Security Or Demography?
The West Bank Barrier As A Demographic Tool

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Introduction: The West Bank Barrier

On June 16, 2002, Israel began to construct an elaborately designed barrier around the West Bank.[1] Such an endeavor was not unusual, nor was it a new policy practice for Israel.[2] Yet, the West Bank Barrier (WBB) has become the most expensive domestic project ever undertaken by the Israeli government, comprising a complex network of electronically sensitive fencing, stacked barbed-wire coils, concrete walls, watchtowers, ditches, patrol roads, and trace roads for detecting footprints.[3] The WBB's path has inevitably undergone a range of modifications, though it differs significantly from the Gaza barrier in one respect: it is built on the Palestinian side of the 1949 Green Line. This difference has arguably been the most important legal nuance of the project and has led to a massive swell of opposition, from both the resident Palestinian population and the international community. Yet, after much debate, including attention from the High Court of Israel, the International Court of Justice, the United Nations, and the United States, the planned 681 kilometers of barrier is virtually complete.

Plans for physical separation from the occupied territories have been considered occasionally throughout Israeli history for a variety of reasons, though Israel has maintained self-defense concerns as the sole motive for the WBB. The barrier, it is argued, serves temporary needs for the security of Israeli citizens in the midst of Palestinian militant attacks. Indeed, construction of the barrier began within two years of the al-Aqsa Intifada's explosive outbreak and has been consistently hailed by the Israeli Defense Forces (IDF) as an effective deterrent to militant attacks. Furthermore, Israeli representatives often mention the ease with which they plan to dismantle the WBB once "final status" is negotiated and peace finally brokered.

Much research has already been contributed to the debate regarding the international legality of the WBB, whether or not the barrier violates the human rights of the occupied Palestinian population, and whether it is an effective annexation of Palestinian land. While I will deal with these issues, the overall purpose of this study is not to question the barrier's legality, nor is it to launch general accusations. Rather, I will examine a specific benefit Israel enjoys as a result of the WBB—namely the demographic benefit. When the

International Court of Justice at the Hague (ICJ) ruled on the WBB in 2004, it raised compelling issues of demography and especially the clear effects the barrier was having on the population balance—issues the High Court of Israel (HCI) did not consider in its own analysis. Yet, the demographic implications of the WBB are significant, and this paper is an attempt to give due consideration to such consequences. The first section reviews rulings by the HCI and the ICJ, respectively, and examines the legal justifications both for and against the WBB. The second section examines the self-defense argument offered to justify the WBB.[4] Given the contextual and unfolding consequences of the WBB, it is clear that demographic, rather than security concerns, provide a better explanation for Israel's drive to construct the WBB.

International Law and the Politics of Self-Defense

To identify potential political factors leading to the construction of the WBB, it is first necessary to consider the viability of Israel's national security justification for the project itself, according to international law and the legal rights and obligations Israel has as an occupying power. This section considers the legal questions raised by Israel's decision to build a physical barrier in the West Bank. I will focus primarily on international laws pertaining to the WBB and will rely on two separate rulings by the ICJ and the HCI as my main guides. I will identify the primary legal citations used by the two courts to determine their respective opinions on the matter and point out controversial aspects. In defense of the WBB before the HCI, representatives of the state of Israel cited Article 51 of the United Nations Charter: the "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[5] This argument is both morally sustainable and relatively safe from criticism. Yet, the degree to which Palestinian attacks *necessitated* the WBB, as Israel claims, remains to be seen.

Before anything else, it must be understood that both the ICJ and the HCI have officially recognized the West Bank as an occupied territory, and despite the unusual nature of the occupation (especially Israel's complicated relationship with the fourth Geneva Convention), international law assumes jurisdiction.[6] Israel denies the *de jure* applicability of the fourth Geneva Convention to the West Bank and often cites the laws of belligerent occupation instead, which implicitly acknowledge a legal relationship between both the occupant and the occupied (Israel and the West Bank Palestinian population respectively). These laws afford Israel a range of ambiguous powers without explicit regard to the humanitarian concerns of the occupied Palestinian population. When such humanitarian concerns have been raised in the past, the HCI has

generally applied the principle of proportionality, which is the right of a state to restrict the liberty of an occupied population only if such restriction is deemed proportional to security needs.[7]

In 2004, the local village council of Beit Sourik, a small Palestinian village in the West Bank, petitioned the HCI in response to the WBB. They challenged the right of the IDF to seize Palestinian property, as it had done in some cases, and decried the de facto annexation of portions of the West Bank to Israel as a breach of international law.[8] Israel's sole justification for the WBB rested upon a platform of self-defense, adhering to the precept that security demands necessitated such measures and that the fourth Geneva Convention even condoned Israel's actions.[9] Moreover, the HCI specifically noted that Israel

> cannot order the construction of the separation fence if [the] reasons are political. The separation fence cannot be motivated by a desire to 'annex' territories to the state of Israel. The purpose of the separation fence cannot be to draw a political border.[10]

If questions of demography figured at all into Israel's decision to build the WBB, they would have been impossible to present before the Court. Self-defense was the most convincing reason Israel could have possibly cited. However, it would be prudent to carefully scrutinize this argument considering Israel's past relationship with the fourth Geneva Convention.

International law, according to the fourth Geneva Convention, is very clearly opposed to the development of settlements in an occupied territory by citizens of the occupying power.[11] The ICJ has long condemned Israel's policy of establishing Jewish settlements in the West Bank, and for the purposes of this study, all such settlements will be regarded as illegal.[12] Because Israel's continued encouragement of such settlement is a clear violation of the fourth Geneva Convention, the enthusiasm with which Israeli representatives cited passages from the Convention in the Beit Sourik case raises legitimate suspicions. It is also significant that the HCI, ruling in the same case, did not once consider the political concerns of the petitioners beyond flatly denying that demographic issues were at stake or even relevant. The Court proceeded to uphold Israel's right to seize Palestinian land and to construct the WBB insofar as the damage inflicted upon the occupied population remained proportional to the security concerns of the IDF. This ruling led to a few minor alterations of the barrier's proposed route and monetary compensation for seized land, yet the barrier was ultimately approved. Through arguing self-defense as a singular concern before the HCI, Israel was able to gain domestic legal legitimacy for the WBB—a significant achievement.

Nine days after the HCI issued its ruling on the WBB, the ICJ at the Hague began considering arguments at the request of the United Nations General Assembly as part of an advisory hearing to rule on the "legal consequences of the construction of a wall in Palestinian territory."[13] Although Israel declined to participate in the hearings, the Court reviewed Israel's official argument: Israel possesses the inherent right to protect its own citizens based equally on Article 51 of the U.N. Charter and Article VIII of the Oslo Accords, which requires Israel to maintain jurisdiction of all matters of defense in the occupied territories.[14] Those opposed to the WBB focused on de facto annexation by stressing the difficulties incurred by Palestinian attempts at self-determination since the barrier's construction had commenced in 2002.[15] The ICJ issued a harsh blow to Israel's position by interpreting Article 51 of the U.N. Charter, the so-called self-defense clause, as irrelevant to the case. It was reasoned that because Palestinian militants do not act on behalf of a state actor *per se,* Israel was not authorized to retaliate against the collective Palestinian population of the West Bank. It is this position that has been so hotly debated by international lawyers. Many rationalize that because the United States was granted authority by the Security Council to invade Afghanistan in response to attacks by non-state actors on September 11, 2001, Israel equally deserves the right to protect itself from the actions of non-state actors (Palestinian militants, for example). On September 12, 2001, the Security Council passed Resolution 1386, which upheld the right to "combat by all means" the "threats to international peace and security caused by terrorist acts."[16] Israel cited the Resolution in defense of the WBB, yet there are significant differences between Israel's barrier and the American response to 9/11. The attacks against Israeli targets during the al-Aqsa Intifada all originated from within territory occupied by Israel, thus the campaign of violence prosecuted by Palestinian militants cannot be imputed to a foreign state—as was the case with the al-Qaeda attacks against the United States in 2001. This implies that an occupying power is not required to maintain an occupation and whatever resistance it encounters as a consequence is thereby provoked. The ICJ reasoned that Article 51 can be invoked against a state actor and *only* against non-state actors if the aggression can be imputed to another state.

There has also been a great deal of controversy in light of the fact that Israel did not exist when the Fourth Hague Convention was ratified in 1907 and is not then bound by its authority. Upon review, this argument falls apart. In 1946, the International Military Tribunal at Nuremburg, while trying Nazi leaders for war crimes, determined that "rules laid down in the [Fourth Hague] Convention were recognized by *all civilized nations,* and were regarded as

being declaratory of the laws and customs of war."[17] Moreover, as recently as 2004, the High Court of Israel itself found,

> The military operations of the IDF in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 … and the Geneva Convention Relative To the Protection of Civilian Persons in Time of War 1949.[18]

It is unclear how far these rights were meant to extend, but certainly Israel's refusal to regard the West Bank occupation with the same legal deference suggests an alternate perception of the West Bank—allowing it to be treated as a separate entity. Because the Fourth Geneva Convention was applied as a supplement to The Hague Convention of 1907, Israel has often tried to circumvent the doctrine. Thus, the recent recognition of the fourth Geneva Convention and, along with it, the Fourth Hague Convention in its entirety, represents a significant step forward for Israel's legal stance on the occupation. The decision came only after decades of ignoring pleas from the international community. Moreover, three U.S.-vetoed Security Council resolutions formally called for Israel to apply the Conventions.[19] Thus, for Israel to now argue against adopting the same standards for the West Bank occupation seems churlish at best.

Aside from such various technicalities of international law, the ICJ adopted a very different approach from the HCI. The ICJ examined an important facet of the case more carefully—one the HCI had almost entirely ignored—the question of demography. Compelled to measure the proportional defense benefits of the barrier against Palestinian humanitarian concerns, the ICJ considered the number of Palestinians forced to depart from land seized by the Israeli government in relation to the defense benefits of the WBB. In doing so, the Court discovered a trend of forced eviction or direct isolation of Palestinians from land in the path of the WBB, occurring with greater frequency near urban industrial areas. International law tolerates such confiscation of property only when there is an absolute defense motive, yet the nonfunction of U.N. Charter Article 51 in the case had virtually castrated Israel's legal argument. Legally, Article 51 was Israel's strongest defense for the barrier and, had the ICJ agreed to its applicability in this case, may have dramatically altered the Court's final decision.[20] The proportionality of self-defense to Palestinian human rights, as realized via the WBB, was found to heavily favor Israel to the peril of Palestinian self-determination, economic growth, and hopes for future peace. Moreover, the final advisory opinion noted that the route of the barrier, with all its topographical peculiarities, "gives expression

in loco to the illegal measures taken by Israel with regard to Jerusalem and the [West Bank Jewish] settlements as deplored by the Security Council."[10] Most relevant to this study, the Court found discomfort in knowing that the massive abandonment of requisitioned land by Palestinian residents, coupled with the further encroachment of Jewish settlements, "is tending to alter the demographic composition of the Occupied Palestinian Territory."[21] Based on these demographic concerns, the Court ultimately found the WBB to exist in fundamental breach of international law and ordered the immediate cessation of its construction. It was also decided that Israel should dismantle what sections of the barrier were already in place and provide ample monetary compensation to those individuals displaced by the construction. Although fourteen of the fifteen judges serving on the Court voted in favor of this outcome, Israel has not yet complied.

It must be noted that an advisory opinion issued by the ICJ is not binding; such a ruling is merely a recommendation. The Court's advisory ruling is more significant symbolically than it has been practically. Thus, reactions to the ICJ's decision have been necessarily mixed. The United States rejected the advisory opinion of the ICJ. Moreover, American disdain for the ICJ in this particular case was universally bipartisan.[22] White House spokesman Scott McClellan noted, "We do not believe that [the ICJ] is the appropriate forum to resolve what is a political issue."[23] Senator John Kerry, simultaneously campaigning for the Presidency, mentioned that he was "deeply disappointed by [the] International Court of Justice ruling related to Israel's security fence" and that "the fence is not a matter for the ICJ." Furthermore, the U.S. Congress voted 361-45 in opposition to the ICJ's decision. House Deputy Assistant Majority Leader Mike Pence declared that when the Court "described Israel as an occupying power in Occupied Palestinian Territory, it was most assuredly a dark day and a day of disgrace for the International Court of Justice."[24] Erstwhile, House Majority Leader Tom Delay, recalling a recent trip to the West Bank, stated, "I did not see occupied territory; I saw Israel."[25] Israel also expressed outrage over the ICJ's opinion. Raanan Gissin, a senior aide to the Prime Minister stated, "I believe that after all this rancor dies, this resolution will find its place in the garbage can of history."[26] Israeli Prime Minister Ariel Sharon also made the point, albeit in less poetic terms: "The State of Israel absolutely rejects the ruling of the International Court of Justice in The Hague."[27] Many of the nations in support of the ICJ's opinion, however, viewed the outcome as a moral victory over Israel. They observed that the HCI is too often able to skirt international law by maintaining a safe level of detachment from the occupation. In the past, when the HCI has ruled on issues challenging Israel's hegemony in the region, it has overwhelmingly sided with the state.[28]

> Examples of this deference include seminal judgments that have permitted the building of settler roads, the deportation of Palestinian prisoners outside of the occupied territories, administrative detentions, house demolitions and collective punishment, the denial or revocation of residency status and family reunification, and, until recently, torture.[29]

The HCI has expressed general apathy towards Israel's "separation cum discrimination" laws, which govern the civil rights of individuals according to ethnic and religious background.[30] Moreover, the Court has simply avoided deciding whether the Fourth Geneva Convention can be applied *de jure* to the West Bank occupation. Some have suggested that such an acceptance of the Convention would oblige the Court to finally consider the legality of Jewish settlements in the West Bank, something it has not yet done and probably will never do.

Without dwelling entirely on the minutiae of relevant passages of international law, one can also search for potential patterns of judicial bias by reviewing the past records of both courts on matters concerning Israel's occupation of the West Bank. While the HCI is well known for maintaining a socially liberal position on individual rights, sexual orientation and freedom of expression, its record on the occupation seems almost to exclusively favor state consolidation of Israeli dominance in the West Bank.[31] Such a tendency leads one to question the Court's capacity for governmental oversight on the matter. Contrarily, the ICJ does not have a particularly obvious record of opposition to Israel—let alone evidence for inane accusations of anti-Semitism.[32] Apart from the advisory opinion in question, there has been only one other time the Court has even formally addressed issues involving Israel.[33] Moreover, even though it was the Jewish-American judge on the Court, Thomas Buergenthal, who cast the dissenting vote, his views did not conflict with the Court's to such a degree that he was prepared to submit a formal dissenting opinion. Instead, he chose to summarize his decision as a separate declaration, in which he states,

> My negative votes with regard to the remaining items of the *dispositif* should not be seen as reflecting my view that the construction of the wall by Israel on the Occupied Palestinian Territory does not raise serious questions as a matter of international law. I believe it does, and there is much in the Opinion with which I agree.[34]

Judge Buergenthal proceeded to uphold the Court's position on the Israeli government's tolerance of Israeli settlement in the West Bank, describing such settlements as *"ipso facto* in violation of international law."[35]

Regardless of Israel's motive for building the WBB, it seems very likely that the project violates international law. Israel has been inconsistent in its own defense, applying and denying the Fourth Geneva Convention at leisure. As mentioned earlier, this inconsistency leads one to question Israel's motives. I believe there is a connection between the HCI's recognition of the Fourth Geneva Convention in Rafah and the withdrawal from Gaza less than three months later. I also believe that Israel's reticence to apply the same standard to the West Bank is tantamount to recognition of a demographic vulnerability in the West Bank. Applying the Convention would seem to imply an independent Palestinian state or at least a level of Palestinian autonomy Israel is not willing to accept. The very fact that the WBB extends deep into Palestinian territory to include 80 percent of the Jewish settlements is more evidence that demographic considerations should not be ignored.[36] Therefore, I conclude this section with serious misgivings about the sustainability of Israel's legal argument for the WBB. However, it is still possible that the barrier, regardless of international legality, *does* achieve significant defense results. I will consider this possibility in the following section.

Defense Versus Demography: Two Justifications

While Israel was able to gain legal credibility for the WBB domestically, the international community overwhelmingly supported the clear decision of the ICJ. The UN General Assembly voted 150-6 in favor of enforcing the Court's opinion.[37] Acting against this consensus, Israel chose to continue construction and today the wall is virtually complete, apart from a few disputed extensions. Yet, to step away from international law for a moment, it is relevant to analyze the barrier according to its purported intent: self-defense. I will examine the efficacy of the barrier as a self-defense mechanism, regardless of international legality, insofar as it has allowed Israel to thwart terrorist attacks. I will systematically dissect key points of the security argument, and consider possible external factors that might have been incorrectly attributed to the WBB. Finally, I will further scrutinize the HCI Beit Sourik ruling, revealing inconsistencies and problems underscoring the Court's general passivity on matters regarding the occupation.

There has been a range of official reports highlighting the curb in terrorist activities since construction of the WBB began. Unfortunately, it seems that the only relevant studies have been conducted either by the Israeli government or by the IDF. Thus, for a lack of more neutral sources and without the means to personally verify the results, I have no way of knowing the accuracy of such information. The challenge for the independent researcher is to view

such information in the context of a range of external factors, which may have *collectively* contributed to the results. A superficial review of these studies leads one to a quick and singular conclusion: the WBB works—at least for the purposes Israel claims to have built it. Stage A of the WBB, the most northwestern section of the barrier, was completed in July 2003. During the first half of 2004, the IDF managed to prevent every suicide bomb attack from this region, especially attacks originating from the Nablus and Jenin regions.[38] From the beginning of the al-Aqsa Intifada in 2000 until the completion of Stage A, a total of 35 Palestinian suicide bomb attacks were successfully detonated in Israel, killing 156 and injuring hundreds more.[39] Now, because of the disadvantage for militant strikes, the central hub for the Palestinian offensive has moved from Nablus and Jenin to East Jerusalem, where the barrier is still undergoing changes. Rather than increasing such attacks in Jerusalem, it is argued that with fewer borders to patrol, the IDF is now more likely to intercept would-be attackers. The IDF's data seemingly corresponds. From the beginning of 2004, more than 2000 Palestinians have been apprehended while trying to enter Israel, of whom 58 were attempting to detonate a bomb.[40] This trend has led many to herald the security benefits of such a barrier. Yet, such statistics are not entirely relevant until put in context.

During the first Intifada, from 1987 until the Peace process began in the early 1990s, the frequency of Palestinian attacks resembled something of a bell curve. Once the Intifada began, the intensity of attacks escalated quickly and correspondingly diminished after the peak of heavy violence had passed. Overall, there were rises and dips in the violence (Saddam Hussein's 1990 invasion of Kuwait reinvigorated the Intifada, for example). However, from the climax to the nadir, a gradual, downward trend was apparent.[41] Interestingly, Israeli retaliation during the first Intifada grew increasingly more severe, despite such lulls. It has been suggested that, with or without the WBB, Palestinian attacks would have naturally decreased during the al-Aqsa Intifada faced with steadily mounting Israeli retaliation. Indeed, over 3,000 Palestinians were killed by the IDF between December 2000 and the cease-fire negotiation of February 8, 2005—more than half of whom were not involved in the fighting and more than six times the number killed during the first Intifada.[42] Yet, the number of Israeli civilians killed by Palestinian militants in Israel peaked in 2002 *even before* completion of the first stage. A sort of bell curve also appears in the fatalities suffered by Israel during the al-Aqsa Intifada. In this case, Israeli retaliation also became increasingly harsh as the Palestinian offensive waned. During 2004 alone, the year Israel cites as an example of the apparent decline in Palestinian attacks, the IDF killed 812 Palestinians—even more than in 2003, when Palestinian attacks were significantly more frequent.

Thus, to automatically attribute the decrease in attacks to the WBB discounts another possible explanation. It is also possible that a steadily increasing Israeli retaliation in the face of waning Palestinian violence, both in the first and the al-Aqsa Intifadas, has helped to prevent militant attacks.

There is no dispute that the WBB has provided at least some compelling self-defense results, yet whether or not a similar barrier, built on the Israeli side of the Green Line, could have achieved these results is an uncertain and highly contentious point. In the Beit Sourik case, security experts on both sides argued over the necessity of the proposed route. The Beit Sourik petitioners argued that because the planned route wove intrusively deep into Palestinian land and often very close to Palestinian villages, Israel could not presume to cite security as a sole concern. They argued that the very proximity of the barrier to Palestinian villages would further incite hostility from the occupied population while simultaneously making it easier to attack patrolling IDF soldiers. According to the official record,

> Distancing the planned route from Israeli towns in order to seize distant hilltops with topographical control is unnecessary, and has serious consequences for the length of the separation fence, its functionality, and for attacks on it.[43]

This implies that the Beit Sourik petitioners would have withheld such fervid opposition to a barrier built on the Israeli side of the 1949 so called "Green Line." This fence around Gaza, built closely along the 1948 borders, and the mild outcry was cited as an example of Palestinian tolerance of *legal* barriers. Israeli respondents claimed, sparking a hypothetical debate among security experts on both sides, that a barrier on the Green Line would be a political border and not a security border, thereby defeating the purpose.[44] The HCI went along with this argument and, having already stated that a political barrier would be forbidden, appeared to make an indirect comment on the matter. To build the barrier on the Green Line—since it is allegedly political—would have been forbidden. This notion of the Green Line as a purely political border, possessing inferior defensibility options has since become a sort of pro-barrier mantra across the Israeli political spectrum. Further stressing this point, Israel argued, "The [current] fence is not a border and has no political significance. It does not change the legal status of the territory in any way."[45] In reality, such an assertion has proven more difficult to ensure, even if avoiding "political significance" was an Israeli objective.[46]

The WBB has undergone a series of metamorphoses since the prospect of physical separation was formally adopted by the Sharon government. At the 2000 Herzliya Conference, Dr. Arnon Sofer of Haifa University, an outspoken

proponent of permanent Israel-Palestinian separation, delivered a presentation outlining his plan to prevent the eventual demographic "end of the Jewish state of Israel."[47] Speaking at the conference, Sofer suggested a plan to isolate the occupied Palestinian population into three geographically separate cantons. The first would encapsulate land from Jenin to Ramallah, the second, from Bethlehem to Hebron (without access to Jerusalem), and the third would surround the city of Jericho. Ariel Sharon had attended the conference and was apparently interested in Sofer's plan. Historically against physical separation, as it seemed to conflict with the Greater Israel vision, Sharon had already begun to flirt with the idea by the time he attended the conference. Despite the idea having traditionally been espoused by the Israeli left, it is possible to trace Sharon's motivation to endorse a barrier. Whereas the Labor party, most notably under the leadership of Yitzhak Rabin, had considered the benefits of a barrier along the Green Line, Sharon's intent was to encourage further Israeli settlement while isolating the Palestinian population centers of the West Bank. Hence, on February 6, 2001, the day Sharon was elected Israeli prime minister, Dr. Sofer received a telephone call from the new prime minister's representatives "and they asked [him] to bring the maps."[48] The route that emerged was approved by the Israeli cabinet in October 2003. This manifestation of the WBB "would have effectively annexed around 16 percent of the West Bank, while leaving scores of settlements, outposts, military areas, and 700 kilometers of Jewish-only roads beyond the wall to the east."[49] This was, to use Sharon's own description, the "Bantustan"[50] plan that both the ICJ and the HCI ruled on in 2004.

The original WBB route was virtually indistinguishable from Dr. Sofer's vision, effectively imprisoning the majority of the West Bank Palestinian population in three strongly militarized enclaves. In February 2005, Sharon changed the path of the wall into its modern manifestation, more or less. Why did Sharon change his mind? In contrast to the original plan, the present barrier does not create such conspicuous Palestinian cantons. It follows the Green Line more than the original plan, albeit on the Palestinian side, and annexes far less land in its attempt to include as many Israeli settlements as possible. Though less sweeping in scope, the remaining similarity between the original plan and the current barrier is the physical reinforcement of Israel's annexation of East Jerusalem and the other 10 percent of the West Bank now on the Israeli side of the WBB.[51] The approximately 49,000 Palestinians on this land, caught between the WBB and the Green Line, have either been forcibly removed or have been granted only temporary permission to remain on the land. Israel has not expressed any intention to assimilate these people into the Israeli population, and it would seem that "through settlement expansion, restrictions on entry

into Israel, and isolation from PA [Palestinian Authority] services, the likelihood is that these enclaves will wither away."[52] Israeli citizens, including settlers, are authorized to move freely throughout these areas without a permit. It is in such an outcome that one is afforded a glimpse at Sharon's intent. Incidentally, such an outcome also verifies one of the central concerns expressed by the ICJ in its advisory opinion of the matter—specifically that the WBB is altering region's demography. According to Shaul Arieli, an Israeli cartographer and former military advisor to Ehud Barak, "The rationale is to create the conditions for voluntary transfer so that the Palestinians will abandon their homes and go [east] to the big Palestinian cities." Such conditions make it "possible to expand the borders of Israel without paying the demographic price, because if you change the demography, you change the geography."[53] Therefore, demography *was* a factor. Under the original route, 400,000 Palestinians would have been caught in the "seam-line" between the WBB and the Green Line. 400,000 refugees would have created a problem for Israel tactically, especially under the scrutiny of the international community; Forty-nine thousand was more manageable number. Sharon's logic is then easier to follow, deftly summarized by Dr. Sofer's response when asked to explain the percentage of his separation plan directed by demography and the percentage directed by security when he said, "One hundred percent demography." [54]

Many of the changes the WBB route has undergone can be attributed to Israeli settlements in the West Bank, another point the ICJ found unacceptable given the illegal status of such settlements. Israel maintains that it is "ready and able, at tremendous cost, to adjust or dismantle [the] fence if so required."[55] Israel, it is argued, has demonstrated its willingness in the past to alter the WBB's course with regard to Palestinian humanitarian concerns. In early 2004, Israel dismantled and summarily reconstructed sections of the barrier near the town of Bakal al-Sharkiya. In the Beit Sourik case, the HCI obliged Israel to alter the WBB's route where the hardship wrought upon the local Palestinian population was deemed unnecessarily disproportionate to Israel's defense needs. Again, this time to comply with the HCI's ruling, Israel dismantled and rebuilt sections of the barrier outside a town near Jerusalem. Yet, apart from complying with the HCI's demands and coordinating other minor changes, the route adopted in February 2005 has diverged from the original plan only insofar as it has not created three separate Palestinian cantons. Thus, apart from the "cantonization" of the West Bank, the western face of the barrier has maintained every other intrusive element, even provoking criticism from the United States regarding the especially intrusive inclusion of Ariel.[56] For the barrier to include Ariel, the sixth largest of the Israeli settlements, it now cuts more than 17 miles into the West Bank. Israel has certainly

proven that it is "willing and able to…adjust or dismantle [the] fence,"[57] but this has typically applied to the WBB's further intrusion of the West Bank.

Many of the WBB's modifications have been crafted around carefully coordinated settler lobbies. For example, the Alfei Menashe settlement of 5,000 residents, located outside the Palestinian city of Qalqiliya, was not originally set for inclusion on the Israeli side of the barrier. The Israeli residents were understandably concerned with the prospect of being cut off from Israel, and when they discovered this, the dismayed town council took action. After petitioning the government and discussing with Ariel Sharon himself, it was suggested that a separate barrier be erected around the settlement, independent from the WBB. The residents were unhappy with this outcome, concerned about entering hostile Palestinian territory upon leaving the settlement and continued to petition for inclusion. Ultimately, through their actions, the Israeli Defense Ministry decided to include Alfei Menashe within the greater barrier, thereby physically preventing the Palestinian towns of Qalqiliya and Halba from growing into one another (an outcome the settlers had feared).[58] The decision was devastating for the Palestinian cities, especially for Qalqiliya, which now finds itself entirely surrounded by the WBB, sealed off from the rest of the West Bank, except for a single military checkpoint. Consequently, 600 of Qalqiliya's businesses have closed and 20 percent of the population has left the city.[59] The entire endeavor, on Israel's part, added an additional NIS 130 million to the overall cost of the barrier. In light of so many other costly modifications, some have questioned Israel's assertion that the barrier is a temporary measure. Asked about his role in petitioning the Israeli government to isolate Qalqiliya and Habla, Eliezer Hasdai, head of the Alfei Menashe local council boasted, "We've moved the Green Line."[60]

In 2004, when the HCI ruled on the Beit Sourik case, all arguments of demography were dismissed by the Court. Although the Court declared that Israel could not build a barrier with political intentions, it went to great lengths to avoid determining whether or not the barrier was political in practice. After hearing arguments put forward by the IDF, the Court found that "these are security concerns *par excellence.* In an additional affidavit, Major General Kaplinsky testified that 'it is not a permanent Fence, but rather a temporary Fence erected for security needs.' We have no reason not to give this testimony less than full weight, and we have no reason not to believe the sincerity of the military commander."[61] Once the Court had established this tentative basis for the security argument to proceed, it could proceed to trivialize Palestinian petitions based on the applicability of proportionality. Yet, proportionality is an inherently subjective notion of measurement. It has been observed that, in weighing comparative benefits between military security and

humanitarian concerns, the Court has most often accepted strong military allowances. For instance, based on the proportionality model and without confirming evidence, the HCI controversially upheld Israel's policy of house demolitions as a deterrent to Palestinian resistance. Ironically, the HCI continued to reject petitions seeking to prevent house demolition even as the IDF independently ceased such operations in February 2005. A government study had found the practice of house demolition provided only marginal benefits compared to the deeper resentment and hatred it fostered in the Palestinian population. The Court's position on the WBB has similarly failed to fully consider the long-term implications of the WBB. As Israeli journalist Tom Segev has written, "When it comes to the occupation, the court has been far from its image as the stronghold for the defense of human rights."[62]

To allow the confiscation of private land to proceed in Beit Sourik, the HCI referred to its own legal corpus, rife with affirmative rulings that have allowed the construction of "roads, settlements, barriers, administrative offices, and military facilities in the name of occupation."[63] The temporary nature of such construction is questionable, however. In 2002, when the IDF first began to confiscate Palestinian property to make way for the WBB, it was issued seizure warrants valid until the end of 2005. The military regime governing the occupied territories, however, allows for the indefinite extension of such permission and has thereby rendered these seizures effectively indefinite. As Michael Lynk has written, "the HCI ignored the historical record of the conflict that there is nothing so permanent as a temporary Israeli installation on occupied lands."[64] Another insufficiency with the HCI ruling was its lack of scrutiny towards the barrier's inclusion of Israeli settlements. Against all evidence, the HCI rejected the claims that the WBB was a political barrier in this respect. Offering no argument to support its decision, the Court was then able to entirely avoid addressing the inclusion of settlements like Ariel and Alfei Menashe.[65] To do so would have jeopardized the security argument, as the Court would have been forced to consider the *de jure* applicability of the Fourth Geneva Convention in the West Bank.

In order to fully grasp the HCI's reasoning in the Beit Sourik case, one must review the process of determining proportionality. Justice Barak discussed this concept at considerable length given its importance to the case. Essentially, the Court was confronted with the simple question of determining whether the means reasonably justified the ends. In other words, could the WBB be justified by increased security benefits, and was this a reasonable justification? To arrive at this decision, the IDF also had to assess whether the amount of suffering inflicted upon the Palestinian population was the least possible under the proposed plan. Last, and most important, was the relation-

ship between the WBB and Palestinian suffering *proportional?* To address the first question, the Court heard from both sides, for which the arguments were naturally polarized. Ultimately, because a reasonable relationship between the WBB and security seemed natural, the Court found this requirement satisfied. Whether or not the WBB was built so as to inflict the least amount of suffering was more subjective. According to B'Tselem, "Israel is once again relying on security arguments to unilaterally establish facts on the ground that will affect any future agreement between Israel and the Palestinians," and that the WBB "is the most extreme solution that causes the greatest harm to the local population."[66] Unbelievably, despite the number of alternative and less-restrictive measures that could have been pursued by Israel to increase security, the Court found the WBB to be the least injurious.[67] As discussed earlier, the question regarding proportionality of Palestinian suffering led the Court to order the IDF to dismantle approximately ten kilometers of the barrier, where the intrusion was especially offensive. Yet, this is where the Court ended its legal analysis. According to Graham Usher, the HCI failed to review an additional two factors required by international law: "(1) Is the occupying power facing an actual and pressing state of necessity? and (2) does the measure in question violate an absolute prohibition in international humanitarian law?"[68] If not dramatically altering the Court's decision, these two additional considerations would have at least expanded the range of considerations one typically expects from a democratic court of law. By solely examining the latter question, the Court would have been forced to address the question of Israeli settlements and, through that, the *de jure* applicability of the Fourth Geneva Convention. Ultimately, it is the Court's hesitancy to rule on this applicability that has historically skewed decisions regarding the occupation heavily in favor of the Israeli military regime.

This section has attempted to place Israel's self-defense argument into a relative analytical context. I conclude that although the WBB has provided some credible security results, the chronological proximity of the 2005 ceasefire agreement to the barrier's completion has prevented serious analysis of any derived security benefits. Yet, the noticeable decrease in Palestinian violence prior the completion of the first stage suggests at least some alternative factors, such as waning popular interest in the Intifada faced with steadily increasing Israeli retaliation. Israel has repeatedly argued that the present route has been entirely determined by security concerns and that, had the barrier been built on the Green Line, it would have violated the HCI's demand for the wall to remain apolitical. Furthermore, Israel has attempted to argue its willingness to remove offensive sections of the wall in order to diminish any negative impact on the lives of West Bank Palestinians. Yet, this has not

been the reality. Israel contradicts itself by claiming the barrier has been built entirely around security needs, while the vast majority of the alterations have been clearly aimed at including more settlements on the Israeli side of the WBB. Thus, Israel is both unrealistic in assuming a singular security purpose for the barrier and in maintaining the barrier's political neutrality. By forcing thousands of Palestinians to relocate as it carves deeply into the West Bank, the WBB's very nature is political. The HCI, being historically averse to addressing the issue, declined to seriously consider the possibility that the barrier was built to encompass Israeli settlements within its protection. These points lend further credence to the implicit demographic undertones of the WBB, a legitimate consideration that should have been addressed by the HCI but was dismissed based on an incomplete and skewed method of measuring proportionality.

Conclusion

This study has been confronted with the uncertain task of arguing a point heavily reliant upon current, unfolding events. While any research involving such developing issues faces the potential threat of quick and merciless invalidation, it is perhaps even more difficult when applied to the rapidly changing political environment of Israel. Any qualms of this nature were quickly replaced with further confidence in my conclusion, however, as I closely followed Israeli politics, parallel to my research. When I began, the WBB's future seemed further solidified with the rise of Hamas and Israel continued to maintain the self-defense argument. Yet now, newly-elected prime minister Ehud Olmert speaks freely of his "convergence plan" to unilaterally draw Israel's permanent borders along the WBB. The eventuality predicted by the WBB's opponents seems to have become mainstream political rhetoric. Olmert is beginning to realize the long-term benefits of the WBB and speaks less of security than he does of permanent borders and of unilateral withdrawal.

Though Israel has been able to successfully avert a number of potential militant attacks since the construction of the WBB, the demographic implications are serious enough to warrant concern. That Israel has applied separate legal standards to the West Bank raises suspicions—especially with regard to the WBB's justification. The WBB's path has frequently altered with respect to Israeli settlements and without consideration for the potentially increased hatred this may inspire in the Palestinian population, which seems to undermine the security argument. Furthermore, thousands of Palestinians caught within the seam-line have been stripped of their land and sent east, leading the ICJ to express concern over the demographic toll the WBB was taking in the

West Bank. Moreover, the HCI's failure to address the political implications of the WBB in the context of Israeli settlement renders their ruling on the barrier incomplete and lends further credence to the notion that security may not be the primary intent. Despite the relative security benefits, it is clear that the WBB allows Israel to more easily annex Palestinian land, strengthen the occupation through the forced removal of Palestinian Arabs and to continue to exercise hegemony in the West Bank.

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ion/imwp_advisory_opinion_declaration_buergenthal.htm.

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Endnotes

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[1] There has been much controversy surrounding the legal status of this barrier and various arguments raised regarding its status as a wall or a fence. In practice, it is both, though for the sake of convenience (and neutrality), I have chosen to refer to this particular project as the West Bank Barrier (hereafter WBB).

[2] A similar barrier was built around Gaza in 1994.

[3] United Nations, International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* par. 82 (9 July 2004) Online; available from *http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm* [accessed 3 February 2006].

[4] The original study, written as my senior thesis, contained a final chapter of the importance of demography to Israeli policy from 1948 until today. I have shortened this paper by removing the last chapter.

[5] United Nations, *Charter of the United Nations,* Ch. VII, Art. 51 (26 June 1945) Online; available from *http://www.un.org/aboutun/charter/* [accessed 3 February 2006].

[6] Iain Scrobbie, "Words My Mother Never Taught Me: In Defense of the International Court," *The American Journal of International Law,* Vol. 99, Iss. 1.

[7] Israel, High Court of Justice, *Beit Sourik Village Council vs. the State of Israel,* HCJ 2056/04 (30 June 2004): par.32.

[8] See Geneva Convention IV, Art. 53: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, *except where such destruction is rendered absolutely necessary by military operations.*" [emphasis added].

[9] Israel, High Court of Justice, *Beit Sourik Village Council vs. the State of Israel,* par. 12.
[10] Ibid, par. 27.
[11] See Geneva Convention IV, Art. 49: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."
[12] United Nations, International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* par.99.
[13] Ibid.
[14] United States, Department of State, *Declaration of Principles on Interim Self-Government Arrangements,* Article 8, (13 September 1993) Online; available from *http://www.state.gov/p/nea/rls/22602.htm* [accessed 8 February 2006].
[15] **United Nations, International Court of Justice, par. 122.**
[16] United Nations, Security Council, *Threats To International Peace & Security Caused by Terrorist Attacks,* Resolution 1368 (12 September 2001) Online; available from *http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement* [accessed 8 February 2006].
[17] *Judgment of the International Military Tribunal of Nuremburg,* 30 September & 1 October 1946.
[18] Israel, High Court of Justice, *Physicians For Human Rights, Etc. vs. IDF,* HCJ 4764/04 (30 May 2004): par. 10.
[19] See Security Council Resolutions 446, 471, and 607.
[20] It should be noted that Judge Buergenthal, in his separate declaration, argued that the ICJ was not provided with ample evidence of the barrier's security benefits and the Court, therefore, should not have ruled on the matter.
[21] United Nations, International Court of Justice, par. 122.
[22] Stephen Zunes, "Implications of the US Reaction To the World Court Ruling Against Israel's 'Separation Barrier,'" *Middle East Policy,* Vol. 11, No. 4 (Winter 2004): 72.
[23] **United States, Office of the Press Secretary,** *Press Gaggle By Scott McClellan,* (July 9 2004) Online; available from *http://www.whitehouse.gov/news/releases/2004/07/20040709-1.html* [accessed 8 February 2006].
[24] United States, House of Representatives. *Congressional Record.* H5772.
[25] American Israel Public Affairs Committee, transcript from 2002 policy conference, 23 April 2002.
[26] British Broadcasting Corporation, *UN Rules Against Israeli Barrier,* (9 July 2004) Online; available from *http://news.bbc.co.uk/1/hi/world/middle_east/3879057.stm* [accessed 9 February 2006].
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[28] Michael Lynk, "Down By Law: The HCI, International Law, and the Separation Wall," *Journal of Palestine Studies,* Vol. 35, No. 1 (Autumn 2005): 8.
[29] Ibid.
[30] B'Tselem, *Land Expropriation and Settlements* (2006) Online; available from *http://www.btselem.org/English/Settlements/* [accessed 9 February 2006].
[31] Michael Lynk, p. 8.
[32] **Charges of anti-Semitism have sometimes been leveled at the United Nations and the International** Court of Justice by strongly Zionist individuals. While I have not reviewed the possibility of such a bias within the General Assembly, I have no reason to suspect such bigotry of the ICJ after having examined a great deal of the court's past decisions.
[33] **See United Nations, International Court of Justice,** *Aerial Incident of 27 July 1955 Israel v. Bulgaria (26 May 1959),* Online; available from *http://www.icj-cij.org/icjwww/idecisions/isummaries/iibsummary590526.htm* [accessed 17 February 2006].
[34] **Thomas Buergenthal,** *Declaration of Judge Buergenthal* (9 July 2004) Online; available from *http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_declaration_buergenthal.htm* [accessed 24 February 2006].
[35] **Ibid. Moreover, having survived the Jewish ghetto of Kielce in Poland and both the Sachsenhausen and** Auschwitz death-camps, one can hardly ascribe Judge Buergenthal's sentiment to covert anti-Semitism. Such accusations are quite entirely baseless.
[36] United Nations, International Court of Justice, par. 119.

[37] In usual disdain for resolutions critical of Israel, the United States vetoed the measure. See UN News Centre, "UN Assembly Votes Overwhelmingly To Demand Israel Comply With ICJ Ruling," (20 July 2004) Online; available from *http://www.un.org/apps/news/story.asp?NewsID=11418&Cr=middle&Cr1=east* [accessed 20 February 2006].
[38] Colonel Zohar Palti, "Israel's Security Fence: Effective In Reducing Suicide Attacks From the Northern West Bank," *PeaceWatch,* No. 464, 7 July 2004.
[39] Ibid.
[40] Ibid.
[41] Benny Morris, *Righteous Victims: A History of the Zionist-Arab Conflict 1881-1999* (New York: Alfred A. Knopf, 1999), 584.
[42] B'Tselem, Statistics: Fatalities (15 February 2006) Online; available from *http://www.btselem.org/english/statistics/casualties.asp* [accessed 24 February 2006].
[43] Israel, High Court of Justice, *Beit Sourik Village Council vs. the State of Israel,* par.18.
[44] United Nations, International Court of Justice, par. 116.
[45] Ibid.
[46] When my research began, it was argued that WBB had no political significance and served merely security goals. Since the recent Israeli elections, Ehud Olmert has expressed his intentions to unilaterally draw Israel's borders along the WBB—his so-called "convergence plan."
[47] Arnon Sofer cited in Lily Galili, "A Jewish Demographic State," *Ha'aretz,* 27 June 2002.
[48] Meron Rappaport, "A Wall In Their Heart," *Yedioth Aharonoth,* 23 May 2003.
[49] Graham Usher, "Unmaking Palestine: On Israel, the Palestinian, and the Wall," *Journal of Palestine Studies,* Vol. 35, No. 1 (Autumn 2005): 35.
[50] Ibid.
[51] Ibid. The term *bantustan,* as Sharon used it here, is a comparison to the squalor of black South African shantytowns during the apartheid era.
[52] Ibid.
[53] Shaul Arieli cited in Graham Usher, 35-36.
[54] Arnon Sofer, *Israel Demography 2000-2020: Dangers and Opportunities* (University of Haifa: National Security Studies Center, 2001).
[55] United Nations, International Court of Justice, par. 116.; Based on Israel's response to the ICJ's *Legal Consequences,* I take it for granted that such a statement refers only to requirements imposed by the HCI.
[56] Todd S. Purdum, "U.S. Criticizes Israel's New Electronic Fence along the West Bank," *New York Times,* 18 June 2002.
[57] United Nations, International Court of Justice, par. 116.
[58] Meron Rappaport.
[59] United Nations, International Court of Justice, par. 133.
[60] Eliezer Hasdai cited in Meron Rappaport.
[61] Israel, High Court of Justice, *Beit Sourik Village Council vs. the State of Israel,* par.29
[62] Tom Segev, "Mahmoud Nasser's House," *Ha'aretz,* 30 June 2005.
[63] Michael Lynk, 10.
[64] Ibid.
[65] In response to a Palestinian petition, the HCI did rule in September 2005 that Israel should "reconsider the various fence route alternatives" around Alfei Menashe. As of now, nothing has been altered. See Israel, High Court of Justice, *The Judgment on the Fence Surrounding Alfei Menashe,* HCJ 7957/04 (15 September 2005).
[66] B'Tselem, *Separation Barrier* (23 February 2005) Online; available from *http://www.btselem.org/english/separation_barrier/index.asp* [accessed 24 February 2006].
[67] A barrier built on the Israeli side of the Green Line or increased troop numbers at the border would have resulted in much less Palestinian hardship while still increasing Israeli security, for example.
[68] Michael Lynk, 13.