

Legalizing the Barrier: the Legality and Materiality of the Israel/Palestine Separation Barrier

YISHAI BLANK^{*†}

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* Yishai Blank is a Senior Lecturer at the Buchmann Faculty of Law at Tel Aviv University. I wish to thank Karen Engle and the Texas International Law Journal for organizing the Conference “Walls: What They Make and What They Break” and its participants for stimulating conversations. I also thank Daphne Barak-Erez, Aeyal Gross, Duncan Kennedy, Roy Kreitner, Dori Spivak, and Issi Rosen-Zvi for excellent comments and suggestions. Yael Tzach provided superb research assistance. The author serves as the Chairman of the Board of “Bimkom: Planner for Planning Rights,” which was involved in the litigation against the route of the barrier.

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INTRODUCTION

Since 2003,¹ the state of Israel has been constructing a barrier snaking through the occupied territories of the West Bank, seldom adhering to Israel's internationally recognized border, often protruding, sometimes very deeply, into the territories.² This barrier—also referred to as the separation wall, the security obstacle, the fence, and a multitude of other terms³—has attracted international and local (Israeli) interest, attention, and critique. While the barrier is clearly unique—a result of the complexities and anomalies of the Israeli/Palestinian conflict and context—it was immediately read within the backdrop of the global phenomenon of walling, therefore becoming a symbol of the emerging new global regime of separation and segregation, of risk management, and of growing securitization.⁴ Thus the local campaign against the barrier was quickly understood—at least by external spectators (mostly academics)—through global theoretical frameworks that were developed in order to analyze the current paradoxical coupling of globalization with segregation, of global openness and renewed national closure, and of decolonization with parochial re-territorialization.

Indeed, it is a great paradox of our times that with the weakening of national borders associated with globalization there seems to appear a growing tendency to erect material walls between states. These walls are usually constructed with the declared purpose of fending off terrorists, traffickers, illegal immigrants, or other undesirable persons and things. Long stretches of physical barriers have been built on the borders of USA/Mexico, Israel/Palestine, Botswana/Zimbabwe, India/Pakistan, and elsewhere.⁵ These barriers often use a combination of high- and low-

1. The Israeli government decided to erect a separation barrier in April 2002 in order to obstruct the entrance of terrorists from the West Bank into Israel. EYAL WEIZMAN, *HOLLOW LAND: ISRAEL'S ARCHITECTURE OF OCCUPATION* 162 (2007). The decision was articulated by Israeli officials and commonly understood by the Israeli public as a response to Palestinian acts of violence, in particular a suicide bombing which originated in the occupied territories. Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT'L J. CONST. L. 540, 540 (2006). This decision, however, was mostly declaratory, with very few operative consequences. See WEIZMAN, *supra*, at 162 (stating that the construction of the barrier began in June 2002 but only incrementally). Real and concrete actions began in late 2003, when the government approved an initial route for the barrier. Oren Yiftachel & Haim Yacobi, *Barriers, Walls, and Dialectics: The Shaping of "Creeping Apartheid" in Israel/Palestine*, in *AGAINST THE WALL: ISRAEL'S BARRIER TO PEACE* (Michael Sorkin ed., 2005) 138, 140. Soon after, the military started issuing land seizure orders and began the actual construction.

2. The Green Line demarcates the internationally recognized border between Israel and the Palestinian occupied territories.

3. See WEIZMAN, *supra* note 1, at 171 (describing the terminology used to refer to the many border-synonyms between Israel and Palestine); Dean McCannell, *Primitive Separations*, in *AGAINST THE WALL*, *supra* note 1, at 28 (explaining the different terms used to refer to the wall).

4. See Mike Davis, *The Great Wall of Capital*, in *AGAINST THE WALL*, *supra* note 1, at 88, 88–90 (discussing the recent international trend of states constructing border walls).

5. Note that, even among these examples, the case of the Israeli wall is exceptional since Palestine is not an independent, internationally recognized state. Hence, the wall separating it from Israel functions rather differently, both politically and legally, from other walls across the world. This important difference will become clearer later in the article.

end technology reminiscent both of antiquity and of futuristic science-fiction movies. In a way, these walls could be seen as the dark side of globalization: they demarcate its limits and its unwanted consequences, those that need to be met with the utmost response—the wall. What makes the phenomenon of walls unique and new is indeed not a result of a particular attribute, but rather that they have become emblematic of our times; as if they are the monument which represent most clearly and vividly the era in which we live.⁶ As such, they are a legal and material manifestation of the idea of sovereign states, but also what makes possible its critique.

The legal campaign against the Israeli barrier was both local, in Israeli courts that had to determine its legality, as well as international, in the International Court of Justice (ICJ), which issued an advisory opinion concerning its legality.⁷ In this article I argue that the unique route of the barrier—crawling through the territories and creating bizarre-shaped enclaves in which Palestinian communities are trapped—caused the legal campaign and court rulings on the matter to take a very specific form. The majority of the legal challenges, as well as the legal principles set out by the courts in response, related to the barrier's route and to its impact on the lives of the persons in the territories surrounding it. Left out of the legal battle was an attempt to delegitimize the very establishment of a separation barrier between Israel and the occupied territories, regardless of its route, even if it were erected exactly on the Green Line.

In this article I analyze the role sovereignty has had in masking the hybrid nature of the barrier and in shaping the legal campaign against it. As a founding concept, sovereignty shaped (1) the legal norms in which the litigators and the courts operated; (2) the theoretical approaches—often of extra-legal disciplines—regarding the harm that the barrier caused (or might cause); and (3) the strategic and tactical choices taken by the various NGOs which spearheaded the campaign, often a result of compromises among disagreeing parties.⁸

In Section I of the article, I describe the hybrid nature of the barrier. I analyze the material as well as the legal/ideological aspects of the barrier, and the inseparability of the one from the other. I then turn in Section II to examine the development of the jurisprudence of the barrier, pointing to the different legal concepts which enabled the Israeli Supreme Court to criticize the route of the barrier while upholding its general legitimacy. What is revealed through the analysis of the jurisprudence of the barrier is that no legal argument was made against a barrier which would have been erected on the internationally recognized border of Israel. I offer some suggestions as to the roots of this omission, arguing that it exposes the sovereigntist ideology and commitment of the various legal actors (both national

6. See WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* 22–26 (2010) (discussing walls as a reaction to waning state sovereignty caused by globalization).

7. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Advisory Opinion*].

8. One of the most difficult dilemmas which anti-wall activists had to address was the question whether to pursue a legal course of action or focus on extra-legal activity such as advertizing and public demonstrations. Another was the following: what legal strategy should be adopted in order to combat the barrier? Should the entire barrier project be challenged altogether or would it be more prudent to question only its current route? And how much weight should be given to expert opinions regarding the harm of the barrier? These debates exposed profound disagreements among professionals and activists and were informed not only by practical considerations, but also by theoretical conflicts surrounding the legitimacy of walls and of separation.

ones and international ones). This ideology obstructs the possibility to delegitimize the entire Israeli barrier project and other barriers which separate between sovereign states throughout the world.

I. THE HYBRID NATURE OF THE BARRIER: MATERIALITY AND LEGALITY

In the various discussions about the barrier, it is often perceived through its two distinct characteristics: the material one and the ideological-legal one. Seen mostly as a *material* object, the barrier is predominantly described as a physical entity, whose material characteristics produce a set of almost-necessary consequences in reality.⁹ Viewed as an *ideological-legal* construction, the barrier becomes almost intangible. In this view, the barrier is mostly an idea, a regime, and a set of legal rules—of separation and segregation, of domination and occupation, and of controlling the population and managing risks.¹⁰

The captivating visual images of tall, fear-inspiring concrete walls and towers bear the danger of overemphasizing the physical-material dimension of the wall and thus underestimating the work that the law and other intangible factors perform in enabling it to have effect in reality. On the other hand, for lawyers, philosophers, and scholars of disciplines with idealist views of reality (as opposed to materialist ones), the opposite happens: the material aspect dissipates into the background and the wall keeps appearing as an idea, a set of rules, or a mere manifestation of ideology.

The barrier, however, is a hybrid creature. It is a mixture of facts and norms, of materiality and legality, of physicality and ideology. A description of the barrier focusing on a single aspect is, therefore, lacking and biased and risks producing negative normative consequences. Realizing that the material aspect of the barrier is indistinguishable from its legal and ideological aspects allows one to fully understand the uniqueness of the barrier (*vis-à-vis* other periods in history in which barriers existed and *vis-à-vis* other methods of separation), and to better grasp and describe the way the wall functions in reality, thus offering new avenues for legally challenging it.

Next, I examine the two different aspects of the barrier, demonstrating that focusing on either one of them bears various risks and that some of the legal disagreements surrounding the barrier can be traced back to these conceptual differences. While most commentators are acutely aware of the fact that walls and barriers are hybrid creatures, composed of material and legal/ideological dimensions, they often focus on only one of these dimensions. What cements and stabilizes the relationship—as well as the analytical separation—between materiality and legality is the concept of sovereignty: the idea that a unified entity has ultimate and unlimited control over the entirety of the material and legal universe within a given national territory. What eventually becomes clear in this article is that the current

9. See U.N. Secretary-General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, paras. 23–27, delivered to the General Assembly, U.N. Doc. A/ES-10/248 (Nov. 24, 2003) [hereinafter *Report of the Secretary-General*] (describing the barrier's socio-economic consequences on the lives of Palestinians).

10. See Yiftachel & Yacobi, *supra* note 1, at 139–41 (describing the barrier as part of Israel's system of “creeping apartheid” of the Palestinian territory).

understanding of sovereignty as a hermetic and insular container is the reason for the failure to launch a radical critique of the Israeli barrier (indeed of barriers and walls throughout the world). In fact, walls are the embodiment of this common interpretation of sovereignty, and therefore even if the specific route of the Israeli barrier can, and indeed should, be legally challenged, the limitations of such challenge are a reflection of the failure to articulate an effective critique of sovereignty not only in Israel but throughout the world.

A. *The Barrier's Materiality*

What is often emphasized in discussions about the barrier is its material nature: that it is a long and winding physical construction, with concrete parts, barbed wires, gates, and towers. And indeed, the Israeli barrier enterprise is materially impressive. Once completed, it is supposed to provide a solid obstacle between the Palestinian territories and Israel, by stretching along more than 600 kilometers (and cutting through the occupied territories).¹¹ Parts of it are made of thirty-foot-high ready-made concrete segments;¹² the majority of the barrier is supposed to be made of regular iron fences, lower brick walls, gates, blockades, and other more traditional fencing mechanisms. Watch-towers, surveillance cameras, and barbed wires are scattered along the barrier.¹³ The barrier only occasionally tracks the Green Line; it snakes through the occupied territories, creating enclaves in order to capture some of the Jewish settlements.¹⁴

The original plans for the barrier barely attempted to adhere to the Green Line. The initial October 2003 route, set out in the Israeli government's decision, placed the vast majority of the barrier within the occupied territories.¹⁵ In addition, in various sections, the barrier protrudes deeply into the Palestinian territories in order to include as many Jewish settlements as possible within the western ("Israeli") side

11. Stephanie Koury, *Why This Wall?*, in *AGAINST THE WALL*, *supra* note 1, at 48, 49.

12. Michael Sorkin, *Introduction: Up Against the Wall*, in *AGAINST THE WALL*, *supra* note 1, at vi. Only about five percent of the wall is made of these high concrete segments. See *Report of the Secretary-General*, *supra* note 9, para. 11 ("Concrete walls cover about 8.5 kilometers of the approximately 180 kilometers of the Barrier completed or under construction."). The vast majority of the barrier is made of a "smart" electronic chain-link fence. Along the external ("Palestinian") side of the barrier passes some sort of an obstacle (a ditch or a pile) and another obstructing road. On its internal ("Israeli") side, there is a smooth dirt road (for the purpose of discovering the tracks of intruders), a service road, a patrol road, and another fence. Its width ranges from thirty-five to seventy meters, depending on the terrain and the topography of the area. See H CJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, paras. 3–4 [2005] (Isr.) (describing the components of the separation fence), available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

13. *Report of the Secretary-General*, *supra* note 9, paras. 9–10.

14. See YEHEZKEL LEIN & ALON COHEN-LIFSHI, UNDER THE GUISE OF SECURITY: ROUTING THE SEPARATION BARRIER TO ENABLE THE EXPANSION OF ISRAELI SETTLEMENTS IN THE WEST BANK 5 (Zvi Shulman trans., Bimkom: Planner for Planning Rights & B'tselem: The Israeli Info. Ctr. for Human Rights in the Occupied Territories, 2005) (emphasizing that only "twenty percent of the barrier's route will run along the . . . Green Line"); see also *Report of the Secretary-General*, *supra* note 9, para. 8 ("If the full route is completed, another 160,000 Palestinians will live in enclaves . . .").

15. See *Report of the Secretary-General*, *supra* note 9, paras. 6–8 (emphasizing that the Israeli Cabinet's Decision 883 planned a Barrier route that deviated up to twenty-two kilometers from the Green Line and incorporated large segments of the occupied territories).

of the barrier.¹⁶ In most of these areas, the protrusions (or “loops”) necessitated the creation of Palestinian enclaves—walled “islands” where tens of thousands of Palestinians live—locked between the Israeli and Palestinian sides of the barrier.¹⁷ These areas became known as the “seam zone” and were controlled by the “permits regime.”¹⁸ According to the permits regime, movement of Palestinians in and out of their enclave is heavily regulated and requires specific permission from the Israeli military.¹⁹ The barrier was erected very tightly around the villages that were captured within the enclaves, cutting off the Palestinians who lived in them from their agricultural lands, schools, health services, extended families, and larger surroundings.²⁰ Entering and exiting these villages required soldiers to open the gates and passageways, which they did for very limited hours each day.²¹

In the more densely populated areas, such as East Jerusalem, concrete segments were installed, accompanied by watch-towers and surveillance mechanisms. In some areas of East Jerusalem, the wall actually tracked the Green Line.²² Yet, due to the annexation of East Jerusalem in 1967, the Palestinians of Jerusalem were accustomed to living in a unified space—rather than a separated one—with the Israelis. Now, the barrier suddenly tore the fabric which had been uninterrupted for decades.²³ It imported into the “united Jerusalem” the logic of separation that had, until then, been applied mostly to the West Bank.²⁴

16. See Stephanie Koury, *Why this Wall?*, in *AGAINST THE WALL*, *supra* note 1 at 48, 50 (stating that the barrier “weaves extensively into the West Bank . . . in order to accommodate Israeli settlements . . .”).

17. See *Report of the Secretary-General*, *supra* note 9, para. 12 (indicating that initial part of the barrier completed July 31, 2003 put approximately 56,000 Palestinians in enclaves); BINKOM: PLANNERS FOR PLANNING RIGHTS, *BETWEEN FENCES: THE ENCLAVES CREATED BY SEPARATION BARRIER III* (2006) (“The Separation Barrier, most of which lies beyond the Green Line, creates enclaves inhabited by some 250,000 Palestinians.”).

18. See BINKOM, *supra* note 17, at III (analyzing the seam zone’s negative impact on the lives of Palestinians). The seam zone is defined as follows:

The area between the Security Barrier and the border of Judea and Samaria, in areas that the Barrier is located inside Judea and Samaria defined as ‘closed military area’. In this area the permit requirement is implemented—meaning: the entry of those who are not residents is conditional upon permit holding. The definition of the ‘seam zone’ as a closed military area, whose entry is supervised, controlled, and requires a permit (excluding permanent residents) enables the army to contend with security threats from the region, and particularly penetration by terrorists and people who enter Israel illegally.

Isr. Def. Forces Military Advocate Gen. Corps, *Security and Criminal Law in Judea and Samaria*, <http://www.law.idf.il/776-3013-en/Patzar.aspx?SearchText=seam%20zone> (last visited Mar. 6, 2011).

19. BINKOM, *supra* note 17, at III.

20. *Id.*; *Report of the Secretary General*, *supra* note 9, paras. 24–27.

21. See *infra* pp. 317–18.

22. See *Report of the Secretary General*, *supra* note 9, para. 7 (“The part of the Barrier that roughly hews to the Green Line is along the northernmost part of the West Bank.”).

23. See BINKOM, *supra* note 17, at VIII (noting the disastrous impact that the barrier has had on the lives of East Jerusalem Palestinians).

24. Clearly, Jerusalem was only partly and de-jure united, while in reality a huge gap between East and West Jerusalem was maintained since the so-called unification of the city in June 1967. The vast majority of the Palestinians of East Jerusalem never accepted Israeli citizenship, do not vote in the municipal elections (though they have the right to do so), and receive poor municipal services as compared to the residents of the western parts of Jerusalem. See Menachem Klein, *Old and new walls in Jerusalem*, 24 *POLITICAL GEOGRAPHY* 53, 61, 64, 71 (2005) (describing nonphysical barriers among Israeli and

The barrier itself, however, was part of a larger spatial-physical restructuring of the West Bank, which began long before the government's decision to construct the barrier, and which far exceeded the barrier itself. Indeed, part of the creation of the barrier was a web of roads and highways connecting the Jewish settlements among themselves and with Israel proper; it also separated the Jewish settlements from the ever-shrinking Palestinian areas and from roads dedicated to the movement of Palestinians (roads which were given the name "fabric of life roads" since they were intended to allow Palestinians to maintain their "fabric of life" despite the fragmentation which the barrier and the enclaves created).²⁵ This was achieved physically by establishing a system of roads for each of the communities, with the Jewish communities enjoying the majority of the resources.²⁶ The roads were separated from one another by means of underpasses and overpasses, road blocks, and other physical elements, which made the movement between the road systems not only illegal, but also close to impossible.²⁷ Additionally, the construction of the roads—both those dedicated to the movement of Jews and those which were built to connect the increasingly-fragmented Palestinian areas—was done on lands confiscated from the Palestinians.²⁸

Furthermore, one might draw—as Eyal Weizman and as the ICJ do—a line connecting the Jewish settlement project in the West Bank to the erection of the barrier.²⁹ According to this narrative, the barrier should not be seen as distinct from the entire architectural and physical project of occupying the Palestinian territories.³⁰ Step by step, Israel has de-facto annexed Palestinian territories, turning them into a land reservoir for Jews to settle in. Yet this annexation process did not result in spatial integration between the occupying and the occupied. Rather, Israel's occupation took the form of spatial separation between the two groups, and an overwhelming domination of the Jews over the Palestinians, apparent in the superiority of the Jewish infrastructure over the Palestinian one, and in the absolute preference of Jewish free movement over that of the Palestinians.³¹ The barrier,

Palestinian inhabitants of Jerusalem).

25. See B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, *Restrictions on Movement: Alternative roads for Palestinians*, http://www.btselem.org/english/freedom_of_movement/alternative_roads_for_palestinians.asp (last visited Mar. 5, 2011).

26. See NEVE GORDON, *ISRAEL'S OCCUPATION* 132 (2006) (describing the purposes of the Israel bypass roads); Klein, *supra* note 24, at 59–60 (discussing how Jewish communities in East Jerusalem receive the majority of municipal resources).

27. See WEIZMAN, *supra* note 1, at 179–82 (2007) (describing the use of tunnels and bridges to create separate road networks for Israelis and Palestinians in the West Bank); GORDON, *supra* note 26, at 136–38 (stating that Israel has restricted movement along roads by prohibiting Palestinians' use, by requiring Palestinians to own permits, and by using military checkpoints to block traffic flows).

28. See GORDON, *supra* note 26, at 131–32 (emphasizing that roads were built in the occupied territories to facilitate Israeli settlement of Palestinian territory).

29. See WEIZMAN, *supra* note 1, at 163–64, 167 (noting the influence of West Bank settlers in manipulating the barrier's route to include their property). See also Yiftachel & Yacobi, *supra* note 1, at 139–41 (emphasizing that the barrier represents a new method of Israeli control and domination of Palestinian territory).

30. See Yiftachel & Yacobi, *supra* note 1, at 139–41 (describing the wall as part of Israel's system of "creeping apartheid" of the Palestinian territory).

31. See WEIZMAN, *supra* note 1, at 161, 164–67, 170–71 (detailing the physical mechanisms used to control Palestinian movement); see also LEIN & COHEN-LIFSHI, *supra* note 14, at 5 (detailing Palestinians' restriction of movement caused by the wall).

according to this story, is merely one more detail, albeit an important one, in the larger picture of “Israel’s architecture of occupation,” as Weizman calls it.³²

Profound spatial segregation between Jews and Palestinians, in this rendering, is the deep spatial structure of the occupied territories and it underlies many of Israel’s policies since the late 1970s. The establishment of new and separated Jewish settlements—rather than settling Jews in already-existing Palestinian towns—is one clear manifestation of this spatial form. Indeed, what seems to be an apparent fact—that Jews and Arabs live in completely segregated localities—is actually not obvious at all. It was both imaginable and plausible that Jews would move into existing Palestinian towns and spatially, even if not socially or politically, integrate with the local population. In some places in the occupied territories—like Hebron and parts of East Jerusalem—this has been the case, and various settler groups consistently argue that it is their “right” to be able to settle everywhere in the West Bank.³³ Yet these places remain an exception to the general form of spatial segregation, which is the rule in the occupied territories.³⁴ This separatist spatial form can be seen in the locations of Jewish settlements, in the segregated road system for Jews and for Palestinians, and in the road blocks scattered throughout the West Bank, which have been documented by various scholars.³⁵

Perhaps not surprisingly, many (though not all) of these critical assessments are made by architects, planners, and geographers. By focusing on the physical and material dimensions of Israel’s policies in the occupied territories, one can observe similarities between various strategies of spatial separation and segregation. It is, I argue, a matter of disciplinary bias (or perspective) which focuses more on the visual and on the spatial. But what remains invisible—perhaps made invisible by the focus on the aesthetics and physicality of the barrier—is the legal regime that is attached to these physical elements: a regime of permits and prohibitions, of confiscations and sanctions. I now turn to examine the legal dimension of the barrier.

B. *The Barrier’s Legality*

As physically imposing and materially oppressing as the barrier is, it is nonetheless a legal concept, a legal regime. These legal aspects of the barrier, I claim, are as important to understanding its functioning as are its material

32. WEIZMAN, *supra* note 1, at 6. Yiftachel and Yacobi describe a similar structural process, which they term “creeping apartheid.” See Yiftachel & Yacobi, *supra* note 1, at 139.

33. See Ulrike Putz, *The Settlements of Hebron: A Stumbling Block for Middle East Peace Talks*, SPIEGEL ONLINE (Sept. 23, 2010), <http://www.spiegel.de/international/world/0,1518,719203,00.html> (discussing the belief held by Hebron settlers that the land was given to Israel by God).

34. Spatial segregation between Jews and Arabs is also the rule within Israel proper. The vast majority of Jews live in predominantly Jewish localities and the same is true for Israeli-Palestinians. See Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, “Our” Women, and the Law*, 30 WOMEN’S RTS. L. REP. 479, 512–13 (2009) (“Israel is a highly segregated country. With the few exceptions of Haifa, Akko (Acre), Jaffa, and Jerusalem, there are no mixed cities in Israel. Even in the mixed cities, there are predominantly Jewish residential neighborhoods, and the interactions between Jews and Arabs take place mostly in the commercial parts of these towns.”).

35. See generally B’Tselem & Eyal Weizman, *Map of Israeli Settlements in the West Bank*, in A CIVILIAN OCCUPATION: THE POLITICS OF ISRAELI ARCHITECTURE 108, 108–19 (Rafi Segal, David Tartakover & Eyal Weizman eds., Babel Publishers 2000) (demonstrating the West Bank settlements’ segregation of the territory); GORDON, *supra* note 26, at 136–38 (describing the complex network of segregated roads and the use of checkpoints in the West Bank).

characteristics. First, the barrier is erected on the basis of authorized government decisions, administrative regulations, and military orders. Every piece of land confiscated, each section of erected wall, and every area declared a “special security zone”—these were all done in a highly legalized fashion according to legal chains of authorizations.³⁶ I am not arguing, of course, that some of the actions were not in violation of international law or contradictory to Israeli constitutional or administrative law. Indeed, even to the admission of the Israeli Supreme Court, some of the actions taken with regard to the barrier were in violation of Israeli administrative and constitutional law.³⁷ And as already noted, the ICJ determined that the construction of the barrier was entirely in violation of international law.³⁸ Yet, the state of Israel behaved as if it were bound by law. Every action was done in accordance with administrative procedures, under explicit authorization, and often received the approval of the Israeli courts which reviewed them.³⁹

What I emphasize in this section is a different point altogether. When I talk about the legal aspect of the barrier, I refer to the fact that rules, procedures, permits, prohibitions, and sanctions directed at Palestinians and Jews were as important to the function of the barrier as were the purely material elements of it. In this sense the barrier was a *legal barrier*; it erected legal boundaries between the occupied territories and Israel and within the occupied territories. The elaborate set of definitions, rules, procedures, and permits that accompanied the erection of the material barrier legitimized the concrete blocks, iron fences, barbed wires, watch towers, surveillance cameras, and gates.

Due to ambitions to include many Jewish settlements within the “Israeli” side of the barrier, it was clear that many Palestinians would become trapped between the Green Line to their west and the fences separating them from the Jewish settlements to the east, north, and south. Gates were built along the barrier to enable Palestinians trapped in enclaves to move in it out of their villages. It quickly became clear that these gates were heavily regulated and that using them required permits from the Israeli military. Permits were given stingily to Palestinians and only after a

36. See H CJ 2056/04 Beit Sourik Village v. The Government of Israel 58(5) PD 807, paras. 3–6, 8 [2005] (Isr.) (discussing the decision-making process to construct the separation barrier and the processes of land seizure), translated in 38 ISR. L. REV. 83 (2005), available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf.

37. The two most well known decisions are: H CJ 2056/04 Beit Sourik Village v. The Government of Israel 58(5) PD 807 [2005] (Isr.); H CJ 7957/04 Mara’abe v. Prime Minister of Israel 60(2) PD 477 [2005] (Isr.), available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf. I discuss these and some other decisions in great detail below. See *infra* Section II. See generally Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT’L J. CONST. L. 540 (2006) (discussing the Israeli Supreme Court’s jurisprudence regarding the barrier).

38. *Advisory Opinion, supra* note 7, paras. 149–53. See generally Aeyal M. Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 LEIDEN J. INT’L L. 393, 393–440 (2006) (discussing the *Advisory Opinion* and an argument regarding the wall’s illegality).

39. See Beit Sourik Village 58(5) PD paras. 20–32 (opinion of the Israeli Court of Justice affirming the legality of the separation barrier). See generally Victor Kattan, *The Legality of the West Bank Wall: Israel’s High Court of Justice v. the International Court of Justice*, 40 VAND. J. TRANSNAT’L L. 1425 (2007) (comparing the High Court of Justice’s repeated affirmation of the barrier’s legality to the International Court of Justice’s decision that the barrier violated international law).

complicated procedure that categorically classified anyone who wished to use the gates.⁴⁰

According to the initial declaration by the military commander given in October 2003, the seam zone—the area between the Green Line and the wall—was declared a “closed military area,” and entry was prohibited.⁴¹ Yet, at the same time, Israeli citizens were exempt from this prohibition. They were allowed to stay and move freely in this area, meaning that Jewish settlers could move between their settlements and the rest of the occupied territories as well as into Israel proper.⁴² Palestinians, however, were generally prevented from doing so since their mere presence in the area—even if they lived there for generations or owned lands there—became illegal with the declaration.⁴³ Hence, even Palestinians who simply wanted to continue living in their own houses needed to ask for permits to remain there.

Michael Sfard, one of the leading litigators in the campaign against the barrier, describes in great detail the elaborated bureaucratic legal mechanism which was erected—alongside the material barrier—in order to regulate the existence and movement of Palestinians in the seam zone.⁴⁴ The initial mechanism established four categories of persons, each of which was entitled to a different permit: 1) Israeli citizens, permanent residents, and those who are entitled to become Israeli citizens on the basis of the Law of Return (that is, Jews) were able to move completely freely in and out of the seam zone without any special permit; 2) tourists with Israeli travel visas were nominally prohibited from entering and staying in the zone but were given a general permit that did not require them to ask for a specific entrance permit; 3) Palestinians who worked in Israel proper and in the Jewish settlements in the West Bank were prohibited from leaving the seam zone but were given a general permit that enabled them to move in and out of their village for the purpose of work; 4) the rest of the Palestinians needed to obtain specific permits if they wanted to enter or leave this area.⁴⁵

Though some important changes were made in the permits regime following petitions submitted by human rights groups to the Supreme Court⁴⁶—for example, Jews entitled to become Israeli citizens were omitted from the general permit—the

40. See SHAUL ARIELI & MICHAEL SFARD, *HOMAH U'MEHDAL [THE WALL OF FOLLY]* 174–79 (2008) (Isr.) (detailing the horrors of the permits regime).

41. Israel Defense Forces, Declaration Concerning the Closure of Area No. s/2/03 (Seam Area) (5764-2003), available at <http://domino.un.org/unispal.nsf/0/c6114997e0ba34c885256ddc0077146a?OpenDocument>.

42. See H CJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, para. 7 [2005] (Isr.) (stating that Israelis could move freely in the seamline area and were not required to hold a permit), available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

43. See *id.* (stating that Palestinian residents' presence in the seamline area would be illegal if they did not possess a written permit from the military commander).

44. ARIELI & SFARD, *supra* note 40, at 174–79.

45. *Id.* at 177–78.

46. The first petition was submitted by HaMoked: Center for the Defense of the Individual in 2003, and the other by ACRI (Association for Civil Rights in Israel) in 2004. While the petitions resulted in the modification of the permits regime, none have been decided by the Court and they are still pending. See H CJ 9961/03 HaMoked: Center for the Defense of the Individual v. The Government of Israel (pending), available at http://www.hamoked.org/items/6653_eng.pdf; H CJ 639/04 The Association for Civil Rights in Israel v. Commander of the IDF Forces in Judea and Samaria (pending), available at http://www.hamoked.org/items/5431_eng.pdf.

gist of the regime remained in place.⁴⁷ Therefore, while the daily lives of Palestinians trapped within the enclaves became somewhat more bearable and less exposed to the most overt ethnic discrimination and to the military's arbitrariness in granting permits, the seam zone became a space where Palestinians were generally prohibited from entering and whose movements were closely monitored. On the other hand, Jews could freely live and move within these enclaves.⁴⁸

The legal walls that separated Palestinians from Jews and that fragmented the Palestinian territory were not entirely new and were not invented with the construction of the barrier. With the construction of the material barrier the legal walls increased in numbers, became more oppressive, exacerbated the internal Palestinian fragmentation process, and extended the legal separation that existed prior to the barrier. But, as I have argued before, since the beginning of the occupation, and with the spread and growth of the Jewish settlements in the West Bank, a regime of legal separation was established, creating distinct legal systems for the two communities, and maintaining their physical-spatial segregation.

This regime rested on several important principles. First, Jews and Palestinians reside in distinct geographical spaces, each of which is legally recognized as a locality with a distinct local government. Though it was often the case that Jews *chose* to live in all-Jewish settlements and Palestinians *chose* to remain in their traditional villages or towns, persons of both groups were legally encouraged and sometimes forced to live in localities that “belonged” to their communities. The following legal rules assisted in obtaining the strict residential segregation: a) many Jewish settlements were managed by cooperative associations with admittance boards, selecting the residents on the basis of their “fit” into the community. These communities obtained the land from the Israeli government and hence were permitted to discriminate legally;⁴⁹ b) several Jewish towns in the West Bank were built for the purpose of housing ultra Orthodox Jews in them. From these towns even secular Jews were legally excluded, let alone Palestinians;⁵⁰ c) the military commander in the occupied territories can declare certain areas as “closed military areas” and prohibit Jews from

47. The amending military orders defined Palestinians who lived in the seam zone as automatic recipients of permanent permits to stay in the seam zone. It defined Israeli citizens as entitled to a permit rather than completely exempt them from the general prohibition. See Declaration in the Matter of Closing Territory Number s/2/03 (seam area) (Judea and Samaria) (Amendment No. 1), 5764-2004; see also HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, para. 7 [2005] (Isr.) (discussing the amended declaration), available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/040795_70.a14.pdf.

48. See ARIELI & SFARD, *supra* note 40, at 178–81 (noting that the changes in the permits regime had little effect on the general prohibition and monitoring of Palestinian movement in the seam zone).

49. This legal rule also applies within Israel, where admittance boards often select the residents of small, collectivist localities. The practice is legal despite various attempts to challenge its constitutionality. These boards serve as a mechanism by which ethnic segregation between Arabs and Jews is created and maintained throughout Israel. Yishai Blank, *Brown in Jerusalem: A Comparative Look on Race and Ethnicity in Public Schools*, 38 URB. LAW 367, 388 n.70 (2006).

50. Though in the United States this governmental practice would have been deemed unconstitutional, the Israeli Supreme Court decided that creating localities for ultra-Orthodox Jews is only permitted in order to protect the unique lifestyle of this community. See HCJ 4906/98 Am Hofshi v. Ministry of Planning and Bldg. 54(2) PD 503, para. 3 [2000] (Isr.) (noting that previous cases have held that it is not per se illegal to allocate land to build a separate settlement for the Orthodox population to enable it to preserve its way of life if the policy is implemented in a manner consistent with constitutional and administrative law principles regarding equality), available at <http://elyon1.court.gov.il>.

entering them.⁵¹ Hence, though Jews can purchase private Palestinian lands wherever they want, including in Palestinian villages and towns, and then move and live there, there is a chance that such actions would cause the military to declare that Jews are prohibited from entering these areas. These declarations would be needed in order to prevent the clashes between Jews and the local population that would almost undoubtedly ensue.⁵²

Second, through the power of the military commander in the area, different legal principles were applied to each type of local government: while Palestinian villages and towns were subject to Jordanian law—the law applicable to them prior to the Israeli occupation—with respect to the Jewish settlements, the army commander adopted local government legislation that was almost identical to Israeli law.⁵³ This meant that the whole structure of local government law was entirely different for people who lived in Jewish settlements and for Palestinians. As a result, the various municipal services—education, welfare, water, sewage, and more—are provided according to nationality, and according to different funding schemes. It meant that the residential segregation was translated into segregation in schooling and other areas of daily interaction.⁵⁴

Third, Jews and Palestinians were subject to different legal systems not only territorially—as residents of localities which were subordinated to different laws—

51. B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, *Free Reign: Vigilante Settlers and Israel's Non-Enforcement of the Law*, at 20–21 (Oct. 2001) (stating that the military can declare an area closed and prevent anyone from entering or exiting), available at http://btselem.org/Download/200110_Free_Rein_Eng.pdf.

52. Indeed, in areas such as Hebron and East Jerusalem this is precisely the case. Radical right-wing settler groups are purchasing private homes—or producing documents which prove their historical ownership in them—and then settling in them, often causing tensions. These two examples are the exception to the rule, since the military has allowed Jews to settle in these predominantly Palestinian areas, thus causing incessant conflicts and producing a need to insert the practice of separation into these Palestinian areas. The local residents inside Palestinian towns suffer from Jewish settlements because their movement in such areas is gradually limited and prohibited, as the Hebron case demonstrates. The current struggle in the Palestinian neighborhood of Sheikh Jarakh in East Jerusalem is similar as it produces the same problem: once Jewish settlers enter a Palestinian area, protecting their security involves curfews, limitations on movement, and other oppressive measures towards the Palestinian residents of the area. See Howard Schneider, *In East Jerusalem, a defining battle over Palestinian ownership in Sheikh Jarrah*, WASH. POST, Feb. 14, 2010, at A19 (discussing fight between Palestinians and Israelis over Sheikh Jarrah), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/13/AR2010021303451.html>. See generally U.N. Office for the Coordination of Humanitarian Affairs Occupied Palestinian Territory, SHEIKH JARRAH (Aug. 2009) (discussing the humanitarian issues in Sheikh Jarrah and other neighborhoods of East Jerusalem), available at http://www.ochaopt.org/documents/ocha_opt_shiekh_jarrah_english_2009_08_15.pdf.

53. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 19, 61–62 (2002) (stating that the military commanders proclaimed that prevailing law would remain in force in captured areas and that the Israeli government refrained from applying the Israeli legal system in the West Bank and Gaza, allowing the pre-IDF legal system to prevail); see also *Land Expropriation & Settlements*, B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, *Land Expropriation & Settlements*, <http://www.btselem.org/English/settlements> (last visited Mar. 5, 2011) (discussing the application of Jordanian law in the occupied territories).

54. The structure was fairly similar to that which operated within Israel proper, where residential segregation between Arabs and Jews was quickly transformed into occupational and societal segregation. See Blank, *supra* note 49, at 373–74 (asserting that as a result of the legal background of the Israeli territory, the patterns of residential segregation between Jews and Arabs and the rich and the poor have been translated into structural segregation in the educational system).

but also since the military commander applied the entirety of Israeli law to Israeli citizens, while Palestinians were subjected to the law which existed prior to the Israeli occupation (Jordanian law in the West Bank).⁵⁵

These basic legal principles were, I argue, the building blocks of a *legal barrier* which was constructed between Jews and Palestinians, demarcating them and separating them. Initially, this barrier was far from being hermetic. On the contrary, in the early days of the occupation, despite the residential segregation, Palestinians and Jews—West Bank settlers as well as those living in Israel proper—interacted on a daily basis. Tens of thousands of Palestinians were commuting to work in Israel and in the settlements; Jews were commuting into Palestinian towns to shop.⁵⁶ With the exponential growth of Jewish settlements in the West Bank (flooding the territories with settlers and the ensuing policies of land confiscations, curfews, etc.), and with the intensification of Palestinian terror, the pressure to separate the Palestinians from the Jews within and outside of the territories increased. As a result, the regime became explicitly directed at separating the two groups not only in residence but also in daily movement. Thus, the legal and material separation between the two communities intensified. Hence, while in the 1980s the movement through the West Bank (and even the Gaza strip) was fairly easy, and the passage from the territories to Israel was almost seamless, during the late 1980s and the 1990s, movement became increasingly harder.⁵⁷ More and more closure orders on the territories—even without a material barrier—were issued, road blocks (“Machsomim”) were erected, and a legal regime of stricter separation between the two groups gradually appeared.⁵⁸ In this sense, the legal barrier, like the material one, should be seen not as the creation of something entirely new, but rather as an extension and intensification of the previously existing Israeli occupation regime.⁵⁹

That the barrier is a legal concept and a regime not exclusive to the security barrier is also evident from the fact that legal principles that developed around the barrier were carried over to other areas of the West Bank, where there was never an intention to construct a material wall. One example is the notion of a “special security zone.”⁶⁰ This military definition, used in reference to an area outside Jewish settlements closed for the movement of Palestinians, first appeared in the context of the enclaves that the barrier created.⁶¹ Once an area is declared as such, it means that Palestinians are prohibited from approaching a perimeter outside of Jewish

55. KRETZMER, *supra* note 53, at 19; see GORDON, *supra* note 26, at 23 (noting Jordanian rule in the West Bank prior to Israeli occupation).

56. See YEHEZKEL LEIN, B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, CIVILIANS UNDER SIEGE: RESTRICTIONS ON FREEDOM OF MOVEMENT AS COLLECTIVE PUNISHMENT 22 (2001) (“In the first half of 2000, 110,000 Palestinians were employed in Israel and the settlements, more than twenty percent of the Palestinian workforce. Eighty-three thousand of them live in the West Bank (not including East Jerusalem) and 27,000 in the Gaza Strip.”).

57. See *id.* at 4 (noting that movement of Palestinians in the occupied territories became increasingly more difficult from the start of the intifada).

58. See *id.* at 6–9 (discussing closures, checkpoints, and the implementation of mandatory permits for travel).

59. See Yiftachel & Yacobi, *supra* note 1, at 145 (arguing that the barrier is a “tangible manifestation of the ongoing urban policy characterizing Jewish-Palestinian relations in the city since 1967.”); WEIZMAN, *supra* note 1, at 163 (describing the barrier as a political tool of Israeli separation and domination).

60. WEIZMAN, *supra* note 1, at 177.

61. *Id.*

settlements, even if they own the lands there and need to use them for agricultural purposes, for instance.⁶² Originally, the stated reason for such a declaration was that it was required for security reasons—to distance terrorist activities from Jewish settlements—and it was part of the permits regime, since it was given as the reason for why in many areas in the seam zone fences were erected in a way which prevented Palestinians from approaching their lands.⁶³ Yet over time, this new legal definition was exported to other areas in the West Bank, thus enlarging the de-facto territory of Jewish settlements without legally expropriating Palestinian land, by merely declaring the area as a “special security zone.”⁶⁴

This point demonstrates how the legal aspect of the barrier is, like many other spatial policies in the occupied territories, a continuation—albeit an extreme one—of the logic of separation between Palestinians and Jews. Therefore, this logic extends from the barrier to areas in which there is no security barrier through more extreme forms of spatial separation, such as those achieved by defining areas as special security zones. Hence the barrier is not just a material construction nor is it just a set of rules, permits, prohibitions and sanctions. It is, no less, an idea, an ideology. It is the ideology of separation—spatial, legal and political—between the two national communities. As ideology, the barrier is a hybrid creature fusing materiality and legality.

C. *The Barrier’s Hybridity: Legality and Materiality, Old and New*

As became clear from the description in the previous sections, the barrier is a material and legal manifestation of a deeply engrained logic that is based on spatial and legal separation between Jews and Palestinians, despite the fact that in reality there is more mixing and friction caused by the massive wave of Jewish settlers moving into the occupied territories.⁶⁵ The fact that the barrier is not just a physical construction nor merely a set of legal rules (closures, permits, prohibitions, etc.) but rather a hybrid of these two aspects—which can be traced back to older spatial practices and legal principles in the territories—gives rise to a fundamental question: What, then, is unique about the barrier? Is it worse than many other practices of Israel in the occupied territories? If not, why has it attracted so much attention, and how has it become such an exceptional object of academic contemplation and activist opposition?

In recent years, the construction of separation walls which resemble the Israeli barrier—all physical obstacles that demarcate national boundaries and obstruct the passage of certain persons and various objects from one country into the neighboring one—has become an object of study for scholars in a plethora of disciplines throughout the social sciences and the humanities.⁶⁶ Political scientists,⁶⁷ architects,⁶⁸

62. *See id.* (“The military and the settlements’ civil militias may, without warning, shoot-to-kill any Palestinian who happens to stray into these zones.”).

63. *See id.* at 163, 166 (asserting that the proposed purpose of the barrier was for security concerns but that the wall became a political means of separation and dominance).

64. B’TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, ACCESS DENIED: ISRAELI MEASURES TO DENY PALESTINIANS ACCESS LAND AROUND SETTLEMENTS 7–8 (Sept. 2008).

65. For a similar point *see* Gross, *supra* note 38, at 437–39 (describing the barrier as being a physical structure that also embodies the structure of Israeli occupation).

66. Many scholars discuss internal walls—walls that are built within the same country, and separate

geographers,⁶⁹ philosophers,⁷⁰ economists,⁷¹ sociologists, anthropologists,⁷² cultural critics,⁷³ and lawyers⁷⁴ have turned their gaze with puzzlement to this old-new phenomenon, and have investigated its impact on our world and its meaning. Students of these various disciplines have tried to evaluate the costs and benefits that such walls have on the economy, society, aesthetics, health, environment, and rights of the impacted countries and their inhabitants.

It is crucial to note in this context, that despite the fact that a majority of these cross-disciplinary studies concluded that the barrier was harmful and destructive, there is still an ongoing debate—within each discipline—regarding its benefits and also regarding what exactly is problematic about it. For example, an Israeli landscape architect argued that the challenge that the barrier posed was the need to integrate it into the landscape and to its surroundings as well as to provide solutions to animals whose habitat was destroyed by the barrier.⁷⁵ Another Israeli architect argued that the barrier looked “clumsy and ugly” since “no architect [had] been employed on the project of the wall.”⁷⁶ Experts on security matters were also debating whether the barrier was required, and what was the exact problem with it: its route? Its design? In the next chapter I will show how these internal-disciplinary debates as regards the harm of the barrier impact the legal discussion and rulings on the matter.

Attempts to assess the novelty of these walls is no less important than these empirical and consequentialist questions. We must also point to their distinctness vis-à-vis walls that have existed throughout human history, and to interpret them as

various locations within the country—in the same context as inter-state walls. While I understand the impetus to do so, there are crucial differences between internal and external walls, which are especially important in the context of the Israeli barrier. They have to do with the legal regime that regulates them. See BROWN, *supra* note 6, at 19 (discussing “walls within walls” in the Southwest United States, Israel, and Morocco).

67. See generally BROWN, *supra* note 6 at 7–42 (arguing that the decrease in state sovereignty since the collapse of the Soviet Union has led to an increase in the building of walls); GORDON, *supra* note 26, at 208–09 (arguing that Israel’s control of Palestinian movement after Israeli troops withdrew from Palestinian territory represented a break with tradition).

68. See generally WEIZMAN, *supra* note 1, at 161–63 (discussing the architectural conception of the Israel-Palestine Wall); Lindsay Bremmer, *Border/Skin*, in *AGAINST THE WALL*, *supra* note 1, at 122–37 (discussing, as a practicing architect, the barriers in Johannesburg, South Africa).

69. See generally Yiftachel & Yacobi, *supra* note 1, at 138–56 (discussing the political geography of the separation barrier); Klein, *supra* note 24, at 53–76 (same).

70. See generally Ariella Azoulay & Adi Ophir, *The Monster’s Tail*, in *AGAINST THE WALL*, *supra* note 1, at 2–27 (criticizing the barrier’s construction from a philosophical standpoint).

71. See generally Anita Vittulo, *The Long Economic Shadow of the Wall*, in *AGAINST THE WALL*, *supra* note 1, at 100–21 (discussing the economic effects of the barrier).

72. See generally Dean MacCannell, *Primitive Separations*, *supra* note 1, at 28–46 (discussing “the wall as a cultural artifact and as symptomatic of specific psychic formations”).

73. See generally Avner Bornstein, *Military Occupation as Carceral Society: Prisons, Checkpoints, and Walls in the Israeli-Palestinian Struggle*, 52(2) *SOCIAL ANALYSIS* 106, 124–25 (2008) (discussing how prisons, checkpoints, and walls have formed the identities of both Israelis and Palestinians).

74. See generally Gross, *supra* note 38, at 393–440 (discussing the legality of the Israel-Palestine barrier).

75. Margalit Soukoy, *The Seam Line—‘Seam’ or ‘Line’?*, 22 *LANDSCAPE ARCHITECTURE* 15, 16 (2006) (Hebrew).

76. WEIZMAN, *supra* note 1, at 161 (quoting architect Gideon Harlap’s speech at the 2004 annual convention of Israel’s Architect Association).

signs of a radically different politics and as markers of our unique historical age.⁷⁷ The Israeli barrier was no exception to this dilemma, albeit somewhat unique, given the fact that it was erected not between two sovereign states, but between a state and a territory it occupies (or, in fact, within the area it occupies).

As the Israeli case demonstrates, the barrier is hardly new or entirely exceptional. First, it resembles other, already existing tactics of occupation, separation and segregation. Azoulay and Ophir argue, for example, that the wall is “one among several instruments used by the Israeli ruling apparatus in the occupied territories whose function must be understood in the context of a structural and historical analysis of the modus operandi of this apparatus.”⁷⁸ While they place the beginning of this stage in the Israeli occupation in 1991 with the closure imposed on the territories by the Shamir government,⁷⁹ other scholars have traced the barrier’s beginning to an earlier or a later stage of the occupation.⁸⁰ Second, some argue that the barrier is yet another manifestation of the modern principles of national sovereignty—a state is entitled to protect its national borders from security threats, invasion, and other unwanted entry.⁸¹ Therefore, there is nothing novel about contemporary walls since states have always defended their territories, using various means including fences, walls and gates. Obviously, this argument is flawed with respect to the Israeli barrier, since it was not constructed on its borders, but within the occupied territories. Yet, as I shall argue in the next section, the “sovereigntist” idea had far-reaching consequences on the legal campaign against the barrier.⁸² Third, the barrier is not new since it’s merely an expression of the basic liberal idea of the division into separate spheres: private/public, religious/secular, in/out, and so on. Like fences that demarcate one’s home and one’s property, today’s walls merely reflect the existing political and legal order.⁸³

Yet there are new aspects to the barrier, which mark it as a contemporary phenomenon. These aspects include the era of globalization, the increased threats stemming from globalization, and the age of growing surveillance and risk management. First, even if prior to the barrier, states such as Israel, were using various techniques in order to prevent unwanted persons from entering, the barrier is a fencing-out technology that is nearly *a far more perfect enforcement mechanism* of the prohibition. Indeed, one of the most perplexing and unique aspects of the barrier is that it potentially allows for full and complete enforcement of the law. A person can no longer take the risk of crossing the border and being caught by the military or

77. See BROWN, *supra* note 6, at 19–28 (arguing that walls are a response to states’ waning sovereignty caused by globalization).

78. Azoulay & Ophir, *supra* note 1, at 2–3.

79. *Id.* at 12–14.

80. As I already noted, some scholars argue that the entire Israeli occupation of the West Bank is marred with a spatial policy—and an ideology—of separation, segregation and domination. See, e.g., WEIZMAN, *supra* note 1, at 161–62 (discussing the barrier as a means to separate Israelis from Palestinians); Yiftachel & Yacobi, *supra* note 1, at 139–40 (mentioning the contradictions between Israel’s oppression and Palestine’s violence); GORDON, *supra* note 26, at 212 (stating that a barrier in the West Bank was a separation policy).

81. See WEIZMAN, *supra* note 1, at 162 (noting that “the very essence and presence of the Wall is the obvious solid, material embodiment of state ideology and its conception of national security”).

82. See *infra* note 156 (discussing the ideological framework defining sovereignty).

83. See Thomas Hansen’s article in this Volume, Thomas Hansen, *From Culture to Barbed Wire: On Houses and Walls in South Africa*, 46 TEX INT’L. L.J. 345 (2011) (discussing the ways in which walls of modern houses produce certain kinds of people and dispositions).

the police; the wall simply prevents him from taking that risk by preventing such an action altogether. Second, the barrier is not passive like more traditional walls, but constantly watches, observes, and surveys. It is equipped with surveillance technologies such as cameras, sensory devices, and smart watch towers which operate according to the logic of the panopticon, giving one the feeling of being constantly watched and observed, even if in reality there is no one watching.⁸⁴ This feeling of being watched all the time, even if not entirely new or unique to the barrier is unique when applied to large populations in a routine fashion. Third, while the barrier is actively watching and monitoring threats, it also hides these threats from the protected population, thus creating an unequal relationship of watching without seeing. Those who are behind the barrier are monitored and surveyed yet not really seen, except as targets.⁸⁵ Fourth, the barrier should be seen as part of a global trend of securitization and risk management. Notwithstanding the fact that the barrier was erected against a real threat of ongoing terror attacks against Israel, it is also directed against hypothetical risks. The barrier is part of a global trend of fearing and averting imagined catastrophes at an ever growing price.

The barrier, therefore, is a continuation of past practices, a manifestation of pre-existing ideologies and concepts, but also a novel creature. It is an expression of new ideas about control and a result of new technologies. It is a hybrid entity, comprised of material as well as legal elements. As I argue in the next section, the hybrid nature of the barrier and the debate over what makes it unique, the harm it is causing and its advantages have had an impact on the legal campaign against the barrier and on the outcomes resulting from the campaign. Even more important than these disagreements, however, is the consensus regarding the concept of sovereignty, which holds together the legal and material aspect of the barrier. As I demonstrate below, it is actually the idea of sovereignty which formalizes the inseparability of the legal and the material, and which structures and curbs the arguments that could be taken against the very existence of the barrier.

II. THE JURISPRUDENCE OF THE BARRIER

I now turn to examine the jurisprudence of the barrier, which is still evolving as the campaign against the barrier continues.⁸⁶ I focus on the limitations of the local campaign, pointing to some of the reasons it took the specific form it did, and trying to assess some of its unintended consequences. More concretely, I try to answer why the legal campaign against the barrier attacked the route of the barrier and the concrete arrangements of the permit regime, rather than the entire project of the barrier, and the implications of this approach. Before I discuss these questions, I will

84. While the technology of the panopticon was invented by Jeremy Bentham, it was Michel Foucault who identified it as pervasive in contemporary institutions such as militaries, prisons, and schools. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195–202* (Alan Sheridan trans., Vintage Books 1979) (1977) (discussing the role of the panopticon). For a discussion of the barrier as a panoptic-carceral mechanism see Bornstein, *supra* note 73, at 107, 121–23 (discussing Palestinians' suffering caused by the barrier).

85. Ruchama Marton & Dalit Baum, *Transparent Wall, Opaque Gates*, in *AGAINST THE WALL*, *supra* note 1, at 212–23.

86. This is so because the Supreme Court did not hesitate, in a number of cases, to instruct the state to dismantle and remove parts of the wall that were built in violation of the law. See discussion *infra* notes 87–90 (discussing cases about the wall and the Supreme Court's hesitation to enforce its removal).

describe the evolution of the legal challenges raised to the Israeli Supreme Court and the jurisprudence the Court developed in dealing with these challenges.

A. *The Evolution of the Legal Challenges Against the Barrier*

Since the barrier impacts so many individuals, the legal challenges against it came from many directions and represented differing and often competing interests. At first the petitioners were mostly Palestinians and a variety of human rights groups.⁸⁷ Their main goals were to change or relax the permit regime,⁸⁸ to change the arrangements of the gates serving Palestinians living in the enclaves,⁸⁹ to minimize land confiscations,⁹⁰ and to remain on the “Palestinian” side of the barrier (rather than be trapped within an enclave on the “Israeli” side).⁹¹ As construction of the barrier continued, and as the Court’s jurisprudence evolved, petitioners with altogether different agendas filed suit.⁹²

The second wave of petitioners included Palestinians who actually requested to be included in the Israeli side of the fence after the proposed track of the barrier was threatening to keep them on the Palestinian side.⁹³ There was more disagreement about this position among Palestinians since it meant that more Palestinian land—rather than less—was to be de-facto annexed to Israel. The petitions revealed the diverse Palestinian interests and the terrible choice that the construction of the barrier forced many Palestinians to make. While for some Palestinians the most important thing was to maintain their close contacts with the rest of the Palestinian community—their families, their fields, and various services they received in the

87. The dominant human rights groups who became involved in the campaign, and who later became repeat players were the following: Association for Civil Rights in Israel (ACRI), HaMoked: Center for the Defense of the Individual, Yesh Din: Volunteers for Human Rights, Bimkom: Planners for Planning Rights, and Physicians for Human Rights (PHR).

88. HCJ 9961/03 HaMoked: Center for the Defense of the Individual v. The Government of Israel [pending] 2 (seeking an interlocutory order whereby declaration and orders requiring Palestinians to own permits would not come into effect), *available at* http://www.hamoked.org/items/6653_eng.pdf; HCJ 639/04 The Association for Civil Rights in Israel v. The Military Commander of Judea and Samaria [pending] 1–3 (petitioning for the court to order respondents to appear and show cause why they have not revoked rules and regulations regarding Palestinian permits in the seam zone), *available at* http://www.hamoked.org/items/5431_eng.pdf.

89. *See* HCJ 11344/03 Fayeze Salem v. The IDF Commander in Judea and Samaria para. 7 [2009] (Isr.) (unpublished) (petitioning for the court to order respondents to appear and show cause of why permanent crossing points in the separation fence are not opened twenty-four hours a day), *available at* <http://elyon1.court.gov.il/files/03/440/113/n59/03113440.n59.htm>.

90. *See* HCJ 2056/04 Beit Sourik Village v. The Government of Israel PD 58(5) 807, paras. 9–11 [2005] (Isr.) (petitioners wishing to minimize the land seizure because it will affect their way of life), *translated in* 38 *Isr. L. Rev.* 83 (2005), *available at* http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf.

91. *See id.* paras. 9, 30 (petitioners arguing that the barrier should heed the Green Line because the route into Palestinian territory would disproportionately disrupt their lives).

92. The analysis of the various waves of petitions partially tracks Chief Justice Barak’s description of the various types of petitions submitted to the Court in HCJ 5488/04 Local Council Al-Ram v. The Government of Israel para. 1 (2006) (Isr.) (unpublished), *available at* <http://elyon1.court.gov.il/files/04/880/054/A59/04054880.a59.htm>.

93. *See* HCJ 2687/06 Arij Rabi’a v. The IDF Commander in Judea and Samaria paras. 1–2 [2006] (Isr.) (unpublished) (petitioning for the court to order the respondent to correct security fence’s planned route so that the petitioner’s hotel would be located on the Israeli side), *available at* <http://elyon1.court.gov.il/files/06/870/026/A02/06026870.a02.htm>.

Palestinian territories—for others it was actually more important to remain on the Israeli side. This was so since some of them had strong economic ties with Israelis (Jews as well as Arabs) and they depended on Israeli clients, Israeli services, and, due to the complicated status of Jerusalem, had a strong interest to maintain linkage with the Palestinian areas of Jerusalem which remained on the Israeli side of the barrier.⁹⁴

Next to join were Jewish settlers who wished to change the route of the barrier so it would include their settlements on the Israeli side, since the planned route left them on the Palestinian side, supposedly unprotected by the barrier.⁹⁵ Among these were commercial petitioners and real estate firms who wished to develop projects in Jewish settlements and who knew that once included on the Israeli side of the barrier their property values would increase, making their projects far more profitable.⁹⁶ Other settlers challenged the path of the barrier since it came too close to their settlements. They wanted it moved further into Palestinian territory.⁹⁷ Settlers who were left outside the barrier demanded that special pathways connecting their settlements with Israel be built.⁹⁸ As I shall explain later, many of the arguments that were originally designed to assist the Palestinians in challenging the route were used at this stage by settlers. Like the Palestinians, settlers argued that the barrier was

94. See H CJ 2687/06 Arij Rabi'a v. The IDF Commander in Judea and Samaria paras. 1–2 (discussing petitioner's claim that they are reliant on Israeli clients and services for their business); see also Rassem Khamaisi, *The Separation Wall around Jerusalem/al-Quds: Truncating the Right to the City of the Palestinians*, 43rd ISOCARP Congress 2007, at 12 (describing the movement of Palestinian-Israelis back into West Jerusalem as a result of the barrier).

95. See H CJ 3680/05 The Committee of the Settlement of Tene v. The Prime Minister of Israel paras. 1–2 [2006] (Isr.) (unpublished) (petitioning for the court to order the respondents to change the planned route of the barrier to include the northern part of an Israeli settlement that respondents intended to leave on the Palestinian side of the barrier), available at <http://elyon1.court.gov.il/files/05/800/036/A13/05036800.a13.htm>; H CJ 399/06 Susi' – An Agricultural Cooperative for Community Settlement Ltd. v. The Government of Israel paras. 2–4 [2006] (Isr.) (unpublished) (petitioning to change the route of the barrier to include the northern part of an Israeli settlement on the Israeli side of the barrier), available at <http://elyon1.court.gov.il/files/06/990/003/A04/06003990.a04.htm>.

96. See H CJ 2645/04 Fares Ibrahim Nasser v. The Prime Minister of Israel paras. 17–18 [2007] (Isr.) (unpublished) (petitioning for the barrier's planned route to include a settlement on the Israeli side of the barrier in order to secure the settlement's future development), available at <http://elyon1.court.gov.il/files/04/450/026/N54/04026450.n54.htm>; H CJ 1361/08 Filadendrum 12 Ltd. v. The IDF Commander in Judea and Samaria para. 10 [2008] (Isr.) (unpublished) (explaining that the barrier's planned route will harm the economic interests of some property holders if the property holders' land is not on the Israeli side of the barrier), available at <http://elyon1.court.gov.il/files/08/610/013/n05/08013610.n05.htm>.

97. See H CJ 426/05 The Council of the Village of Bidou v. The Government of Israel para. 7 [2006] (Isr.) (unpublished) (petitioning for the barrier to go farther into Palestinian territory because the settlement's residents were not given adequate security due to the proximity of the barrier to the settlement), available at <http://elyon1.court.gov.il/files/05/260/004/A29/05004260.a29.htm>; H CJ 11651/05 Beit Aryeh Local Council v. The Government of Israel para. 4 [2006] (unpublished) (petitioning that the route be changed because the proximity of the barrier to a school and a road would endanger school children and commuters to potential terrorist attacks), available at <http://elyon1.court.gov.il/files/05/510/116/A05/05116510.a05.htm>; H CJ 2645/04 Fares Ibrahim Nasser v. The Prime Minister of Israel para. 8 (2007) (Isr.) (unpublished) (explaining that there is a need of several hundred meters between the fence and the houses of a settlement for security purposes).

98. H CJ 6379/07 The Council of the Settlement of Dolev v. The IDF Commander in Judea and Samaria para. 12 [2009] (Isr.) (unpublished) (holding that the Minister of Defense and other respondents' decision not to build an access road for 4,000 settlement residents was reasonable and proportional since the security situation made travel of the road impossible), available at <http://elyon1.court.gov.il/files/07/790/063/s22/07063790.s22.htm>.

destroying their “fabric of life” and that its route should be changed in order to protect the integrity of the communities and their linkage to their greater political unit—Israel.⁹⁹

Soon after, Israeli-Palestinians—Palestinians who are citizens of Israel who chose to live in the eastern neighborhoods of Jerusalem—joined the waves of petitioners and Palestinians who are Israeli residents requested that their neighborhoods be included in the Israeli side of the barrier, so as not to be cut off from the rest of Israel.¹⁰⁰ These petitions reveal another layer of the complexities (not to say pathologies) of the spatial configuration of the Israeli occupation. In June 1967, East Jerusalem was annexed to Israel—an annexation which did not receive international acknowledgment but which was recognized internally—and its residents were offered Israeli citizenship.¹⁰¹ While most of the Palestinians have rejected this offer, they are still permanent residents of Israel, they are subject to Israeli law, and they are subordinated to the municipal jurisdiction of Jerusalem.¹⁰² They receive municipal services from Jerusalem—though poorer in quality—and are thus often dependent on access to the western parts of the city.¹⁰³ Over time, new Palestinian neighborhoods were constructed to the east of the annexation line, attracting Palestinians from other areas in the West Bank as well as East Jerusalem Palestinians forced to move out of the Jerusalem municipal lines due to the extreme housing shortage in East Jerusalem.¹⁰⁴

An external viewer could hardly tell which Palestinian neighborhoods are part of Israel and which are part of the occupied territories because they are territorially contiguous and economically and socially tied to each other. Yet they are subordinated to entirely different legal systems, and their residents are divided into “protected persons” (the occupied population living under military command), permanent residents of Israel, and some Israeli citizens (Palestinian-Israelis who

99. See discussion *infra* notes 130–133 and accompanying text.

100. See HCJ 5488/04 Local Council Al-Ram v. The Government of Israel paras. 32, 40, 46 [2006] (Isr.) (unpublished) (questioning the legality of the security barrier, the court notes that the question is complicated by the fact that many Israeli citizens are also “protected persons” that wish to remain on the Israeli side of the barrier in Jerusalem), available at <http://elyon1.court.gov.il/files/04/880/054/A59/04054880.a59.htm>; HCJ 6193/05 The Committee of the Residents of Ras Hamis v. The Authorized Commission According to the Property Seizure Arrangement Act paras. 2, 5 [2008] (Isr.) (unpublished) (petitioning the court to divert the route of the barrier on behalf of over 20,000 Palestinian permanent residents of Israeli, so that their refugee camp, located north of East Jerusalem, is on the Israeli side of the barrier), available at <http://elyon1.court.gov.il/files/05/930/061/n15/05061930.n15.htm>.

101. See Klein, *supra* note 24, at 54 (discussing Israel’s annexation of East Jerusalem in 1967); Elodie Guego, ‘Quiet Transfer’ in East Jerusalem Nears Completion, 26 FMR 26, 26 (2006) (stating that “[t]he international community, led by the UN, has continuously denounced [Israel’s] unilateral annexation” of East Jerusalem).

102. See Klein, *supra* note 24, at 61 (“Israeli citizenship was offered to [Palestinians], but only 2700–5000 accepted.”); Guego, *supra* note 101, at 26 (noting that few Palestinians accepted Israeli citizenship).

103. See Klein, *supra* note 24, at 64, 66, 70 (discussing East Jerusalem Palestinians’ reliance on West Jerusalem for municipal services, such as health and sanitation).

104. The housing shortage in East Jerusalem is a result of, among other things, residential patterns, an ongoing refusal of planning authorities in Jerusalem and Israel to grant building permits in East Jerusalem, and of ownership disputes and problems caused by the fact that many Palestinian property owners left Jerusalem during the 1948 war and therefore their property was confiscated by the state. The Palestinians—often relatives of Palestinian refugees—do not acknowledge the legitimacy of this confiscation and therefore make attempts to build on these contested lands. See Klein, *supra* note 24, at 63 (discussing the illegal building of Palestinians in and around East Jerusalem).

chose to live there for various reasons such as marriage).¹⁰⁵ Indeed, the entire Jerusalem area is a liminal zone, partly belonging to the Palestinian territories, partly to Israel. It represents the difficulty—some would say impossibility—of truly and finally separating Israel from Palestine.

The barrier in Jerusalem was built along a route which sometimes tracked the Green Line, sometimes tracked the municipal line, and sometimes disregarded both. This created a chaotic situation. Some East Jerusalem neighborhoods were on the Israeli side of the barrier while some were left on the Palestinian side.¹⁰⁶ Especially for the residents of these areas, the choice was impossible. In many of those neighborhoods, the residents are divided between Palestinians, Israeli residents, and Israeli citizens. Most of them have ties and interests on both sides of the barrier. Here too, the Court had to decide which interests and which rights were to prevail.

B. *The Jurisprudence of the Barrier*

Over the past seven years the Israeli Supreme Court developed a fairly elaborate jurisprudence regarding the barrier. It is comprised of four main principles, each of which rests on a choice made between two sides of well-known conceptual legal dichotomies. A different choice in each of these dichotomous concepts might have resulted in different concrete conclusions (though not necessarily so). In the following sections I specify these principles.

1. Proportionality/Authority

Probably one of the most important principles that the Israeli Supreme Court established early in the *Beit Sourik* case was that Israel had the legal *authority* to construct a separation barrier.¹⁰⁷ This was so despite the fact that its route passed through the occupied territories and required the confiscation of private Palestinian lands. However, the Court held that some parts of the barrier were *disproportionally* infringing on the rights and interests of the Palestinians affected by it, and therefore had to be removed.¹⁰⁸ The dichotomy between authority and discretion, and the general principle that Israel had the legal authority to construct the barrier regardless of the fact that it passed through the occupied territories set the tone for the entire legal campaign against the barrier. The reason that the military commander has authority to do so, the Court opined, is that his actions were not based on political reasons—i.e., a desire to annex Palestinian lands to Israel—but instead rested on

105. See *East Jerusalem: Legal Status of East Jerusalem and Its Residents*, B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES (discussing the legal status of Palestinians in East Jerusalem), http://www.btselem.org/english/Jerusalem/Legal_Status.asp (last visited Mar. 8, 2011).

106. *Separation Barrier: Route of the Barrier around East Jerusalem*, B'TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, http://www.btselem.org/english/Separation_Barrier/Jerusalem.asp (last visited Jan. 29, 2011).

107. H CJ 2056/04 Beit Sourik Village v. The Government of Israel 58(5) PD 807, paras. 27–32 [2005] (Isr.), translated in 38 ISR. L. REV. 83, 98–102 (2005), available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf.

108. *Id.* paras. 27, 28, 32.

security grounds, and thus undoubtedly within the authority, perhaps even the duty of the military commander of an occupied territory.¹⁰⁹

Indeed, some critics argue that this basic principle prevented any real chance of combating the barrier effectively.¹¹⁰ From then on, these critics opined, the legal battle against the barrier was bound to be lost or, at most, the principle would serve tactically as an obstructive mechanism, a rearguard device to slow down the pace of the construction of the barrier.¹¹¹ The Israeli Court was never willing to reconsider this principled position. In the *Mara'abe* case,¹¹² soon after the ICJ published its Advisory Opinion, the Israeli Court made an explicit effort to reject the claim that Israel had no authority to construct the barrier—the opposite conclusion to that of the ICJ.¹¹³ The Court did so even though it was clearer this time—more so than in the *Beit Sourik* case—that the barrier also protected Jewish settlements. The Court did not alter its position even after it was brought to its attention that some parts of the barrier not only defended *existing* settlements but also their *future development* plans.¹¹⁴ While the Court deemed that route to be politically motivated and therefore illegal, it did not change its basic ruling on the authority question: the military was authorized to construct the barrier since it was generally a security-motivated endeavor.¹¹⁵

The wedge that the Court used to delve into the legality of the barrier was, therefore, through the doctrine of proportionality, which requires that the means taken to achieve a legitimate goal be “proportional”: rationally related to the goal; minimally infringing on rights of individuals affected by the means; and that the harm inflicted on the individuals be “proportional” to the good stemming from the means.¹¹⁶ This test enabled the Court to minutely dissect every section of the barrier

109. *Id.*

110. See Gross, *supra* note 38, at 433 (“[T]he 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.”). For a favorable analysis of the Court’s ruling, see also Barry A. Feinstein & Justus Reid Weiner, *Israel’s Security Barrier: An International Comparative Analysis and Legal Evaluation*, 37 GEO. WASH. INT’L L. REV. 309, 390–451 (2005).

111. This is the position made by the Head of the Legal Department of ACRI, Adv. Dana Alexander. According to Alexander, once the Court rejected the claim that Israel had no authority to construct the barrier within the occupied territories, the Palestinians and human rights groups that represented them were forced to lead rearguard battles. Interview with Dana Alexander, Head of Legal Department, ACRI (Aug. 8, 2010) (on file with author).

112. HCJ 7957/04 *Mara’abe v. Prime Minister of Israel* 60(2) PD 477, para. 19 [2005] (Isr.) (“Our conclusion is, therefore, that the military commander is authorized to construct a separation fence . . .”), available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

113. See *Advisory Opinion, supra* note 7, paras. 120–21. For a comprehensive analysis of the ICJ Opinion see generally Gross, *supra* note 38; Ian Scobbie, *Words My Mother Never Told Me: In Defense of the International Court*, 99 AM. J. INT’L L. 76 (2005).

114. See HCJ 2732/05 *Head of the City Council of Azoun, Abd Elatif Khassin v. The Government of Israel* paras. 4–6 [2006] (Isr.) (unpublished) (suspending the declaration of invalidity of the eastern route of the barrier after complaint by petitioner that the boundary was not decided for security reasons but rather to expand the settlement area), available at <http://elyon1.court.gov.il/files/05/320/027/n18/05027320.n18.htm>.

115. See *id.* para. 6 (declaring section of the barrier illegal); see also HCJ 2056/04 *Beit Sourik Village* 58(5) PD, para. 27 (establishing that the military has the authority to build the barrier so long as it is not for political reasons).

116. See HCJ 2056/04 *Beit Sourik Village* 58(5) PD, paras. 36–41 [2005] (Isr.) (establishing doctrine of proportionality), translated in 38 ISR. L. REV. 83 (2005), also available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf; HCJ 7957/04 *Mara’abe* 60(2) PD, para. 30 (citing

and examine the ratio between the security it promotes and the burden it puts on the individuals impacted by it.¹¹⁷ In examining the proportionality of the barrier project, the Court measured the harm to the Palestinians using international humanitarian law and their rights as protected persons under the law of belligerent occupation.¹¹⁸

Despite the hopes of litigants and commentators that the Israeli Court would declare that the military commander had no authority to construct the barrier, it was somewhat naïve and legally unrealistic to hope that out of all the actions that were taken by Israel over the past twenty years in the occupied territories—closures, road blocks, and, most importantly, the establishment of hundreds of Jewish settlements populated by over 200,000 settlers, all in the name of “security” and all found by courts to be within the authorization of the occupying force—the construction of a barrier would be deemed unauthorized.¹¹⁹ Such expectations relied on a view of “wall exceptionalism”—as if the barrier was so exceptional that the Court would finally see that Israel was not motivated by security considerations but by a desire to annex Palestinian lands. As I argued earlier, while the barrier is indeed unique in some respects, it is a direct continuation of many past Israeli policies, all approved by the Court over the years. It is no surprise—legally speaking—that the construction of the barrier was also deemed authorized.

I argue that the barrier is in fact much more plausibly connected to security considerations than the settlements, also originally approved as necessitated by military needs and security. Indeed, while the route of the barrier is dubious, and is clearly influenced by political considerations (at least in some locations, as the Court found on numerous occasions), there is little doubt that it is also aimed at obstructing terrorist attacks. The huge settlement enterprise, on the other hand, can hardly be seen this way, yet it is still legally justified, at least formally, by the fiction of its security value, as well as by its “temporary” nature, which I explain in the next subpart.

2. Transiency/Permanence

In the many cases handed out by the Court, the transient nature of the barrier was repeatedly emphasized. The barrier, opined the Court—despite its appearance as a permanent and unmovable object—is actually only a temporary anti-terrorist measure.¹²⁰ Indeed, the fiction of the temporal nature of the barrier was necessary to

proportionality doctrine established in Beit Sourik), *available at* http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

117. *See* HCJ 2056/04 Beit Sourik Village 58(5) PD, paras. 48–81 (applying the proportionality test to different segments of the barrier outside East Jerusalem).

118. *Id.*

119. The issue of the legality of the Jewish settlements in the occupied territories is one of the most perplexing in the history of the Supreme Court’s dealing with the occupation. The first time in which the legality of civilian settlements (rather than military posts) was adjudicated is the famous Elon Moreh case of 1977. The Court ruled that Jewish civilian settlements in the occupied territories were legal only insofar as they met the military commander’s security requirements. *See generally* KRETZMER, *supra* note 53, at 77–94 (discussing the legal history of the settlements).

120. *See* HCJ 1361/08 Filadendrum 12 Ltd. v. The IDF Commander in Judea and Samaria para. 10 [2008] (Isr.) (unpublished) (explaining the temporary nature of the barrier), *available at* <http://elyon1.court.gov.il/files/08/610/013/n05/08013610.n05.htm>; HCJ 8222/08 Corp. “Davka” Ltd. v. The IDF Commander paras. 27–28 [2009] (Isr.) (unpublished) (discussing the temporary nature of the security

overcome the legal problem facing an occupying force. According to the rules of belligerent occupation, it is prohibited for an occupying power to take any permanent actions.¹²¹ As Ben-Naftali notes, this is one of the major purposes of this set of international laws, since they were not created to support prolonged occupations.¹²²

This ruling stands in stark opposition to the determination of the ICJ, and many critics of the barrier argue that this fiction is hard to maintain in light of its imposing materiality.¹²³ And indeed, if one wishes to point to a difference between material objects and legal rules, the stability and permanence of the material seems like an obvious one. Undoubtedly, an enormous physical barrier is more permanent than an easily-removable road block. It is also probably more static and harder to change than opening hours of gates or lifting a curfew. However, material barriers—even huge ones—can be moved, sometimes more easily than ideological ones. In this sense, the barrier could theoretically be viewed as transient. Without the required ideological support, walls and other barriers have crumbled in a matter of days.

As I already argued, the ideology which supports the barrier is the ideology of sovereignty, which deems barriers a legitimate expression of territorial integrity and of the sovereign's right to protect its territory from external invasions and interventions. In this sense, although the Israeli barrier passes mostly within the occupied territories and not on the sovereign's internationally recognized border, the ideology of sovereignty still supports the barrier since the barrier is mostly understood to be protecting the security of Israel. As such, the barrier as a whole is justified as a legitimate sovereign project, even if some of its details—the protrusions into the occupied territories—should be amended.

More realistically, to my mind, and what is truly permanent about the barrier is the fact that it is so heavily entangled with the settlements and the ongoing particular ideology of Israeli occupation. This is an ideology of profound separation between Palestinians and Jews, despite their growing entanglement due to the rapid and massive increase in settlements and Jewish settlers in the West Bank. What highlights the connection between the settlers and the barrier are a number of cases in which the Court was confronted with the fact that the specific route of the barrier was designed on the basis of future settlement expansion plans. In these various cases the Court oscillated between two positions: 1) refusing to acknowledge the legality of such a consideration, since “security” means protecting only settlers that are already there, not those who might wish to move there; and 2) distinguishing between expansion plans that were already submitted and were in the process of approval and those that had not started the formal process.¹²⁴ But one has to wonder:

barrier), available at <http://elyon1.court.gov.il/files/08/220/082/n15/08082220.n15.htm>.

121. See *Advisory Opinion*, *supra* note 7, paras. 117–22.

122. See Orna Ben-Naftali, ‘A La Recherche du Temps Perdu’: *Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, 38 *ISR. L. REV.* 211, 218–20 (2005) (emphasizing that the Fourth Geneva Convention was not intended for prolonged occupation, i.e., Israel’s occupation of Palestine for 37 years).

123. See generally Weizman, *supra* note 1, at 237–41 (discussing Israel’s policy of using the word “temporary” as a means to justify a prolonged occupation); Orna Ben-Naftali, Ayal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 *BERKELEY J. INT’L L.* 551, 604–05 (questioning Israel’s attachment of the word “temporary” to alleged security measures).

124. See, e.g., H CJ 2577/04 Taha El Khawaja v. The Prime Minister of Israel paras. 31, 32, 36, 44 [2007] (Isr.) (unpublished) (holding that harm caused to Palestinians was not balanced by security

if any such consideration is illegal, as the first position suggests, why would it matter if the plan was already submitted or not? This ambivalence of the Court keeps open the possibility either to plan very quickly and extensively or to argue that future expansion is part of the security considerations that a military commander is entitled to take.

While physical barriers may be easily moved, people are far less so, especially if they are economically motivated and ideologically committed to staying put where they are. Some of the petitioners tried to point to the temporary nature of the Jewish settlements—another “temporary” creature who proved to be extremely durable—by claiming that if the military commander cannot ensure the safety of the settlers, he can remove them rather than build a barrier which infringed on the rights of Palestinians.¹²⁵ Perhaps not surprisingly, the Court did not even address these claims. It was, indeed, more than a formal legal argument. It was a provocation, an ironic reminder to the Court that what begins as a temporary measure, once involved with real people with vested interests and with strong political power and will, might become permanent.¹²⁶

3. Balancing/Trumping

Another important principle set by the Court is that a military commander, operating in a situation of belligerent occupation, is under the duty to balance the rights and needs of the “protected people” (the occupied population) against the army’s security needs.¹²⁷ This means that he does not have an absolute duty to protect the rights of the occupied. Indeed, the occupied have no “trumping” rights that could *prima facie* override security needs.¹²⁸ Therefore, each military action—or

justifications, though the barrier is within the authority of the military commander), *available at* <http://elyon1.court.gov.il/files/04/770/025/N56/04025770.n56.htm>; H CJ 143/06 Shalom Achsav v. The Minister of Defense para. 1 [2007] (Isr.) (unpublished) (holding that expansion was justified under the first plan but this justification was exhausted once the second plan was approved), *available at* <http://elyon1.court.gov.il/files/06/430/001/C31/06001430.c31.htm>; H CJ 8414/05 Ahmed Issa Abdalla Yassin, Head of the Village Council of Bil’in v. The Government of Israel paras. 2, 9 [2007] (Isr.) (unpublished) (holding that respondent must find an alternative route for the security barrier to reduce the harm caused to Palestinian private landowners since the security interest is not proportional to the harm caused to petitioners), *available at* <http://elyon1.court.gov.il/files/05/140/084/n33/05084140.n33.htm>. For more on the issue of expansion plans of settlements *see* Gross, *supra* note 38, at 420–23.

125. *See* H CJ 639/04 The Association for Civil Rights in Israel v. The Military Commander of Judea and Samaria paras. 47, 52, 60 (pending) (emphasizing that as a temporary measure the barrier disproportionately infringed on the rights of Palestinians and should be removed, or, alternatively, that the settlements themselves should be removed if they cannot be protected without the construction of a barrier). Adv. Avner Pinchuck of ACRI also emphasized this fact in an interview. Interview with Avner Pinchuck, Counsel for ACRI (Aug. 8, 2010) (on file with author).

126. In fact, this argument was not so far-fetched, since the temporary nature of the settlements in the occupied territories was mentioned by the Court, when the disengagement from the Gaza strip was challenged by Jewish settlers. The Court repeated the principle that settlements, in an area held in belligerent occupation, are only temporary. *See* H CJ 1661/05 Regional Council Hof Aza v. The Knesset of Israel 59(1) PD 481, paras. 8–9 [2005] (Isr.) (emphasizing the temporary nature of the settlements in Gaza).

127. *See* KRETZMER, *supra* note 53, at 60 (“The military must strike a fair balance between military needs and humanitarian considerations.”).

128. *See* H CJ 7957/04 Mara’abe v. Prime Minister of Israel 60(2) PD 477, para. 25 [2005] (Isr.) (“Human rights, to which the protected residents in the area are entitled, are not absolute.”), *available at*

segment of the barrier—requires careful balancing of a multitude of interests and rights by the military and by the Court. Furthermore, the Court has shown increasing willingness to consider not only the rights and needs of the protected people against the needs of the military, but also the rights and needs of Jewish settlers. This increased willingness was implemented through the general application of Israeli administrative and constitutional law in the occupied territories, which requires the army to protect the human rights of settlers.¹²⁹

The increased recognition of settlers' rights, combined with the Court's agreement to review every section of the barrier and the various arrangements accompanying it, spurred a number of challenges by settlers, demanding that the barrier's route be adjusted to their needs to expand and develop, to remain in touch with Israel, and to have easy access to other Jewish settlements in the territories.¹³⁰ Especially interesting was the use of the "fabric of life" concept by settlers and the Court. The concept was originally developed by Palestinian litigants in order to demand that the barrier be re-routed in a manner that would allow them to have access to their fields, to their extended families, to their larger community, and to the rest of their "fabric of life."¹³¹ This concept, which at first seemed to slightly shift the balance between security needs and Palestinian rights and interests in favor of the Palestinians, rather quickly became one more element in the growing number of considerations which the Court was willing to take. The Court ruled that settlers, too, had a legitimate interest in maintaining their fabric of life.¹³² Honoring the settlers' fabric of life often meant a direct collision with Palestinians' fabric of life, since letting settlers move more easily meant curbing the movement of Palestinians. However, the Court is still reluctant to give this concept the extreme meaning which settlers tried to give it, which is the creation of full territorial and legal contiguity between distant settlements.¹³³

4. Details/Structure

Aharon Barak, the former Chief Justice of the Israeli Supreme Court under whose leadership the principles of the Court's jurisprudence regarding the barrier were developed,¹³⁴ explained that the difference between the rulings of the Israeli

http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf; see also KRETZMER, *supra* note 53, at 63, 115–43 (describing that the rights of protected people in an occupied area can be infringed, according to accepted doctrine, when "necessary security needs" or "expedient military needs" arise).

129. See HCJ 7957/04 Mara'abe 60(2) PD, para. 19 (ruling that "the military commander is authorized to construct a separation fence . . . for the purpose of defending the lives and safety of the Israeli settlers"); see also KRETZMER *supra* note 53, at 19–29 (discussing the application of Israeli administrative and constitutional law in the occupied territories).

130. See discussion *supra* notes 95–99 and accompanying text.

131. See HCJ 2645/04 Fares Ibrahim Nasser v. The Prime Minister of Israel paras. 15, 19 [2007] (Isr.) (unpublished) (settlers demanding that their "fabric of life" be protected by the barrier), available at <http://elyon1.court.gov.il/files/04/450/026/N54/04026450.n54.htm>.

132. See HCJ 10309/06 Local Council Alfey Menashe v. The Government of Israel para. 21 [2008] (Isr.) (unpublished) (stating that settlers of Alfey Menashe had a legitimate interest in protecting their fabric of life), available at <http://elyon1.court.gov.il/files/06/090/103/N05/06103090.n05.htm>.

133. See *id.* (stating that the barrier is not meant to protect settlements, but only settlers).

134. Justice Barak served on the bench for nearly thirty years, ten of which as its Chief Justice. During the last years of his term, he heard dozens of barrier litigation cases, and he was part of the panels of every important decision regarding the barrier, often writing for the Court. See ARIELI & SFARD, *supra* note 40, at 156–60.

Court and the ICJ was that the latter viewed the barrier as a whole, while the former looked at the concrete details of each section of the barrier.¹³⁵ Indeed, looking at the specific details of a section might give a better idea as to the real purpose of the barrier and its actual effects on its surroundings. It is also true that the ICJ was rather careless about the facts and about the need to take security interests seriously.¹³⁶ It is possible that these omissions on the part of the ICJ were a result of its broad perspective—looking at the entire barrier. On the other hand, looking at the details of each and every section might obscure the many cases where considerations other than security were considered. Had the Court looked at the larger picture, these critics argue, it would have seen the barrier as a political project, not a military one.¹³⁷

I doubt that this is the problem with the Court's ruling. Indeed, the initial plan of October 2003 might have revealed the barrier's political nature. De-facto annexing more than 16 percent of the West Bank and locking within it 320,000 Palestinians, including East Jerusalem residents,¹³⁸ might seem contrary to the fiction of a "temporary security measure" even for avowed believers in the good faith of the state. However, the initial plan was soon amended and limited, following international pressure and internal political battles. By January 2004—before the Court issued its first decisions on the matter—the route was already much shorter and closer to the Green Line than before, resulting in less de-facto annexing of Palestinian land and locking fewer people in its loopy enclaves.¹³⁹

What is truly missing from the Court's analysis of the barrier is not looking at the greater picture of the barrier, but, as Gross points out, the form and structure of the occupation and how the barrier fits within it.¹⁴⁰ The "larger picture" is not just the barrier, but the way it is connected to the measures taken before it and to the policies that are still underway. This is true even in areas unrelated to the barrier, such as remote settlements, which are ever expanding and ever demanding of more "security" and more "protection." This limits the movement of Palestinians, obstructing their access to their lands, and fragmenting their habitat.¹⁴¹

135. HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, para. 58 [2005] (Isr.), available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

136. See Gross, *supra* note 38, at 399–400 (discussing the "insufficient analysis of the self-defense question in the Advisory Opinion").

137. See ARIELI & SFARD, *supra* note 40, at 158–60 (criticizing the narrow approach of the Israeli Supreme Court in addressing only sections of the barrier rather than the entire project).

138. *Id.* at 44.

139. *Id.* at 44–46. Already in the summer of 2003 the US began exerting pressure on the Sharon government to move the route of the barrier onto the Green Line. It resulted in the abolition of various segments of the barrier, freeing from it more than 100,000 Palestinians and large sections of Palestinian lands. *Id.* at 45.

140. See Gross, *supra* note 38, at 438 ("The barrier, however, is not only a physical structure. It is part of the structure of the occupation.").

141. See Gross, *supra* note 38, at 437–39 (discussing how the barrier is part of a larger system regulating the movements of Palestinians).

5. Security/Politics

The almost trivial distinction between security considerations and political ones is another crucial element in the jurisprudence of the barrier. This distinction has enabled the Court to authorize the construction of the barrier despite ample evidence that the barrier was also designed according to the political purpose of protecting settlements, including their future expansion plans. While the Court prohibited such considerations when they were explicitly presented, it maintained the basic belief that the barrier is a security-driven endeavor. But what made this distinction even more bizarre is the basic principle, already announced in *Mara'abe*, that it is a legitimate military consideration to protect Jewish settlements, regardless of their legality, since the very presence of the settlements in the occupied territories is a political question not for the Court to second guess or review. Yet, how can security considerations be severed from political ones, if security is defined in relation to the annexational aspirations and practices of settlers?¹⁴²

C. *The Missing Legal Argument: Any Barrier is Illegal*

One legal argument was not made by litigants, nor was it mentioned by Courts (the Israeli one or the ICJ): that a barrier is illegal, even when built within Israel proper. It is possible that this argument is so preposterous that it is unsurprising that no one raised it. Yet, for example, the U.S./Mexican wall is constructed purely *within* U.S. territory, and various arguments regarding its illegality have been raised.¹⁴³ Recently a legal challenge against the U.S./Mexican barrier was brought before the Inter-American Court, demonstrating that even walls that are built on international borders might pose serious challenges, legal as well as extra-legal.¹⁴⁴ And indeed I think that such a claim would also have been plausible and desirable in the Israeli context.

In this section I first give some arguments as to why such claims should have been raised in the case of the Israeli barrier. I then offer some tentative suggestions as to why in the Israeli/Palestinian context, such claims were not raised, nor were they even contemplated by lawyers or academics who wrote on the topic.¹⁴⁵ Michael Sfar, for example, specifically argues that “[i]n fact, it would have been possible to build a wall or a fence, even a trench with crocodiles, without raising any legal difficulty, especially not an international one. The simple and legal way would have

142. See Gross, *supra* note 38, at 422 (“[W]hen Israel makes the protection of the occupation and the settlements part of its security interests, these interests become indistinguishable from its political-annexational purposes.”).

143. See generally Marta Tavares, *Fencing Out the Neighbors: Legal Implication of the U.S.-Mexico Border Security Fence*, 14(3) HUM. RTS. BRIEF 33, 33–37 (2007); see also Denise Gilman, *Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall*, 46 TEX. INT’L L.J. 257 (2011).

144. See THE WORKING GROUP ON HUMAN RIGHTS AND THE BORDER WALL, OBSTRUCTING HUMAN RIGHTS: THE TEXAS-MEXICO BORDER WALL (Submission to the Inter-American Commission on Human Rights) (June 2008), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-FULL-SET-OF-REPORTS.pdf>.

145. When I raised this question in interviews I have had with some of the leading lawyers of the anti-wall litigation, they admitted that they did not think about this argument. Indeed, they all shared the thought that a wall on the Green Line was clearly legal.

been to construct the ‘separation barrier’ right on the Green Line.”¹⁴⁶ These statements were repeated in petitions submitted to the Court. Furthermore, I argue that the refusal to attack a border-barrier (that is, a barrier which is erected on an internationally recognized border) is not only Israeli-specific, but is in fact a manifestation of the hold that the idea of sovereignty has on our legal—both international and national—imagination and doctrines.

1. Why Are Barriers Undesirable?

Though lawyers might think that a border-barrier is unproblematic, for some planners, architects, immigrant rights activists, and environmentalists, a barrier might seem like a terrible idea *even if built exactly on the Green Line or deep within Israeli territory*. This position could be taken for several *non-legal* reasons. First, if one thinks of borders not only as a *separation* between states and societies but also as fluid areas—as places of meeting, of interacting, of osmosis, and of influence—then a hermetic barrier is a disastrous idea. Borderlands in human history were often places of strife and friction, but also of influence, of inter-penetrability, of integration, and of great creativity that stemmed exactly from these rich and plural human interactions.¹⁴⁷ A hermetic barrier puts an end to this. A barrier between Israel and Palestine will decrease the chances of building bridges between the two societies and will curtail the rich encounters that might still take place, though admittedly they currently happen less and less due to separationist policies.

Second, *any* barrier would have a devastating impact on the large minority of Israeli-Palestinians who live within Israel proper (as well as on the non-Israeli ones). Indeed, Palestinian Israelis and non-Israelis are strongly connected in familial, cultural, economic, and historical bonds. For years, even after the occupation, the connections between the two communities remained strong. The barrier—even if it is built on the Green Line—will likely jeopardize these ties and will have harsh consequences on this community.

Third, as long as the occupation continues, a barrier on the Green Line will bring about further injustice and dispossession to the occupied population. As long as Israel controls and significantly uses the resources of Palestine (water reservoirs, waste dumping sites, excavation sites, and more) and allows its citizens to move freely into and out of the territories, depriving the vast majority of Palestinians of all the goods that Israel has to offer is ostensibly unfair. A border-barrier would exacerbate this situation further and would make it far more difficult for the ordinary Palestinian to take a day off and enjoy the beach of Jaffa, the clubs of Tel Aviv, the theater in Jerusalem, and more. Put differently, what makes occupation a severe form of domination is not only the deprivation of political rights from the occupied. Nor is it merely the fact that resources and goods are being transferred from the occupied territories to the occupying state. What makes occupation patently unjust is the fact that the occupied population is unable to enjoy the most basic goods which the occupiers have. An effective barrier exacerbates this problem as it seriously

146. See ARIELI & SFARD, *supra* note 40, at 145.

147. See, e.g., Mansoor Akbar Kundi, *Borderland Interaction: The Case of Pak-Iranian Baloch*, 9 IPRI J. 90 (2009), available at <http://ipripak.org/journal/summer2009/Article9.pdf> (describing the effects of social and cultural interactions between populations along the Iran-Pakistan border).

limits the ability of Palestinians to use goods and services, which although it might not be a right, is nonetheless sometimes available to them, as long as they can enter Israel.

Fourth, a hermetic border-barrier will make economic and commercial transactions between Israel and Palestine far more difficult. This might have negative consequences both in efficiency terms as well as in economic justice terms. The flow of goods and of people will be further limited, producing economic waste and inefficiencies. It also prevents Palestinians from realizing the various economic opportunities that exist in Israel.

Fifth, a large-scale barrier of this type—no matter its route—will have devastating impacts on the environment. As various environmental activists already argued, the habitats of animals and plants have been divided by the barrier, and even if the wall moved to the Green Line, it would still create detrimental effects.¹⁴⁸ A related objection, made by both laypeople and professionals, is that a barrier is simply an eyesore, an ugly construction that blocks the horizon.¹⁴⁹

2. The Reasons Why No Such Legal Argument Was Made or Such Rule Determined

However, these arguments were never translated into legal arguments; they were not articulated in legal terminology and no legal doctrine seemed to have been relevant to them. They were, in fact, almost absent from the public and intellectual discussion of the barrier altogether. In this subpart I offer four main reasons for this omission, and I end by pointing to a few disturbing consequences that this omission might have had.

The first reason is the most trivial and obvious: the barrier was simply not designed on the Green Line. Therefore, there was no point in attacking a hypothetical barrier. Especially for lawyers, and according to acceptable legal doctrines, there is no use in addressing a theoretical policy; one is always required to challenge a concrete and real state action. Since much of the barrier passed well within the occupied territories, this is the route that was challenged. Furthermore, the Green Line served as a rhetorical trope for petitioners as well as for the justices. They could always retort that if the state wanted to construct a security barrier, it could do so as long as it strictly adhered to the Green Line. The location of the actual barrier released them from the need to offer an alternative path (in fact, the Green Line *was* the ready-made alternative path), and it was indeed the position of most of the human rights groups that challenged the route of the barrier.¹⁵⁰

148. RON FRUMKIN & TAMAR AHIRON-FRUMKIN, *ECOLOGICAL ASPECTS OF THE SEPARATION FENCE IN THE JUDEA DESERT* (2007) (Hebrew), available at http://www.teva.org.il/_Uploads/dbsAttachedFiles/AdivGalsOpinion.pdf.

149. See Dana Gilerman, "Trying to Make the Wall Transparent," HAARETZ, Jan. 4, 2004, <http://www.haaretz.com/culture.arts-leisure/trying-to-make-the-wall-transparent-1.118566> (reporting on the joint protest against the barrier by Israeli and Palestinian artists).

150. An important exception to this position was an NGO called Council for Peace and Security—Association of National Security Experts in Israel, which was founded and run by ex-military officers and security experts. See H CJ 2056/04 Beit Sourik Village v. The Government of Israel 58(5) PD 807, para. 16 [2005] (Isr.) (discussing the composition of the Council for Peace and Security). Its position in most of the cases it either joined or filed expert briefs in was that in general the route of the barrier should be changed to fit more closely with the Green Line. See *id.* para. 30. Despite its general deference to the military's

Second, and related to the first point: the legal arguments against a barrier constructed within the occupied territories are much stronger than the ones that might be raised against a barrier on the Green Line. As I have shown in great length, both the ICJ and the Israeli Supreme Court were highly receptive to the legal arguments regarding reasonableness and proportionality, due to the limitations that are imposed on an occupying power. The need to demonstrate that *only* security considerations were taken into account and the requirement of temporality do not exist if a state operates within its recognized territory.

The third reason is the fairly consensual status that the two-state solution to the Israeli/Palestinian conflict enjoys among the majority of legal actors. When abstractly presented with the idea of a barrier between Israel and Palestine, many human rights lawyers, politicians, academics and perhaps also judges—Israelis and Palestinians—would actually endorse it, even with a degree of enthusiasm. This is because such a barrier would finally demarcate the borders of Israel, a state which has refused to define its permanent and fixed borders since its inception. The barrier, therefore, presented a sudden opportunity to draw the boundary between Israel and Palestine. In the beginning of the construction of the barrier, the staunchest opposition to the barrier did not come from the political left, but from the settler movement.¹⁵¹ For the latter, the idea to divide Israel and to even cursorily demarcate the Green Line seemed like an anathema. The political right argued against constructing a barrier through territory that they consider a part of Israel.¹⁵² The political left, however, thought it a good idea, as long as it was constructed on the Green Line.¹⁵³ According to this position, the barrier did not have to be emblematic of the occupation and its structure of domination and abuse. It could be a way out of the occupation by finally drawing the political line between Israel and the nascent Palestine.¹⁵⁴

The fourth and most important reason is the idea of sovereignty. Although the concept of sovereignty is an aspect of the partly-defunct Westphalian paradigm, it is still highly influential and dominates international law and theory as well as political theory throughout the world.¹⁵⁵ I believe that it is impossible to understand the

expertise on security matters, the Court was often willing to entertain the alternative routes of the Council for Peace and Security due to its prestige and reliability as famous and illustrious former soldiers. *See id.* paras. 61, 71 (giving great weight to the opinions of the Council for Peace and Security in deciding whether to reroute the barrier).

151. *See* Professor Yeshayahu Folman, former Chief Scientist of the Ministry of Agriculture, Association for National Security Experts in Israel, Address at Seminar entitled Aspects of the Security Fence before Council for Peace and Security: The Political Concept of the Security Fence (Nov. 11, 2007), available at <http://www.peace-security-council.org/doc/Aspects.of.the.Security.Fence.pdf> (emphasizing that the original opposition to the barrier came from the settler movement).

152. *See id.* (“For the settlers, [it] was an ideological break in the belief that the Land of Israel was ours and that the creator gave it to us forever.”).

153. *See id.* (describing the political left’s fear that the barrier would be constructed beyond the Green Line).

154. *See* Michael Bell, *The West Bank Barrier Debate: Concept, Construction, and Consequence*, 1–2 J. OF INT’L L. & INT’L RELATIONS 293, 294–95 (2005) (describing a leftist General’s view that the barrier would allow the Israelis “to pursue their own destiny without the crippling burden of the occupation”).

155. *See* Chris Tollefson, *Games without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime*, 27 YALE J. INT’L L. 141, 144–46 (2002) (describing Westphalian sovereignty and critiques of the theory). *See, e.g.*, Andeas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT’L ORG 251, 281–84 (2001) (critiquing the understanding and application of

jurisprudence of the barrier without recourse to the underlying ideology of international law and international lawyers: the idea that the world is neatly divided into sovereign states, defined and limited by a bounded territory, each of which is free to act within its territorial boundaries as it pleases.¹⁵⁶ According to this perception, one can actually imagine that each piece of land on the globe belongs to a sovereign state, and that there are invisible barriers erected between those states. Since these legal barriers surround every state and create the metaphor of the “black box,” that insulates the state from external critique, intervention, and invasion, it makes no real difference if they are complemented by material barriers.

It is this ideological position which leaves lawyers—international ones as well as domestic ones—out of legal arguments when material barriers suddenly appear all around the world. It is this conception which renders the materiality of the barrier transparent. The material barriers become invisible once they are placed on internationally-recognized borders or within national territories. International law has simply nothing to say about it. The doctrine of self-defense only adds to the absence of international legal arguments against such a barrier since it is a recognized right of a state to defend itself by passive means, including border fences.¹⁵⁷

It is time, I argue, that we part from this conception. I already named a few reasons why barriers—even when they track national borders—are undesirable. Though it is sometimes possible to articulate the harm they produce in terms of human rights, it is important to develop a radical legal critique of barriers. This will enable those who oppose them to argue against their legality even if they do not infringe on any particular human right. The interest that we have in inter-cultural dialogue, in borderland fluidity, and in living in societies which are permeable to (some) illegal immigration and (some) illegal trafficking should also be articulated in legal terms. I want to make clear that I do not suggest that these considerations should always overcome the need for security or protection. However, we need to be more aware of the price we pay when we equate borders with barriers and when we give up on the idea that we can invent legal rules and principles that would prohibit a state’s full insularity.

The barrier is indeed the most overt manifestation of the idea of sovereignty. As such, it offers a unique opportunity to critique it. The fact that the Israeli barrier and other walls throughout the world provoke so much attention and cause such opposition demonstrates most vividly the fact that the concept of sovereignty in its crude form has gone bankrupt both positively and normatively. When material barriers are erected right on international borders, they might become invisible as far as international law goes due to the myth of sovereignty. However, they also expose the dark side of this myth—its undesirable normative consequences and its conceptual incoherence. Even when sovereign states do not invade, interfere, or occupy any other sovereign state’s territory, they impact them in varying degrees which might have similar effects to infringing on their sovereignty. Domination and

Westphalian theory to specific historical periods).

156. Ben-Naftali et al., *supra* note 123, at 553–54 (“The underlying principle of the international legal order rests on a presumption of sovereign equality between states. Current international law understands sovereignty to be vested in the people, giving expression to the right of self-determination.”).

157. Clearly, some legal arguments might still be made as far as national law goes. These depend, however, on the specific legal system and on the specificities of the scheme. If, for example, land was taken from individuals in order to construct a barrier, or if the barrier limits the freedom of movement of citizens within their state, these arguments might work in national courts.

control of one state over the other, as already well known, can be obtained through a wide range of actions, which might not formally be recognized as interference with sovereignty, and hence reveals the incoherence of this concept when used in international legal doctrines. The fact that bordering states can have economic, social, cultural, and political ties with one another and then erect a wall in order to prevent various groups of people from moving in between them can, at least sometimes, be articulated as an act of violence.

3. Some Possible Consequences of the Legal Omission

Trying to evaluate the successes and failures of the legal campaign and the legal doctrines which were developed in the context of the barrier seems like an impossible task. The main problem with such a question is that the goal of the campaign was not entirely clear. Was it to minimize the harm caused to Palestinians? Was it to maximize the Israel's security? Was it to protect the rule of law and adhere to national and international legal norms? Assessing the success of the legal campaign is not the goal of this article. I would like, however, to address several possible consequences of the legal campaign with special emphasis on the consequences that the failure to critique the barrier in general—and not just its route—might have had.

First, it is important to note that during the legal campaign, the barrier's route was radically transformed, and the permits regime was fundamentally changed. The size of the area de-facto annexed shrunk by almost half, and the number of Palestinians trapped between the fences shrunk by roughly the same percentage.¹⁵⁸ Movement in and out of the various enclaves became easier. Yet, the grip of Israel on the territories did not ease. The changes in the barrier—important and impressive as they might be—did not change the ongoing structure of the occupation: growing entanglement between Jews and Palestinians, followed by new methods of separation, both spatial and legal.

Perhaps this is why many of the lawyers who were active in the campaign felt ambivalent about their successes. On the one hand, it is clear that the achievement was phenomenal in that the barrier's route changed dramatically, and the delay in construction provided more time for local and international political action. On the other hand, the fact that the barrier does not fall strictly on the Green Line has resulted in the ongoing violation of Palestinians' human rights.

In addition to the possible failure of the campaign, I would like to briefly address two of its possible negative consequences: legitimation and de-politicization. First, I will discuss the issue of legitimation. When considering possible legitimation effects, one needs to distinguish between two types: consequential legitimation and structural legitimation. The first refers to the possible impact that an action might have on what people actually think about an institution or an activity.¹⁵⁹ In this respect, the question of legitimation would be the following: did the legal campaign make people think that the barrier is more legitimate? Another version would be: do people think that the occupation is more legitimate than before the construction

158. ARIELI & SFARD, *supra* note 40, at 48–49, 226–27.

159. See generally Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 THE ACADEMY OF MGMT. REV. 571, 579–81 (1995) (defining consequential and structural legitimacy).

of the barrier? For others more interested in its effect on the Supreme Court, the question might turn on whether people view the Court as a more just institution after its ruling. These questions require empirical research. To answer these questions, one would need to determine whose thoughts on the matter are worth consideration. This might consist of the Israeli public or the international community. Although it would be fascinating to know people's views on the barrier, the occupation, and the Court, I have not pursued this line of investigation. Therefore, I cannot suggest answers to these pertinent questions.

The second type of legitimation—structural legitimation—is no less important. This type of legitimation is not about statistically measurable consequences of a course of action. At stake is whether various actors actually legitimized a certain policy or course of action. Here, the structure of the legal argument regarding the barrier legitimated the construction of a barrier on the Green Line. Indeed, it is not a hypothetical or an empirical claim. It was precisely this argument that was repeatedly made: that a barrier on the Green Line would be legitimate and legal. In light of what I said before, and in light of my ambivalence towards a barrier on the Green Line, I think that this is a price of the anti-wall litigation. This argument does not mean that the litigation and the jurisprudence of the barrier should have been avoided; it merely means that we should take it into account when considering the costs and benefits of a certain campaign and jurisprudence.

A second possible negative consequence of the litigation is that it might have caused some de-politicization of the anti-barrier struggle. As some activists worried before taking the legal route, whenever a social struggle is taken to courts, there is a possible risk that the energies of the struggle would be exhausted in the courtroom, and the political battle would subside in anticipation of a legal remedy. Here, too, there is a real problem in assessing the effect of the litigation since there is no telling whether, without the legal campaign, there would be more or less social and political activity. Legal campaigns not only drain energy, they also galvanize attention, keep the issue alive in the media, and serve as a tool for politicization. Indeed, the anti-barrier political and social battle is far from over. The weekly demonstrations in Bil'in are a prime example of an ongoing social struggle taking place despite the fact that their cause is also being heard in courts.¹⁶⁰

There is another aspect of de-politicization, however, which did take place during the legal campaign. It is a result of the involvement of many professional NGOs, dealing with planning, health, security and education. These professional NGOs assisted in submitting expert opinions to the Court.¹⁶¹ While these expert opinions are part and parcel of how litigation around such matters looks like these days, and these opinions proved to be extremely important and practical—pointing to some of the unbearable consequences of the barrier. The expert opinions also de-politicized the question of the barrier and turned into a conversation among experts: security experts, planners, landscape architects and environmentalists, public health scholars, psychologists, and anthropologists. Clearly, one can still listen to the experts and make a normative decision based on these expert opinions, but there is a risk that the professionals will take over the discussion and turn it into a bureaucratic, technocratic debate.

160. Heather Sharp, *Bilin Marks Five Years of West Bank Barrier Protest*, BBC NEWS (Feb. 19, 2010), <http://news.bbc.co.uk/2/hi/8523221.stm>.

161. See *supra* note 87 for a list of the primary NGOs involved in the legal campaign.

CONCLUSION

The Israeli barrier oscillates between two ideologies: the general ideology of sovereignty and the particular one of the Israeli occupation. It has been legitimated as an expression of national sovereignty as well as an expression of the occupier's right and duty to protect security. While the latter grounds have been attacked in courts based on the specific route of the barrier, the general legitimation of every sovereign's right to erect a border-barrier was not critiqued. In fact, I argue, the focus on the nature of the barrier as an occupation-related project has undermined the ability to critique the ideology of sovereignty and to delegitimize the barrier as a whole. The legal campaign against the barrier in Israel/Palestine is still underway. The barrier—both a material entity and a legal creature which operates through a set of prohibitions, permits, licenses, and sanctions—reflects both the deep structure of the Israeli occupation in the West Bank, and a novel reality, that is a uniquely contemporary phenomenon that is observed in states all over the world. Facing the barrier requires us to look at its hybridity—material *and* legal, old *and* new, local *and* global—and develop legal reasoning that will not only look at it through the familiar lenses of national law and international humanitarian law, but as a new phenomenon that merits a radical critique.