PROBABLE TO BE REALIZED IN REASONABLE TIME": URBAN PLANNING IN THE JEWISH SETTLEMENTS AND THE DEBATE ON THE LEGALITY OF THE SEPARATION BARRIER IN THE WEST BANK

© Elya Milner and Alexandre (Sandy) Kedar

Abstract

In this paper, we analyse the impact of outline plans for the development of Jewish settlements in the West Bank both on the routing of the separation barrier constructed by Israel and on the legal discourse regarding its legitimacy. Our aim is to study the political purposes of the barrier project, particularly its entanglement with the Israeli settler colonial settlement of the West Bank. The paper focuses on the case-study of the Modi'in-Ilit settlement block, which is surrounded by a segment of the barrier that was subjected to several petitions addressing development outline plans. Through a close reading of the legal documents of these petitions, we demonstrate how the Israeli High Court of Justice gradually constructed the dubious category of "outline plans that are probable to be realized in reasonable time" as a de facto legal reason, which legalizes the inclusion of settlement considerations (settlers' "fabric of life" and further settlements' expansion) in the routing of the barrier. Within the interdisciplinary field of legal geography, this paper explores the reciprocal relationship between the technologies of space and the procedures of law in the context of the Israeli occupation of the West Bank.

Keywords

Legal Geography, Settler Colonialism, Israel/Palestine, the Separation Barrier, the Jewish Settlements in the West Bank

Introduction

In 2002, following the violent events of the second Intifada, the Israeli administration under Prime Minister Ariel Sharon decided to construct a "separation barrier", officially justifying it with the

security need to prevent Palestinians terrorists from entering Israel from the West Bank.[1] While the internationally-recognized eastern border of Israel is the 1949 armistice border, commonly known as "the Green Line", the route of the barrier deviates dramatically from it. About 85 percent of the barrier is constructed within the West Bank, surrounding most of the Israeli settlements and detaching many Palestinian villages from their agricultural lands. The serpentine route of the barrier, consisting of 720 kilometres – more than double the length of the Green Line – has been heavily criticized by legal scholars and practitioners, as well as by academics and activists, as a central means for the de-facto annexation of segments of the West Bank to Israel and as a blunt violation of the international law of belligerent occupation and of the human rights of Palestinians under Israeli occupation (Lynk, 2005; Usher, 2005; Blank, 2011; Dana, 2017; Gross, 2017; Weizman, 2017; Rijke and Minca, 2018).The area between the barrier and the Green Line, consisting of 16 percent of the West Bank and named "the seam zone", is de-facto conjoined with Israel and is also often referred to as the "Israeli side" of the barrier even though it is in the West Bank. The Israeli army severely restricts Palestinian movement in the seam zone, subjecting Palestinians to a draconian permit regime (Berda, 2017). The (il)legality of the barrier's route was extensively discussed by the United Nations and the International Court of Justice (ICJ). In 2004 an Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was published by the latter, stating that the wall as it is built within the Occupied Territories violates public international law and must be dismantled.[2]

Palestinian representatives and human rights organizations filled numerous petitions to the Israeli High Court of Justice (HCJ) challenging the construction of segments of the barrier, arguing against the severe infringement of Palestinian human rights it entails. In the face of these petitions, the HCJ continuously maintained a position according to which the construction of the barrier is a legitimate and legal project, based on security considerations and detached from political interests. In two leading decisions on the separation barrier – the Beit-Sourik and the Mara'abe\Alfei-

[1]The noun used to describe the separation barrier bears much ideological significance. It is referred to as either "the fence", "the wall", "the barrier" or "the security obstacle", variations which reflect the speaker's political position as much as it reflects the barrier's varied materiality. In this paper we refer to it as "the separation barrier".

[2] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* International Court of Justice, July 9, 2004. All legal sources are cited in footnotes, according to the Uniform System of Citation accepted in legal scholarship ("Bluebook").

Menashe rulings[3] – the HCJ explained that irrespective of the legality of the Jewish settlements, Israel had a duty to safeguard the lives of Israeli settlers. The construction of the Barrier was therefore legal even when established in the Occupied Palestinian Territories (OPT) and protecting not only Israelis within the "green line" but "the lives and security"[4] of settlers as well.

As we show in this paper however, the court itself did not adhere to the security rational and facilitated the inclusion of political considerations in the routing of the barrier. We analyse here the impact of outline plans for the development of Jewish settlements both on the routing of the barrier and on the legal discourse regarding the legitimacy of the barrier. Such a focus, we argue, is crucial to exposing the entanglement of the separation barrier and the Israeli settler colonial settlement in the West Bank.[5] Specifically, we study here the case of the Modi'in-Ilit settlement block, which is surrounded by a segment of the barrier that was subjected to several petitions addressing development outline plans. We demonstrate how the HCJ gradually constructed the dubious category of "outline plans that are probable to be realized in reasonable time" as a de facto legal reason which legalizes the route of the barrier. This category, we argue, while partially limiting the settlers' ambitions for development, acknowledges their "fabric of life" and the addition of new settlers as a legitimate consideration in the routing of the barrier – contrary to the stated security rational of safeguarding the life of settlers that already live the area. The HCJ's creeping transformation of its original ruling undermines the official security argument and exposes the inherent political purposes of the project, and the role of the HCJ in its legitimization.

Our investigation in this paper is rooted in the field of legal geography. Emerging in the 1980's in the writings of legal scholars interested in the "locatedness" of law in the physical world and evolving into an interdisciplinary scholarly endeavour, legal geography explores the mutually-constitutive relationship of space and law (Blomley, 1994; Braverman *et al.*, 2014; Bennett and Layard, 2015; Delaney, 2015, 2016, 2017). On the one hand, works on legal geography investigate

[3] HCJ 2056/04 *Beit-Sourik Village et al v. The Government of Israel et al*, Nevo legal database (June 30, 2004) (hereinafter: Beit-Sourik ruling); HCJ 7957/04 *Mara'abe et al v. The Prime Minister of Israel et al*, Nevo legal database (Sept. 15, 2005) (hereinafter: Mara'abe ruling).

[4] Mara'abe ruling, paragraph 19.

[5] Our discussion in this paper is rooted within the understanding of the Israeli settlement in the West Bank as a settler colonial endeavor. This conceptualization, while deeply contested in the Israeli public sphere, has been well established in the literature. See, for example: Veracini, 2006; Salamanca *et al.*, 2012; Gordon and Ram, 2016; Shafir, 2016; Joronen, 2017; Kedar, Amara and Yiftachel, 2018; Yacobi and Tzfadia, 2019

how law – its institutions, procedures, and practices – plays a central role in the production of different aspects of space; and on the other hand, how different aspects of space (e.g., its materiality, the way it is planned and imagined, it's social and political significance) shape the institution, practices and procedures of law. Within this interdisciplinary context, this paper explores the impact of urban planning in the OPT's Jewish settlements on the development of the legal discourse surrounding the route of the separation barrier. In the next part of the paper, we explain the legal framework constructed by the HCJ in its discussion of the separation barrier. We then turn to discuss the impact of urban plans prepared for the development of the settlements on the routing of the barrier. We focus on the case-study of the Modiin-Ilit block, delineating the emergence of legal categories aimed at incorporating the settlements' development aspirations into the legal discourse legitimizing the barrier as a "security need".

The Separation Barrier: Legal Framework

The HCJ established the legality of the barrier under the Israeli domestic legal framework in two landmark cases, known as the Beit-Sourik case (HCJ 2056/04) and the Mara'abe\Alfei-Menashe case (HCJ 7957/04) (Lynk, 2005; Barak-Erez, 2006; Blank, 2011; Gross, 2017). It delivered the ruling in the Beit-Sourik case in June 2004, several days before the ICJ published the Advisory Opinion. The Beit-Sourik ruling, written by the then-President of the HCJ, Justice Aharon Barak, was the first to explicitly articulate the official position of the HCJ regarding the legality of the barrier, a position that was in stark contrast to the position of the international community as was established in the Advisory Opinion (Kretzmer, 2005). First, similarly to the ICJ, the HCJ established the military commander's authority to operate within the occupied territories as derived from rules of international law of belligerent occupation, and specifically from the 1907 Hague Conventions and the 1949 Geneva Conventions.[6] According to these rules, opined the HCJ, the military commander has the authority to order the building of a barrier within the occupied territories – and indeed to expropriate private Palestinian lands for this purpose – as long as it "is rendered absolutely necessary by military operations"[7] and is "for the needs of the army of

[6] While Israel does officially acknowledge the applicability of these laws on the occupied territories, it does use them partially in its juridical discussions. See Kretzmer 2012.
[7] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, article 53.

occupation".[8] At the same time, "the military commander cannot order the construction of the separation fence if his reasons are political" and "The separation fence cannot be motivated by a desire to 'annex' territories to the state of Israel".[9] Thus, in the Beit-Sourik ruling the HCJ stated that it has "come to the conclusion, based upon the facts before us, that the fence is motivated by security concerns", and is therefore legal.[10] This ruling articulated the principle that constructing the barrier within the OPT is indeed legal as long as it serves "security needs" and purposes. This became the official position of the HCJ in all future barrier cases: in no future ruling has the court questioned the statement that "the fence is motivated by security concerns".[11]

The Beit-Sourik ruling thus established the legality of the barrier and its construction within the occupied territories. However, it did not address directly to a central argument raised against the barrier's route, namely the fact that it includes within its "Israeli" side most Israeli settlements, regarded by the international community as a blatant violation of international law. The issue was fundamental to the ICJ's deeming the wall illegal in its Advisory Opinion: Since the settlements are illegal, their "protection" cannot justify the deviation of the barrier from the green line and cannot be considered a security necessity.

The HCJ delivered a second landmark ruling in September 2005, in the Mara'abe/Alfei-Menashe case, thus established the HCJ's position on the matter. Though the settlers are not considered "protected persons" according to article 4 of the Fourth Geneva Convention, the court opined, it is still within the authority – and indeed, the duty – of the military commander to protect them. This authority, ruled the court, derives both from the Hague Conventions themselves, delegating the military commander the authority to secure public safety and order; and from the obligation of the State of Israel, anchored in internal Israeli law, to protect its citizens.[12]

In its conclusion in this ruling the court maintained its refusal to pass any judgement on the legality of the Jewish settlements in the West Bank, a refusal that originates in the 1990's "Bargil case" in which it ruled that the issue of the settlement is *political* rather than *juridical*, and therefore

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[8]Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, paragraph 52.
[9] Beit-Sourik ruling, paragraph 27.
[10] Beit-Sourik ruling, paragraph 28.
[11] Beit-Sourik ruling, paragraph 28.
[12] Mara'abe ruling, paragraphs 18-23.

beyond the authority of the HCJ.[13] "It is therefore our conclusion", the Mara'abe/Alfei-Menashe ruling states, "that the military commander is authorised to construct a separation fence in the area to protect the lives and security of the Israeli settlers. For the purpose of this conclusion, it is irrelevant to examine if the settlement is in accordance with international law or is contrary to it, as declared in the Advisory Opinion of the International Court of Justice in Hague. For this reason, we will not express any position on the matter".[14] Referring to the protection of the lives of Israeli *settlers* rather than of Israeli *settlements*, the HCJ thus managed to refrain from addressing the question of the legality of the settlements while expanding the interpretation of security purposes to include the protection of Israeli settlers in the occupied territories as a legitimate security consideration in the routing of the barrier.

These two cases established the basic assumptions of the HCJ in discussing the barrier: first, that building it within the occupied territories is legal as long as it serves necessary security needs; and second, that including an Israeli settlement in its "protected" side falls under this category and is therefore legal. This since according to the Court's rationale, the protection extends to the settlers and only derivatively to the settlement itself. Thus constructed, the court could evade ruling on the legality of the settlements, and in balancing the interests, could justify the taking of land and infringing the property rights of the Palestinians, since property rights are less important than the settlers' right to life and security.

The international conventions interpreted by the HCJ as establishing the occupying force's authority to build a wall for security reasons also establish its obligation to secure the human rights of the "protected people" in the area, namely of the occupied Palestinian population (Benvenisti, 2012). To mediate the potential contradictions between security considerations and the human rights of the "protected people", the court determined the principle of proportionality as a benchmark for scrutinizing the legality of the barrier's segments. Indeed, in the Beit-Sourik case the HCJ found that the majority of the barrier's route under dispute causes disproportionate harm to the Palestinian population and should be therefore altered. Moreover, following this ruling, other amendments were made in the general route of the barrier. While bringing significant relief to the

[13] HCJ 4481/91 *Gabriel Bargil et al v. The Government of Israel et al*, Nevo legal database (Aug. 25, 1993), paragraph 5.
[14] Mara'abe ruling, paragraph 19.

hardships the barrier inflicted on the Palestinian petitioners, this judgment also established the structure of all HCJ's judgments, critically scrutinizing the barrier's segments according to the principle of proportionality while maintaining a basic legal justification for its construction within the West Bank. This fragmented discussion of segments of the barrier – unlike the ICJ's reference to the barrier as a whole – allowed the HCJ to avoid engaging with the political aspects of the barrier. "The actual move to proportionality", argues Aeyal Gross, "[…] shifts the discussion from questions of substantive justice and power relations to managerial calculus which isolates specific issues and abstract them from the context of occupation" (Gross 2017: 266).

Settlement Development Planning and the Routing of the Barrier

In 2005, two Israeli human rights organizations – "B'Tselem" and "Bimkom"[15] – published a report in which they methodically demonstrated how extensive parts of the barrier were planned to include within the seam zone not only existing Israeli settlements but also vast areas designated and planned for their future development (Lein and Cohen-Lifshitz, 2005). The report delineated how the barrier was planned to surround both approved and unapproved outline plans and master plans for the Jewish settlements, while creating a route that is not only illegal according to the standards the HCJ itself established, but also oftentimes inferior in terms of security. Since the publication of the report, several petitions were filed by Palestinians and human rights organizations against segments of the barrier arguing its illegality based on its purpose to include such development plans in the seam zone, while significantly violating the Palestinians' human rights.

A landmark ruling in this context was the ruling in HJC 2732/05, known as the Azun case.[16] The Palestinian town of Azun and the village AlNabi-Ilyas appealed against a segment of the barrier separating them and the Jewish settlement Tzufin, indicating to a plan that was being initiated for the construction of an industrial area for Tzufin as a major consideration in the routing of the barrier more than two kilometres from the settlement's houses. In a response to the appeal,

[15] B'Tselem - The Israeli Information Centrefor Human Rights in the Occupied Territories, www.btselem.org;Bimkom: Planners for Planning Rights, www.bimkom.org

[16] HCJ 2732/05 *the Head of Azun Municipality et al v. the Government of Israel et al*, Nevo legal database (June 15, 2006) (hereinafter: Azun ruling).

the state and the military admitted that indeed "in the planning of the route […] weight was given to the existence of [the] plan".[17] Following the discussions in the court, the state declared that it would change the route of the barrier in this segment. In a harsh ruling the judges chastised it for concealing these planning considerations from the court in a previous petition made by the Palestinian villages, stating that the "route of the wall in the [relevant segment] is unlawful, and we hereby declared it null".[18] The HCJ delivered another important ruling in a case known as the Salfeet case, in which representatives of the Palestinian town of Salfeet petitioned against the barrier that was constructed between them and the urban Jewish settlement of Ariel, again, pointing to the existence of a development plan that was being prepared for Ariel as a consideration in the routing of the barrier.[19] While the court rejected the appeal, it noted that "If the outline plan was the only or dominant rational for the chosen route, we would consider this illegal".[20]

The HCJ widely quoted these cases in its future rulings, presenting its position that development plans for settlements do not constitute legitimate (security) considerations in the planning of the barrier's route. However, critical reading of these rulings exposes the ways settlement-driven considerations in the planning of the barrier, and primarily the inclusion of outline plans for future development of settlements within the seam zone, became legitimized by the state as well as the court itself. This clearly contravenes the rational so carefully constructed by the HCJ, namely that it would justify the route of the barrier solely as safeguarding the lives of Israeli settlers already present in the Occupied Territories, thereby avoiding ruling on the legality of their presence or their settlement in these territories. Indeed, while the court refused to rule on the subject, in legitimizing the outline plans as a consideration in the routing of the barrier, we argue, it implicitly legitimized the settlements as such and not the life of persons already living in the area. The case study of the Modi'in-Ilit block serves us to further explore and delineate this dynamic.

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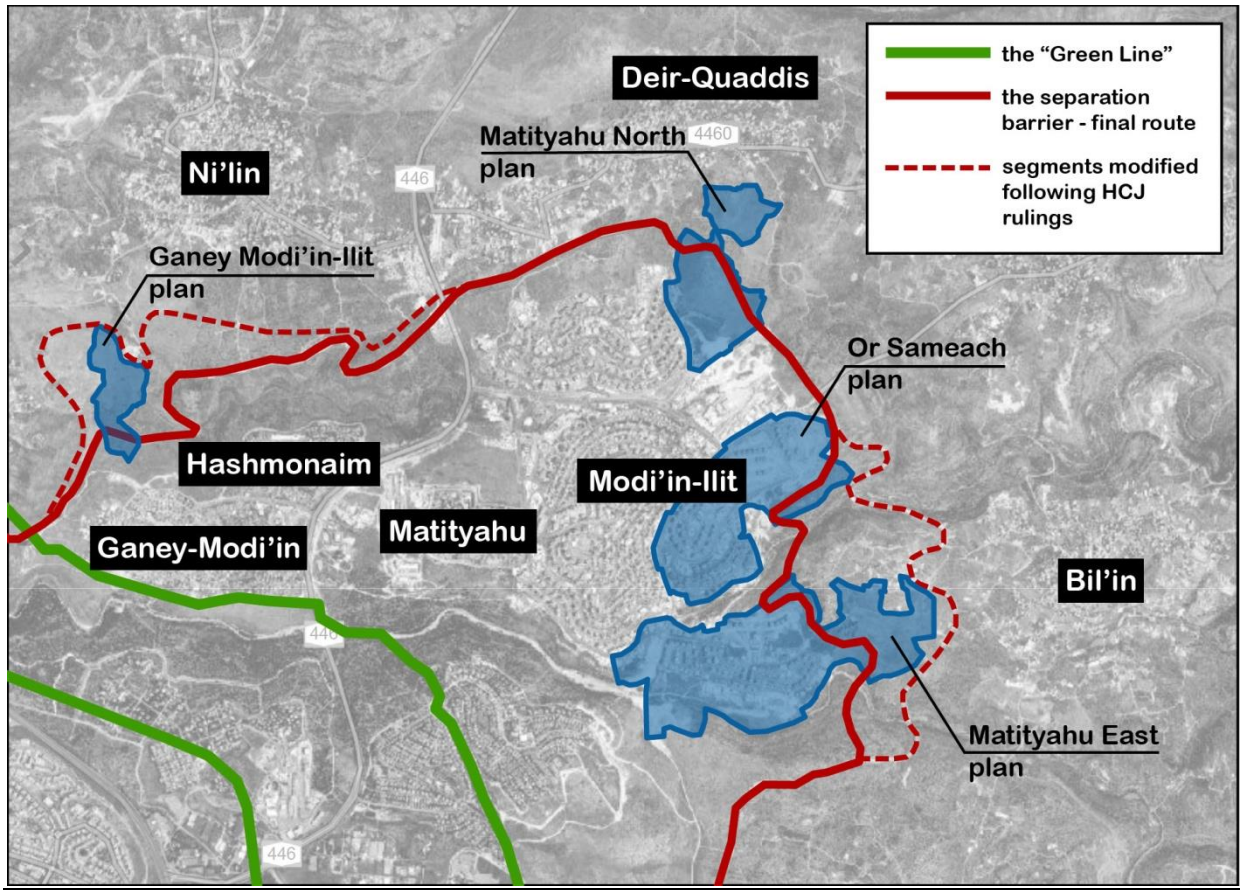
[17] Azun ruling, paragraph 5.
[18] Azun ruling, paragraph 6.
[19] HCJ 1348/05, 3290/05 *the Head of Salfeet Municipality et al v. the State of Israel et al*, Nevo legal database (July 17, 2006) (Hereinafter: Salfeet ruling).While the appeal here is against a barrier that is not part of the main route of the separation barrier, the legal framework within which it was discussed is the same, and this case s widely referred to in other barrier cases.
[20] Salfeet ruling, paragraph 29.

Case Study: The Modi'in-Ilit Block

Image 1: Modi'in-Ilit block's plans and the changing routs of the barrier (image produced by the authors).



Modi'in-Ilit is an urban settlement located to the east of the green line, midway between Tel Aviv and Jerusalem and is populated by an ultra-orthodox Jewish population. It was established in 1993 by private real-estate investors that purchased the lands, and received a status of a city in 2008. It is currently the largest Jewish settlement in the West Bank, comprising of about 73,000 residents. The Modi'in-Ilit block is comprised of Modi'in-Ilit and three other adjacent settlements built during the 1980's, also populated by ultra-orthodox Jews: Hashmonaim, Matityahu and Ganey-Modi'in.

Following a 1997 government decision to coordinate the private initiatives into a coherent project, a group of planners prepared a master plan for the development of the Modi'in-Ilit block. The planners engaged in the task described it as a fragmented space, planning to unite its fragments

into a coherent and continuous urban fabric.[21] The resulting master plan bluntly ignored the landownership in the area, as well as the existing borders of Modi'in-Ilit's jurisdiction, advancing a vision for an urban area populating 150,000 people by 2020 and spreading continuously within borders set by a major circular road. Though according to the Israeli planning system, a master plan is a guiding policy document and does not have statutory status, it reflects the vision of the Israeli authorities (in this case the Ministry of Interior and the municipality of Modi'in-Ilit) to the future development of the settlements. This vision is being gradually implemented by the planning and execution of a series of outline plans, which were all in different phases of planning and authorization during the period of the barrier's planning.

In 2004, the military began issuing seizure orders for land owned by Palestinians living in the villages surrounding the Modi'in-Ilit block, in order to construct the separation barrier in the area. As in many other places throughout the West Bank, Palestinians from the adjacent villages petitioned to the HCJ against the route of the barrier that left large tracts of their agricultural lands to its west, detaching them from their livelihood while including tracts of land designated for the future development of the settlements within the "Israeli" side of the barrier. In addition to these petitions, private real-estate firms invested in the area and the municipality of Modi'in-Ilit also petitioned against the barrier's route. Some of these petitions were unified, and they were all discussed within three cases decided in 2007. Table 1 presents the legal proceedings that we discuss in the following paragraphs, concerning three segments of the barrier surrounding the Modi'in-Ilit block: the Ni'lin segment, the Deir-Quaddis segment and the Bil'in segment.

	HCJ case number	Petitioners	Brief description
Ni'lin Segment	2577/04	the Head of Ni'lin Council et al	Palestinian petitioned against the route of the barrier that includes a tract of land designated for the Jewish settlement's expansion. **The petition was accepted.**

[21] Petition for order nisi and interim order in HCJ 1213/06 *Tzifha International 1994 Ltd et al v. the IDF's Military Commander in Judea and Samaria et al* (Feb. 7, 2006), appendix G: Expert Opinion, architect Giora Gur.

Deir-Quaddis Segment, Unified Ruling	2645/04	the Head of Deir-Quaddis' Municipal Council	Palestinian petitioned against the rout of the barrier that includes a tract of land designated for the Jewish settlement's expansion. **The petition was rejected.**
	1213/06	Tzifha International et al	Real-estate companies invested in the expansion of the Jewish settlement and the municipality of Modi'in-Ilit petitioned against the State's decision to alter the barrier route so it left segments of the tract of land designated for the Jewish settlement's expansion out of the seam zone. **The petitions were rejected.**
	1780/06	Modi'in-Ilit Municipal Committee	
Bil'in Segment	8414/05	the head of the village council of Bil'in et al	Palestinian petitioned against the route of the barrier that includes a tract of land designated for the Jewish settlement's expansion. **The petition was accepted.**

Table 1: petitions against the barrier in the Modi'in-Ilit Block, by segments

Ni'lin segment

The inhabitants of the Palestinian village of Ni'lin petitioned against a segment of the barrier separating them from the Ganey-Modi'in and Hashmonaim settlements. While the Israeli authorities altered the route of the barrier in the area several times, the final route included in the "Israeli" side a tract of land owned by an Israeli real estate firm. A layout plan 208/3 for a new neighbourhood called "Ganey Modi'in-Ilit" was promoted on this tract of land since the 1990's, though it was not yet authorized. Furthermore, the petition pointed to close cooperation between the military and the contractor in the process of routing the barrier. Also, the petitioners presented a letter from a military representative to the contractor, stating that a security distance of 150 meters from the barrier is required for the authorization of the plan. This is in contradiction to the military's argument that a route that does not include the plan's area endangers the Jewish settlements by passing "only" 300-350 meters from its houses.

The HCJ accepted the petition, and referred to the Azun ruling by stating that "the planning of the security fence's route must not be based on the will to include in the fence's 'Israeli' side lands for expanding settlements, particularly when the outline plans are not at all authorized".[22] It thus adhered to the official position as articulated in Azun and Salfeet ruling and (perhaps in light

[22] HCJ 2577/04 *the Head of Ni'lin Council et al v. the Prime Minister et al*, Nevo Legal Database (July 19, 2007) (hereinafter: Ni'lin ruling), paragraph 42.

of the blatant cooperation between the military and the private contractor presented in this case) ordered to alter the barrier's route by drawing it closer to the Jewish settlements and leaving the development plan's area outside the seam-zone. However, the court's wording implicitly suggested a distinction between approved plans and unapproved ones. By arguing that the consideration is illegal "particularly when the outline plans are not at all approved", it implied that approved plans can be possibly an acceptable consideration. The HCJ further developed this distinction inin two other cases surrounding the barrier's route around the Modi'in-Ilit Block, as we discuss in the following sections.

Deir-Quaddis segment

The military altered the route of the barrier separating Deir-Quaddis village from Modi'in-Ilit settlement four times. The first route included the entire areas designated for two development plans: plan 210/6/3 for a neighbourhood called "Matityahu North" that was in initial stages of planning and approval; and plan 210/4/2 for a neighbourhood called "Or Sameach" that was already approved and valid by the time the barrier was planned. Following an objection submitted to the military by the inhabitants of Deir-Quaddis and following the amendments made by the State to the barrier after the Beit-Sourik ruling, the route in this segment was slightly altered. The new route left a section of Matityahu North plan out of the seam zone. It was then altered two more times, however still leaving segments of the plan out of the seam zone.

The inhabitants of Deir-Quaddis petitioned against the route, demanding it to be brought further closer to Modi'in-Ilit. The petitioners described the fatal impact the planned route of the barrier will have on their livelihood that is almost completely dependent on agriculture. The planned route detaches the village from about 900 dunums of land, including olive groves and other seasonal crops. This, in addition to the seizure of 220 dunums and the uprooting of more than a thousand olive trees for the purpose of constructing the barrier itself.[23] This route, they argued, is unlawful since

[23] Amended petition for order nisi in HCJ 2645/04 *the Head of Deir-Quaddis Council et al v. the Prime Minister et al* (Dec. 7, 2005) (Hereinafter: Deir-Quaddis petition), paragraph 15.

> in planning the route of the fence, foreign considerations were taken into account, which have nothing to do with security considerations, military considerations and the protection of civilian lives.[...] expanding the settlements and connecting them in a territorial continuity with the State of Israel […] were dominant considerations in determining the route of the fence in the Deir-Quaddis area.[24]

The petitioners further pointed to the way the planned route, even in its amended version, included most of the areas of the settlement's development plans. "The purposes of protecting future residents, ensuring the realization of the outline plan, and the expansion of the Modi'in-Ilit settlement", they argued, "are not part of the military commander's duties".[25] Furthermore,

> setting a route that matches the outline plan for the nearby settlement implies that the respondents [the state and military] seek to guarantee not only the continuous existence of Modi'in-Ilit but its expansion. […] In a verdict concerning the Alfei-Menashe enclave [Mara'abe ruling] the court determined clearly that an expansion plan for a settlement is a foreign [illegitimate] consideration that the military commander is not allowed to take into account in determining the route of the barrier.[26]

They conclude that

> The route of the fence, deviating to the north and invading Deir-Quaddis' agricultural lands, is not based on security justifications, and certainly not on an absolutely necessary military need, as required by international law, and is seemingly clearly guided by a concern for the future development of Modi'in-Ilit. *This consideration is in any case not a consideration of a security need, but a foreign consideration, which makes the decision and its execution illegal and devoid of any basis* in international humanitarian law and a blatant violation of this law.[27]

Since the final version of the route divided the Matityahu North plan, the Modi'in-Ilit municipality and the private real-estate firms promoting the plan also petitioned against it to the HCJ. These

[24] Deir-Quaddis petition, paragraph 39.2.
[25] Deir-Quaddis petition, paragraph 68.
[26] Deir-Quaddis petition, paragraphs 78-79.
[27] Deir-Quaddis petition, paragraph 98, emphasis in original.

petitions focused on the so-called injury to the "fabric of life" of Modi'in-Ilit residents to be caused if the barrier would hamper the execution of development plans for the new neighbourhoods. As noted by Blank, the concept of "the fabric of life" "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 therest of their 'fabric of life'"(Blank 2011: 334). Under international law, the military commander is obliged to protect not only the life and security of "protected people", but also "their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs",[28] namely, their fabric of life. As we show below, the Jewish settlers adopted this argument with the purpose of expanding this obligation to include not only Palestinian protected persons but also settlers (which are not considered "protected persons"). They endeavoured to expand the military's obligation to protect their lives – as determined in the Mara'abe/Alfei-Menashe ruling – to an obligation to protect their "fabric of life".

According to the Modi'in-Ilit municipality and the private real-estate companies, securing a proper fabric of life in Modi'in-Ilit was inextricably linked to the realization of the master plan and the outline plans prepared for the development of the settlement and their inclusion within the seam zone. The Modi'in-Ilit municipality argued that the final route of the barrier "is evidently unreasonable and disproportional, inflicting serious harm to the *fabric of life* and planning of Modi'in-Ilit".[29] It further argued that

> as of today, according to the master plan and later outline plans […] many essential ingredients are still lacking to give a proper fabric of life to the residents of Modi'in-Ilit[…]The current removal of vast lands, that could have possibly been included in the future in the jurisdictionof Modi'in-Ilit […] will land a death blow on the future and continued development of Modi'in-Ilit and leave it devoid of urban elements essential for the urban fabric of life of its inhabitants.[30]

[28] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, paragraph 27

[29] Petition for order nisi and interim order in HCJ 1780/06 *the Modi'in-Ilit Municipal Committee v. the IDF's Military Commander in Judea and Samaria et al* (Feb. 26, 2006) (hereinafter: Modi'in-Ilit petition), paragraph 2.1, emphasis added.

[30] Modi'in-Ilit petition, paragraph 6, emphasis added.

The real-estate companies raised similar arguments. The land they owned and that was left "outside" the barrier, they argued, was essential to the planning and development of Modi'in-Ilit and enabling its inhabitants a proper fabric of life. In a wording that was almost identical to the municipality's petition, they argued that developing this land is "essential for the urban *fabric of life* of its inhabitants".[31]

The court unified the discussion of the petitions filed by the habitants of Deir-Quaddis, the real-estate companies and the municipality of Modi'in-Ilit. In the face of all these petitions, the state defended the final route it planned for the barrier, including the decision to leave small parts of Modi'in-Ilit plans out of the seam zone.[32] Its explanation, however, was revealing, testifying to the way it perceived the wider interests of the settlements – rather than the basic commitment to settlers' *security* – as valid considerations in the routing of the barrier.

First, the state argued that "three main considerations are to be weighted by the military commander while he sets the route of the barrier within Judea and Samaria: the security consideration, the interests of the Palestinian residents *and the interests of the Israeli residents*".[33] Within the "interests of the Israeli residents" the state included "the necessity to maintain their fabric of life".[34] An outline plan for the future development of a Jewish settlement can be therefore also considered in the routing of the barrier, however in a "balanced" way. The state then constructed a "probability" criterion for the balanced consideration of such plans, stating that

> as a rule, the military commander is authorized to weight, while determining the route of the fence, the consideration of the existence of outline plans for the expansion of an Israeli settlement, as part of the legitimate interests it should properly balance.[…] the

[31] Petition for order nisi and interim order in HCJ 1213/06 *Tzifha International et al v. the IDF's Military Commander in Judea and Samaria et al* (Feb. 7, 2006) (hereinafter: Real-estate companies petition), paragraph 130, emphasis added.
[32] In all petitions, "the state" and "the military" are referred to as separate responders. However, the State Attorney's Office files a united response on their behalf. We therefore hereinafter use the term "the state" to refer to the official position of both the state and the military.
[33] Response on behalf of the state in HCJ 2645\04, 1213\06, 1780\06 *the Head of Deir-Quaddis Council et al v. the Prime Minister et al* (June 11, 2006) (hereinafter: Deir-Quaddis response on behalf of the state), paragraph 38, emphasis added.
[34] Deir-Quaddis response on behalf of the state, paragraph 56.

> commander is authorized to consider, in the routing of the barrier, *new neighbourhoods with an actual probability to be executed within reasonable time*.[35]

In other words, the state argued that "The greater the chance [probability] that the [planned] neighborhood will be built in the near future […] the greater weight should be given to it as part of the planning of the barrier".[36] Within this logic, the state defended its decision to cut through the Matityahu North plan. It argued that "in the concrete circumstances, [the] plan is merely a conceptual plan [...]. No proper weight should be therefore given to this plan in the routing of the fence".[37]

The HCJ accepted the state's position and rejected all the petitions, legitimizing the fifth and final route of the barrier. Seemingly, it adhered to its preceding rulings, which allowed the construction of the barrier only according to strict security considerations.[38] However, in applying the rational of these precedents to the case of Deir-Quaddis segment, the court actually deviated from the stated justification of safeguarding the lives of settlers already in the area, to that of protecting the planed future expansion of the settlement. In a consequential yet subtle transition, the court accepted the state's position that "the area of the outline plan on which a neighbourhood is in the process of being built ["Or Sameach"], is part of Modi'in-Ilit, and needs defence just like it."[39] Thus, denying the Palestinians' request to move the barrier closer to Modi'in-Ilit, the court argued that the current route is indeed proportional, since "the purpose of the barrier is to protect the lives of the Israeli residents from terrorist acts." However, contrary to the court's depiction, the planned area has not been yet settled, so there were no "residents" in it in need of defence.

Simultaneously, the court also rejected the petitions by Modi'in-Ilit's municipality and the real-estate companies, which requested to include the entire areas of the plans within the "Israeli" side of the barrier. Referring to the area of the plan that was still in initial stages ("Matityahu North"), the court noted that "the planning of the security fence's route must not be based on the will to include in the fence's 'Israeli' side lands for expanding settlements, *particularly when the*

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[35] Deir-Quaddis response on behalf of the state, paragraphs 59-60, emphasis added.
[36] Deir-Quaddis response on behalf of the state, paragraph 58.
[37] Deir-Quaddis response on behalf of the state, paragraph 61.
[38] HCJ 2645\04, 1213\06, 1780\06, *the Head of Deir-Quaddis Council et al v. the Prime Minister et al*, Nevo legal database (Apr. 25, 2007) (hereinafter: Deir-Quaddis ruling), paragraph 25.
[39] Deir-Quaddis ruling, paragraph 33.

outline plans are not at all approved. [...] This consideration, *of the future needs of the Israeli population, is only one of the considerations the military commander must balance*".[40] While rejecting the petitions of Modi'in-Ilit municipality and the real estate companies, thus allowing the barrier to cut through the unapproved plan for Matityahu North, the court simultaneously ratified the logic presented by both the settlers and the state and military, according to which the "future needs of the Israeli population" are indeed legitimate considerations in the planning of the barrier's route. At the same time, it also ratified the "probability" criterion developed by the state.

The state's response to this petition, together with the ruling issued by the HCJ in the case, we argue, marks therefore a significant transformation in the discursive and normative framework within which the route of the barrier is discussed in court. This transformation is comprised of two main aspects: First, both the state and the court expanded the proportionality test that was established in previous rulings to include an extended notion of the Jewish settlers' rights and interests. In the landmark ruling of the Mara'abe/Alfei-Menashe case, in which the court first established the legality of including the Jewish settlements in the routing of the barrier, it argued that "the military commander is authorized to build a separation fence in the area in order to protect *the lives and safety* of the Israeli settlers".[41] In the Salfeet case – one of the landmark rulings which established the court's official position against considering future development plan in the routing of the barrier – the court mentioned "the human rights, enshrined in the Israeli law, *of Israelis residing in Israeli settlements* in the area" as a consideration to be taken into account (notice the employment of a present, not a future tense).[42] However in defending its position in the current case, and in a skewed interpretation of the previous rulings, the state referred to "the interests and rights of the Israeli settlers, including the need to maintain their fabric of life" as a consideration the military commander should take into account.[43]

Accepting the state's position while stating that "the future needs of the Israeli population, is only one of the considerations the military commander must balance", the HCJ ratified this extended interpretation. Importantly, we argue that in this subtle transition from the protection of

[40] Deir-Quaddis ruling, paragraph 36, emphasis added.
[41] Mara'abe ruling, paragraph 19, emphasis added.
[42] Salfeet ruling, paragraph 21, emphasis added.
[43] Deir-Quaddis response on behalf of the state, paragraph 56.

settlers' lives to the protection of their fabric of life the court legitimized the building of the barrier in a way that supported a future development of the Israeli settlements in the West Bank.

Ratifying the "future needs", "the fabric of life" and the "interests" of the settlers as a legitimate consideration in the routing of the barrier was meant, indeed, to justify the inclusion of outline plans for the future development of the settlements, contravening previous rulings that determined the contrary. The second aspect of the transformation the Deir-Quaddis case marked consisted therefore of the development of a "probability test" for these plans, a dubious category of an outline plan with a "probability" to be executed in "reasonable time". This category, we argue, was developed as a means to include such plans in the routing of the barrier, while maintaining a guise of "balanced" consideration and concealing the diversion from previous rulings and international law. Similarly to the criteria to be weighted in the proportionality test, this was first extensively developed by the state in its response. It was then ratified by the court in accepting the states' position and differentiating between the plan for "Or Sameach" (which was "in the process of being built") and the plan for "Matityahu North" (which was "not at all approved"). This development in the discursive and normative framework of the legal discussion, and the impact it had on the shaping of the barrier, is further exemplified in the HCJ's discussion of the Bil'in case.

Bil'in segment

Following the Beit-Sourik ruling, the state slightly altered the segment of the barrier separating Modi'in-Ilit from Bil'in village. However, the altered route ran about two kilometres from Modi'in-Ilit's built area, and included within the seam zone a large area designated for a development plan 210/8 for a neighbourhood called "Matityahu East", approved since the 1990's. When the decision to build the barrier was made in the early 2000's, the real estate companies that promoted it were preparing a new outline plan for Matityahu East, plan 210/8/1, containing a much larger number of residential units. While it was still unapproved, the companies began its execution and constructed illegal residential buildings.

The inhabitants of Bil'in village submitted a petition against the route that detached them from large tracts of their agricultural lands, "containing thousands of olive trees, almond trees and vines [and] used for grazing […]. These lands constitute the primary source of income for about 200 families at Bil'in, and without them these families are sentenced to a life of poverty and

deprivation".[44] Similarly to the Deir-Quaddis petition, the Bil'in petition emphasized the inclusion of the development plan's area within the seam zone as a prominent consideration in the routing of the barrier: "the route of the fence was chosen not from security considerations but for the benefit of the Modi'in-Ilit settlement, wishing to expand eastward.[...] the route follows an outline plan that in the relevant section is not even authorized [...] and does not follow a topographical line [...] or any line that can be considered security-related".[45] The petitioners poignantly concluded that

> The interest of the "military necessity" (or "security needs"), acknowledged in humanitarian law and in laws of belligerent occupation as allowing a proportional harm to civilians' rights […] includes security interests of the occupying power *but not the interests of the citizens of the occupying power who decided to immigrate and settle in the occupied area*. […] The serpentine, invading and dispossessing fence does not serve any military need. The considerations of the future of Modi'in-Ilit guided its routing. *This is in any case not a security consideration but a foreign consideration that renders the decision and its execution illegal.*[46]

At the same time, fearing the illegal constructions that took place in the plan's area would create "facts on the ground" that the court will accept as final, the habitants of Bil'in submitted two other petitions, against the plan itself and against the illegal construction.[47] These petitions revealed flaws in the planning process and led to significant delays in the approval and implementation of the plan. It was finally approved only in 2007.

In the response to the petition against the route, and particularly against the argument that the military commander had no authority to take into consideration new plans for the expansion of Israeli settlements, the state defended its decision to include the plan's area in the seam zone. It extensively developed the criterion of the "probability" of the plan, already used in the Deir-

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[44] Petition for order nisi and interim order in HCJ 8414/05 *the Head of the Village Council of Bil'in v. the Government of Israel et al* (Sept. 5, 2005) (hereinafter: Bil'in petition), paragraph 30.
[45] Bil'in petition, paragraph 3.
[46] Bil'in petition, paragraphs 71, 74, emphasis in original.
[47] HCJ 143/06 *Peace Now Organization et al v. the Minister of Defense et al*, Nevo legal database (Sept. 5, 2007); HCJ 1526/07 *the Head of the Village Council of Bil'in v. the Head of the Israeli Civil Administration et al*, Nevo legal database (Sept. 5, 2007).

Quaddis case, as a central criterion effecting the decision to take Matityahu East plan into account in the routing of the barrier. "As a rule", the state argued,

> the military commander is authorised to consider [...] the existence of valid outline plans for the expansion of an Israeli settlement. Yet, it is clear that the same rule that applies on a plan with no prospect of being realized in the foreseeable future does not apply on a plan that was authorised in recent years and that actions for its realization have already been made.[48]

It was therefore the state's position that "the military commander is authorised to weight, within the routing of the barrier, valid outline plans that are probable to be realized in reasonable time".[49] It further argued that

> the weight to be given to a valid outline plan in the routing of the barrier is depending on the actual status: the more advanced the procedures for implementing a valid outline plan, or that the prospect of its realization in reasonable time is higher, the greater weight the military commander is authorized to give it in the routing of the barrier.[50]

Within this logic, the state therefore claimed that since the future plans for Or Sameach and Matityahu East meet the criterion of "reasonableness" and "probability", they should be included in the "Israeli" side of the barrier, protecting "the residents that will reside in the new neighbourhoods [...] in Modi'in-Ilit".[51]

Referring to these considerations in discussing the case, the HCJ, in its decision, accepted the state's arguments as valid consideration in the routing of the barrier. Namely, it did not question the state's arguments, nor did it point to their lack of legal basis in international law. It did, however, partly accept the petition and ordered the alteration of the barrier's route. Crucially, though, the court's ruling further ratified and reinforced the "probable to be realized plan" category by implementing it in its orders to the state. While the Court conceded that the route of the barrier was "significantly influenced from the plans to establish new neighbourhoods east of Modi'in-

[48] Response on behalf of the state in HCJ 8414/05 *the Head of the Village Council of Bil'in v. the Government of Israel et al* (Nov. 17, 2005) (hereinafter: Bil'in response on behalf of the state), paragraphs 76-78
[49] Bil'in response on behalf of the state, paragraph 79.
[50] Bil'in response on behalf of the state, paragraph 80.
[51] Bil'in response on behalf of the state, paragraph 90.

Ilit[...] as far as it concerns building plans that are in advanced process of building and population [namely – in Or Sameach], this does not raise real difficulties".[52] However, focusing on the area of the Matityahu East planned neighbourhood, the court disagreed with the state's argument that the plan fully meets the probability criterion. Rather, it argued, the plan "is divided into two parts.

> Part A (the western) can be realized once the plan is validated. However, the development and marketing of part B (the eastern) is subjected to an approval by the Minister of Defence. There is no doubt that over forty buildings have been already constructed in "Matityahu East", including hundreds of residential units. Dozens of apartments have already been populated – however this construction is completely in the western part of the neighbourhood. In the eastern part there was no construction or development works. This part is far from realization both normatively and practically. In this state of affairs, we cannot accept the argument that protecting the eastern part of "Matityahu East" neighbourhood is an essential security goal.[53]

The HCJ therefore decided that the military should "reconsider, in a reasonable time, an alternative to the route of the fence […] in such a way that the area of phase A […] will be included to the west of the security fence, while the agricultural lands […] and the areas designated for the future construction of phase B […] will remain in the eastern side of the fence".[54] Implementing the probability criteria, the HCJ therefore differentiated between different segments of the same plan, offering a route to the barrier that runs along the lines that were drawn within the plan itself.

Concluding Remarks

The State of Israel executed the controversial project of the separation barrier under the guise of necessary security measures in the face of terrorist threats. It was justified as a project that is inherently temporary, thus bearing no political consequences regarding the future of Israel's

[52] HCJ 8414/05 *the Head of the Village Council of Bil'in v. the Government of Israel et al*, Nevo legal database (Sept. 4, 2007) (Hereinafter: Bil'in ruling), paragraph35.
[53] Bil'in ruling, paragraph 37. It is important to note that though by the time of the ruling, plan 210/8/1 was in final stages of authorization, the court failed to refer to the fact that the "hundreds of residential units" already built in the western part of the neighbourhood were built illegally before the plan was validated. It thus implicitly ratifies the retrospective "whitening" of these illegal structures, while mobilizing these illegal constructions to further anchor its argument regarding the "probability" of this part of the plan.
[54] Bil'in ruling, paragraph 42.

eastern border. The Israeli High Court of Justice defended this formal narrative and legitimized the barrier in an interpretational framework of international law. However, as many critics of the barrier argue, the de-politicization of the barrier – expressed in the insistence that the fence be temporary – is a mere fiction (Hareuveni, 2012; Ben-Naftali, 2018). "What is truly permanent about the barrier", argues Blank, "is the fact that it is so heavily entangled with the settlements and the ongoing particular ideology of Israeli occupation"(Blank 2011: 332). And what links the barrier to the settlement most clearly, he notes, is the way the barrier takes into consideration the planning of the settlements' future development.

Our paper analysed this link between the settlements and the barrier in order to further expose and delineate the colonial logic of settlement inherent in the barrier project. First, we demonstrated how Modi'in-Ilit Block's settlers adopted the "fabric of life" argument to justify the inclusion of development plans in the planning of the barrier. The state, military and court ratified this consideration by expanding the dual proportionality test into a threefold one, including "the interests of the settlers" as a separate category to be weighted into the routing of the barrier, together with security needs and the rights of the protected Palestinian population. Second, we examined the emergence of the category of "reasonableness", or "probability", for the inclusion of these interests while maintaining the visibility of balanced, impartial legal process. A critical reading of the legal text allowed us to expose the lack of legal anchoring of this category.

The paper thus exposes the major impact urban planning in the Modi'in-Ilit block had on the shaping of the legal discourse surrounding the (il)legality of the barrier, and as a result, on the shaping of the barrier itself. Within the framework of legal geography, this case clearly illustrates the reciprocal relationship between the technologies of space and the procedures of law.

Outline plans and master plans for the development of settlement, we argue, constitute a valuable point of departure for a critical analysis of the political, spatial and legal project of the separation barrier. While our paper focused on the plans that were promoted before and during the execution of the separation barrier, several plans were promoted in the proximity of the barrier in the aftermath of the legal proceedings and its final construction. By way of conclusion, we propose that examining these plans can further reveal the entanglement of the barrier with the settlement project, and the production of a "security guise" for a project that is deeply rooted in the settler colonial ideology of the Israeli occupation. These plans expose the significant space for development and growth that the barrier's final route allowed for the settlements, despite the

limitations the HCJ subjected in its rulings. They allow for the construction of hundreds of residential units to be populated by future settlers, as well as public buildings, tourism facilities and open spaces.[55] Indeed, it is through these plans that the inclusion of the Israeli settlers' "fabric of life", their "interests" and "future needs" as legitimate considerations in the routing of the barrier is materialized in the form of settler colonial expansion.

Furthermore, these plans reveal the fictitiousness of some of the main arguments presented by the state and military in court while defending the segments of the barrier under dispute and their adoption by the HCJ. Particularly, these plans reveal the falsehood of the state's argument that a significant distance should be left between the settlements and the barrier as a safety buffer zone: the construction appendix for a plan approved for "Ganey Modi'in-Ilit" after the construction of the barrier shows a day-care and a kindergarten planned adjacent to the wall. Similarly, the valid plan in the Bil'in segment was not modified, following the re-construction of barrier, to include any buffering between the planned houses in the settlement and the separation barrier.

Such discord between the arguments presented in court and the actual developments resonate one of the famous clashes between the political and judicial Israeli strata. In a public gathering in 2005, the then Minister of Law Tzipi Livni declared that "the HCJ is drawing with its rulings on the separation fence the state's borders" and that "the fence will have consequences on the future border" (Yoaz, 2005). HCJ justice Mishael Cheshin replied: "This is not what you claimed in court".

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[55] We base this argument on a search we conducted in the official websites of the Israeli Land Administration (ILA).

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