ICJ considered the Wall in terms of the structure of the Israeli occupation and the settlements, which is one of de facto annexation. By contrast, the Israeli HCJ uses proportionality to regulate within the occupation. This approach may be inherent in humanitarian law, but involves a misplaced transplantation of the proportionality doctrine and an imbalanced rights/security equation. Contrary to the HCJ's determination, which attributes the different conclusions of the two courts to the different factual backgrounds available to them, this article argues that they reflect the courts' variant attitudes towards the barrier and its place within the broader context of the occupation and its structure. The looming shadow of the ICJ affected the HCJ's decision. On critical questions of international law, however, a wall separates international law as articulated in The Hague and the decisions issued in Jerusalem, pointing to the need for a new articulation of existing theories on transnational legal processes.

### Key words

Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; International Court of Justice; international humanitarian law; occupation; proportionality; transnational legal process

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## I. INTRODUCTION

The Advisory Opinion issued by the International Court of Justice (ICJ) on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*<sup>1</sup> in July 2004 has been the subject of extensive scholarly debate.<sup>2</sup> Some of the comments also addressed a parallel decision rendered nine days previously by the Israeli Supreme Court sitting as the High Court of Justice (HCJ) in the case of *Beit Sourik Village Council v. The Government of Israel*,<sup>3</sup> dealing with a section of the same separation barrier<sup>4</sup> examined by the ICJ.<sup>5</sup> The Advisory Opinion and the process in The Hague leading to it were also discussed at length in a second decision involving the barrier rendered by the HCJ 14 months later, in *Mara'abe v. The Prime Minister of Israel*.<sup>6</sup> In this judgment, the HCJ dealt with another section of the barrier and also discussed the status of the Advisory Opinion in domestic law, while addressing the differences between its own positions and those of the ICJ.

Many of the academic and non-academic analyses were extremely critical of the Advisory Opinion. Some opposed it altogether, either because they held that the Court should have refused the request to address this question or because they thought it had reached the wrong conclusion.<sup>7</sup> Others, who seemed to agree with the Court's decision to entertain the request and were at least partly supportive of its conclusions, argued that its legal and/or factual reasoning, or its procedural fairness, had been extremely flawed.<sup>8</sup>

1. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), Judgment of 9 July 2004, (2004) 43 ILM 1999 (hereafter Advisory Opinion).
2. See especially the two symposia devoted to the Advisory Opinion: 'Agora: ICJ Advisory Opinion on *Construction of a Wall in the Occupied Palestinian Territory*', (2005) 99 AJIL 1; 'Special Double Issue: Domestic and International Judicial Review of the Construction of the Separation Barrier', (2005) 38 *Israel Law Review* 6.
3. HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel*, 58(5) P.D. 807 (2004), translated in (2005) 38 *Israel Law Review* 83 and (2005) 43 ILM 1099 (hereafter *Beit Sourik*).
4. The question of what to call the structure being built in the West Bank remains controversial. Although the title of this article cites the title of the ICJ Opinion, which used the term 'wall', others think the term 'fence' is more appropriate. Throughout the article, unless in a direct quote, I will use the term 'barrier' (or 'separation barrier'), which is perhaps this structure's best description.
5. For articles that look at both cases together see G. Watson, 'The "Wall" Decision in Legal and Political Context', (2005) 99 AJIL 6; D. Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law', (2005) 99 AJIL 88; D. Kretzmer, "Introduction" to Special Double Issue: Domestic and International Judicial Review of the Construction of the Separation Barrier', (2005) 38 *Israel Law Review* 6; Y. Shany, 'Capacities and Inadequacies: A Look at the Two Separation Barrier Cases', (2005) 38 *Israel Law Review* 230; Y. Shany, 'Head against the Wall? Israel's Rejection of the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*', in *Yearbook of International Humanitarian Law* 2004 (forthcoming); A. De Puy, 'Bringing Down the Barrier: A Comparative Analysis of the ICJ Advisory Opinion and the High Court of Justice of Israel's Ruling on Israel's Construction of a Barrier in the Occupied Territories', (2005) 13 *Tulsa Journal of International and Comparative Law* 275. Further elaborate discussion of the *Beit Sourik* decision is to be found in some of the articles in the *Israel Law Review* symposium issue, *supra* note 2.
6. HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* (not yet published) (hereafter *Mara'abe*), English translation available at [http://elyon1.court.gov.il/files\\_eng/04/570/079/a14/04079570.a14.pdf](http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf).
7. See, e.g., M. Pomerance, 'The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial', (2005) 99 AJIL 26; M. Pomerance, 'A Court of "UN" Law', (2005) 38 *Israel Law Review* 134; R. Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense', (2005) 99 AJIL 52; K. Calvo-Goller, 'More than a Huge Imbalance: The ICJ's Advisory Opinion on the Legal Consequences of the Construction of the Barrier', (2005) 38 *Israel Law Review* 165; R. Sabel, 'The International Court of Justice Decision on the Separation Barrier and the Green Line', (2005) 38 *Israel Law Review* 316.
8. See, e.g., I. Scobbie, 'Words My Mother Never Taught Me: "In Defense of the International Court"', (2005) 99 AJIL 76; A. Imseis, 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall

Critics favourably disposed to the ICJ's conclusions take a position resembling that of some of the ICJ's judges, who concurred with the result but added separate opinions criticizing the gaps in the ICJ's reasoning.<sup>9</sup> Some of them engage in attempts to understand why the ICJ's reasoning is lacking in many aspects,<sup>10</sup> while others fill in the 'missing pages'<sup>11</sup> in the Advisory Opinion and provide some of the reasoned and well-argued legal basis that they find to be missing.<sup>12</sup>

In this article I examine the Advisory Opinion and the HCJ rulings on the separation barrier (in, but not limited to, the *Beit Sourik* and *Mara'abe* judgments) as part of international law enforcement in general, focusing on International Humanitarian Law (IHL) regarding occupation and, specifically, on the Israeli occupation of the Occupied Palestinian Territory (OPT).

Throughout the article I consider the enforcement but also the limits of humanitarian law, pointing to conclusions that may be drawn from the legal proceedings conducted so far concerning the barrier. It is my argument that humanitarian law as applied by the HCJ uses the doctrine of proportionality to regulate a belligerent occupation. Although it may thereby alleviate some of the occupation's effects, the HCJ does not challenge this occupation's basic structure, which views the settlers' rights as security concerns that can justify placing restrictions on the rights of the local residents. I also argue that the HCJ's legal analysis involves a misplaced transplantation of doctrines of proportionality developed in international and domestic law to the context of occupation, leading to an imbalanced rights/security equation. Broader conclusions about the limits of the proportionality analysis and the validity of the separation between authority and proportionality are also suggested.

Unlike the HCJ, the ICJ did challenge the basic structure of Israeli occupation, which is one of a *de facto* annexation. I argue that, contrary to the HCJ's determination that attributed the differences between the conclusions reached by the two courts to the different factual backgrounds available to them, the different conclusions should mostly be attributed to the two courts' variant attitudes towards

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Advisory Opinion', (2005) 99 AJIL 102; Kretzmer, 'The Light Treatment', *supra* note 5; Shany, 'Capacities and Inadequacies', *supra* note 5; O. Ben-Naftali, "'A la Recherche du Temps Perdu': Rethinking Article 6 of the Fourth Geneva Convention in Light of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion', (2005) 38 *Israel Law Review* 211; T. Broude, 'The Legitimacy of the ICJ's Advisory Competence in the Shadow of the *Wall*', (2005) 38 *Israel Law Review* 189.

9. See especially the Separate Opinions of Judge Higgins, Judge Kooijmans, and Judge Owada. A critical view of the Court's reasoning was also taken by Judge Buergenthal, who dissented from the Court's decision to hear the case, and thus from the Advisory Opinion itself. In his Declaration, Judge Buergenthal also addressed the merits part of the Advisory Opinion, and pointedly criticized the gaps in the Court's reasoning.
10. See especially I. Scobbie, 'Smoke Mirrors and Killer Whales: The International Court's Opinion on the Israeli Barrier Wall', (2004) 5 *German Law Journal* 1107, available at <http://www.germanlawjournal.com/print.php?id=495>. Scobbie argues that the Court's drafting method sometimes makes its reasoning 'less candid than one might desire'. The Advisory Opinion, he suggests, seeks to convey only the 'lowest common denominator' of the various judicial opinions. For a similar explanation see L. Fisler Damrosch and B. Oxman, 'Agora: ICJ Advisory Opinion on *Construction of a Wall in the Occupied Palestinian Territory*: Editor's Introduction', (2005) 99 AJIL 1, at 1.
11. On 'missing pages' in a court's decisions in another context, see L. Baker, 'The Missing Pages of the Majority Opinion in *Romer v. Evans*', (1997) 68 *University of Colorado Law Review* 387; J. Halley, 'Gay Rights and the Courts – The Amendment 2 Controversy: *Romer v. Hardwick*', (1997) 68 *University of Colorado Law Review* 373.
12. See especially Imseis, *supra* note 8.

the questions of 'security' and of the barrier itself and its place within the broader context of the structure of the occupation.

I further argue that typical of the HCJ's discussion of these issues are artificial separations between security and politics, between authority and proportionality, and between different sections of the barrier. In its rulings, the HCJ accepted, but at the same time also rejected, Israel's security arguments regarding specific segments of the barrier and, in so doing, it took an unprecedented step by intervening in security arguments in the name of international law. I argue that the looming shadow of the Advisory Opinion issued in The Hague affected this HCJ decision. The story of the barrier, therefore, is an important case study for learning about the indirect influence of international law, which emerges here as limited: on critical questions of international law, a wall separates international law as articulated in The Hague and the HCJ's decisions given in Jerusalem. The two courts may thus be seen as talking *at* rather than *to* each other. Judicial proceedings surrounding the barrier, then, shed light on the need to rearticulate existing theories on transnational legal processes and on the dialogue between courts.

By the time the question of the barrier was referred to the ICJ in 2003, it had already been pending before the HCJ.<sup>13</sup> Both the *Beit Sourik* decision and the Advisory Opinion issued several days later held against the government of Israel, ruling, respectively, that the building of specific segments of the barrier, or of any parts of it built in the OPT, is illegal. Nevertheless, these decisions are also strikingly different: the ICJ Advisory Opinion looked at the building of the barrier as a whole, and the question the General Assembly asked the ICJ to address concerned the legal consequences 'arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem'.<sup>14</sup> By contrast, the *Beit Sourik* case was limited to a section of the barrier located near Jerusalem. Note, however, that questions similar to the one addressed to the ICJ were at the same time pending before the HCJ too. The first of these more generalized petitions argued that building the barrier in the occupied territory is illegal under international law in general and the law of belligerent occupation in particular.<sup>15</sup> Of two others, one challenged the permits system associated with the barrier,<sup>16</sup> and another asked to change the arrangements concerning the gates in the barrier.<sup>17</sup> The petition concerning the permits system challenged the military orders declaring the area between the barrier and the Green Line<sup>18</sup> to be a closed military zone

13. The Israeli High Court of Justice enjoys original jurisdiction over petitions made against government agencies regarding their capacities as such. See Basic Law: The Judiciary, 38 L.S.I 181 (1984), Art. 15, available at [http://www.mfa.gov.il/MFA/MFAArchive/1980\\_1989/Basic per cent20Law- per cent20The per cent20Judiciary](http://www.mfa.gov.il/MFA/MFAArchive/1980_1989/Basic%20Law-%20The%20Judiciary).

14. UN Doc. A/RES/ ES-10/14, 10 Dec. 2003, quoted in Advisory Opinion, *supra* note 1, para. 1.

15. HCJ 9961/03 *Hamoked – The Center for the Defense of the Individual v. The Government of Israel* (pending).

16. HCJ 639/04 *The Association for Civil Rights in Israel v. The IDF Commander in Judea and Samaria* (pending).

17. HCJ 11344/03 *Faiz Salem v. The IDF Commander in Judea and Samaria* (pending). On 27 July 2005 the HCJ issued a decision within this petition, stating that it would hear it together with the petition in HCJ 639/04 challenging the permit regime.

18. The Green Line is the name given to the border that had existed between Israel and the West Bank, which was held by Jordan before the 1967 war, and thus currently marking the boundary between Israel and the occupied territories.

requiring its Palestinian residents to procure special permits to remain there. The other demanded that the gates in the barrier, through which Palestinians must pass in order to travel to work, school, and other services in the West Bank, remain open 24 hours a day rather than for limited periods, and that the army allow vehicles as well as agricultural and mechanical equipment to pass through. The first of these petitions would have allowed the HCJ to deal with the legality of building the barrier in the OPT as a whole, and in the two others the HCJ could have addressed several basic features of the barrier's functioning gravely impinging on the life of the Palestinian population. The HCJ chose to give preference to localized petitions, and the judgment it issued shortly before the ICJ gave its Advisory Opinion concerned one of the barrier's sections. In its second major decision concerning the barrier, in *Mara'abe*, the HCJ again dealt with a particular section. The effects of looking at the 'parts' rather than the 'whole' will be discussed throughout this article.

In section 2 of this article I analyse the Advisory Opinion and the basis for its holding that building the barrier in the OPT is illegal. This part discusses, *inter alia*, the ICJ's failure to distinguish, in its discussion of self-defence, between questions of *jus ad bellum* and questions of *jus in bello*. Section 3 deals with the major decisions of the HCJ on this issue. Section 4 considers how the HCJ engages the Advisory Opinion. Section 5 explores the effect that the decisions of both courts had on one another and on the barrier itself, and offers thoughts about the role and the limits of humanitarian law in this context. Finally, section 6 considers the place of the barrier within the structure of the occupation and the logic of separation. It looks at the barrier's role in the dissection of the occupied territory and the regulation of people's lives and bodies, based on ethnic criteria.

## 2. THE HAGUE: ONE OPINION, TWO ILLEGALITIES

The ICJ dealt with the barrier as a whole and found that building it in the OPT is illegal and that Israel is under an obligation to cease construction works, to dismantle the structure already built, to repeal or render ineffective all legislative and regulatory acts relating thereto, and to make reparations for all damages caused by the construction of the barrier.<sup>19</sup>

The ICJ relied on the Secretary-General's report, stating that, for most of its course, the barrier lies within the occupied territory 'and deviates from the Green Line to encompass settlements, while encircling Palestinian population areas'.<sup>20</sup> The ICJ further noted the large number of Palestinians who would be living in the area between the Green Line and the barrier and the administrative regime to which they would be subject; the area would be declared 'closed' and its residents would be unable to remain there unless they held a permit issued by the Israeli authorities. As reviewed by the ICJ, the regulations issued by the Israeli army determined that Israeli citizens, Israeli permanent residents, and those eligible to immigrate to Israel in accordance with the Law of Return (although the ICJ failed to say so explicitly,

19. Advisory Opinion, *supra* note 1, paras. 149–53, 163.

20. *Ibid.*, para. 83.

this last is a synonym for Jews<sup>21</sup>) may remain in the closed area without a permit. The ICJ also noted that access to and exit from the closed area would be allowed only through gates to be opened infrequently and for short periods.<sup>22</sup>

The ICJ concluded that, in light of these circumstances, Israel had violated several binding international obligations when constructing the barrier and endorsing the associated regime.<sup>23</sup> The ICJ's determination of illegality rested on two arguments which constitute the main core of the decision.

### 2.1. The ICJ on the building of the barrier in the Occupied Territory

The first argument related to the 'big picture': the ICJ determined that it is apparent the barrier's route had been planned so as to include within Israel the great majority of Israeli settlements in the OPT; that these settlements are illegal pursuant to Article 49(6) of the Fourth Geneva Convention, which prohibits the transfer of population of an occupying power into the territory it occupies; that the route of the barrier may prejudice further negotiations between Israel and Palestine; and that Israel might use it to integrate the settlements and their means of access.<sup>24</sup> Thus the ICJ stated that it considered

that the construction of the wall and its associated regime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel as temporary, it would be tantamount to de facto annexation.<sup>25</sup>

21. The Law of Return, 5710-1950, 4 LSI 114 (1950), available at [http://www.mfa.gov.il/MFA/MFAArchive/1950\\_1959/Law+of+Return+5710-1950.htm](http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law+of+Return+5710-1950.htm). The permit system was later changed in some aspects, including omission of the special status given specifically to non-Israeli Jews. However, for the most part the changes seem cosmetic only. See note 22, *infra*.

22. Advisory Opinion, *supra* note 1, paras. 84–5. A similar outline of the facts appears in the petitions brought to the HCJ mentioned above against the permits system and the gates' opening hours. See notes 16–17 and accompanying text, *supra*. In a brief to the HCJ submitted in *The Association for Civil Rights in Israel v. The IDF Commander in Judea and Samaria* (*supra* note 16), the Israeli army announced that it had identified problems affecting residents of the 'seam zone' in connection with the permit system and the location and opening times of the gates. The army recommended that the permits be replaced by permanent cards for residents of the 'seam zone' and also other changes, including extending the opening hours for gates serving agricultural purposes. Although the brief stated that these recommendations were already being implemented, it also indicated that residents of the 'seam zone' would still need a special card to be allowed to remain in the area where they live, valid for a period that will be determined by the Israeli army. Holders of this permanent resident card would be exempt from procuring a special permit to be in the 'seam zone', and the process for obtaining these cards would be simplified. The question remains whether the new permanent-resident cards system is not actually the same as the existing permits system, other than in name. Also, people not residing in the 'seam zone', but who need to enter it for work purposes, including farmers whose lands are located there, will still require special permits to enter it. Palestinians will be allowed to enter and exit the 'seam zone' only through the gates indicated in their permit. Meanwhile, new orders issued by the Israeli army changed the terms of the general permit allowing people to be present in the 'seam zone'. They now include Israeli citizens and residents, as well as visitors to Israel who hold a valid visa to Israel. The category of non-Israeli Jews was omitted, although those for the most part would fall under the category of visitors to Israel holding a valid visa. It seems, then, that the Palestinians, whether they reside in the 'seam zone' or need to enter it for any purpose, will de facto remain the only ones needing a special permit (or card) to be in this area. The changes are detailed in letters from the Legal Advisor's Office to the Judea and Samaria area in the Israeli Defense Forces to the Association of Civil Rights in Israel dated 20 Sept. 2005 and 20 Dec. 2005, and in military orders attached to the letters.

23. Advisory Opinion, *supra* note 1, para. 143. For an overview of the Advisory Opinion and its place within the Israeli–Palestinian conflict see P. J. I. M. De Waart, 'International Court of Justice Firmly Walled in the Law of Power in the Israeli–Palestinian Peace Process', (2005) 18 LJIL 467.

24. Advisory Opinion, *supra* note 1, paras. 119–20.

25. *Ibid.*, para. 121.

The route of the barrier, said the ICJ, 'gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements'.<sup>26</sup> Based on the effect of the barrier on the Palestinian population, the large number of Palestinians who would live in encircled communities because of it, and the risk of further alterations to the demographic composition of the OPT, the ICJ also concluded that the construction of the barrier together with previous measures 'severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect this right'.<sup>27</sup>

## 2.2. The ICJ on violations of humanitarian and human rights norms resulting from the barrier

The second major pillar of the ICJ's decision concerning the illegality of the barrier touches on the violation of specific provisions of IHL and international human rights law. The ICJ examined Israel's actions and their effect on the lives of Palestinians in the OPT in the light of certain provisions in the Fourth Geneva Convention,<sup>28</sup> the Hague Regulations of 1907, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Rights of the Child. The rights said to be infringed through the violation of these provisions include liberty of movement and the rights to work, health, education, and an adequate standard of living, besides provisions concerning the protection of property.<sup>29</sup> Information that Palestinians living between the barrier and the Green Line would be cut off from their land, workplaces, schools, health clinics, and other social services was pertinent to the ICJ's determination on this matter.<sup>30</sup> In a succinct discussion, the ICJ determined that none of the exceptions to provisions of humanitarian and human rights law applied here; that no military exigencies justified exceptions to some of the relevant provisions of the Hague Regulations and the Fourth Geneva Convention; that no such exigencies existed in the context of other provisions in ways that might allow acts regularly prohibited, and that the violation of those human rights that might be limited in the name of national security or public order do not conform with the principle of proportionality required for their limitation.<sup>31</sup> Moreover, in this particular case, no viable 'state of necessity' argument could be used to protect Israel's actions, since the ICJ was not convinced that the construction of the barrier along the chosen route was the only means of safeguarding the Israeli interests at stake.<sup>32</sup> The ICJ also rejected

26. *Ibid.*, para. 122.

27. *Ibid.* The ICJ noted that these demographic changes might result from Palestinians being forced to depart from certain areas as a result of the barrier. *Ibid.*, para. 133. For a comprehensive discussion of self-determination in this context see J. F. Gareau, 'Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', (2005) 18 *LJIL* 489.

28. The ICJ confined its analysis to provisions that continue to apply after the cut-off date, namely one year after the general closure of military operations, interpreting Art. 6 of the Fourth Geneva Convention to imply that only these provisions are applicable in the OPT. For a powerful critique of this position see Ben-Naftali, *supra* note 8. On this point, see also Imseis, *supra* note 8, at 105–9.

29. Advisory Opinion, *supra* note 1, paras. 123–37.

30. *Ibid.*, para. 133.

31. *Ibid.*, paras. 135–7.

32. *Ibid.*, paras. 140–1.

the applicability of the self-defence argument to this case, and concluded that Israel could not rely on Article 51 of the United Nations Charter.<sup>33</sup>

This is the least satisfactory section of the ICJ Advisory Opinion. Concerning the handling of such issues as military exigency, proportionality of the limitation of rights in the name of national security and public order, and the question of 'necessity', hardly any explanation can be found for the ICJ's conclusions on these matters other than the repeated mantra that the ICJ is 'not convinced'<sup>34</sup> that any of these doctrines can justify Israel's actions, without any explanation as to *why* it is not convinced.<sup>35</sup>

The insufficient analysis of the self-defence question in the Advisory Opinion merits further discussion.<sup>36</sup> The ICJ rejected the argument offered by Israel in various fora stating that the building of the barrier was consistent with the right of states to use force in self-defence, as enshrined in Article 51 of the UN Charter. The ICJ dismissed this argument in a brief paragraph, noting that Article 51 recognizes the right of self-defence in the case of an armed attack by one state against another and that Israel does not claim that the attacks against it are imputable to a foreign state. The ICJ further noted that Israel exercised control over the OPT and that the threat originated from within this territory, so that the situation was different from that contemplated in Security Council Resolutions 1368 and 1373 following the 11 September 2001 terrorist attacks on the United States, and Israel could not therefore invoke these resolutions in support of its claim to be exercising a right to self-defence.<sup>37</sup>

Insofar as the ICJ meant that the doctrine of self-defence applies only to an armed attack by one state against another, I consider it to be wrong.<sup>38</sup> Yet the ICJ's attempt to distinguish the situation that led to the Security Council resolutions recognizing the United States' right to self-defence from the situation of Israel vis-à-vis Palestinian terror indicates that the ICJ might have admitted that self-defence *can* be invoked against non-state actors as well, though not when the attacks originate in a territory controlled by the party that claims to be acting in self-defence. This reasoning appears to be sensible, since granting an occupying power a right to self-defence shifts the structure of the occupation regime and gives the military commander in the occupied territory more powers than the law of occupation had intended. Military commanders have authority to take the actions needed to maintain security in the occupied territory and this, rather than the doctrine of self-defence, is the proper context for examining their conduct.<sup>39</sup>

33. Ibid., paras. 138–9.

34. Ibid., paras. 135, 137, 140.

35. For such critiques, see Advisory Opinion (Buergethal), *supra* note 1. See also Watson, *supra* note 5, at 24; Shany, 'Capacities and Inadequacies', *supra* note 5, at 230–6; Kretzmer, 'The Light Treatment', *supra* note 5, at 98–9. Imseis, *supra* note 8, at 110–15, discusses in detail what he considers to be the ICJ's patent failure to give substantive reasons for its finding that Israel's construction of the barrier cannot be justified by military necessity, and offers reasons of his own.

36. For a comprehensive discussion see Scobbie, *supra* note 8.

37. Advisory Opinion, *supra* note 1, paras. 138–40.

38. Judge Higgins was critical of this view in her concurring opinion, but accepted this is a statement of the law as it stands. Advisory Opinion (Higgins), *supra* note 1, para. 33. In my view the law on this question at this time does not require an attack by a state.

39. For such a reading see also Scobbie, *supra* note 8. About the confusion between self-defence as a legal doctrine and the broader notions of security concerns see *ibid.*, at 84. Thus I agree with the position taken by Judge

The ICJ (including the judges giving separate opinions) also erred in neglecting to note that the building of the barrier, even if conceived as a military action, should be examined in the context of *jus in bello* rather than *jus ad bellum*.<sup>40</sup> The situation in the OPT is one of belligerent occupation. The question of the barrier is not whether to oppose terror but through what means, a problem definitely within the purview of a military commander's authority in a belligerent occupation. Some characterize the situation in the OPT as one of 'armed conflict short of war' and consider that the laws of warfare have applied since the beginning of occupation or, at least, certainly since the outbreak of the Second Intifada. In their decisions on the barrier, both the ICJ and the HCJ failed to rule explicitly on this point and on the possible applicability of the laws of warfare. Determining that these laws apply might muddle the picture, granting the military commander greater authority than that possessed by him according to the law of belligerent occupation.<sup>41</sup> Although the Advisory Opinion seems to imply that the laws of warfare do not apply, the ICJ stopped short of fully addressing the issue.

Even if we were to assume that the laws of armed conflict rather than (or in addition to) those of belligerent occupation apply to this case at this time, the question of the barrier is still not one of *jus ad bellum* but one of *jus in bello*. The doctrine of self-defence is relevant only to the question of *jus ad bellum* and regulates the initial use of force. Examining the measures used by the belligerents through the prism of the self-defence doctrine and using it to justify specific acts is a highly

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Kooijmans in his separate opinion (Advisory Opinion (Kooijmans), *supra* note 1, paras. 35–6) that the ICJ was wrong insofar as it stated that self-defence can only be a response to an armed attack by a state, but right in rejecting the application of the doctrine to an attack from a territory under a state's control. Judge Higgins found the ICJ's reasoning on the issue of self-defence unconvincing and described it as 'formalism of an unevenhanded sort'. She wondered why an occupying power loses the right to defend its own civilian citizens at home if the attack emanates from the occupied territory (Advisory Opinion (Higgins), *supra* note 1, para. 34). I would argue that the occupying power does have such a right but that, *within* the occupied territory it controls, it may only invoke the security needs of an occupying power rather than the right to self-defence. See Scobbie, *supra* note 10, paras. 51–2, 57–9. Alternatively, if we were to read the situation as one of ongoing armed conflict and maintain that the law of armed conflict applies, then, as noted in the text, self-defence will regulate the initial use of force rather than the legality of specific actions within it. One may also question Judge Higgins's determination whereby, if Palestine is enough of an entity to be part of the ICJ's proceedings and to benefit from humanitarian law, it is also enough of an entity for the prohibition of armed attack against others to apply (*ibid.*, para. 34). The enjoyment of humanitarian law is not dependent on Palestine being or not being an entity but rather on the rights of human beings to enjoy this law. As to its invitation to the proceedings, I would say that here it is actually Higgins who is taking the side of formalism. To argue that since Palestine is enough of an entity for this purpose it is also an independent entity for the purpose of applying the law of self-defence is a formal conceptual position ignoring that, in placing Palestine in legal categories, it is proper to consider the purpose and the context of the classification.

Judge Buergenthal in his Declaration (Advisory Opinion (Buergenthal), *supra* note 1, para. 6) also disagreed with the ICJ's determinations and expressed the view that the question of Israel's control is irrelevant, and that Israel can exercise the right to self-defence – if the conditions of necessity and proportionality are met – as long as the attacks come from outside Israel proper. For a view that the originating locus of an attack does not diminish a right of self-defence see also Wedgwood, *supra* note 7, at 57–9.

40. See Scobbie, *supra* note 8, at 83–4. For a discussion of the complex relationship between *jus ad bellum* and *jus in bello* in this context see also S. Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?', (2005) 99 AJIL 62; I. Canor, 'When *Jus ad Bellum* Meets *Jus in Bello*: The Occupier's Right of Self-Defence against Terrorism Stemming from Occupied Territories', (2006) 19 LJIL 129.

41. For an outline of the positions on this issue see Harvard Program on Humanitarian Policy and Conflict Research, 'The Separation Barrier and IHL', July 2004, available at <http://www.ihlresearch.org/opt/feature.php?a=36>.

dangerous course that blurs the distinction between *jus ad bellum* and *jus in bello* and serves to legitimize any act that a military force may seek to take.<sup>42</sup>

In sum, the ICJ's determination of illegality is founded on two pillars. The first is a structural analysis of the barrier's place in the broader context of the occupation. The barrier, like the settlements, is perceived as part of an impending de facto annexation of the territory that also entails changing its demographic structure, violating the Palestinians' right to self-determination and prejudging the result of further negotiations. The second is a humanitarian and human rights analysis of the violation of specific provisions within the law of occupation and IHL and within human rights law. The two are obviously connected, since the ICJ assumes that violating the rights of Palestinians living in the 'seam zone' may force them to leave the area, so that the barrier and its associated regime will entail consequences for the demography of the occupied territory.

### 3. JERUSALEM: *EX ANTE* AND *EX POST*

Both in the *Beit Sourik* and in the later *Mara'abe* rulings, the HCJ discussed questions involving the structural nature of the barrier as well as the violation of specific rights. In both decisions its answers concerning the nature of the barrier are very different from and less satisfactory than those of the ICJ, whereas its answers concerning the violation of rights tend to resemble those of the ICJ but, at least ostensibly, rely on far more solid reasoning.

#### 3.1. HCJ *ex ante*: *Beit Sourik*

The HCJ ruling, issued several days before the ICJ opinion, deals with the challenge of the *Beit Sourik* village council, as well as other village councils and affected landowners, to the legality of the orders to seize plots in eight villages for the purpose of erecting the separation barrier.<sup>43</sup> The HCJ examined the issue within the framework of the law of belligerent occupation, applying the Hague Regulations, the Fourth Geneva Convention (applied de facto<sup>44</sup>), and Israeli administrative law.<sup>45</sup>

The judgment, like others issued by the HCJ after the beginning of the Second Intifada, offers an account of the events leading to the erection of the barrier. After

42. For a discussion of the importance of maintaining the distinction between *jus ad bellum* and *jus in bello* see section 3.1.2, *infra*. Scobbie joins some of the critiques of the ICJ's determination on self-defence, but agrees with the ICJ's rejection of Israel's claims on this matter, partly out of agreement with Judge Higgins's scepticism about the applicability of the doctrine to non-forcible measures. Without taking a position on this complex question, I agree with Scobbie's determination that 'to state the proposition that measures taken in self-defence may exculpate a State from responsibility for violations of IHL is to demonstrate both the fallacy and danger at the heart of the Israeli argument. It is to claim that the law designed to restrain the exercise of force does not apply when force is being exercised.' Scobbie, *supra* note 10, paras. 44–59.

43. *Beit Sourik*, *supra* note 3, para. 9.

44. The HCJ noted that it will examine the matter under the Fourth Geneva Convention, notwithstanding the controversy about its applicability in the OPT, 'since the parties agree that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review' (*ibid.*, para. 23). On the question of the status of the Fourth Geneva Convention in Israeli Courts see notes 137 and 211–216 and accompanying text, *infra*.

45. *Beit Sourik*, *supra* note 3, paras. 23–4.

briefly mentioning that Israel had been holding the area in belligerent occupation since 1967, and following a short description of the Oslo process and the failure of the Camp David negotiations in 2000, the HCJ said that it learned from the respondent's affidavit that 'a short time after the failure of the Camp David talks . . . in September 2000, the Palestinian side began a campaign of terror against Israel and Israelis'. As of April 2004, noted the HCJ, the conflict had claimed the lives of 900 Israeli citizens and residents, while more than 6,000 had been injured. The HCJ also noted that 'the armed conflict has left many dead and wounded on the Palestinian side as well'.<sup>46</sup> This description of the background to the establishment of the barrier portrays what happened at the beginning of the Second Intifada as a campaign of terror against Israel and Israelis. Alternative narratives, however, are obviously possible. Notably, the Second Intifada broke out as an immediate reaction to a visit to Temple Mount/Haram al-Sharif by then opposition leader Ariel Sharon. During the following days, as a response to stones thrown at Jewish worshippers from the el-Aqsa mosque, Israeli security forces entered the area around the mosque and fired at the crowd, killing five Palestinians and injuring 200 more. These events sparked a cycle of violence.<sup>47</sup>

Not only are there different perspectives on the background, reasons, and course of the Intifada,<sup>48</sup> but the actual circumstances of its beginning (Palestinians killed by Israelis rather than the opposite) are excluded from the HCJ's discourse. This exclusion is important to the eventual framing of the issue as one of Israeli security versus Palestinian terror rather than of Palestinian security versus Israeli military violence. Moreover, the Palestinian toll of victims, not cited by the HCJ, has been significantly higher than that of Israelis and, as of November 2005, amounted to 3,366 dead and over 29,000 wounded.<sup>49</sup>

In adopting this narrative the HCJ placed its discussion in the context of the need to defend Israel and Israelis from a terrorist campaign launched by the Palestinians rather than in the context of the occupation and the settlements.<sup>50</sup> The process of establishing the barrier is thus described as a link in the chain of events described in this narrative. The government decision to establish the barrier cited by the HCJ describes it as a 'security measure for the prevention of terror attacks [which] does not mark a national border or any other border'.<sup>51</sup>

46. *Ibid.*, para. 1.

47. See O. Ben-Naftali and K. R. Michaeli, "'We Must Not make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings', (2003) 36 *Cornell International Law Journal* 233, at 241, and the sources cited therein.

48. *Ibid.*, at 241–7 (where they discuss the Rashomon quality of the Second Intifada), and the sources cited therein.

49. All data taken from B'Tselem, the Israeli Centre for Human Rights in the Occupied Territories, available at <http://www.btselem.org/English/Statistics/Index.asp>.

50. As opposed to graphic descriptions of Palestinian terror, mention of the Israeli occupation is confined in the HCJ's Hebrew original to the term '*tefisah lohmatit*' (belligerent occupation), a technical legal term lacking any of the overtones attached to the Hebrew word for occupation (*kibbush*). *Ibid.*, citing a previous ruling (HCJ 7015/02 *Ajuri v. The IDF Commander of the West Bank* 56(6) P.D. 352 (2002), English translation available at [http://elyon1.court.gov.il/files\\_eng/02/150/070/a15/02070150.a15.pdf](http://elyon1.court.gov.il/files_eng/02/150/070/a15/02070150.a15.pdf)), which includes this description and was later canonized by the HCJ through recurrent quoting.

51. Cited in *Beit-Sourik*, *supra* note 3, para. 6. Interestingly, the emphasis on the statement that the barrier is not a border was probably included in the government decision in order to conciliate the Israeli right wing that

As for its effect on the Palestinians, the petition described how the barrier would prevent access to agricultural lands. It stated that tens of thousands of olive trees and fruit trees would be uprooted, and the petitioners' ability to move from place to place would become dependent on a labyrinthine, complex, and burdensome permit regime. It further described the barrier's negative effects on the livelihood of residents of these villages and on their access to urban areas, including medical, educational, and other services.<sup>52</sup>

The HCJ addressed the argument that the military orders are illegal because building the barrier within the occupied territory alters the borders of the West Bank without express legal authority, annexing areas to Israel in violation of international law using a smokescreen of security arguments,<sup>53</sup> and because it violates many rights of the local residents, specifically the rights to property, freedom of movement, and freedom of occupation and livelihood. Violations of access to education and of freedom of religion were also cited.<sup>54</sup>

Beyond its proximity to the ICJ hearings, the *Beit Sourik* litigation was unique in at least two more ways. The first was an *amici curiae* brief submitted by members of the Council for Peace and Security (CPS), a non-governmental organization comprising retired high-ranking officers of the Israeli army. The brief criticized the route chosen for the barrier, stating that its proximity to the houses in the Palestinian villages was not only unnecessary from a security perspective but, due to the serious injury to the local population and the consequent friction, actually detrimental to security.<sup>55</sup> The second is that the petitioners were joined by Israeli-Jewish residents from Mevaseret Zion, a nearby town, who claimed that the barrier's route should be coextensive with the Green Line so as to allow Beit Sourik villagers to work their land, and noted that the building of the barrier had led to a deterioration in their relationship with the Palestinian residents.<sup>56</sup>

The HCJ thus considered two questions: whether the military commander was authorized to build the barrier in the occupied territory and, if so, the legality of the barrier's location, although it noted that the parties had focused mainly on the second question.

3.1.1. *Beit Sourik: the HCJ on the legality of building the barrier in the occupied territory*  
Addressing the first question,<sup>57</sup> the HCJ accepted the petitioners' argument that the military commander could not order the construction of the barrier if his reasons were political. The HCJ determined that the military commander in a belligerent occupation had to balance the army's needs against those of the local inhabitants and

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has traditionally opposed the barrier as a potential border for Israel that would leave out much of the West Bank. On the link between the barrier's route and Israel's permanent borders see note 152 and accompanying text, *infra*.

52. *Beit Sourik*, *supra* note 3, para. 9.

53. *Ibid.*, para. 10.

54. *Ibid.*, para. 11.

55. *Beit Sourik*, *supra* note 3, paras. 18, 54, 64, 71, 78.

56. *Ibid.*, para. 22. Another Israeli citizen appearing before the HCJ argued the opposite: bringing the barrier close to the homes of the Jewish residents would endanger them.

57. While noting it does not 'exhaust' it. *Ibid.*, para. 25.

there was no room for additional considerations, be they political views, territorial annexation, or establishing the country's permanent borders. The HCJ determined that the belligerent occupation was temporary and the authority of the military commander was temporary,<sup>58</sup> concluding that the decision to build the barrier had been driven by security rather than political motives and accepting the government's statement that the barrier's course had not been meant to delimit the country's borders.<sup>59</sup> The HCJ thus held that, in principle, seizing land to build the barrier might fit the relevant provision of international law, which allows taking property for permitted military needs as long as the needs of the local population are taken into account.<sup>60</sup> Having determined this, the HCJ proceeded to discuss the second question, dealing with the chosen route per se.

On the first question, therefore, involving the authority to build the barrier in the OPT, the HCJ took a very different view from that of the ICJ. The petitioners' arguments in *Beit Sourik*, which the HCJ rejected, resembled the claims on which the Advisory Opinion had relied when dealing with the establishment of the barrier. The ICJ had seen the barrier's route as overlapping the settlements, creating a 'fait accompli' that might become permanent and tantamount to de facto annexation. The HCJ rejected this position, not only because it adopted a different perspective on the issues at stake but because it confined its discussion to a specific section of the barrier that, for the most part, involved no settlements.<sup>61</sup> The logic of the ICJ Advisory Opinion, winding a course from the Israeli occupation through de facto annexation and up to the denial of Palestinian self-determination that results from the settlements, is absent from the *Beit Sourik* judgment. Hence the HCJ could focus in its holding on specific violations of the residents' rights and avoid the larger issue. On these specific issues, its conclusions were close to those of the ICJ.

### 3.1.2. *Beit Sourik: the HCJ on the violations of humanitarian norms resulting from the barrier*

In discussing the route of the barrier the HCJ strove to strike a balance between the military commander's authority to maintain security in the area and protect the security of his country and its citizens, and the rights, needs, and interests of the local population.<sup>62</sup> A foundational principle in this balance, said the HCJ, was proportionality: individual liberty can be limited on condition that the restriction is proportionate to the objective. The HCJ viewed this as a significant principle of international law (and specifically of the law of belligerent occupation) and as

58. *Ibid.*, paras. 26–7.

59. Whereas the petitioners argued that a security barrier should have been constructed on the Green Line, the HCJ said the opposite was true: the barrier's route must be determined by security considerations rather than by the location of the Green Line (*ibid.*, paras. 28–31).

60. *Ibid.*, paras. 32–3.

61. The HCJ mentioned in passing an area within a West Bank settlement as deserving the barrier's defence, without even mentioning that it is beyond the Green Line. *Ibid.*, para. 80.

62. *Ibid.*, para. 34.

a central standard of Israeli administrative law, which applies to the area under belligerent occupation.<sup>63</sup>

The HCJ's discussion of proportionality in IHL rested on sources pointing to its importance within humanitarian law (i.e., within *jus in bello*) and focusing on the prohibition on the disproportionate use of force:<sup>64</sup> 'Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the strength of the enemy.'<sup>65</sup> I will argue that this notion of proportionality, as a humanitarian principle of *jus in bello*, is different from that applied in the *Beit Sourik* judgment. Contrary to the demand that the use of force be regulated by principles of proportionality at both the *jus ad bellum* and *jus in bello* levels, the HCJ ruling transplants<sup>66</sup> these principles to the relationship between the military commander and the people under occupation.

Proportionality has a place in both *jus ad bellum* and *jus in bello* in constraining the use of force. Its meaning in each of these contexts, however, is very different. In *jus ad bellum*, it sets limits on a belligerent's overall response to a grievance. In *jus in bello*, currently culminating in IHL, it determines the balance to be struck between the achievement of a military goal and its cost in terms of lives and destruction of civilian property. Regarding combatants, who are legitimate targets in armed conflict, IHL rules on proportionality are intended to prevent unnecessary suffering or superfluous injury. Regarding civilians, who are not legitimate objects of attack, proportionality seeks to protect them from the collateral effects of armed conflict.<sup>67</sup> In *jus ad bellum*, then, it considers whether an act of force in self-defence is a proportional response to an attack. In *jus in bello*, regarding civilians, it determines to what extent they are entitled to protection from the collateral effects of armed conflict, and examines the acts in question vis-à-vis the legitimate object to be achieved.<sup>68</sup>

63. Ibid., para. 36. Although Israeli law does not apply to the OPT as such, the HCJ has repeatedly ruled in the past that it would examine the actions of the Israeli army in the OPT according to Israeli administrative law as well, since this law is binding on Israeli army authorities. See HCJ 393/82 *Jamait Askan v. The IDF Commander in Judea and Samaria*, 37(4) P.D. 785, 810 ('Every Israeli soldier carries in his backpack the norms of public and customary international law, which regard the rules of war, as well as the basic norms of Israeli administrative law.')

64. *Beit Sourik*, *supra* note 3, para. 37.

65. J. Pictet, *Developments and Principles of International Humanitarian Law* (1985), at 62.

66. The term is borrowed from A. Watson, *Legal Transplants: An Approach to Comparative Law* (1993).

67. J. Gardam, 'Proportionality as a Restraint on the Use of Force', (1999) 20 *Australian Yearbook of International Law* 161, at 162, 164–5. The latter meaning of proportionality is currently incorporated into Protocol 1 of the Fourth Geneva Convention, to which Israel is not a party (*ibid.*, at 165). For a detailed discussion of the history of proportionality in international law and problems inherent in the concept see E. Jaworski, 'Military Necessity' and 'Civilian Immunity': Where is the Balance?, (2003) 2 *CJIL* 175. For a historical account of proportionality in international law on the use of force see also J. Gardam, 'Proportionality and Force in International Law', (1993) 87 *AJIL* 391.

68. Gardam, 'Proportionality as a Restraint', *supra* note 67, at 164–5; R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 231. Gardam argues that only proportionality in the *jus in bello* derived traditionally from humanitarian considerations, whereas in *jus ad bellum* the limitations of proportionality related to the minimization of the disruption of international peace and security. At present, however, proportionality in the context of the *jus ad bellum* has a humanitarian component, namely to achieve a reasonable balance between the achievement of the legitimate goals of the state claiming self-defence and the anticipated loss of life and suffering of those involved, especially civilians. Gardam, 'Proportionality as a Restraint', *supra* note 67, at 166. See also J. Gardam, 'Legal Restraints on Security Council Military Enforcement Action', (1995) 17 *Michigan Journal of International Law* 285, at 308. For a discussion of the use of the concept of proportionality in the ICJ's Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons,

The HCJ discussion of proportionality here does not distinguish between the two. Presumably, what should apply here is the proportionality of *jus in bello* or international humanitarian law,<sup>69</sup> which is the linchpin of modern humanitarian law.<sup>70</sup> Yet, beyond failing to make this distinction, the HCJ also determined that included in the military commander's security considerations were not only the security of the area but also the security of his country and its citizens, and then applies proportionality criteria to this issue.

Even more inadequate is the HCJ's transplant of proportionality principles from municipal administrative law. The HCJ referred to the pivotal role of the proportionality principle in Israeli constitutional and administrative law which governs the action of the Israeli army and thus applies to the duties of the military authority.<sup>71</sup> This move, however, is of questionable relevance. Proportionality is a valuable tool because it allows us to weigh conflicting considerations through a means–ends test. It is a consideration to be used with caution, however, because it shifts the human rights discourse to an analysis consistently focused on their infringement and on the extent to which violations are still 'proportional'. The use of this administrative principle in the context of a military occupation is particularly problematic. When used to review administrative action, the principle of proportionality assumes an accountable democratic government committed to the collective good of its citizens, but occasionally forced to violate the rights of whole or part of the population in order to attain legitimate ends. The benefits to the population are then weighed against the infringement of their rights, the point being that the benefits accrue to the *same* population whose rights were violated. But it is questionable whether this logic can apply when the government is a military occupier promoting the collective security interests of its *own* citizens while violating the rights of the people it occupies. Even more questionable is the applicability of this principle to Israel's military occupation: the establishment of settlements that channelled land, water, and rule of law resources to their own inhabitants at the expense of, and by means of the dispossession of, the Palestinian residents<sup>72</sup> makes the use of a proportionality perspective a dubious proposition indeed.

The notion of proportionality in administrative law developed as part of the idea of a free democracy, when the state's very attempt to maximize freedom can have the opposite effect of minimizing the freedom of the citizens. In this equation, the rule of proportionality is that one should only interfere with individual rights if and insofar as it is necessary to satisfy a compelling public interest.<sup>73</sup>

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see J. Gardam, 'Necessity and Proportionality in *jus ad bellum* and *jus in bello*', in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 275.

69. On the relevance of *jus in bello* rather than *jus ad bellum* to the examination of the barrier, see notes 40–2 and accompanying text, *supra*.

70. Gardam, 'Proportionality as a Restraint', *supra* note 67, at 172.

71. *Beit Sourik*, *supra* note 3, para. 38.

72. On these policies as creating a breach of trust by the military commander see O. Ben-Naftali, A. Gross, and K. Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', (2005) 23 *Berkeley Journal of International Law* 551, at 579–92.

73. N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (1996), 40–3. Emiliou points to this rationale for proportionality in his discussion of the principle as developed in German public law. The inadequacy of transplanting this framework to an occupation context is evident in Moshe

In its discussion of proportionality, then, the HCJ relied on sources that had developed this notion in different contexts and with different meanings, with dubious relevance to a military government engaged in a long-term occupation. Even if a proper distinction had been drawn between the two contexts of proportionality in international law and if we were to relate this only to the part dealing with IHL, we should still question its synthesis with domestic administrative law to create a rule of proportionality applicable to the military commander in a situation of belligerent occupation. In such a context a discourse on proportionality could serve to justify restrictions on the rights of the occupied population in the name of illegitimate goals, as is indeed discussed throughout this article, while actually validating acts banned by international law. If proportionality is measured, in Rosalyn Higgins's words, 'in

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Cohen-Eliya's analysis of the use of proportionality in the *Beit Sourik* judgment. Cohen-Eliya distinguishes between 'formal' and 'substantive' meanings of proportionality: the former deals with an analysis of the logical and empirical connections between the declared purpose and the means chosen, while the latter deals with the balance between the realization of the declared purpose and the extent to which fundamental rights are infringed. He argues that a focus on the formal meaning of proportionality accords better with the skills of courts, and complies more fully with the democratic principle whereby decisions are determined by representatives expressing the will of a majority of the citizens. In his view, applying the substantive sense of the proportionality test in a limited manner is only justified when fundamental rights are violated, and only after a strict application of formal proportionality has not led to the striking down of the government policy. His argument is that the HCJ erred in *Beit Sourik* when basing its decision on the substantive sense of the proportionality tests, in violation of the democratic principle whereby decisions should be determined by the people's elected representatives. See M. Cohen-Eliya, 'The Formal and the Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence', (2005) 38 *Israel Law Review* 262. This line of analysis illustrates the problem of transplanting the concept of proportionality from a context of administrative law to that of a belligerent occupation. Clearly, the people under occupation whose rights are violated by the barrier do not elect the Israeli government and the military commander making the decisions that affect their lives. The idea that courts should apply a restrained model of proportionality for democratic reasons is thus inconceivable in this context. His critique of the HCJ's reasoning as lacking democratic legitimacy (*ibid.*, at 290) is striking given that the occupation regime is lacking in the basic principle of democratic legitimacy – the consent of the ruled. Although my critique of Cohen-Eliya might be read as suggesting that, in the context of the occupation, the HCJ should apply a strict, or what he calls 'substantive', proportionality analysis, I would rather suggest that it points to the inadequacy of this transplant and to the paradoxical places to which it may lead us. For an analysis that questions the appropriateness of applying another administrative law doctrine outside the context of an accountable democracy, see the discussion of the HCJ's use of reasonableness in the occupied territories in D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), at 69–70.

The problems entailed in analysing the HCJ's and ICJ's decisions on the barrier as if they involved the review of a legitimate democratic government's actions are also apparent in Yehudah Mirsky's critique of the Advisory Opinion. In Mirsky's view, the ICJ failed to distinguish between democratic and non-democratic regimes. It ignored the fact that Israel is a functioning democracy with a robust practice of judicial review and a state that has internalized democratic processes and values. Y. Mirsky, 'Human Rights, Democracy and the Inescapability of Politics: Or, Human Dignity Thick and Thin', (2005) 38 *Israel Law Review* 358. Mirsky contrasts the Advisory Opinion with the *Beit Sourik* judgment, where the HCJ was able to invalidate portions of the wall causing disproportionate injury to the local Palestinian population without denying the security context that brought 'a fundamentally law-abiding democracy to undertake actions that test the limits of legality' (*ibid.*, at 367). Emanuel Gross, too, examines the question from the perspective of a democratic state's right to defend itself against terror, ignoring the fact that the issue is Israel's right to build the barrier in an occupied territory rather than a democracy's right to defend itself. See E. Gross, 'Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask', (2005) 38 *Cornell International Law Journal* 569, at 578, 582. This analysis is oblivious to the fact that Israel's rule over the Palestinians has created a non-democratic regime in the West Bank. The length of the occupation, the establishment of settlements, and the reliance on ethnicity criteria make it impossible to describe Israel's actions in this context as the defence of a democracy. In fact, this regime raises questions not only about the occupation but, more generally, about Israeli democracy itself. On this question see Ben-Naftali, Gross, and Michaeli, *supra* note 72, at 611, n. 329. In any event, Israel's long occupation of the West Bank can hardly be described as an internalization of democratic processes and values, and its actions there are hardly those of a law-abiding democracy.

*respect of the object legitimately to be achieved*,<sup>74</sup> it is clear that ‘No conduct that fails to meet the specific requirements of the substantive *jus in bello* can be justified on grounds that it is still “proportionate”.’<sup>75</sup> Indeed, proportionality is a limiting element of otherwise *permitted* harm.<sup>76</sup> Thus, insofar as building the barrier is viewed as a military action subject to the proportionality of IHL, we distort IHL, which forbids, as discussed throughout this article, the situation enabling the building of the barrier in the OPT in the first place. And insofar as it is viewed as subject to the proportionality of domestic law, we distort administrative law, which is structured around the concept of a government acting for the benefit of its citizens. The purported synthesis of the two when reviewing the actions of the military commander in an occupation, and especially in a long-term occupation where the military commander assumes many governmental duties, blurs and distorts their respective functions and objects, thereby casting a garb of legitimacy on an illegal endeavour, as is evident in the context of the Israeli occupation of the OPT. Proportionality may be a useful tool for examining the acts of the military commander when he exercises his authority for *legitimate* security causes, and when dealing with actions that IHL does not forbid *in toto*. For instance, IHL absolutely prohibits population transfers to the occupied territory or the deportation of protected persons from it,<sup>77</sup> but allows the destruction of civilian property if an absolute military need is present.<sup>78</sup> Proportionality thus may be used only in the latter of these contexts. One should be careful when developing even this limited doctrine, however, since the transplant of principles used to examine democratic governments to the context of an occupation leads to a slanted discourse about balance, when those who enjoy the benefits are not those whose rights are violated. The discourse is distorted even further by making the settlements part of the military commander’s legitimate security concerns.

On closer scrutiny the proportionality analysis pursued by the HCJ in *Beit Sourik* reveals further limitations. The HCJ emphasized that it would not examine the military considerations of the military commander, an examination which requires professional expertise, and would only ‘determine whether a reasonable military commander would have set out the route as this military commander did’.<sup>79</sup> Available to the HCJ, however, were the contradictory opinions of recognized military experts, in the *amici curiae* brief submitted by the CPS. Addressing this discrepancy, the HCJ said it would give special weight to the military opinion of the official responsible for security, and thus could not adopt the options proposed by the Council.<sup>80</sup> The HCJ made this determination when discussing the barrier’s route, focusing on the authority of the military authority to erect it and defining it as a matter separate from the proportionality of the barrier’s route. The distinction between these two issues, however, may not be as blunt as the HCJ indicated. The HCJ stated that the proportionality issue raised no military problems but dealt

74. Higgins, *supra* note 68, at 232 (emphasis in the original).

75. *Ibid.*, at 234.

76. *Ibid.*, at 232.

77. Fourth Geneva Convention, Art. 49.

78. *Ibid.*, Art. 53.

79. *Beit Sourik*, *supra* note 3, para. 46.

80. *Ibid.*, para. 47.

instead with the severity of the injury the route inflicts on the local residents: 'In the framework of this question we are dealing not with military considerations but rather with humanitarian considerations', and '[t]he question is the proportionality between the military consideration and the humanitarian consideration' that, as the HCJ emphasized, was a legal matter within its realm of expertise.<sup>81</sup>

Within this analysis the HCJ determined that three out of five segments of the barrier discussed in this case cause Palestinians disproportional injury.<sup>82</sup> It reached its conclusion on the basis of a segment-by-segment analysis, but also on an evaluation of the entire section of the barrier comprising these segments and of its effect on people's lives in general.<sup>83</sup>

The separation between issues of military and issues of legal expertise adopted by the HCJ, however, is far from convincing. The determination that the injury caused to the inhabitants by the barrier's route is not proportional must assume the existence of other options. As the HCJ itself noted, the question of proportionality required it to answer whether security considerations could have been met by building the barrier on a route causing less (and thus proportionate) injury to the local inhabitants.<sup>84</sup> Notwithstanding its reasoning, then, the HCJ's conclusion can only be interpreted as a rejection of the army's security argument, for the security argument is the one that justifies the current route and cannot be disentangled from the question of its proportionality.<sup>85</sup> It is hard to imagine that the HCJ could have reached this conclusion without taking into account the brief filed by the CPS. In deciding that segments of the barrier were not 'proportional', the HCJ cited the army's argument about the military need for choosing this route, the arguments about the route's effect on the local inhabitants, and the arguments of the CPS about alternative routes that would not only be less detrimental to local residents but also better from a security perspective. By dividing its inquiry concerning each segment into two, the HCJ was able to deal first with the military considerations and, on this matter, accepted the arguments of the army. It then proceeded to deal with the proportionality question and determined that the barrier's route did not fulfil the part of the proportionality requirement requiring that the injury caused to local inhabitants be proportionate to the security benefits accruing from the barrier in the chosen route.<sup>86</sup> The HCJ held that the relationship between the security benefits and the injury to the local inhabitants is not proportionate due to the severe injury

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81. *Ibid.*, para. 48.

82. *Ibid.*, paras. 49–81.

83. *Ibid.*, para. 82.

84. *Ibid.*, para. 49.

85. Thus I agree with Cohen-Eliya that, notwithstanding its discourse to the contrary, the HCJ did examine the relative effectiveness of the current route vis-à-vis the proposed ones. Cohen-Eliya, *supra* note 73, at 285–6. I also agree with his observation that the HCJ did suspect that the true purpose of the barrier's route was not security, although it did not openly cast doubt on the state's motives (*ibid.*, at 290).

86. This test, of 'proportionality in the narrow sense', which examines the proportionality between the injury to the Palestinians and the security benefit of the barrier, is the third prong of the proportionality test that the HCJ applies generally, and specifically in this case. The other two are the rational means test, which examines whether there is a rational connection between the barrier's route and the goal of its construction, and the 'least injurious' test, which examines whether the chosen route is the least injurious. *Beit Sourik*, *supra* note 3, para. 44.

they would suffer, and described in great detail the drastic changes to the farmers' lives and the hindrances to their livelihood, property, and freedom of movement.<sup>87</sup> When stating that these injuries were not proportionate, the HCJ noted that they could be substantially decreased by an alternate route – either the one presented by the CPS experts or another set out by the military commander. 'Such an alternate route exists', said the HCJ. 'It is not a figment of the imagination. It was presented before us.' The security advantages to be reaped from the current route as opposed to the proposed ones did not stand in any reasonable proportion to the injury to the local inhabitants. The gap between the security benefits ensured by these two alternatives was minute as opposed to the vast difference between a barrier that separated the local inhabitants from their land and one that did not.<sup>88</sup>

For the HCJ to follow this line of reasoning – supporting an alternate route and, more specifically, stating that the existing one had no justified security advantages – it must do what it said it was not doing: it must assume that, despite the army's declaration, an alternative route is possible from a security perspective, and that the chosen route, contrary to the army's view, is not a military imperative. The HCJ's ruling, then, dismisses the army's security argument and replaces it with its own conviction about security requirements, obviously influenced by the CPS brief. This is one of the most welcome elements in the *Beit Sourik* ruling: it is one of the first major cases in the HCJ's long history of adjudicating claims brought by Palestinians from the OPT in which it rejected the army's security arguments. Its decision to do so after a detailed analysis and recognition of the harm done to Palestinians is a significant and welcome development. This time, the HCJ pierced the veil of security arguments and offered alternatives less injurious to the Palestinian population. But this laudable move actually requires the HCJ not to be convinced of the military exigency behind the barrier's current route. Although the HCJ explained why the army's claim was not convincing, its attempt to do so without questioning the army's security arguments and judgments is unpersuasive. Moreover, the reading I propose of the HCJ's proportionality discussion as implying a rejection of the security argument casts doubts on the HCJ's determination in the first part of its analysis, stating that the sole motive for building the barrier is a legitimate security need. The limits of the proportionality discourse as structured by the HCJ, divorced from the question of military necessity, become immediately evident. The HCJ fails to demonstrate that the separation between the authority and proportionality arguments is possible, given that its explicit determination regarding proportionality relies on the existence of alternatives capable of meeting security needs. The implications of this failure on the role of the security and proportionality analysis in IHL will be further examined below, in section 3.2.2.

### 3.2. HCJ *ex post*: *Mara'abe*

Fifteen months after the ICJ's Advisory Opinion and its own *Beit Sourik* decision, the HCJ again issued a landmark ruling on the barrier. The September 2005 decision in

87. *Ibid.*, paras. 59–60.

88. *Ibid.*, para. 61. See also paras. 71, 76, 80.

*Mara'abe v. The Prime Minister of Israel*<sup>89</sup> continues *Beit Sourik* in many respects but involves two major innovations: it discusses the link between the barrier's route and the settlements, and it engages the ICJ Advisory Opinion.

The *Mara'abe* case dealt with five villages in the so-called 'Alphei Menasheh enclave'. As described by the HCJ, the barrier in this area surrounds the settlement of Alphei Menasheh (which the HCJ describes as 'an Israeli town in the Samaria area') from all sides, leaving a road connecting it to Israel. Several Palestinian villages were included within the barrier and were thus cut off from the rest of the West Bank area, and '[a]n enclave of Palestinian villages on the "Israeli" side of the fence has been created.'<sup>90</sup>

The HCJ's narrative in this case is similar to the one in *Beit Sourik*, and the HCJ again describes the terrorism that 'landed' on Israel as the Second Intifada broke out in September 2000.<sup>91</sup> This time, however, the HCJ's factual background mentioned the changes in the route after its own *Beit Sourik* judgment, noting that the data submitted show that about 19.7 per cent of the barrier is inside Israel or on the Green Line.<sup>92</sup> The HCJ did not note the clear meaning of this data, namely that about 80.3 per cent of the barrier is built beyond the Green Line and inside the West Bank. The HCJ further mentioned that the data submitted show that the barrier's route leaves about 7.8 per cent of the West Bank area on what it calls 'the "Israeli" (western) side of the fence'. The use of the term 'Israeli', albeit in quotation marks, is telling.<sup>93</sup> The HCJ also referred to the regulations applying to the area known as the 'seam zone', including the associated permits regime and the requirement for Palestinians who are not permanent residents of the area to provide a reason for entering.<sup>94</sup>

Living in the five villages within the Alphei Menasheh enclave are about 1,200 Palestinians inhabitants, who can enter the West Bank through several gates that open at different times. The enclave is connected to Israel, however, without a checkpoint.<sup>95</sup> The petitioners pointed to the destructive effects of the barrier<sup>96</sup> and noted, for instance, that doctors can only pass through the gates during opening hours, requiring them to prearrange medical visits, and that no arrangements had been made for medical emergencies.<sup>97</sup>

Petitioners argued both that the barrier was built *ultra vires* and that it was not proportional. Relying, *inter alia*, on the Advisory Opinion, they argued that the enclave was intended to put Alphei Menasheh west of the fence to make it territorially contiguous with the state of Israel, effectively moving the border. The barrier thus created a long-term change, actually annexing the enclave without serving any military need. Defending the residents of Jewish settlements is not, according to the

89. *Supra* note 6.

90. *Ibid.*, para. 1.

91. *Ibid.*, para. 2.

92. *Ibid.*, para. 6.

93. *Ibid.*

94. *Ibid.*, para. 7. The HCJ notes that this is true regarding 'Phase A' of the barrier, of which the barrier around Alphei Menasheh was part. See note 22 and accompanying text, *supra*.

95. *Ibid.*, para. 9.

96. *Ibid.*, paras. 76–80.

97. *Ibid.*, para. 104.

petitioners, a military need.<sup>98</sup> The second argument was that the impingement on the rights of Palestinians was disproportionate.<sup>99</sup> The third concerned the permits regime within the enclave, which they argued was discriminatory.<sup>100</sup>

3.2.1. *Mara'abe: The HCJ on the legality of building the barrier in the occupied territory*

The HCJ set for its discussion a legal framework resembling that in *Beit Sourik* – belligerent occupation and the pertinent laws: the Hague Regulations, Israeli administrative law, and the de facto application of the Fourth Geneva Convention.<sup>101</sup> The HCJ also repeated its determination that the military commander was authorized to order the construction of the barrier on security and military grounds, but not if motivated by a political goal of ‘annexing’ territories to Israel and determining its political borders.<sup>102</sup> Based on the state’s response,<sup>103</sup> the HCJ rejected the petitioner’s first argument and held that security considerations were behind the decision to erect the barrier, which was a temporary structure as evident from the changes that were made in it following the *Beit Sourik* ruling. The reduction in the number of terrorist attacks proved the barrier’s effectiveness as a security measure.<sup>104</sup> Regarding the barrier section before the HCJ, the state’s submissions indicated that it acted as a significant obstacle, hindering the terrorists’ ability to enter Israel. After examining it and hearing detailed explanations, the HCJ concluded that the route was chosen for security rather than political reasons, and the decision to erect it was thus within the authority of the military commander.<sup>105</sup>

The HCJ determined in its ruling that, if the barrier fulfils military needs, the military commander might take possession of land belonging to Palestinian residents in order to build it.<sup>106</sup> The HCJ emphasized that these measures were temporary: the military commander’s authority to erect a security barrier but not to annex territory derived from the fact that his authority was inherently temporary, as was the belligerent occupation. Seizing land in this case was not a prohibited expropriation or a confiscation but a temporary taking of possession.<sup>107</sup> Turning to the needs that required these measures, the HCJ cited three security and military reasons: (i) the

98. *Ibid.*, para. 80.

99. *Ibid.*, para. 81.

100. *Ibid.*, para. 82.

101. *Ibid.*, para. 14.

102. *Ibid.*, para. 15.

103. The State cited three reasons for not building the barrier on the Green Line: (i) topography; (ii) the proximity of Israeli towns and villages to the Green Line, which would require building the barrier on their actual limits, leaving no space for an alert zone that would allow security forces to arrive prior to a terrorist infiltration; and (iii) the need to protect Israelis living in the West Bank as well as other ‘important locations’ such as roads and high-voltage lines. *Ibid.*, para. 99.

104. *Ibid.*, para. 100.

105. *Ibid.*, para. 101.

106. *Ibid.*, para. 16. The HCJ anchored this authority in Arts. 43 and 52 of the Hague Regulations and Art. 53 of the Fourth Geneva Convention. By relying on these sources the HCJ sidestepped the question concerning Art. 23(g) of the Hague Regulations it had applied in *Beit Sourik*, which the ICJ had found was inapplicable and relevant only during hostilities. Although the HCJ questioned the ICJ’s reading of the article’s applicability, it chose to leave the discussion for another opportunity (*ibid.*, para. 17). The differences between the courts on this matter reflects the controversy about whether the applicable law in the OPT includes the law of warfare. See notes 41–2 and accompanying text, *supra*.

107. *Ibid.*, paras. 15–16.

need to protect the army in the territory under occupation; (ii) the defence of the state of Israel itself; and (iii) the protection of the life and safety of Israelis living in what it called 'Israeli communities in the Judea and Samaria area'.<sup>108</sup> Although reason (ii) is also in dispute,<sup>109</sup> it is the third that emerges as the most controversial determination of *Mara'abe*. The HCJ held that Israelis living in the occupied area were not 'protected persons' per the meaning of this term in Article 4 of the Fourth Geneva Convention. Nevertheless, it stated that the military commander was authorized to protect their lives and defend their safety, and anchored its answer in both international and Israeli law.

The first reason for the HCJ's determination concerning the settlers rests on the military commander's general authority as set out in Article 43 of the Hague Regulations, which grants the commander the authority to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.<sup>110</sup> This authority, said the HCJ, covers any person present in the territory held under belligerent occupation, whose safety must be preserved by the military commander. The protection of the Israeli settlers is called for in the light of every individual's human dignity. For the purpose of this conclusion, held the HCJ, it was not relevant whether settlement activity conformed with or defied international law, as determined in the Advisory Opinion: 'For this reason, we shall express no position regarding that question.' Through this statement the HCJ continued its tradition of refusing to rule directly on the legality of the settlements according to international law, while legitimizing them through decisions that allow the use of land in the OPT for their establishment.<sup>111</sup> Even if a person were located in the area illegally, said the HCJ, he was not outlawed:

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108. *Ibid.*, paras. 18–19.

109. Imseis argues that military necessity can operate 'only to protect the security interests of the occupying power's military forces, and then only within the occupied territory'. Imseis, *supra* note 8, at 112. Including the security needs of the occupying power's home state under Art. 43 thus remains controversial. Given that a state may use its army to protect its own legitimate borders, I will not enter here the debate on whether this prerogative is part of the military commander's authority.

110. The language of the official French version of Art. 43 of the Hague Regulations refers to 'ordre et la vie publique', and thus the term 'civil life' is more accurate and appropriate than the term 'safety' used in the English version. See E. Benvenisti, *The International Law of Occupation* (2004), 7, n. 1 and the references therein.

111. *Mara'abe*, *supra* note 6, para. 19. For a detailed discussion of the case law on this question, see Kretzmer, *supra* note 73, at 77–9. By refusing to rule on the legality of the settlements and generally choosing not to interfere in decisions connected with the use of land for settlements, the HCJ's case law on this matter served to legitimize government actions. An exhaustive discussion of the HCJ's case law on settlements is beyond the scope of this article, and I will only point to a number of avoidance mechanisms in use by the HCJ. One technique, when dealing with specific settlements, is to hold that arguments made in accordance with Art. 49(6) of the Geneva Convention are not justiciable in Israeli courts because the Convention has not been incorporated into domestic law (see, e.g., HCJ 608/78 *Ayub v. Minister of Defense* 33(2) P.D. 112 (1978), English summary available at (1979) 9 *Israeli Yearbook of Human Rights* 337). Another is to reject petitions brought against settlement policy as too general and abstract, as well as raising non-justiciable political questions (see, e.g., HCJ 4481/91 *Bargil v. Government of Israel*, 47(4) P.D. 210 (1991)). Concerning the use of land for settlements, the HCJ has held that civilian settlements can fulfil military goals and can be temporary, and are thus within the authority of the military commander (see *Ayub v. Minister of Defense*, *supra*). For a famous exception, which as Kretzmer puts it proves the rule and is the HCJ's sole intervention in these matters, see HCJ 390/79 *Dweikat v. Government of Israel*, 34(1) P.D. 1 (1979), English summary available at (1979) 9 *Israeli Yearbook of Human Rights* 345. For an overview, discussion, and critique of these and other cases see Kretzmer, *supra* note 73, at 75–99.

Even if the military commander acted in a manner that conflicted with the law of belligerent occupation at the time he agreed to the establishment of this or that settlement – and that issue is not before us, and we shall express no opinion on it – that does not release him from his duty according to the law of belligerent occupation itself, to preserve the lives, safety and dignity of every one of the Israeli settlers.<sup>112</sup>

The second justification for the HCJ decision that the military commander was authorized to order the construction of a barrier intended to protect the lives and security of Israeli settlers in the area was that they were Israeli citizens, and that the state of Israel had a duty – grounded in Israel's Basic Law: Human Dignity and Liberty – to defend their lives, safety, and well-being. The constitutional rights granted under the Basic Law were also granted to citizens located in the territory under belligerent occupation that was controlled by Israel.<sup>113</sup> Concerning human rights, Israelis living in these areas enjoyed a different scope and level of protection of human rights from those of Israelis living in Israel, since Israeli law did not apply in these areas and people lived there under a regime of belligerent occupation that was inherently temporary. The rights granted to Israelis living in these areas, said the HCJ, came to them from the military commander, and they had no more than he had – *nemo dat quod non habet*.<sup>114</sup>

The determination that protecting the settlers is within the authority, if not the duty, of the military commander is crucial to the rest of the judgment. The HCJ's further determinations concerning the military commander's considerations, and the need for proportionality when balancing security needs against the rights of the local inhabitants, rest on the determination that building the barrier so as to protect the *settlements* is a legitimate security concern for the military commander. In this specific case, the Palestinian villages in question were saved from what the HCJ called the 'chokehold' placed on their necks, but the question was left open as to what would have been the result had no alternative route been found to protect Alpeh Menasheh without such an effect on the Palestinian villages. The HCJ, then, permitted in principle (and in some of its case law on the OPT in actual fact) the violation of Palestinian rights for the sake of the settlers' security.<sup>115</sup>

The logic of this determination, however, is flawed at several levels. First, the HCJ determination granting authority to the military commander to protect the settlers and as a matter of fact the settlements themselves up-ends the logic of Article 43. The rationale of Article 43, which is indeed the basic norm of the law of

112. *Mara'abe*, *supra* note 6, para. 20. The HCJ also cited Art. 3 of the Fourth Geneva Convention to support its conclusion, as well as the Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip, which provides that the issue of Israeli settlements in the area will be discussed in the negotiations over the final status, and that Israel shall bear responsibility for the overall security of Israelis and the settlements. For a discussion of the latter see notes 123–5 and accompanying text, *infra*.

113. *Mara'abe*, *supra* note 6, para. 21.

114. *Ibid.*, para. 22. Though critical of the ICJ's determination on self-defence, the HCJ does not examine the matter and does not make a positive determination as to whether the law of self-defence and Art. 51 of the UN Charter also grant authority to erect the barrier. *Ibid.*, para. 23.

115. For a case where settlers' security justified limiting Palestinians' rights see, e.g., HCJ 10356/02, *Hess v. Commander of the IDF Forces in the West Bank*, 58(3) P.D. 443 (2003). In this case, the rationale stated in the text was accepted by the HCJ as a basis for authorizing the Israeli army to seize land owned by Palestinians and destroy structures in Hebron for the purpose of allowing the settlers safe access to the Cave of the Patriarchs.

occupation,<sup>116</sup> is that the military commander should preserve existing laws ‘unless absolutely prevented’, that his duty is of temporary duration, and that his role is to manage the territory in a manner that protects civil life, exercising authority as a trustee of the sovereign.<sup>117</sup> Article 43, then, does not confer sovereign powers on the occupant; rather, it limits the occupant’s authority to the maintenance of public order and civil life.<sup>118</sup> A reading of Article 43 giving the military commander the right to protect the settlers by way of protecting the settlements, which in the occupation of the West Bank are the most manifest breach of this very article, takes the law of occupation intended to prevent the military commander from changing the nature of the territory under occupation and turns it on its head. The settlements were built in violation of Article 49(6) of the Fourth Geneva Convention, which prohibits occupants to transfer part of their own civilian population into the territory under occupation.<sup>119</sup> The military commander was the one who formally erected the settlements and, as the HCJ held in a ruling on the Gaza withdrawal,<sup>120</sup> has the authority to dismantle them. It is thus inconceivable to determine that, as a matter of international law, it is now his duty to protect the settlers by building yet another structure in the West Bank – this time the barrier – in order to protect the settlements and especially given the structure’s indisputable effects on protected persons. Moreover, the HCJ ruling confuses here the settlers and the settlements. The discourse about the need to protect the life of the settlers and not ‘outlaw’ them in international or Israeli constitutional law takes a prodigious leap and is transformed into a determination that a barrier used to incorporate the settlements is legal.<sup>121</sup>

All this was made possible by the HCJ’s choice to sidestep, yet again, the question of the settlements’ legality. Although the HCJ said that the question was not before it, the petitioners’ argument in this case rested on the illegality of the settlements. The HCJ’s reasoning that this question is inconsequential to its judgment is thus misleading, since, if the settlements are illegal, the military commander should obviously consider ways of protecting the settlers without reinforcing this illegality or, at the very least, in the ‘least illegal’ manner. One option would be to move the settlers to Israel, thereby ending the illegality of the settlements.<sup>122</sup> Moreover, if the

116. See Benvenisti, *supra* note 110, at 7–31.

117. Under contemporary international law, and in view of the principle of self-determination, sovereignty is vested in the population under occupation. See Ben-Naftali, Gross, and Michaeli, *supra* note 72, at 554.

118. *Ibid.*, at 563, 575–9.

119. For an elaborate discussion of the application of this prohibition to the settlements, *ibid.*, at 581–2.

120. HCJ 1661/05 *Hof Azah Regional Council v. The Knesset* (not yet published, 2005).

121. See, in this context, Kretzmer’s argument about the need to protect settlers who are civilians as grounded in IHL. Kretzmer, ‘The Light Treatment’, *supra* note 5, at 93. But Kretzmer emphasizes that the need is to protect civilians rather than the settlements in which they live. This begs the question of why, then, the HCJ found it logical (basing itself partly on Kretzmer’s argument – see *Mara’abe*, *supra* note 6, para. 20) to infer from this the justification for a barrier that in fact protects the settlements, rather than requiring the military commander to protect the settlers in another way. Indeed, even according to Kretzmer’s position, whereby the illegality of the settlements does not per se affect the legality of the barrier, the HCJ should have taken into account, as part of a detailed examination of the barrier’s route and the evaluation of its legality, the illegality of the settlements and the consequent duty of the occupying power to return its civilians in those settlements to its own territory. Kretzmer, ‘The Light Treatment’, *supra* note 5, at 94.

122. Yuval Shany suggests that the illegality of the settlements is an important factor in assessing the legality of the barrier but cannot be the determining element, given the need grounded in human rights law to protect the settlers, the material unfeasibility of a quick dismantling of the settlements, and the fact that

settlers cannot have more than the military commander has, as the HCJ notes, how can the military commander approve their move to the occupied territory (as the HCJ notes he did) when he lacks the authority to allow them to settle there in the first place? The discussion again slides from the need to protect the settlers' lives to conclusions about protecting the settlements, in a way that obscures the need to address these questions.

It has been argued that the illegality of the settlements is no longer an issue given the agreement in the Oslo accords that their future will be decided in the final status negotiations and, until then, Israel is responsible for their security.<sup>123</sup> The HCJ also relied on this position.<sup>124</sup> But this argument is invalid because, when it signed the Oslo accords, the Palestine Liberation Organization (PLO) could not waive the humanitarian rights to which protected people are entitled, including the right enshrined in Article 49(6) of the Fourth Geneva Convention not to have civilian population from the occupying power transferred into their territory.<sup>125</sup>

The principle of *ex injuria jus non oritur*<sup>126</sup> is of relevance here.<sup>127</sup> According to this principle, acts contrary to international law cannot become a source of legal rights for the wrongdoer, so that once a situation is ruled illegal, states for which this finding is binding are obliged to end it.<sup>128</sup> Israel, then, cannot argue that it is allowed to take steps to meet the military need of protecting the settlements which

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their status is yet to be determined in a final status agreement. Shany, 'Head against the Wall', *supra* note 5. But this argument is problematic given that, notwithstanding the pull-out from Gaza and the dismantling of the settlements there, Israel is not taking any steps to dismantle settlements in the West Bank. Had Israel shown that it is working bona fide and with all deliberate speed to undo the illegality of the settlements, the temporal issues raised by Shany could have become more credible. At this time facts on the ground point rather to the opposite, creating a link between the barrier and plans for settlement expansion. See notes 146–50 and accompanying text, *infra*. As for the question of final status agreement, given that the settlements and the barrier create facts on the ground that may prejudice the final status, it would not make sense to justify the barrier by claiming that final status talks are yet to take place.

123. Interim Agreement on the West Bank and the Gaza Strip (Israel/PLO), 28 September 1995, Art. XII(1), 36 ILM (1997) 551 ('Israel shall continue to carry the responsibility for defence against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defence against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility'); *ibid.*, Art. XXXI(5) ('It is understood that [the permanent status] negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest').
124. *Mara'abe*, *supra* note 6, para 20.
125. See Fourth Geneva Convention, Arts. 7, 8, and 47. For an argument as to why the determination in the Oslo accords implies that the legality of the barrier does not depend on the legality of the settlements, see R. Lapidot, 'The Advisory Opinion and the Jewish Settlements', (205) 38 *Israel Law Review* 292, at 293–4; Wedgwood, *supra* note 7, at 60–1. Kretzmer, 'The Light Treatment', *supra* note 5, at note 41. For a discussion of the possible effect of the Oslo accords on this issue see Shany, 'Head against the Wall', *supra* note 5.
126. In the words of the ICJ in another context: 'One of the fundamental principles governing the international relationships thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship'. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution (Advisory Opinion), (1971) ICJ Rep. 16, at 46.
127. Judge Elaraby mentioned the principle in his Separate Opinion in the Advisory Opinion (Advisory Opinion (Elaraby)), *supra* note 1, para. 3.1) but without elaborating precisely on its applicability in this case. To the extent that he intended to imply, as may be apparent from the context of his reference, that states may not acquire land by use of force, this may be a problematic use of the principle, since contemporary international law prohibits such acquisition regardless of whether use of force was illegal, or a legal resort to self-defence.
128. See R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (1992), I, at 183–4 and the references cited therein.

it built illegally in the first place.<sup>129</sup> If the settlements are illegal, a barrier built to protect them that aggravates violations of the local residents' rights for the settlers' benefit is illegal too. The HCJ justifies this violation by relying on Article 43, while it should have determined, at the very least, that the settlers cannot be protected in any way that violates the Palestinians' rights.

Making illegal settlements part of the security considerations to be balanced against the rights of the protected people under occupation places an additional burden on these rights, unanticipated in international law. Even if in this specific case the results ultimately favoured the Palestinians, this additional burden upsets and distorts the law of occupation and humanitarian law and the 'delicate balance', as the HCJ itself calls it,<sup>130</sup> struck between them, leading instead to an *imbalance* of security.<sup>131</sup> When the HCJ discusses the relativity of human rights and the possibility of restricting such rights as freedom of movement due to national security needs, public order, or the rights and freedom of others, as developed in IHL and human rights law,<sup>132</sup> we must consider the problematic application of the concept in this context: IHL does not anticipate placing the onus of balancing the settlers' rights on the protected people. The rights in whose name the Palestinians' rights are limited are those of the settlers, who not only live in the OPT illegally but also enjoy a set of rights and privileges different from those enjoyed by the Palestinians,<sup>133</sup> as the permits regime alone will attest. The regime associated with the barrier, then, is not built on an equal allocation of rights and a fair balance between all the citizens electing a government that makes the decisions. By a special statutory arrangement, Israelis living in the West Bank can vote in Israeli elections and choose the government making decisions about the territory, while the Palestinians have no such right.<sup>134</sup>

A significant element in the HCJ's analysis is that the interests of the people under occupation are defined as rights, while the interests of the settlers are defined as security interests. These security interests, comprising all Israelis and the state of Israel itself, can now be invoked to restrict the rights of the people under occupation, in a conceptual framework that distorts the IHL balance of security versus rights. Striving for proportionality in this framework, then, could lead to strong imbalances, justifying extensive restrictions to the rights of protected people, particularly given the tendency of courts to defer to security arguments adduced by military authorities.

129. For a similar position see Imseis, *supra* note 8, at 112. For an elaboration of this position see Shany, 'Head against the Wall', *supra* note 8. As Shany notes, Art. 25(2)(b) of the ILC Draft Articles on State Responsibility would bar states that have contributed to the situation of illegality from invoking the defence of necessity. See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 51, UN Doc. A/CN.4/L.602/Rev.1 (2001). For an argument on why *ex injuria jus non oritur* may not be relevant here, see Kretzmer, 'The Light Treatment', *supra* note 5, at note 41.

130. *Mara'abe*, *supra* note 6, para. 28.

131. On the (im)balance of security as part of the breach of trust entailed in the Israeli occupation, see Ben-Naftali, Gross, and Michaeli, *supra* note 72, at 590–2.

132. *Mara'abe*, *supra* note 6, paras. 24–5.

133. See Ben-Naftali, Gross, and Michaeli, *supra* note 72, at 581–8.

134. Although Israel generally does not have an absentee ballot and voting can only take place within Israel. See Knesset Elections Law (Consolidated Version) 5729–1969, 23 L.S.I. 110 (1969), Arts. 6 and 147. See on this Ben-Naftali, Gross, and Michaeli, *supra* note 72, at 584–5.

Although in the specific cases of *Beit Sourik* and *Mara'abe* the balance was struck in favour of the people under occupation, the structure of the occupation and many HCJ rulings attest to frequent restrictions of Palestinians' rights, such as freedom of movement, in order to protect the security of the settlers.

The effects of the HCJ's consistent refusal to consider the overall legality of the settlements must be considered in this context. The declaration that the issue is irrelevant to the matter at hand allows the military commander to use his authority to seize land for the purpose of building the barrier as a security measure. At the same time, however, he is not restricted in one of the major prohibitions incumbent on a military commander in the context of a belligerent occupation, which is not to transfer civilian population from his own country to the territory under occupation.<sup>135</sup> Not only does this decision distort the balance of security anticipated in IHL but it also allows Israel to act in the occupied territory as both occupier (enjoying the authority vested in an occupying power) and sovereign (establishing towns and cities, applying its laws to their residents,<sup>136</sup> and protecting its citizens who settle in the territory at the expense of the local population). In turn, the local Palestinian population cannot enjoy the rights of people under occupation or the rights of citizens in a sovereign state. Significantly, although in recent cases the HCJ has examined the violations of Palestinians' rights on the basis of the Fourth Geneva Convention, it has stopped short of determining that the Convention applies *de jure* to the situation.<sup>137</sup>

Throughout the history of the occupation, the Palestinians have been denied most of the rights accorded to people under occupation.<sup>138</sup> Making the settlements part of the military commander's security concerns has tilted the balance against Palestinian rights even further. The HCJ rulings in *Beit Sourik* and *Mara'abe* concerning Israeli violations of humanitarian law may mitigate this situation, but do not change the matrix of Israel's legal control in the OPT.<sup>139</sup> Hence, by refraining from discussing the settlements' legality, the HCJ has conferred legitimacy on an illegal situation.<sup>140</sup>

### 3.2.2. *Mara'abe: the HCJ on the violations of humanitarian norms resulting from the barrier*

Relying on this framework, the HCJ decided in *Mara'abe* that the military commander had the authority to build the barrier partly in the Alpehi Menashe enclave, but that it was not clear whether the barrier passed the 'least injurious means' prong

135. See Kretzmer's discussion of what he calls 'a convenient system of control', whereby the government relates to the occupied territories as colonies at the political level while resorting to the law of belligerent occupation at the legal level. Kretzmer, *supra* note 73, at 197. This is a valid analysis, but, as discussed in the text, it is the contradictions between occupation and sovereignty within the legal level itself that structure the matrix of Israeli control in the OPT. See notes 136–9 and accompanying text, *infra*.

136. On the means by which Israeli law is applied to the settlers and the settlements see Ben-Naftali, Gross, and Michaeli, *supra* note 72, at 584–5.

137. For a discussion of Israeli objections to the application of the Fourth Geneva Convention in the OPT and for the rejection of these arguments see *ibid.*, at 567–70.

138. See generally Kretzmer, *supra* note 73; Ben-Naftali, Gross, and Michaeli, *supra* note 72.

139. For a discussion of this matrix see Ben-Naftali, Gross and Michaeli, *supra* note 72, at 609–12.

140. On the illegality of this occupation see *ibid.*

of the proportionality test.<sup>141</sup> Wondering why the barrier was not planned in a manner that could indeed pass such a test, the HCJ wrote, 'Indeed, based upon the factual basis as presented to us, the existing route of the fence seems strange.' Referring to the south-western section of the enclave, the HCJ said that it was 'by no means' persuaded of any definitive security–military reason for building the barrier in its current route and wondered why it could not be changed so as to ensure that all or most of the Palestinian villages now within the enclave would remain outside it. Referring to the north-western section, the HCJ said that it was 'by no means convinced that it is necessary for security–military reasons' to preserve it.<sup>142</sup> The barrier, then, failed the proportionality test: the HCJ's impression was that no effort had been invested in finding an alternative route able to ensure security with lesser injury to the local residents, as required. In its ruling the HCJ ordered a reconsideration of the current route according to these guidelines, the dismantling of the existing barrier, and the building of a new one.<sup>143</sup> What if the examination of alternatives leads to the conclusion that the current route is the only one meeting minimum security requirements, notwithstanding its severe injury to the residents? The HCJ described this as the hardest of all questions, but stated that the time to confront it had not yet arrived and, indeed, might never come.<sup>144</sup>

This is a perplexing ruling. The HCJ held that the barrier is justified on security grounds, and rejected the argument that building the barrier in the OPT was forbidden since it constituted a politically motivated *de facto* annexation.<sup>145</sup> It also included – wrongly, in my view – the protection of the settlers and thus the settlements in the category of 'security–military needs'. In its discussion of proportionality, however, the HCJ held that the chosen route was 'strange', and that it was 'by no means' convinced that it could be justified on security–military grounds. An unexplainable gap divides the HCJ's determination that legitimate security considerations motivated the establishment of the barrier from its finding that no security–military explanation justified its 'strange' route. This gap is especially striking given the HCJ's recognition of extreme violations of the Palestinians' rights: if the HCJ cannot find a security–military explanation for a route that causes such serious violations, how can it determine that the barrier is driven by security considerations and merely lacks proportionality?

One line in the HCJ judgment hints that it may indeed have harboured some doubts in this regard. When wondering why the barrier's route was not drawn so as to leave out the Palestinian villages, the HCJ noted,

There is a planning scheme, which has been filed, for the development of Alfei Menashe in the direction of the southwestern part of the enclave. But as Mr Tirza [the Israeli

141. *Mara'abe*, *supra* note 6, paras. 111–12. On the three prongs of proportionality see note 86, *supra*.

142. *Mara'abe*, *supra* note 6, para. 113.

143. *Ibid.*, para. 114. Unlike *Beit Sourik*, which had dealt with a planned section of the barrier, the novel feature in *Mara'abe* is that the HCJ ordered changes in a section of the barrier that had already been built.

144. *Ibid.*, para. 116.

145. The rejection of this argument was part of the HCJ's rejection of these sections in the ICJ Advisory Opinion. See notes 176–83 and accompanying text, *infra*.

official in charge of the construction of the barrier], who presented the enclave map to us, stated before us, that is not a consideration which should be taken into account.<sup>146</sup>

The link between the barrier and not only the settlements but also their expansion plans, however, is crucial. In several briefs submitted to the HCJ in pending cases involving other parts of the barrier, the state explicitly argued that the route's course was intended to protect not only built-up areas but also planned expansions. Their protection, said the state, is a legitimate consideration of the military commander.<sup>147</sup> The brief filed by the state in one of these cases argued that the military commander's considerations are confined to security, showing that 'security' is defined by the Israeli government as including not only the protection but also the expansion of existing settlements.<sup>148</sup> In a pending petition, the barrier's route was changed to a course less injurious to Palestinians but later reversed to the original route due to the objection of an existing Jewish settlement. The settlement relied for its objection on, *inter alia*, the claim of a real-estate company stating that the change would hinder a building project in which it had already made a large investment.<sup>149</sup> The barrier's route, then, is affected by plans for expanding the settlements and by the financial interests of the real-estate companies involved, neither of which is a legitimate concern of the military commander.<sup>150</sup>

In *Mara'abe* itself, the HCJ's baffling statement on this matter both points to and denies the connection between the barrier's route and the plans to expand the settlement. The HCJ stops short of addressing the legitimacy of this connection but, by hinting at it, undermines its own decision even further: beyond its problematic

146. *Mara'abe*, *supra* note 6, para. 113.

147. HCJ 8414/05 *Head of the Village Council Bil'in v. The Government of Israel*, Respondent's Brief (17 November 2005), paras. 20–9, 76–84. In this brief the government also noted that some of the settlement construction conducted in the area was at the time illegal even by Israeli law. *Ibid.*, para 25. See on this case Akiva Eldar, 'State Turns Blind Eye to Illegal Construction at Ultra-Orthodox West Bank Settlement', *Ha'aretz*, 14 Dec. 2005, at. For a discussion of the barrier in Bil'in and the various expansionist and economic interests involved see G. Algazi, 'Matrix in Bil'in' (Hebrew), available at <http://www.hagada.org.il/hagada/html/modules.php?name=News&file=article&sid=4143>. In a decision in another pending case, the HCJ issued an interim order prohibiting the construction of the barrier in segments where it was meant to protect 'unauthorized outposts'. HCJ 5139/05 *Faleh Mizlach Achmed Shaib v. State of Israel* (unpublished, 26 Dec. 2005), available at <http://elyon1.court.gov.il/Files/05/390/051/a10/05051390.a10.HTM>. If eventually in its ruling in this case the HCJ determines that the illegality, under Israeli law, of this 'outpost' determines the illegality of building the barrier which is meant to protect it, this will beg the question as to why the same rationale does not apply to the connections between the question of the legality of the settlements themselves and the legality of the barrier meant to protect them.

148. *Head of the Village Council Bil'in v. The Government of Israel*, *supra* note 147, para 85. For another case where the state indicated that it had taken the settlement's building plans into account when planning the barrier's route see HCJ 2732/05 *The Head of the Azun Council v. The Government of Israel*, Respondent's Brief (30 June 2005), paras. 17–19, 35.

149. HCJ 2577/04 *Taha El Chawaga v. The Prime Minister of Israel*, Corrected Petition filed 2 June 2004 (pending). In an HCJ decision issued on this case on 18 Aug. 2005, the Court added the real estate company in question as a respondent in the petition.

150. For an elaborate discussion of the way in which plans to expand settlements affect the route chosen for the barrier see B'Tselem – The Israeli Information Centre for Human Rights in the Occupied Territories, *Under the Guise of Security: Routing the Separation Barrier to Enable Israeli Settlements Expansion in the West Bank* (2005), available at [http://www.btselem.org/english/publications/summaries/200509\\_under\\_the\\_guise\\_of\\_security.asp](http://www.btselem.org/english/publications/summaries/200509_under_the_guise_of_security.asp). For a discussion of the economic interests involved, see Algazi, *supra* note 147; G. Algazi, 'The Upper-Class Fence', available at [http://www.kibush.co.il/show\\_file.asp?num=5086](http://www.kibush.co.il/show_file.asp?num=5086). For a discussion of the economic effects of the barrier see also A. Vitullo, 'The Long Economic Shadow of the Wall', in M. Sorkin (ed.), *Against the Wall* (2005), 100.

determination that the military commander can take into account the protection of settlements, regardless of the question of their legality, it implies that the military commander may also have taken into account, though without admitting it, plans already filed for the settlements' expansion. The HCJ's determination that security grounds cannot explain the chosen route appears to confirm the ICJ's insight in defining the barrier's course as part of Israel's settlement policy. It is not thereby suggested that the barrier serves no security purposes; as a matter of fact it does. Moreover, the proportionality analysis included in the HCJ's decision could be read as an attempt to amend the barrier so as to bring it closer to its security objectives. But erecting the barrier inside the West Bank, in clear violation of Palestinian rights, and admitting that the barrier is also meant to protect the settlements, along a route whose security rationale the HCJ itself rejects, brazenly defies this attempt.

Indeed, several separations in the HCJ analysis – between security and political considerations, and between authority and proportionality – create the possibility of its decision. A critical reading, however, reveals the failure of these separations.

When it determines that the barrier is built for security rather than political–annexational reasons, the HCJ appears to overlook that 'security' interests are politically defined.<sup>151</sup> The HCJ ruling that the barrier is established *intra vires* because its purpose is security, contrary to the ICJ's determination, ignores the question of what is perceived as 'security': when Israel makes the protection of the occupation and of the settlements part of its security interests, these interests become indistinguishable from its political–annexational purposes. Similarly, the HCJ separates authority from proportionality – it determines that the military commander had the authority to build the barrier because of the security concern, and then states that the injury to the Palestinians was not proportionate because the security grounds for the chosen route are not really understandable. Evidence has surfaced in the interim proving the annexational purpose of the barrier, relying not only on the barrier's actual route and its connections to existing and future settlements but also on statements such as that issued by the Israeli Minister of Justice, who proclaimed the barrier as the future border of Israel.<sup>152</sup> While it is possible that this evidence will affect future HCJ rulings in some of the cases that are currently pending, especially in cases where the

151. For a discussion of the relationship between 'professional' and 'political' considerations in *Beit Sourik* and in the Advisory Opinion, see Shany, 'Head against the Wall', *supra* note 5. While Shany's position is similar to mine in that he finds the distinction between 'political considerations' and 'professional "security considerations"' to be unrealistic, I cannot agree with his suggestion that instead of judging the barrier in accordance with this division, 'the question which should have been properly placed before the HCJ and ICJ is, then, whether the barrier can be justified in terms of military necessity'. Military necessity could again be based on politically defined security needs, such as the protection of the settlements.

152. See Y. Yoaz, 'Justice Minister: West Bank Fence is Future Border', *Ha'aretz*, 1 Dec. 2005, 3. In the quotation from Minister Tzipi Livni, she further said that the HCJ in its rulings over the barrier 'is drawing the country's borders'. See also Kretzmer, 'The Light Treatment', *supra* note 5, at note 32 and accompanying text. For the argument that Ariel Sharon's political programme for Israel's future borders is identical to the barrier's route, and the barrier thus aims to determine Israel's permanent borders by annexing maximum territory, settlements, and settlers and creating a territorial continuum with the Green Line while annexing a minimum of Palestinians and Palestinian villages, see S. Arieli, 'Between the Completeness of the Land and a Jewish State We Chose the Jewish State', in F. Raday and Y. Shani (eds.), *The Separation Barrier: An Interdisciplinary Analysis* (2004), 25 at 28–9 (Hebrew). Shaul Arieli is a reserve colonel in the Israeli army and formerly the chair of the Office in Charge of Negotiations with Palestinians in the Prime Minister's Office.

connection between the barrier's route and settlement expansion plans is clear, it is doubtful that it will undermine the rationale of *Mara'abe* and its separations. These separations, then, joined by a separation of the barrier into segments examined separately, lead to a discourse that blurs the reality of the barrier and its role within Israel's expansionist policy, in a pattern that has characterized the jurisprudence of the occupation from the start: allowing the military commander to establish civilian settlements, allowing permanent settlements on land 'temporarily' seized by a military commander whose duties are temporary, and allowing a 'temporary' barrier as part of this process. The result is a language game of humanitarian law being played ever since the Israeli HCJ legitimized land use for settlements many years ago, supposedly for security reasons, currently continued in the definition of the barrier as meant only for 'security' purposes.

#### 4. JERUSALEM VERSUS THE HAGUE

Several of the petitions against the barrier submitted to the HCJ, including that in the *Mara'abe* case, rely on ICJ determinations in the Advisory Opinion. In its *Mara'abe* ruling, the HCJ outlined for the first time its own stance on the Advisory Opinion and the way in which it should affect its decision, dividing the discussion into two parts. In the first it described in detail the factual basis that was before the ICJ in the dossier filed by the UN Secretary-General, which included reports by the Secretary-General and by special rapporteurs. In the second, it offered a comparative perspective on the Advisory Opinion and on its own *Beit Sourik* judgment, offering explanations for the differences between them.

The HCJ's discussion is a rare instance of a domestic court offering an elaborate analysis of an opinion issued by the ICJ on the same matter.<sup>153</sup> Noting that the opinion was advisory and not binding, the HCJ nevertheless stated that it was 'an interpretation of international law, performed by the highest judicial body in international law' that 'should be given its full appropriate weight'.<sup>154</sup>

The HCJ read its own and the ICJ decisions as based on a shared normative foundation but reaching different conclusions. Both courts, said the HCJ, agreed that Israel holds the West Bank pursuant to the law of belligerent occupation; that an occupier state is not permitted to annex the occupied territory; that it must act in accordance with the Hague Regulations and the Fourth Geneva Convention (although in regard to the latter the HCJ did not determine the *de jure* status of the Fourth Geneva Convention in the light of Israel's declaration that it would act in accordance with its humanitarian part); that the barrier hinders the rights of Palestinian residents, and that the harm to the Palestinian residents would not

153. For a discussion of the attitude of national courts towards ICJ decisions, see M. Bedjaoui, 'The Reception by National Courts of Decisions of International Tribunals', in T. M. Franck and G. H. Fox (eds.), *International Law Decisions in National Courts* (1995), 21 at 21–35; S. Ordonez and D. Reilly, 'The Effect of the Jurisprudence of the International Court of Justice on National Courts', in T. M. Franck and G. H. Fox (eds.), *International Law Decisions in National Courts* (1995), 335, at 335–71. Ordonez and Reilly point out that domestic courts have received ICJ decisions and advisory opinions in various ways, along a spectrum of more or less deferential treatment. Specifically concerning advisory opinions see *ibid.*, at 357–9, 364.

154. *Mara'abe*, *supra* note 6, para. 56.

be a violation of international law if resulting from military necessity, national security requirements, or public order. The ICJ also determined that human rights conventions apply. This issue, noted the HCJ, did not arise in *Beit Sourik*, but for the purpose of the current judgment it was willing to assume that these conventions do apply.<sup>155</sup>

As for the differences in their conclusions, the HCJ indicated that the ICJ had held that the building of the barrier and its associated regime were contrary to international law, whereas the HCJ held that no particular route should sweepingly be proclaimed a breach of international law. Instead, each segment should be examined separately to clarify whether it impinged on the rights of Palestinians in disproportionate ways.<sup>156</sup> Thus the HCJ held that some segments violated international law while others did not.<sup>157</sup> The HCJ noted that the ICJ was not convinced that the route of the barrier, which severely injures the rights of the Palestinian residents, was necessary for achieving the security objectives pursued by Israel. In its own holding in *Beit Sourik*, the HCJ argued that erecting the barrier was a military necessity, although some of the segments discussed involved a disproportionate violation of the Palestinian residents' rights.<sup>158</sup>

The HCJ explained this difference in the legal conclusions of the two courts as mainly a function of the factual basis made available to them that, in turn, was affected by the way in which the proceedings were conducted and by the legal problems brought before them.<sup>159</sup> To support this determination, the HCJ closely scrutinized the factual basis put before the two courts and noted that the ICJ had relied on the report of the Secretary-General, on his written statement, and on the rapporteurs' accounts, whereas the HCJ had relied on data submitted by the Palestinian petitioners, by the state, and by the military experts who had submitted the *amici curiae* brief in *Beit Sourik*.<sup>160</sup> The main difference in the data before the courts focused on 'the security–military necessity to erect the fence'. It was the evidence regarding terrorism, the failure of other measures to stop it, and the need to find solutions, said the HCJ, that had led it to conclude that the decision to build the barrier resulted from security–military considerations and necessity rather than from a political decision to annex occupied territory to Israel.<sup>161</sup> By contrast, this security–military necessity was mentioned only minimally in the sources before

155. *Ibid.*, para. 57. For a critical discussion of the ICJ's application of human rights treaties in the Advisory Opinion see M. J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', (2005) 99 *AJIL* 119. For an extensive discussion of this topic and an evaluation of the ICJ's position see O. Ben-Naftali and Y. Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories', (2003) 37 *Israel Law Review* 17.

156. The HCJ in *Mara'abe* said, 'Despite this common normative foundation, the two courts reached different conclusions. The ICJ held that the building of the wall, and the regime accompanying it, are contrary to international law . . . In contrast, the Supreme Court in the *Beit Sourik* Case held that it is not to be sweepingly said that any route of the fence is a breach of international law' (*ibid.*, para. 58). This statement somewhat obscures the fact that the ICJ's opinion was limited to the part of the barrier being built in the OPT and did not deal with the entire barrier as such. See Advisory Opinion, *supra* note 1, paras. 67, 83.

157. *Mara'abe*, *supra* note 6, para. 58.

158. *Ibid.*, para. 59.

159. *Ibid.*, para. 60.

160. *Ibid.*, para. 61.

161. *Ibid.*, para. 62.

the ICJ. Although the Advisory Opinion recorded the Israeli claim that the barrier's objective was to enable an effective struggle against terrorist attacks originating in the West Bank, the HCJ pointed to the brevity of this discussion.<sup>162</sup> It also stated that the ICJ had relied on a factual basis regarding the barrier's violations of the Palestinians' rights but, unlike its own ruling in *Beit Sourik*, the ICJ had lacked a factual basis regarding the security–military grounds for these violations.<sup>163</sup> The HCJ also claimed that the information before the ICJ was deficient not only regarding Israel's security–military needs but also regarding the scope of the impingement on the rights of the local residents. Whereas both the petitioners and the state had submitted data concerning violations in *Beit Sourik*, the ICJ had relied for its conclusions on the report of the Secretary-General and his supplemental documents, and on special reports that the state counsel arguing before the HCJ in *Mara'abe* claimed had been 'far from precise'.<sup>164</sup>

The HCJ stated that its own access to the facts, which it attributed *inter alia* to an exchange process that was part of the adversarial nature of the proceedings conducted before it,<sup>165</sup> and its differences on this account with the ICJ, were of 'decisive significance'. According to international law, the legality of the barrier route depended on an appropriate balance between security needs and the impingement on the rights of the local residents. The appropriate solution resulted from a '[d]elicate and sensitive balancing between the two sides of the scale'. Its own *Beit Sourik* ruling, claimed the HCJ, struck this balance, unlike the ICJ ruling, which placed great weight on the infringement of rights and none on security–military needs, thus altogether disregarding the question of proportionality.<sup>166</sup>

Besides the differences in the factual basis available to each of the courts as an explanation of their different conclusions, the HCJ also noted that they differed in the scope of their examination. The ICJ looked at the entire route of the barrier, and this 'cast an unbearable task upon the ICJ', which could not embark on the necessary detailed analysis of each segment.<sup>167</sup> By contrast, the HCJ dealt with five segments in *Beit Sourik* and discussed others in various petitions. The HCJ mentioned that about 90 petitions had been submitted since the construction of the barrier began. Hearings on 44 had been completed and in most of them the parties reached a compromise

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162. *Ibid.*, para. 63.

163. While noting that it did not need to and could not determine the cause for what it called 'this severe oversight', the HCJ listed a few possibilities: the dossier of documents submitted to the ICJ, Israel's neglecting to provide information, the ICJ's unwillingness to use the data Israel did submit as well as the information in the public domain, and the method used by the ICJ, focusing on the barrier in general rather than on specific segments. *Ibid.*, para. 65.

164. The HCJ points to four issues attesting to such imprecision: (i) the area of agricultural land that was seized – the state argued that it was significantly smaller than the data relayed to the ICJ; (ii) freedom of movement – the state argued that a regime of permits allowed entry and exit from the 'seam zone', contrary to the reports before the ICJ describing a split between the residents of this area and the rest of the West Bank; (iii) the water question – the state argued that data before the ICJ according to which Israel is annexing most of the western aquifer system were completely baseless; (iv) information regarding entry into and exit from the city of Qalqilia and the barrier's effect on life in the city. *Ibid.*, paras. 66–7.

165. *Ibid.*, para. 69.

166. *Ibid.*, para. 68.

167. *Ibid.*, para. 70.

after negotiations, usually after amendments were made to the route, while 43 were still pending.<sup>168</sup>

In the light of this analysis, the HCJ concluded that it would give full and appropriate weight to norms of international law as developed and interpreted by the ICJ in its Advisory Opinion. The ICJ's conclusion, however, relying on a different factual basis from the one before the HCJ, was not *res judicata* and did not obligate the HCJ to rule that each and every segment of the barrier violated international law. The HCJ would continue to examine each segment of the barrier as it was brought to its attention, asking whether it represented a proportional balance between security–military needs and the rights of the local population, although each segment would still be viewed as part of a whole.<sup>169</sup>

The rationale of the HCJ, attributing the differences between its own conclusions and those of the ICJ to discrepancies in their factual backgrounds, is not convincing, particularly after the HCJ's analysis in *Mara'abe*. As noted, the HCJ's determination that the barrier was a security measure is undermined by its own discussion of the proportionality question. Moreover, this conclusion is possible only because the HCJ ignored the settlements' expansionism and because it leapt over the question of their legality. The separations the HCJ made between security and political considerations on the one hand, and between the authority and proportionality issues on the other, blur the reality created by the barrier and are part of the background to the differences between the two courts.

The HCJ took pride in the fact that its examination of the barrier segment by segment (though keeping in mind the larger picture) enabled it to reach more nuanced decisions and was another reason for the gap between its conclusions and those of the ICJ.<sup>170</sup> But it is precisely this specific separation as well as the neglect of the larger picture, despite the dictum in *Mara'abe*, that allowed the HCJ to ignore the fact that the barrier is part of an existing *de facto* annexation and the related attempt to entrench it by drawing up a new border for Israel, incorporating major settlement blocs. Both stages of this process are illegal. The HCJ itself speaks of the side of the barrier including the enclave as 'the "Israeli" side' and, notwithstanding the quotation marks, this description suits a widespread perception of the barrier as a new border.<sup>171</sup>

Critics of the ICJ decision question the legal basis for its sweeping conclusion that the very construction of the barrier on occupied territory violates international law, regardless of whether it involves an attempted annexation or a specific violation of international humanitarian or human rights law. Kretzmer wonders, for instance, whether the barrier would be considered illegal under international law had it been built a few metres from the border in an uninhabited deserted area of the

168. *Ibid.*, para. 72.

169. *Ibid.*, para. 74.

170. Along a similar line, Kretzmer criticizes the sweeping conclusions of the ICJ concerning the barrier in its entirety. Kretzmer, 'The Light Treatment', *supra* note 5, at 100–2. Alberto de Puy also seems to find that the HCJ's analysis of each segment of the barrier's route leads to a more persuasive result than that of the ICJ. De Puy, *supra* note 5, at 299.

171. See note 152 and accompanying text, *supra*.

OPT.<sup>172</sup> Although this example is telling, it fails to appreciate that the structural analysis endorsed by the ICJ in the Advisory Opinion looks at the bigger picture. Its determination that building the barrier in the occupied territory is illegal should be read in the context of this specific barrier – the settlements, the dispossession, the de facto annexation, and the violations of human rights and humanitarian law. The ICJ looked at the forest, and not only at the trees. Had it been presented with another barrier built in the West Bank fitting the circumstances of Kretzmer's hypothetical example, its conclusion might have been different.<sup>173</sup>

Shany argues in his analysis of *Beit Sourik* and the Advisory Opinion that the HCJ judgment seems superior to that of the ICJ in its style and methodology,<sup>174</sup> but lacks a comprehensive legal analysis taking into account the link between the legality of the settlements and the legality of the barrier,<sup>175</sup> and attributes these differences to the institutional capacities of the two courts. But although the HCJ does, as noted, provide the detailed analysis missing from the ICJ's brushstroke discussion, it ultimately fails to convince on its own terms, largely because of its failure to address the actual context of the settlements and the de facto annexation.<sup>176</sup> This is precisely what the ICJ did through its appreciation that the whole is bigger than the parts. Indeed, the HCJ says in its judgment,

*prima facie*, the ICJ could have determined, that on the basis of the examination of the totality of the fence, it had reached the conclusion that the motivation behind its construction is political and not security-based, and that the intention of the government of Israel in erecting the fence was its desire to annex parts of the West Bank which lay on the 'Israeli' side of the fences. The ICJ did not, however, do so; nor was a factual basis placed before it, which would have enabled it to do so.<sup>177</sup>

But the HCJ does note that the ICJ 'came extremely close to such an approach',<sup>178</sup> when pointing to the following statement by the ICJ:

Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature . . . it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated regime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.<sup>179</sup>

172. Kretzmer, 'The Light Treatment', *supra* note 5, at 100–2.

173. Thus, as Shany points out (Shany, 'Capacities and Inadequacies', *supra* note 5, at 238 and n. 33), although some parts of the barrier in the West Bank cannot definitely be linked to the location of settlements, this does not detract from the general picture as seen by the ICJ.

174. Shany, 'Capacities and Inadequacies', *supra* note 5, at 233–4.

175. *Ibid.*, at 242–5.

176. Ben-Naftali argues that the ICJ failed to consider the legality of the barrier in the context of the legality of the occupation. As she notes, however, although the ICJ did not consider the legality of the occupation, it did consider the issue of the barrier as part of the greater whole of the occupation. Ben-Naftali, *supra* note 8, at 227–9.

177. *Mara'abe*, *supra* note 6, para. 71. For a similar critique see Kretzmer, 'The Light Treatment', *supra* note 5, at 92.

178. *Mara'abe*, *supra* note 6, para. 71.

179. Advisory Opinion, *supra* note 1, para. 121, cited in *Mara'abe*, *supra* note 6, para 71.

The ICJ speaks here of 'fears' of a possible de facto annexation while it should have pointed to an existing one.<sup>180</sup> The ICJ may have, in fact, understated its point.<sup>181</sup> Not least, its discussion of a 'fait accompli' is in the present, not future, tense. Of course, saying that there is a fait accompli does not mean that, given the political will, things could not be reversed, but rather amounts to a description of the current situation as one in which facts have been established on the ground. This paragraph should be read together with the ICJ's determination that the route of the barrier 'gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements' and that there is 'a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall'. These measures, stated the ICJ, 'severely imped[e]s the exercise by the Palestinian people of its right to self-determination'.<sup>182</sup> John Dugard, the Special Rapporteur of the UN Commission on Human Rights on the situation of human rights in the OPT, was much more explicit: 'what we are presently witnessing in the West Bank is a visible annexation under the guise of security'.<sup>183</sup>

The HCJ's decisions on the barrier ignore the reality of de facto annexation that Dugard explicitly points out and the ICJ cautiously hints at. For instance, the HCJ fails to notice how, in ruling that Israeli civilian towns built in the OPT were entitled to the defence of the Israeli army<sup>184</sup> and their residents to *in personam* application of Israel's Basic Laws, its own rulings become part of the de facto annexation that the barrier only continues. This de facto annexation may entail a greater violation of international law than a 'formal' one. It ensures for Israel the benefits of annexation without requiring it to grant Israeli citizenship and its concomitant rights and privileges to the Palestinians under occupation, while shielding it from sanctions for having annexed the territory illegally. The result is the current regime in the OPT that could, under the guise of a belligerent occupation, appear to resemble apartheid.<sup>185</sup>

Separating the wall into different segments does allow the HCJ a more careful consideration of the damages to Palestinians in the specific communities in question.

180. See Ben-Naftali, Gross, and Michaeli, *supra* note 72, at 602.

181. Jean-Francois Gareau indicates that the ICJ's view was not that a de facto annexation has already crystallized, but that it could be a violation *in statu nascendi*. In his view, however, the mere possibility of annexation places Israel in breach of its obligation to respect the Palestinians' right of self-determination, as the acts signalling this possibility are unilateral actions that tend to prejudice or impede the process. Gareau, *supra* note 27, at 513–16. He argues that the very fluidity of the final result compounds the obligation placed on Israel not to perform unilateral changes in the composition of the territory before an agreement is reached. *Ibid.*, at 518. Yet if the barrier's construction is deemed essential to protect (illegal) settlements populated by Israeli citizens who are owed protection by the state, the incorporation of those settlements into Israel's self-defence zone signals that the territory is considered part of Israel and that the construction of the barrier represents an annexation. *Ibid.*, at 521.

182. Advisory Opinion, *supra* note 1, para. 122.

183. J. Dugard, 'Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine', Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, Commission on Human Rights, Sixtieth Session, E/CN.4/2004/6, 8 Sept. 2003, paras. 6–16, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G03/160/82/PDF/G0316082.pdf?OpenElement>.

184. See Gareau, *supra* note 27, at 521 (on Israel's argument for defence of the settlements as part of its self-defence as implying annexation).

185. See Ben-Naftali, Gross, and Michaeli, *supra* note 72, at 586–8.

But it also allows it to determine that building the barrier in the West Bank is in principle legal even when intended to protect the settlements, while leaving open the question of what would happen were such protection to require a grave violation of Palestinian rights in the absence of an alternative route.

The HCJ was wrong, then, when it determined that its differences with the ICJ could be attributed to the factual backgrounds before them. True, had the ICJ been better informed about Israel's security needs and the barrier's importance in the prevention of terror, it might also have been more sympathetic to some of the purposes behind it.<sup>186</sup> And yet the ICJ would probably have reached the same conclusion even if presented with a different factual background because it insisted on looking at the big picture and considering the structure of the occupation. The ICJ did mention Israel's authority and duty to protect its citizens,<sup>187</sup> but understood that building the barrier in the occupied territory is part of an annexation in the making. The HCJ criticized the ICJ for its failure to preserve the 'delicate and sensitive' balance that should govern the issues at stake, and was supposedly more persuasive because its proportionality analysis was much more detailed and accurate. The HCJ's new formula, however, making the settlements part of Israel's legitimate security interests rather than seeing them as part of a prohibited *de facto* annexation, besides the other noted contradictions in its reasoning, also upset the purported 'delicate balance'.

The HCJ's discussion of the violation of specific rights, then, is also unsatisfactory. Although both courts found that the violation of humanitarian norms by Israel could not be justified, neither one managed to support this with a convincing rationale, be it due to problems with their reasoning or with their respective doctrines of proportionality and their application to this specific context. The ICJ's answer seems more convincing concerning the larger picture, although its failure to give sufficient weight to the legitimate security purpose of the barrier (if properly built along the Green Line) is unfortunate. The HCJ expressed satisfaction with the fact that both courts operated within the same legal framework, but, had this *really* been the case, it could not have ignored the significant sections of international law forbidding settlements and annexation. The wall separating international law as read in The Hague from the rulings issued in Jerusalem is therefore much higher than the HCJ is willing to admit.

An institutional analysis tracing the limits constraining each court might note that the HCJ went as far as it could.<sup>188</sup> The very fact that it acknowledged the grievances caused to Palestinians, pierced the veil of security, and ordered a rerouting of the barrier is itself a great achievement for international law and human rights. This is probably true, but while in the next section I address the relationship between the legal processes in The Hague and the ones taking place in Jerusalem, my main focus in this article is on an interpretation of what courts actually do rather than on

186. On the ICJ's lack of empathy with Israeli society in general and terror victims in particular, see Shany, 'Capacities and Inadequacies', *supra* note 5, at 239–40. The ICJ could have relied here on open information or on the limited input on this issue in Israel's submission.

187. Advisory Opinion, *supra* note 1, para. 141.

188. For an excellent institutional analysis see Shany, 'Capacities and Inadequacies', *supra* note 5.

why they do it or on what they can do. In the next section, I consider the effects of both courts' determinations.

## 5. A TALE OF TWO COURTS, ONE OCCUPATION

Comparisons made between the Advisory Opinion and the *Beit Sourik* judgment point out that the HCJ's analysis is more specific and meticulous, providing more full-bodied, reasoned arguments,<sup>189</sup> while the ICJ's discussion of humanitarian law suffers from what has rightly been called 'light treatment'.<sup>190</sup> Yet, although well reasoned, the HCJ's discussion in both *Beit Sourik* and *Mara'abe* is not only oblivious of the bigger picture but also marked by internal contradictions on issues of security and military need and the extent of their judicial review, as noted throughout this article. True, the HCJ's two major rulings on the barrier are significant decisions, and give Palestinians a remedy on crucial material issues of humanitarian concern. However, given that they neither undermine nor question the structure of the occupation and its fundamental illegalities, they position the HCJ as a court of regulation of the occupation. The novelty in these two rulings is that the HCJ's regulatory decisions had hitherto been confined largely to procedural issues, whereas here they also extend to substantive matters.

To understand this change, evident also in the HCJ's unprecedented willingness to pierce the veil of security, we cannot ignore the shadow that The Hague cast over Jerusalem.<sup>191</sup> In 2002, prior to the UN General Assembly's request for an Advisory Opinion, the HCJ rejected a number of petitions raising issues similar to those discussed in *Beit Sourik*, usually in brief judgments deferring to the army's security arguments.<sup>192</sup> Different circumstances in the new petitions, as well as the growing reality of the barrier on the ground and the visibility of its effects, together with the accumulation of internal and external pressures in the course of time, may have led to the change in the HCJ's attitude. The change may be also considered as part of a broader context in which the HCJ is becoming more sensitive to international law, especially in the shadow of international criminal law. Specifically in the context of

189. Watson, *supra* note 5, at 24–5.

190. Kretzmer, 'The Light Treatment', *supra* note 5, at 88–9. Kretzmer further points to problems in the ICJ's application of the Hague Regulations on the seizure of land and destruction of property (*ibid.*, at 95–100), which point to a lacuna in the ICJ's opinion concerning the question of whether it sees the situation in the West Bank as one of occupation, or one of an occupation in which hostilities amounting to armed conflict are taking place, and thus the laws regulating armed conflict also apply. On this issue see notes 41–42 and 106, and accompanying text, *supra*.

191. G. Levy notes in 'Cry, Our Beloved Country', *Ha'aretz*, 11 Jan. 2004, that the General Assembly's request for the Advisory Opinion is what prompted Israel to discover the wrongs of the barrier and to start considering changes in it.

192. See, e.g., HCJ 8172/02 *Ibrahim v. The IDF Commander in the West Bank* (unpublished, 2002), where the HCJ, in a two-page decision, rejected a petition from Palestinians who were severely affected by the barrier. The HCJ discussed the military commander's authority to seize land but did not discuss any humanitarian or human rights norms and determined that, although the local residents were injured by the actions taken by the military commander, these were security measures 'and, as is well known, this court tends not to intervene in operative security measures'. Other brief decisions issued prior to the General Assembly's referral rejecting arguments against the barrier without elaborate discussion include HCJ 3771/02 *The Local Council of A-Ras Village v. The Military Commander of Judea and Samaria* (unpublished, 2002); HCJ 3325/02 *Rashin Chasan (Kraos) v. The Military Commander of Judea and Samaria* (unpublished, 2002).

the barrier, the opinion of the CPS and the support of the Jewish neighbours in *Beit Sourik* may also have had an important effect. Nevertheless, and although isolating these various elements is not simple, the ICJ's looming shadow appears to have been critical in changing the HCJ's attitude towards the issue.<sup>193</sup>

The interaction between the ICJ and the HCJ can be seen as a case of synergy between national and international judiciaries.<sup>194</sup> Formally, the *Beit Sourik* judgment and the Advisory Opinion ignored each other, and the *Mara'abe* judgment rejected the Advisory Opinion's findings, while supposedly sharing its legal framework. Informally, the HCJ's rejection of Israel's security claims, however limited, is unusual when compared with the HCJ's jurisprudence in cases involving the OPT in general and the barrier in particular before the decision of the General Assembly to refer the matter to the ICJ.<sup>195</sup> The history of the HCJ's involvement in cases dealing with the rights of Palestinians shows that the court had intervened in substantial matters mainly in cases that had been at the forefront of international attention. By the time the HCJ ruled that the interrogation methods used by Israel's General Security Services, which some argued amounted to torture, were illegal,<sup>196</sup> the case had attracted worldwide media interest and gained the attention of the international legal community. The HCJ views itself as part of a cosmopolitan, human-rights community of jurists, and making the issue a matter of international law would not allow it to dismiss the petition outright, as it had often done in similar cases previously.<sup>197</sup>

The actions of both courts and the interactions between them may be viewed, in a phrase borrowed from Harold Koh, as a 'transnational legal process' of 'complex enforcement', in which the decisions of specific courts are not the final stop but only 'way stations'.<sup>198</sup> Koh asserts that nations must eventually interact with one another, and this interaction creates a complex process whereby international legal norms step into domestic processes, both legal and political.<sup>199</sup> For Koh, this process is a key

193. Kretzmer rightly notes that we do not know to what extent the pending ICJ proceedings influenced the HCJ's decision in *Beit Sourik*. Kretzmer, 'Introduction', *supra* note 5, at 10. Nevertheless, it seems plausible to assume, given the HCJ's unprecedented intervention in security considerations, that international law or at least its shadow did play a role here. An interesting question is also whether the HCJ's proceedings influenced the ICJ. Kretzmer notes that the Advisory Opinion was not influenced by the *Beit Sourik* ruling, and that the ICJ judges had already voted on the Opinion when the HCJ delivered its judgment and were not prepared to review their position in its light. *Ibid.* On this issue see also Shany, 'Capacities and Inadequacies', *supra* note 5, at 246.

194. T. M. Franck and G. H. Fox, 'Introduction: Transnational Judicial Synergy', in Thomas M. Franck and Gregory H. Fox (eds.), *International Law Decisions in National Courts* (1996) 1, at 1–11. For an argument on the need for both courts to co-operate within a framework of mutual comity formulated in the context of the separation barrier, see Shany, 'Capacities and Inadequacies', *supra* note 5, at 245–6.

195. Thus I agree with Kretzmer's description of *Beit Sourik* as signalling 'a radical departure' from the HCJ's tendency not to interfere in operational security considerations. Kretzmer, 'Introduction', *supra* note 5, at 8.

196. HCJ 5100/94 *The Israeli Committee Against Torture v. The State of Israel*, 53(4) P.D. 817 (1997).

197. For a few suggestions as to why the ICJ proceedings may have prompted the HCJ to give a substantial decision on the barrier see Shany, 'Capacities and Inadequacies', *supra* note 5, at 232 and note 6. For a discussion of the way the HCJ may have been affected by international legal developments, as part of a system of 'global deliberation', in the context of its scrutiny of Israel's interrogation methods, see A. Reichman, "'When We Sit To Judge We Are Being Judged": The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation', (2001) 9 *Cardozo Journal of International and Comparative Law* 41.

198. H. Koh, 'Transnational Legal Process', (1996) 75 *Nebraska Law Review* 181, at 199.

199. *Ibid.*, at 205.

factor in the internalization of norms that, ultimately, is the reason why states obey international law.<sup>200</sup> Although the legal proceedings in the ICJ and the HCJ were independent, the HCJ's request from the parties in subsequent cases involving the barrier to submit their positions concerning the Advisory Opinion is significant.<sup>201</sup> In terms of Koh's model, this request could be viewed as an instance of Israeli law partly internalizing the ICJ's judicial interpretation in its Advisory Opinion, whereby Israel was violating international law.<sup>202</sup> And yet the case of the separation barrier illustrates the need to modify the model: the HCJ internalized the ICJ's interpretation of international law only partly, while rejecting significant sections of it. The HCJ adopted this position before the ICJ rendered its Advisory Opinion (although ostensibly influenced by its expected contents), and reiterated it after the Advisory Opinion was published. The overall effect of the HCJ partly accepting and partly rejecting the ICJ's determination was to lighten the burden of some of the people under occupation, but also to grant further legitimation to Israeli policies that, according to the ICJ, are in violation of international law. Many explanations for the wide divergence between the conclusions of the HCJ and those of the ICJ are possible.<sup>203</sup> For our purposes, what is important is that this case proves the need to rethink 'transnational legal process' as a model that is about the internalization of international law. This model may suitably describe cases such as the litigation on the barrier in the two courts, but this case illustrates that such transnational legal process may sometimes lead to greater enforcement of international law in the service of humanity but at the same time may also result in greater legitimation of military action in violation of humanitarian values.<sup>204</sup>

Incidentally, the effects of this internationalization were evident not only in the HCJ. As soon as the matter was referred to the ICJ and before it rendered its Advisory

200. H. Koh, 'Transnational Legal Process After September 11th', (2004) 22 *Berkeley Journal of International Law* 337, at 339–49. See also H. Koh, 'Why Do Nations Obey International Law?', (1977) 106 *Yale Law Journal* 2599, at 2602–3, 2645–58.

201. See Shany, 'Head against the Wall', *supra* note 5.

202. Compare with Koh's discussion of the Nicaragua case in the ICJ and its impact on US domestic law. Koh, 'September 11', *supra* note 200, at 340.

203. For a comprehensive discussion see Shany, 'Capacities and Inadequacies', *supra* note 5.

204. One should also consider in this context Anne-Marie Slaughter's concept of a 'New World Order', in which judges are one of the groups of sub-state actors who interact independently from the states in networks that create a disaggregated world order. In her terminology, the relationship between the HCJ and the ICJ is one of a vertical government network, between national officials, in this case judges, and their supranational counterparts. A.-M. Slaughter, *A New World Order* (2004), 1–35, 131–65. On the role of judges in this order, see *ibid.*, at 65–103. See also A.-M. Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 99. For our purpose, the relevant factors may not be those concerning judges creating transnational networks and connections, but rather the idea that judges share the recognition of one another as participants in a common judicial enterprise and view themselves as fellow members of a profession that transcends national borders. *Ibid.*, at 68. Although it is not clear from the HCJ's judgment whether it sees the ICJ in this light, the issues on which the HCJ chose to support the ICJ seem to suggest that it may have been partly motivated by this perception of a partnership in a common judicial enterprise. While Slaughter's insights are important to understand sub-state-level dialogues and influences between different actors, such as judges and courts, her description of this 'new world order' does not seem sufficiently inclusive of a variety of possible situations: courts may talk at each other rather than to each other, and the division of labour between courts may sometimes serve to conceal lack of enforcement rather than guarantee a more comprehensive and just legal order. The dynamic between the ICJ and the HCJ may represent a complex case, whereby the HCJ is to some extent affected by the ICJ and even resorts to a deferential discourse in its decision, but rejects many of the ICJ's findings.

Opinion, public debate flared up in Israel on the need to modify the barrier's route. These internal pressures were certainly reinforced by those ensuing externally from the process in The Hague. The result was the two HCJ rulings, which did not fully abide by the logic of the Advisory Opinion and did not examine the barrier as part of the structure of the occupation, but did present the HCJ as a reasoned mediator of security and humanitarian considerations rather than as the *bête noire* of the international legal community. If synergy means the concerted efforts of two systems to improve the enforcement of international law, the result here is mixed: the barrier as a feature of the occupation ultimately gained judicial legitimacy, but the restrictions imposed on it could help to reduce the onus on the Palestinians and lead to changes in its overall structure. The question whether the cumulative effect of the HCJ's activity will merely be that of regulation or rather that of structural changes in the barrier and its associated regime is still pending. Notwithstanding the novelty these rulings entail, as noted, they still keep the court in its overall role of regulating (now mostly through proportionality), and even legitimizing, the occupation and its illegalities. The court's discourse on humanitarian law and proportionality, together with the army's responses, should be seen in the broader context of the current relationship between humanitarianism and force. As David Kennedy elaborates, humanitarianism and military strategy currently speak the same language, since modern humanitarian law provides a professional vocabulary about objectives and means that civilized people can use to discuss military violence. Military commanders and humanitarians, says Kennedy, assess acts of violence from a similar vantage point, and thus reinforce one another's professionalism. In a way, humanitarian law becomes a blueprint for professional efficiency on behalf of the military: it regulates how the military would best achieve its objectives without unnecessary or disproportional use of force.<sup>205</sup> Kennedy's analysis pertains to the place of humanitarian lawyers and advocates vis-à-vis the military. In petitions against the barrier, humanitarian lawyers do not confine their arguments to proportionality but point to its illegality and to the specific occupation regime it reinforces and creates. The HCJ's judgments, however, could be seen as an instance of the humanitarianism Kennedy describes, sharing the language of proportionality with the military without attempting to look in depth at the structure of the occupation and without questioning the nature and the legitimacy of the concept of 'security' used by the army, but rather regulating within it. This humanitarianism, to borrow from Kennedy's analysis, participates in the occupation machine.<sup>206</sup> Through this regulation policy, the HCJ may rescue thousands of Palestinian villagers from the unbearable conditions the barrier has created for them, which is indeed significant, but it also legitimizes the occupation and the place of the barrier within it. Unlike the HCJ, the ICJ's Advisory Opinion, even if it does not go so far as to call the occupation illegal, does attempt to delegitimize the occupation and the barrier. That it often

205. D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004), 235–323.

206. For an understanding of various alleviations in the name of humanitarianism as being part of the structure of the regime of the occupation in general and the barrier in particular, see A. Azoulay and A. Ophir, 'The Monster's Tail', in M. Sorkin (ed.), *Against the Wall* (2005), 2 at 23.

does so in an under-reasoned way is unfortunate. That it has no *direct* effect on the reality of people's lives is a well-known reality in international law.

As discussed above, in the HCJ's analysis, the Palestinians' rights are defined as rights, while the settlers' rights are tantamount to security interests. When these definitions are used in the context of applying proportionality in the OPT, Palestinians may enjoy occasional victories in specific cases, but, overall, they find their rights restricted in the name of security in ways that create imbalance.

An interesting phenomenon deserves note in this context. In the OPT, the Israeli army has resorted to practices considered forbidden by most of the international law community but allowed by the HCJ with few if any limitations, including punitive home demolitions<sup>207</sup> and deportations.<sup>208</sup> Eventually, use of these measures was interrupted. Demolitions were stopped when the army judged them to be ineffective as deterrents, and deportations were discontinued when it was understood that their legality under international law, although sanctioned by Israeli courts, is dubious.<sup>209</sup> By contrast, reliance on other heavily regulated practices, such as the barrier, has continued.<sup>210</sup> Allowing a practice in its full horror, then, may eventually lead to its dismissal, perhaps out of fear of international sanctions, especially in the era of international criminal law, while attempts to regulate it through proportionality endow it with an aura of legitimacy. Apparently, these are the rules of the proportionality game.

The jury is still out on whether the HCJ's ruling on the barrier continues or breaks with its previous endeavour concerning the enforcement of humanitarian law in the OPT. The HCJ had not ruled before on the applicability of the Fourth Geneva Convention in the OPT, stating that it was not justiciable in Israeli courts. When it did examine Israeli military activity in the OPT in the light of the Convention, it chose to interpret it in a way that made it meaningless.<sup>211</sup> The few cases where the HCJ did intervene were mostly 'landmark cases' dealing with procedure and due process and hardly affecting the life of the Palestinians.<sup>212</sup> In recent years, the court has scrutinized military actions in light of the Geneva Convention without deciding on its applicability or changing its doctrine on the Convention's justiciability, relying instead on the declaration that Israel abides *ex gratia* by the Convention's

207. See Kretzmer, *supra* note 73, at 145–63. See, e.g., HCJ 2006/97 *Ghanimat v. Officer Commanding Central Command*, 51(2) P.D. 651 (1997) (the plausibility of the deterrence objective prevents intervention in the considerations of the military commander concerning home demolitions).

208. See Kretzmer, *supra* note 73, 165–86. See especially HCJ 785/87 *Afu v. IDF Commander of the West Bank*, 42(1) P.D. 4 (1990), trans. in (1990) 29 ILM 139.

209. On home demolitions see A. Harel, 'IDF Panel Recommends Ending Punitive House Demolitions for Terrorists' Families', *Ha'aretz* 17 Feb. 2005. On deportations see D. Barak-Erez, 'The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue', (2004) 2 *International Journal of Constitutional Law* 611, 630–1.

210. Another interesting example is the use of physical force, which some argue amounts to torture, in the investigations of the General Security Services, prohibited by the HCJ in *The Israeli Committee Against Torture v. The State of Israel* (*supra* note 196), but which, according to some reports, continues by other means. See Public Committee Against Torture in Israel, 'Back to a Routine of Torture' (April 2003), available at <http://www.stoptorture.org.il//eng/images/uploaded/publications/58.pdf>; Public Committee Against Torture in Israel, 'Flawed Defense' (September 2001), available at <http://www.stoptorture.org.il//eng/images/uploaded/publications/13.pdf>.

211. Kretzmer, *supra* note 73, 43–56.

212. R. Shamir, 'Landmark Cases and the Reproduction of Legitimacy', (1990) 24(3) *Law and Society Review* 781.

humanitarian provisions.<sup>213</sup> In most cases, however, this use of the Convention has served to legitimize Israeli army practices,<sup>214</sup> to deal with issues of due process and procedure<sup>215</sup> or in judgments that are mostly declaratory.<sup>216</sup> The *Beit Sourik* and *Mara'abe* rulings are novel in that, although the HCJ denies this, they pierce the veil of security considerations, reject them, and apply humanitarian law (including the Geneva Conventions) on a matter that may have a significant effect on the life of Palestinians. In this sense these rulings constitute a breakthrough.<sup>217</sup> In a larger context, however, they legitimize the structure of the Israeli occupation and address only specific segments of the barrier, and their overall impact on these specific segments and on the barrier in general remains unclear. After the *Mara'abe* decision the HCJ issued orders in pending barrier cases requesting the parties to express their updated positions on the matter before it in the light of the *Mara'abe* decision,<sup>218</sup> suggesting that this ruling could affect other segments currently under judicial scrutiny. Indeed, the HCJ's requests that the parties to the various pending barrier cases submit positions, first concerning the Advisory Opinion, and later concerning its own major decisions on the issue, may be an indication of a complex trans/national legal process, which is still not over.

On 20 February 2005, in response to the *Beit Sourik* ruling, the Israeli government decided on a new route for the barrier that was purported to be less injurious to Palestinians, reducing the numbers of Palestinians living in the 'seam zone' between the barrier and the Green Line from 93,200 to 49,400.<sup>219</sup> And yet, more than a year after *Beit Sourik*, a decision was still needed in *Mara'abe*, and many new petitions

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213. For an understanding of these decisions in the broader context of the role of international law within the Israeli legal system see Barak-Erez, *supra* note 209; see especially the discussion of cases concerning the OPT, *ibid.*, at 615–17, 618–23.
214. *Ajuri v. IDF Commander of the West Bank*, *supra* note 50 (allowing the 'assigned residence' of Palestinians who assisted terrorist activities, while restricting the use of this mechanism through the doctrine of proportionality). See O. Ben-Naftali and K. Michaeli, 'The Call of Abraham – Between Deportation and Assigned Residence: A Critique of the Ajuri Case', (2002) 15 *Hamishpat* 56 (Hebrew). For a reading of this decision as establishing an important role for IHL in the HCJ's jurisprudence see E. Benvenisiti, 'Case Review: *Ajuri et al. v. IDF Commander in the West Bank et al.*', (2003) 9 *European Public Law* 481. On this case see also D. Barak-Erez, 'Assigned Residence in Israel's Administered Territories: The Judicial Review of Security Measures', (2003) 33 *Israel Yearbook on Human Rights* 303.
215. HCJ 3239/02 *Marab v. The IDF Commander in Judea and Samaria*, 57(2) P.D. 349 (2002) (repealing orders enabling detention of Palestinians for up to 18 days without judicial review).
216. HCJ 4764/04 *PHR v. The IDF Commander in Gaza*, 58(5) P.D. 385 (2004) (declaring the army's obligation to abide by humanitarian law during an operation in the town of Rafiah).
217. A significant decision in another context is the recent judgment concerning the 'early warning' procedure: in this case the HCJ held that the procedure, according to which Israeli soldiers wishing to arrest a Palestinian suspected of terrorist activity may be aided by a local Palestinian resident, who gives the suspect prior warning of possible injury to the suspect or to those with him during the arrest, is illegal. See HCJ 3799/02 *Adalah – The Legal Centre for Arab Minority Rights in Israel v. GOC Central Command* (not yet published, 2005), available at [http://elyon1.court.gov.il/Files\\_ENG/02/990/037/a32/02037990.a32.HTM](http://elyon1.court.gov.il/Files_ENG/02/990/037/a32/02037990.a32.HTM).
218. See, e.g., HCJ 2577/04 *Taha El Chawaga v. The Prime Minister*, decision issued by the Court on 19 Sept. 2005; HCJ 6336/04 *Head of the Local Council Dir-Balut v. The Prime Minister*, decision issued by the Court on 19 Sept. 2005.
219. For a discussion of the new route and a map comparing it with the previous one see The Humanitarian Impact of the West Bank Barrier on Palestinian Communities, March 2005, Update No. 5, A Report to the Humanitarian Emergency Policy Group (HEPG), compiled by the United Nations Office for Coordination on Humanitarian Affairs (OCHA) and the United Nations Relief and Works Agency for Palestinian Refugees (UNRWA) in the occupied Palestinian Territory, available at [http://www.humanitarianinfo.org/opt/docs/UN/OCHA/OCHABarRprto5\\_Full.pdf](http://www.humanitarianinfo.org/opt/docs/UN/OCHA/OCHABarRprto5_Full.pdf). See also the official 'seam zone' website of the Israeli Ministry of Defence: <http://www.seamzone.mod.gov.il/Pages/ENG/default.htm>.

are constantly being submitted to the HCJ, even after *Mara'abe*, addressing similar circumstances. This situation attests that, despite the judicial pronouncements, the barrier's construction still raises the same problems described back in *Beit Sourik*.<sup>220</sup> As a matter of fact, a new *Beit Sourik* petition is now pending, arguing that the new route in this very area did not solve the problem of the Palestinian residents.<sup>221</sup> On the other hand, in some areas the rerouting of the barrier, following the *Beit Sourik* judgment, to a route proximate to the Green Line, led to changes significant enough to be held by the HCJ as reducing the infringement of the rights of Palestinians in a way that strikes a valid balance between rights and security.<sup>222</sup>

Will *Beit Sourik* and *Mara'abe* become 'landmark cases' that in reality will have little influence on the life of Palestinians? Given that they go beyond the procedural issues handled in previous OPT landmark cases,<sup>223</sup> they do have a potential for truly affecting the lives of Palestinians. Nevertheless, they do confer on the occupation and the barrier the legitimacy of the rule of law while many daily grievances of Palestinians, including injuries associated with the barrier that attracted less judicial and public attention, are still awaiting address. As noted above, there are many petitions concerning the barrier before the HCJ,<sup>224</sup> and obviously even those do not cover the full range of grievances associated with it. In other cases dealing with serious violations of rights in the OPT, the HCJ often still gives the actions of the Israeli army its stamp of approval. Consider, for instance, a petition briefly rejected by the HCJ involving the city of Hebron, where two Palestinians were prevented from returning to homes they had left because of harassment from neighbouring Jewish settlers. The house of one petitioner was in an area outside Hebron where the Jewish settlement of Kiryat Arba was later built. In 1987, a barbed-wire fence – yet another barrier – was built around her house, preventing the family's access. A gate was later installed, to which they were given a key, but the army later replaced the lock and refused to give her the new keys. The HCJ ruled that the arrangement suggested by the army, stating that the gate would be opened within minutes following prior co-ordination by phone, was satisfactory and was required from a security perspective, dismissing the petitioner's fears that opening the gate would each time turn into a protracted affair. In rejecting the petition, the HCJ again accepted the paradigm that Palestinian rights can be restricted to protect the settlers, that only settlers can invoke 'security' arguments, and that an arrangement requiring a person to co-ordinate every entry to her home with the occupying

220. See, e.g., the petition in HCJ 1348/05 *Mayor of Salfit v. State of Israel* (pending), describing situations comparable with those discussed in the *Beit Sourik* case, which were not amended following this judgment and required additional petitions. The petition at HCJ 10905/05 *The Major of Jayus v. The Prime Minister*, filed 23 Nov. 2005 (after the *Mara'abe* decision), also outlines problems affecting Palestinians of the type discussed in the two major cases already decided by the HCJ.

221. HCJ 426/05 *Bido Village Council v. The Government of Israel* (pending).

222. HCJ 5683/04 *Beit Sira Village Council v. The Government of Israel* (not yet published, 9 Jan. 2006), available at <http://elyon1.court.gov.il/Files/04/830/056/a19/04056830.a19.HTM>. For another case where the HCJ held that a significant rerouting of the barrier following its principled rulings resulted in a route which strikes a valid balance see HCJ 6336/04 *Kamal Yosef Mahmud Moussa v. The Prime Minister* (not yet published, 4 Jan. 2006), available at <http://elyon1.court.gov.il/Files/04/360/063/a14/04063360.a14.HTM>.

223. See Shamir, *supra* note 212.

224. See note 168 and accompanying text, *supra*.

army, all to protect the security of settlements whose legality is never questioned, is acceptable.<sup>225</sup> Unlike the *Beit Sourik* and *Mara'abe* decisions, this one-page ruling was not placed in English translation on the HCJ's website and was not the subject of extensive discussions in international law journals, but is as much a part of the occupation's legal structure as the decisions discussed in this and other articles.

Whether the recent developments in the HCJ's jurisprudence are about the enforcement of humanitarian law or about a *fata morgana* of humanitarian law is, therefore, still to be determined. They may attest to the limits of humanitarian law, including the doctrine of proportionality as applied by the HCJ and its enforcement as discussed throughout the article, particularly by domestic courts. The limits could be inherent in humanitarian law, or reflect its misapplication by the courts or the limits of courts, or all of the above. Indeed, the limited institutional capacity of the courts, both international and domestic, should not be disregarded.<sup>226</sup> Does international humanitarian law, then, serve as a mechanism of legitimation or of emancipation? The answer is both. Whether the HCJ's involvement has contributed more to the legitimation of the occupation or to the improvement of the Palestinians' lives is a recurring question that may never be answered.<sup>227</sup>

## 6. CONCLUSION

The barrier can be understood as a physical structure set up in order to ensure the security of Israelis and, as such, part of the system restricting freedom of movement for Palestinians in the OPT. These restrictions are a salient feature of the occupation and play a central role in denying the Palestinians the possibility of conducting a full human life. Not only do they violate their access to health care, education, work, and family life, but they touch on a much deeper issue, concerning the very idea that individuals need to convince someone else that they have a legitimate reason for moving and have procured a special permit for doing so.<sup>228</sup> The barrier continues the checkpoints system restricting freedom of movement within the OPT, whose harsh consequences have been widely documented.<sup>229</sup>

225. HCJ 4547/03 *Chlabi v. The Prime Minister* (not yet published, 2005). Some of the facts of this case are not detailed in the HCJ's verdict but in the petition itself. Significantly, the HCJ did not mention in its decision that while the petitioners were outside the house they could not enter, their house was set on fire and destroyed.

226. See Shany, 'Capacities and Inadequacies', *supra* note 5.

227. Kretzmer reminds us that 'however critical one may be of many of the Court's decisions . . . One must also consider what the position would have been if the Court had declined to assume jurisdiction in such petitions.' He further speculates that 'in the short term, the lack of formal external constraints would have resulted in more arbitrariness . . . Is it possible that in the medium or long term, the very lack of restraint . . . would have made the occupation less palatable for Israel's elite, and that the pressure to end the occupation . . . would have been felt much earlier?' (Kretzmer, *supra* note 73, at 198).

228. For a description of such a regime see J. M. Coetzee, *The Life and Times of Michael K* (1983).

229. See Machsomwatch, 'A Counterinterview: Checkpoints 2004' (2004), available at <http://www.machsomwatch.org/docs/Counterinterview.pdf>; B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 'Forbidden Roads: The Discriminatory West Bank Road Regime' (2004), available at [http://www.btselem.org/download/200408\\_Forbidden\\_Roads\\_Eng.pdf](http://www.btselem.org/download/200408_Forbidden_Roads_Eng.pdf); B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 'No Way Out' (2001), available at [http://www.btselem.org/Download/200106\\_No\\_Way\\_Out\\_Eng.doc](http://www.btselem.org/Download/200106_No_Way_Out_Eng.doc); Physicians for Human Rights, 'The

These restrictions, as noted, rest on the assumption that the rights of Israelis are a security concern justifying a 'proportionate' limitation of rights of Palestinians. While rights may sometimes override these security concerns, the basic structure remains in place: the freedom of Jewish settlers to live in the OPT safely and travel freely is apparently hardly ever challenged, resulting in a regime that regulates people and their movements on the basis of ethnicity. The HCJ noted that this structure has been likened by some to apartheid,<sup>230</sup> but Dugard, the special rapporteur who is also one of South Africa's leading international lawyers, notes in his report that, although the term 'Apartheid Wall' is frequently used in Palestine, 'Strictly speaking, this historical metaphor is inaccurate as no wall of this kind was erected between Black and White in apartheid South Africa.'<sup>231</sup>

The barrier, however, is not only a physical structure. It is part of the structure of the occupation. It represents de facto annexation, confining security concerns to one side, restricting freedom of movement to the point of denying realization of basic aspects of human life, dissecting the occupied territory, branding people, regulating their bodies, their location, and their movements, and allocating their rights on the basis of their ethnicity.<sup>232</sup> Restraining people's access to the barrier to specific hours, only for specific goals such as work or school, and only through specific gates,<sup>233</sup> denies the humanity of the Palestinian residents of the 'seam zone' and others who wish to enter this area: from people who should be able to make choices about their daily life, they become prisoners of the Israeli occupation. When considering the legal questions and the ways in which courts have addressed the barrier, we should recall its effects on people's lives. Arguably, we should also recall its stated purpose, which is to save the lives of Israelis threatened by Palestinian terrorists. This purpose, however, flies in the face of the barrier's route, which often separates Palestinians from Palestinians rather than Palestinians from Israelis. The absence of a barrier between Palestinian villages in the 'seam zone' and Israel, and the existing barrier separating them from the rest of the West Bank, attest that the barrier is not only about 'security', and, indeed, its route may even sacrifice security in the name of other interests. Allowing Palestinians to cross the barrier and enter the 'seam zone' to work, as is required given the barrier's location within the West Bank,

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Bureaucracy of Occupation' (2004), available at [http://www.phr.org.il/phr/files/articlefile\\_1108316859979.pdf](http://www.phr.org.il/phr/files/articlefile_1108316859979.pdf). See also the film *Checkpoint* (Machsomim), directed by Y. Shamir (Israel, 2004).

230. *Mara'abe*, *supra* note 6, para. 45.

231. Dugard, *supra* note 183, note 1.

232. Thus the barrier and the permits regimes associated with it can be examined from the perspective of Foucault's notion of 'bio-power' as a form of power which achieves the subjugation of bodies and the control of populations, and of Agamben's idea of 'bare-life'. See respectively M. Foucault, *The History of Sexuality, Volume 1: An Introduction* (1990), at 135–45, and G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998). For discussions which address this perspective, as well as the spatial implications of the barrier and its place within the logic of 'separation' in the Israeli–Palestinian context see Azoulay and Ophir, *supra* note 206; M. Sorkin, 'Introduction: Up Against the Wall', in M. Sorkin (ed.), *Against the Wall* (2005), vi; O. Yiftachel and H. Yacobi, 'Barriers, Walls and Dialectics: The Shaping of "Creeping Apartheid" in Israel/Palestine', in M. Sorkin (ed.), *Against the Wall* (2005), 138; S. Hanafi, 'Spacio-cide and Bio-Politics: The Israeli Colonial Project from 1947 to the Wall', in M. Sorkin (ed.), *Against the Wall* (2005), 158; R. Marton and D. Baum, 'Transparent Wall, Opaque Gates', in M. Sorkin (ed.), *Against the Wall* (2005), 212; E. Weizman, 'Hollow Land: The Barrier Archipelago and the Impossible Politics of Separation', in M. Sorkin (ed.), *Against the Wall* (2005), 224; N. Ouroussoff, 'A Line in the Sand: Architects and Israel's Barrier', *New York Times*, 1 Jan. 2006.

233. See *supra* note 22.

creates 'holes' through which potential terrorists may enter Israel.<sup>234</sup> Rather than building the barrier so as to protect Israel, then, security is sacrificed to maintain the settlements. All of this attests to the gap between the 'fantasy of separation'<sup>235</sup> which the barrier represents, and the complex reality, both separated and not separated, in which Israelis and Palestinians live.

The barrier, however, is also a site of resistance to this persistent breach of Palestinians' rights in the name of perceived Israeli security. It is the site for joint Palestinian–Israeli resistance in the form of demonstrations and sit-ins, but also of violent military reactions to it.<sup>236</sup> One of the movements leading this resistance is an Israeli group called 'Anarchists against the Wall' and the related group 'One Struggle', which is active on both human and animal rights.<sup>237</sup> These groups came to the forefront of public attention after a demonstrator was shot by the Israeli army.<sup>238</sup> The activities of groups seeking to abolish structures of hierarchy while resisting the barrier are a significant development. Another context for considering the barrier are walls between Jewish and Arab neighbourhoods within Israel proper, built supposedly for crime protection but sometimes claimed to represent racist–segregationist ideology, which are currently being litigated in Israeli courts.<sup>239</sup> Although still limited and local, this phenomenon attests to the insidiousness of the separation logic and its effect on the lives of Israelis and Palestinians in Israel and in the OPT.<sup>240</sup>

In one of the many petitions on the barrier submitted to the HCJ, the State Attorney's office argued in its submission that the 'barrier' is a 'natural and required measure, in the spirit of the saying "high fences make good neighbours"',<sup>241</sup> thus twisting the familiar saying 'good fences make good neighbours'. The 'good fences' saying was immortalized in Robert Frost's poem 'Mending Wall',<sup>242</sup> written in 1914.

234. Dan Rubinstein, 'The Fence Will Not Block the Next Suicide Bomber', *Ha'aretz*, 9 Dec. 2005, b5 (Hebrew).

235. The term 'fantasy of separation' is used by Weizman in his analysis of the barrier; see Weizman, *supra* note 232, at 225.

236. M. Rapaport, 'Without Shai'ds', *Ha'aretz*, 10 June 2005; G. Lasky, 'Bilin: A Test Case for Immunity – The Culture of Violence and Deception among the Israeli "Security Forces"' (2005), available at <http://www.adalah.org/newsletter/eng/oct05/ar1.pdf>.

237. See <http://www.onestruggle.com>.

238. L. Galili, 'Fringe Benefits', *Ha'aretz*, 2 Jan. 2004 (Hebrew); R. Kupperboim, 'Hero Anti', *Ha'ir*, 1 Jan. 2004 (Hebrew).

239. See Administrative Petition (Tel-Aviv) 1252/05 *Aaref Mucharab v. The National Council for Planning and Building – Central District* (pending), which deals with the plan to erect a wall 1,600 metres long and 4 metres high between the Arab neighbourhood of Pardes Snir in Lod and the nearby Jewish village of Nir Zvi. On this case see A. Dayan, 'Wall-Eyed', *Ha'aretz*, 22 July 2003. On walls now being built between Jews and Arabs in Israel see the Arab Association for Human Rights, 'Behind the Walls: Separation Walls Between Arabs and Jews in Mixed Cities and Neighborhoods in Israel' (2005), available at [http://www.arabhra.org/publications/reports/Word/SeperationWallsReport\\_English.doc](http://www.arabhra.org/publications/reports/Word/SeperationWallsReport_English.doc); L. Galili, 'Long Division', *Ha'aretz* 19 Dec. 2003, which discusses three such walls in detail. For more information on the issue see <http://www.bimkom.org/publicationView.asp?publicationId=51> (Hebrew).

For a discussion of the barrier as part of regimes which are structured around economic and ethnic separations see Algazi, *supra* note 150; see also Ronen Shamir, 'Without Borders? Notes on Globalization as a Mobility Regime', (2005) 23 *Sociological Theory* 197, at 204–5.

240. For a suggestion to look at Israel's land policies in the West Bank as a continuation of its domestic land policies see Ben-Naftali, Gross, and Michaeli, *supra* note 72, at 611, n. 329. On the logic of separation in the Israeli–Palestinian context, see A. Gross, 'The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel', (2004) 40 *Stanford Journal of International Law*, 47, at 100–2.

241. HCJ 9961/03 *Hamoked – The Center for the Defense of the Individual v. The Government of Israel*, Respondent's Brief (1 Jan. 2004), para. 33.

242. R. Frost, 'Mending Wall', in *The Poetry of Robert Frost*, ed. E. C. Lathem (1979), at 33.

Its origin, however, is older, and some ascribe it to a mention in a 1640 letter from Reverend Rowley to Massachusetts Governor John Winthrop, admitting that a good fence will keep peace between neighbours but cautioning against high stone walls that would preclude them from meeting.<sup>243</sup> A high wall, then, is not a good fence.

Robert Frost's poem actually begins by saying, 'Something there is that doesn't love a wall', describing the speaker and his neighbour walking together to mend a wall between them. The neighbour recurrently says, 'Good fences make good neighbours', but the speaker wonders if he could make his neighbour consider: 'Why do they make good neighbors? . . . /Before I built a wall I'd ask to know/What I was walling in or walling out,/And to whom I was like to give offence.' The neighbour, however, 'moves in darkness as it seems to me –/Not of woods only and the shade of trees./He will not go behind his father's saying,/And he likes having thought of it so well/He says again, "Good fences make good neighbors."'

At first, like the neighbour in the poem, the Israeli government moved in darkness and failed to answer in its submission to the courts why it is building the wall along the present route. Later, answers came. First strategic–security answers, and then answers pertaining to the protection of the settlements themselves, as well as to their expansion. The petitioners in the various cases, like the speaker in the poem, want to bring the government and the courts to consider why the barrier is good and to enquire carefully into what is being walled in or walled out, and to whom the barrier is likely to give offence. The answers to these questions are already well known. The barrier will give offence to many. Its implications for the daily lives of tens of thousands of Palestinians and their freedom of movement, housing, education, health, and family life have been widely reported.<sup>244</sup> All know that the barrier often separates Palestinians from Palestinians rather than Palestinians from Israelis. It divides families, separating people from their workplace, children from their schools, patients from doctors. It turns tens of thousands of Palestinians into illegal residents in their own homes, requiring them to obtain a special permit to stay in the 'seam zone'. Facing a reality in which the barrier is part of the settlements and of the *de facto* annexation regime entailed by them, international law could shed light on the illegal regime that this barrier is part of rather than move in darkness ignoring its illegality. The structural analysis in the Advisory Opinion could move us in this direction, though its potential and influence are undermined by the many flaws in parts of the ICJ's reasoning. In turn, the HCJ's problematic application of IHL to the barrier, although it might improve on the original planning, also serves to confer legitimacy on this structure and its regime while being unable to dismantle it.

243. Wolfgang Mieder, "'Good Fences Make Good Neighbours': History and Significance of an American Proverb', (2003) 114 *Folklore* 155 at 158, available at <http://taylorandfrancis.metapress.com/media/988tvgryundke6tvxceg/contributions/5/x/f/g/5xfgtwckwdpm3nxx.pdf>.

244. For a detailed report on the violations of human rights deriving from the barrier see B'Tselem – The Israeli Information Centre for Human Rights in the Occupied Territories, 'Behind The Barrier: Human Rights Violations as a Result of Israel's Separation Barrier' (April 2003), available at [http://www.btselem.org/Download/200304\\_Behind\\_The\\_Barrier\\_Eng.pdf](http://www.btselem.org/Download/200304_Behind_The_Barrier_Eng.pdf); B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 'Not All It Seems: Preventing Palestinians Access to their Lands West of the Separation Barrier in the Tulkarm-Qalqiliya Area' (June 2004), available at [http://www.btselem.org/Download/200406\\_Qalqiliya\\_Tulkarm\\_Barrier\\_Eng.pdf](http://www.btselem.org/Download/200406_Qalqiliya_Tulkarm_Barrier_Eng.pdf). See also the information from the UN Office for the Coordination of Humanitarian Affairs (OCHA – OPT) at <http://www.humanitarianinfo.org/opt/>.