

# The Price of Internal Legal Opposition to Human Rights Abuses

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## Abstract

Many of the legal campaigns against governmental practices and policies in large-scale human-rights abusing regimes are waged 'internally', through the regime's own institutions. Such litigations raise serious dilemmas for human rights lawyers and for human rights organizations. This essay is an attempt to dig out the implications of these internal legal struggles, whatever their effectiveness, for the project of bringing an end to the human rights abusing regime. The essay analyzes 35 years of ongoing, occupation-related human rights litigation in the Israeli court as a generic example of a massive 'internal' legal opposition. The author of this essay, an Israeli lawyer, involved in such litigations, reaches a painful conclusion: although internal legal action might ease human sufferings in individual cases, it nevertheless potentially empowers the regime and contributes to its sustainability.

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I was not, as I liked to think, the indulgent pleasure-loving opposite of the cold rigid Colonel. I was the lie that Empire tells itself when times are easy, he was the truth that Empire tells when harsh winds blow (Coetzee, 1980: 135).

## The Question

It happened almost imperceptibly. The Israeli Supreme Court (hereinafter: 'the Court') has ruled that its power to judicially review any military activity extends beyond the border of the State of Israel;<sup>1</sup> or, to put it differently, that it can examine the deeds of the military and the civilian administration dominating the lands conquered by Israel in the 1967 war. During that war between Israel and its neighbouring Arab countries, Israel occupied the West Bank, which until then was under Jordanian rule, and the Gaza strip, which was under Egyptian domination. The 1967 belligerent conquests submitted millions of Palestinians to an Israeli military regime, stripping them of basic civil and political rights. The occupation, which was supposed to be temporary (and is defined as such in International Humanitarian Law), continues, more than four decades after its establishment.

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1 Since Israel does not have agreed and defined political borders, I am referring here to the boundaries of the regions to which Knesset-enacted Israeli law is applicable.

At the time the ruling of the Court was given, 5 years into the Israeli occupation of the Palestinian lands, no one seemed to be aware of the possible ramifications of submitting occupied territories to the jurisdiction of the occupier's court. In fact, the Court's acknowledgment of its jurisdiction over the military activity in the Occupied Territories was only implicit. An internal dispute between Palestinian employers and employees resulted in the Military Commander's decision to change the existing labour laws in the territory – according to international law, the Military Commander is vested with the powers of all branches of government and is responsible for the territories under his domination (only ever 'his'; never 'hers'). One party petitioned the decision arguing that the Commander had exceeded his authority. The Court did not raise the question of jurisdiction and gave a ruling on its merits, applying the international law of belligerent occupation.<sup>2</sup>

Since then, the Court has been regularly reviewing the decisions of the Military Commander of the Occupied Territories. In retrospect, the 1972 decision tacitly paved the way for occupation-related jurisprudence in the Israeli Court. After 1972, the Court's courtrooms gradually became the major arena for the struggle against human rights abuses by the occupation forces. Much of the energy and resources of the human rights movement have been channelled in this direction.

The legal field created by the Court's expansion of its territorial jurisdiction became a ground for an intensive, decades-long legal drama. Four actors have appeared on the stage: the Military Commander; the Palestinian civilian who is the subject of the military regime; the human rights lawyer and campaigner who represents the struggle for human rights and civil liberties in those territories; and the Court itself, torn by a complex net of interests, pressures and, naturally, by legal doctrines.

More than 35 years have passed and none of the actors has left the stage nor has the drama ever reached its conclusion. New conflicts between the actors emerge every so often and the legal disputes go on. The scenario is always the same: the military introduces new means of domination and makes claims to new types of power; the Palestinians, often assisted by human rights organizations and lawyers, lodge petitions challenging the legality of those means and powers; the Court's docket is inundated with occupation-related cases. The show goes on and on.

Looking back at the four decades of this ongoing legal struggle, can we declare a winner? Can we decide whether 'taking the occupation to court' is an effective strategy? Above all, for whom is this move beneficial, if for anybody? Do we know for whom the legal struggle is worth fighting?

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2 H.C.J. 337/71 *The Christian Society for the Holy Places v. Minister of Defense* 26 (1) P.D. 574 [For an English summary see (1972) 2 *Isr YBHR* 354].

A thorough analysis of the occupation-related legal practice and jurisprudence leads to two contradicting conclusions.<sup>3</sup> On the one hand, the Israeli Court's jurisprudence has systematically enhanced the power and authority of the Israeli Army and approved a wide range of abuses of the rights of the occupied population. This was done even when the power sought contravened basic tenets of international law. In fact, the Court has become one of the pillars of the Israeli occupation and its judgments have been used both as forms of authorization waved daily by the army and the government, and as a major public relations tool, applied both internally and internationally.

On the other hand, Court proceedings had a mitigating influence on the activity of the Israeli Defense Forces and its subsidiary bodies: it generated self-restraint among officials, who would not succumb to petitioner's demands unless a petition was lodged or the judges questioned the army's position during the hearings; and it strengthened procedural rights (such as the right to be heard, right of appeal, etc.). This striking combination of upholding abusive practices and creating self-restraint raises the question, which of the above-mentioned influences of Court proceedings is to receive more weight? Which of them, if any, has been more influential in shaping the occupation?

While most human rights legal discourses hold law and courtroom litigation to be a tool for combating abuses, experience of some human rights campaigns is quite different and results in violations being negotiated through the law. The danger in such 'violations under the law' is obvious and stems from the *legitimizing power* the law has, which is fiercely sought by some abusing regimes. Thus, the human rights practitioner, possessing the primary power of choosing which legal battles to fight, is instrumental not only in igniting processes that might end in ruling out and banning abuses. He or she is also responsible in many cases for launching procedures that ended up in legitimizing, shaping and fine-tuning violations.

In the rest of this article I will try to examine these themes from the *human rights lawyer's perspective*. I will do so by exploring the lessons to be learned from experience gathered in the four decades of legal fights against Israeli policies and practice in the Palestinian territories that abuse human rights. Through these lessons I will try to appraise the pros and cons of going to court. The obvious answer is that since lawyers are only interested in safeguarding their clients' rights, and since in occupation-related cases the breach of those rights are a given, the client has nothing to lose in litigating the case.

But this analysis oversimplifies the role of human rights lawyers in combating large-scale human rights abusing regimes. It overlooks the fact that human rights lawyers are no ordinary lawyers. They are, in a way,

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3 The best and most comprehensive study of the Occupation-related jurisprudence of the Israeli Supreme Court was done by Ketzmer (2002).

independent political actors, sensitive to the potential consequences of one litigation on another and to the human rights situation in general. In other words, even if the particular client has nothing to lose from going to court, *the human rights perspective* must be sensitive to the litigation's ramification on the *overall* fight for securing human rights. In the context of the Israeli occupation, the *overall* goal of the fight is to end the occupation. As the occupation is, *in itself*, a violation of democracy, in that it institutionalizes inequality and suspends basic civil rights, the occupation *in itself* is a human rights issue.<sup>4</sup> Therefore, in examining the Court's contribution or damage to human rights and human rights lawyers' shared responsibility, one must examine the Court's role in strengthening or weakening the occupation as a legal and political entity. In other words, the assessor of the Court's jurisprudence and of human rights legal activity will have to consider the effect they both have on the *sustainability* and *durability* of the occupation.

### You Win Some, You Lose Some

Probably, the oldest slogan lawyers use to cheer themselves and their clients up is 'you win some, you lose some'. Evaluating whether the 'some' victories are worth the 'some' losses, demands inflating them, both with a measurable value, and defining clearly what constitutes a success and what should be considered a failure.

### Losing some

The Court's record in guaranteeing human rights for the residents of the occupied Palestinian territories is extremely poor, to say the least. As Ketzmer (2002) shows in his thorough study of the Court's jurisprudence in occupation-related cases, whenever the Court had to interpret international law, to establish the boundaries of authority, or to declare the legality of a policy, the Court's ruling, almost without exception, has strengthened the powers of the Military Commander, broadened the borders of his authority, legitimized his decisions, and left basic human rights unprotected. In 40 years of occupation, the Israeli human rights legal establishment has never missed an opportunity to challenge abusive practices and policies; these efforts were systematically undermined by the Court, which invariably went a long way to secure the legitimacy of the military actions. It dismissed well-grounded and legally sound petitions even when it meant violating basic tenets of legal interpretation. The Court went so far as to compromise the consistency of its own decisions. The few exceptions to this rule won, by the

4 I reject the argument that can be heard from time to time by human rights neutralists, according to which there must not be a linkage between objecting to human rights violations and objecting to the occupation. The *human rights perspective* cannot treat large scale human rights abusing regimes as a random collection of many human rights violating events. The existence of an 'industry' of abuses forces human rights activists and lawyers to fight for the dismantling of the abuses 'factory'.

sheer force of their rarity, disproportionate public attention. Legal analysts and the Court itself, by translating those extraordinary rulings into English, would deliberately make them more noticeable than any other.<sup>5</sup>

Here are several examples of the Court's dubious human rights occupation-related record. Article 49 of the Fourth Geneva Convention states, among others: 'Individual or mass forcible transfers as well as deportations of protected persons ... are prohibited, regardless of their motive'. According to the Court's interpretation, this article does not prohibit individual deportations for security reasons.<sup>6</sup> The Court's analysis was based on an extremely broad and counter-textual interpretation that used mass deportations conducted by the Nazis during World War II as a generic example of the provision's prohibition. In a later case, the Court used an opposite, black letter law approach to support the transfer of Palestinian detainees to detention centres in Israel. The Court had to interpret Article 76 of the Fourth Geneva Convention that maintains that 'Protected Persons accused of offences shall be detained in the Occupied Territory and if convicted they shall serve their sentence therein'. According to the Court, this rule does not apply to those who are subject to administrative detention, and it thus does not protect them.<sup>7</sup>

The Court has approved the establishment of several Israeli–Jewish settlements in the Occupied Territories (Beit-El in the West Bank and Fithat-Rafiach in Sinai Peninsula) under the pretext of 'military necessity'. It did so in contrast to the clear language of Paragraph 6 of Article 49 of the Geneva Convention that clearly prohibits the transfer of citizens of the occupying power to the occupied territory.<sup>8</sup> When, for the first time, the

5 As may be remembered, the Israeli Supreme Court has outlawed the usage of torture in security interrogations. The Court is always happy to cite its own decision and it considers this a landmark ruling. But legal history shows that there is very little to be proud of. The first petition against the use of torture, filed in 1991, was dismissed by the court (see H.C.J. 2581/91 *Morad Adnan Salahat v. The Government of the State of Israel* (1991) 47 (4) P.D. 837). It took the Court almost 6 years to issue its famous opposite decision in another petition (H.C.J. 5100/94 *Public Committee against Torture in Israel v. The Government of Israel* (1999) 53 (4) P.D. 817) [An English version of the Judgment is available at [http://elyon1.court.gov.il/files\\_eng/94/000/051/a09/94051000.a09.HTM](http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.HTM)]. In the meantime, the Court refused numerous requests for interim measures, and thus thousands of Palestinians were tortured while the case was pending.

6 See H.C.J. 97/79 *Awad v. Commander of Judea and Samaria Region* 33 (3) P.D. 309 [For an English summary see (1979) 9 *Isr YBHR* 343]; H.C.J. 698/80 *Kauasme v. Minister of Defense* 35 (1) P.D. 617 [For an English summary see (1981) 11 *Isr YBHR* 344]; H.C.J. 785/87 *Afu v. Commander of the IDF Forces in the West Bank* 42 (2) P.D. 4 [For an English summary see (1993) 23 *Isr YBHR* (1993) 277]. On deportation cases, see Ketzmer (2002: Chapter 10).

7 H.C.J. 253/88 *Sajedia v. Minister of Defense* 42 (3) P.D. 801 [English Summary: (1993) 23 *Isr. YBHR* (1993) 288].

8 See the *Rafiach* case, *supra*, note 10; H.C.J. 606/78 *Ayub v. Minister of Defense* 33 (2) P.D. 113 [English Summary: (1979) 9 *Isr. YBHR* 337] (Hereinafter: 'the *Beit-El* case').

‘military necessity’ argument failed, the Court declared the formation of a settlement (Elon Moreh) illegal.<sup>9</sup> The Court in the Elon Moreh case refrained from ruling on the legality of the settlements under international law. Instead, the outcome was reached by constraining the power to requisition private land for that purpose. As a result, the settlement movement began using State-owned land and the question of the legality of Jewish settlements was again waiting to be answered by the Court. At this stage, the Court refused to adjudicate, grounding its decision in the claim that the issue is politically charged and thus non-justiciable.<sup>10</sup> The Court’s abstention enabled one of the main sources of Palestinian-rights violations to run wild: the settlement movement. Here, as in other cases, the *golem* [dummy] has overwhelmed its creator.

Palestinians could not rely on the Court’s protection also in matters of residency and family unification. The Court was ready to declare almost any military policy as legal. It upheld the practice of stripping Palestinian civilians of their residency status whenever a person has lived several years outside the Occupied Territories. Under this policy, a Palestinian who has spent as little as 4 years with his or her nuclear family in a neighbouring country is not allowed to resettle in the Occupied Territories.<sup>11</sup> The Court has also supported the government and the army in refusing numerous family reunification requests, and it did so even when husband–wife or child–parent unification was requested.

During the second Intifada (Palestinian popular uprising) and in recent years, the Court supported the army by authorizing severe violations of human rights. This was done under the excuse of the ‘war against terror’. The Court allowed seizure of private lands for the construction of roads bypassing Palestinian towns and villages,<sup>12</sup> as well as the demolition of houses for military needs.<sup>13</sup> It did not prevent the uprooting of olive groves,<sup>14</sup> or the destruction of a plantation because it was used by a Palestinian sniper;<sup>15</sup> the closing of schools and the use of the school buildings for military needs;<sup>16</sup> the cutting of electricity and fuel supplies to

9 H.C.J. 390/79 *Dweikat v. Government of Israel* 34 (1) P.D. 1 [English Summary: (1979) 9 *Isr. YBHR*] (Hereinafter: ‘the Elon-Moreh case’).

10 H.C.J. 4481/91 *Bargil v. Government of Israel* 47 (4) P.D. 210 (*Peace Now* case); H.C.J. 606/78 *Suliman Toufik Uyav and 11 others v. The Minister of Defense* 33 (2) P.D. 113 (Hereinafter: ‘Maaleh-Adumim case’).

11 H.C.J. 209/73 *La’Afi v. Minister of Interior* 28 (1) P.D. 13; H.C.J. 500/72 *Al-Teen v. Minister of Defense* 27 (1) P.D. 481.

12 H.C.J. 2716/ 01 *Dir Asthia Council v. The Military Commander* (unpublished).

13 H.C.J. 2977/ 02 *Adalla v. IDF Commander* 56 (3) P.D. 6.

14 H.C.J. 9252/ 00 *El-Saka v. The State of Israel* (unpublished).

15 H.C.J. 4219/ 02 *Gusin v. The Military Commander* 56 (4) P.D. 608.

16 H.C.J. 8286/ 00 *The Association for Civil Rights in Israel v. The Military Commander* (unpublished).

Gaza;<sup>17</sup> and the construction of walls and fences on Palestinian soil, as a security barrier (known as the ‘separation barrier’), separating Palestinians from their cultivated lands and seriously damaging Palestinian civic life in multiple ways.<sup>18</sup> The Court has also allowed (sometimes by way of indecision) the evolution of the Israeli self-proclaimed ‘policy of separation’, which aims to ‘separate’ Palestinians from Israelis in the West Bank. This policy combines several practices including channelling Palestinians and Israelis to different road systems; applying different legal norms to each community and creating separate residential zones for each, physically enforced by walls and fences.<sup>19</sup> And this is only the beginning of the long list.

### Winning some

This list is staggering. Considering the Court’s record, why do Palestinians and human rights lawyers keep returning to the bench? The answer lies not with the Court’s jurisprudence in cases challenging the legality of policies, but rather with the influence Court proceedings have on decisions taken by the military administration in individual cases. As Ketzmer shows in his study, and as every human rights lawyer in Israel knows from her or his practice, in many cases the administration scrutinizes its own activity without a judicial determination – in ‘the Court’s shadow’ (Ketzmer, 2002: 189–190). In many cases, petitioners’ success is achieved, in whole or partially, without a court ruling. The change in the administration’s position prior to a judicial decision usually happens at one of the following three stages: during preliminary informal procedures involving the Attorney General’s office; at the time of negotiations conducted while a petition is pending; and after a hearing takes place, as a result of pressure imposed by the Judges through their comments.

Indeed, many types of remedies, on a variety of human rights issues, are guaranteed ‘in the shadow of the Court’. These range from permits to enter the ‘seam zone’ or to exit the West Bank, to securing information regarding a family member who was detained, to shortening the period in which a

17 H.C.J. 9132/ 07 *Jaber al-Basyuni Ahmed and Others v. The Prime Minister* (Decided 30 January 2007).

18 H.C.J 2056/ 04 *Beit Sourik Village Council v. The Government of Israel* 58 (5) P.D. 807.

19 In H.C.J 2150/07 *Abu Tzfiya v. The Minister of Defense* the Court refused to issue interim measures freezing the order that prevented Palestinians from using a West Bank road the Military Commander designated for Israelis. The case is still pending, but the Court issued an interim decision suggesting that building alternative roads for Palestinians might be a reasonable solution; the Court has refrained from ruling in two cases filed in 2003 that challenged the ‘permit system’ regime. This latter set of military orders prohibited Palestinians from entering the ‘seam zone’ (the area between the separation barrier and the armistice line known as ‘the Green Line’) unless they asked and received a permit (H.C.J 9961/03 *HaMoked: The Centre for the Protection of the Individual v. The Government of Israel et al.* – the author is one of the lawyers for the petitioner in this case, and H.C.J 639/ 04 *The Association for Civil Rights in Israel v. The Military Commander*).

detained person is barred from meeting an attorney. Securing rights ‘in the shadow of the Court’ is a common phenomenon. Here is an example. According to the statistics gathered by the Israeli human rights NGO, Hamoked for the Protection of the Individual, 75 percent of petitions filed by the organization on behalf of Palestinians who were denied permits to exit the West Bank, ended up with the administration issuing a permit without the need for a court ruling.

Another group of cases that might result in petitioners’ success, this time through a Court ruling, are the ‘proportionality’ driven cases. In recent years, the Israeli Court has shifted much of the legal onus from the issue of legality of the means under review to the question of proportionality of its use in the specific case. The Court has done so, with regard to the route chosen for the construction of a separation barrier;<sup>20</sup> the practice of closing lands and assigning only special days for cultivation;<sup>21</sup> and even with respect to the Israeli policy regarding assassinations.<sup>22</sup> When proportionality becomes the main concern, the Court may intervene and demand the army lessen the damage to the petitioner while the damaging practice or policy is approved. And these judicial interventions may be significant. For example, when the proportionality test was applied by the Court in the case of the separation barrier, the Government and the army were forced to make extensive changes in this wall’s original route, reducing the territory it delineates as the ‘seam zone’ from more than 20 percent of the West Bank to about 8 percent. So, though the Court has legalized the construction of the fences and walls, enabling a project that is catastrophic to the human rights of the neighbouring villages, it has saved for the Palestinians thousands of acres of lands through its ruling in specific cases. No one can take this important result lightly, least of all human rights lawyers.

Cases like these are the reason why Palestinian petitioners have continued filing petitions to the Court, even though statistics show that their chances of abolishing abusive policies are very slim.

### The Arithmetic of Human Rights Litigation

The lose-and-win balance, as sketched above, raises a question: Why are the authorities ready to compromise ‘in the shadow of the Court’ when reality shows that the Court rarely, if ever, decides in favour of the Palestinian petitioners?

Some suggest that the Court’s considerable moral power and influence give rise to self-censorship, of sorts, among military officials and their legal

20 H.C.J. 2056/04 *Beit Surik v. The Government of the State of Israel*; H.C.J.7957/04 *Marabe v. The Prime Minister* [the author was one of the lawyers acting on behalf of the petitioner in this case].

21 H.C.J 9593/04 *Morar v. The Military Commander*, mainly Paragraphs 17–27

22 H.C.J 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel* [the author was one of the lawyers acting on behalf of the petitioner in this case].



councils. The latter fear the Court's criticism even when the petitions are dismissed on their merits. Others point to the state lawyers' image of the Court and their image of themselves. State attorneys view the Court as a 'last Israeli barrier against arbitrary breaches of human rights.' They view themselves as liberal 'good guys'. The first image deters them from going to court and the second provokes an internal objection to the military position or a desire to aid the petitioner *ex gratia* (Dotan, 1999: 319). In both cases, the readiness to compromise has nothing to do with the realistic prediction of Court outcome.

Ketzmer (2002: 190) points to the great prestige of the Supreme Court justices in the eyes of the Israeli political and legal elite and presents it as one of the reasons why the authorities are susceptible to judges' pressure. In addition, Ketzmer (2002: 190–191) suggests that for the authorities the price of losing, unlikely as it may be, is much higher than the rewards of winning. But all this, it seems, is only a small part of the story. One should also consider the possibility that petitioners' success, be it in 'the shadow of the Court' or in actual court rulings, is important for the authorities too, albeit for different reasons.

Deciding who gains and who loses from settlements 'in the shadow of the Court' and Court declarations of specific actions as disproportionate is quite a complex project. On the face of it, the successful petitioners should be satisfied with the outcomes of their cases since they got at least part of what they asked for in their petition or pre-petitions. But is the game they are playing a zero-sum game? Is the petitioner's success automatically tantamount to the authority's loss? One should ask whether petitioner victories do not supply (at least part of) the oxygen that enables the occupation to operate.

At this point, it is important to remind ourselves that the human rights perspective on the question at hand requires that the implication of court proceedings be evaluated not only on the basis of their contribution to the rights of the specific petitioner, but also with regard to their impact on the *durability* and *sustainability* of the occupation *itself*. Indeed, when the Court option is assessed according to the criterion of its potential for putting an end to, or at least shortening, the 'shelf life' of the occupation, both winning and losing in court may have significant implications of a general nature.

### **Legitimacy is a commodity**

The first potential danger is that of calming parts of the resistance to occupation. Court proceedings, and especially petitioners' success, suggest that Palestinians have recourse to justice. The existence of a court system entitled and capable of dealing with petitions from the occupied population implies that the occupying regime has, to some extent, rules that are democratic in their nature and tools that help combat arbitrariness. These understandings create a sociological and psychological process of transference of moral responsibility from the individual (Israeli or foreign) to the justice system. It

provides liberal elites, those who identify themselves with Menachem Begin's famous saying 'there are judges in Jerusalem', with the cure for 'occupation headaches'.

But the implications of court proceedings in occupation related cases – in the occupier's Court – go much further. Human rights litigation in the abuser's court is a type of *internal opposition*. It is internal because it is a (legal) campaign fought in the abuser's institutions. As such, it is bound to use and recycle at least some of the abuser's narratives and concepts. Good examples of such internal opposition are dozens of petitions against different segments of the separation barrier filed in the Israeli Court. The Court accepted the government's claim that the motivation for construction of the barrier was security. It ruled that when security is at stake, the army does have the authority to erect a barrier in the occupied territory. The petitioners were charged with the task of proving that an alternative route, one that is less damaging for them, did not jeopardize security. The discussion in Court focussed, as the government wanted, on the security of Israeli and the 'war against terror', rather than on the limits of military powers that violate rights of the occupied. The evidence indicating the Israeli desire to grab as much Palestinian land as possible and de facto annex it to Israel did not cross the Court's threshold.

In parallel with the proceedings in the Israeli Court, extensive *external opposition* to the barrier campaign has occurred. *External opposition* denies the legitimacy of Israeli institutions to arbitrate conflicts between Palestinians and the occupation forces; it denies the abuser's claim that it has the right to make unilateral decisions on the subject matter, that it is an 'internal' affair. *External opposition* also rejects the abuser's discourse, which in the Israeli case places Palestinian terror as the grounds for its policies. *External opposition* thus lobbies authorities who are *external* to the abuser (i.e. legal systems of other countries, international tribunals, external political channels, and even foreign public opinion), and it sticks to a rights-based narrative, refusing, in the Israeli example, to adopt the 'war on terror' discourse. A good example of *external opposition* activity in the campaign against the construction of the separation barrier is the Palestinian Authority-led UN General Assembly referral of the legality of the barrier to the International Court of Justice (ICJ) for its advisory opinion. Another example is popular protest in the form of demonstrations, accompanied by clashes with the army that took place at barrier construction sites. Protestors in those clashes used civil disobedience techniques such as chaining themselves to olive trees marked for uprooting and mass sit-ins in front of the bulldozers, to prevent the construction of the barrier. They did so even when the Israeli institutions have made their final ruling on the matter, and they directed their appeals to the international community.

The capability of internal and external opposition to bring about the desired effect changes from one case to another. Their effectiveness depends,

among other factors, on the nature of issues at stake, on the identity of the abuser, and on its political status and power. For example, the ICJ's declaration of the separation barrier as illegal, the world-wide condemnation of its construction and the frequent public protests and demonstrations did not bring any tangible success. This activity might have an important impact on international public opinion, but it brought very little measurable change. This failure might be attributed to Israel's might in international politics and to the international community's inability to combat even the most brutal violation of international law committed by a close American ally. On the other hand, internal opposition in the form of petitions filed with the Israeli Court has brought about, as mentioned before, a significant change in the route. In this case, the effect of internal opposition is tangible and measurable.

This said, internal opposition has an undesirable side-effect: it legitimizes the abusers' narratives and their claim for sole authority over the subject at hand. Thus, successful internal opposition in the separation barrier context is not only a 'cure for occupation headaches', but also a direct provider of legitimacy to the occupation regime. Viewed from this perspective, the barrier cases contributed to the occupation's *durability*. As a matter of fact, it is questionable whether legitimacy is merely an offshoot of internal opposition. Whenever legitimacy is in short supply but in high demand, as in the case at hand, it becomes a commodity and the regime, its courts included, is ready to pay for it in rights. The relative success in separation barrier cases was, in fact, a process of bartering legitimacy for land and of trading recognition for soil and for groves. Indeed, in times of conflicts, legitimacy is a commodity.

### To win or not to win?

Internal opposition may legitimize abusive practice under review and the regime's narratives. Both serve as power injections for the regime. But if the human rights lawyer wins and saves his client's rights, maybe all this is worthwhile?

Let us consider an example: the 'seam zone's' permit system prohibits Palestinians from entering the zone unless they ask for and receive a permit, but keeps the zone open to Jews and foreigners.<sup>23</sup> Many Israeli human rights lawyers think that this system of legal and physical fences and walls, separating Palestinian farmers from their lands and from their relatives, is a new

23 On 2 October 2003, the Military Commander issued a set of orders governing the 'seam zone'. Those orders declare the seam zone 'a closed military area'. The orders further state that the declaration will not apply to Israeli citizens, Israeli residents and people who have a right of return under the Israeli law of return. The legality of those orders were challenged in several High Court of Justice proceedings, including one litigated by the author of this article, but none have yet been decided (H.C.J. 9961/03 *HaMoked: The Centre for the Protection of the Individual v. The Government of Israel et al.*).

version of the crime of apartheid. Yet, they have decided time and again in recent years to appeal on behalf of their Palestinian clients for changes in the route and for an extension of the zone's gate opening hours. Their dilemma is painful: they may go to court and they might even win (in 'the shadow of the Court' or through a Court declaration that the current route or gate opening hours damage Palestinian livelihood 'disproportionately' to the security advantage gained). Success means their clients, the farmers, will be able to pass through the military fences and that their livelihood is secured. But it also means improving the ethnic separation system and ensuring its efficiency. It means contributing to the barrier's *workability*. The alternative is to boycott the occupier's court and justice; not to supply any legitimization to what the human rights lawyer believes to be a blatant abuse of human rights and dignity.

But the human rights lawyer's dilemma is even more complex. Arguably, internal opposition may lead, eventually, to a symbiosis between resistance movements and the authorities. The authorities need internal opposition to better assess the feasibility and ease of implementing its policies. It needs human rights litigation as a policy 'fine-tuner'. This insight is overwhelming: the opposition, when it uses only internal means of combat, becomes part of the practice to which it objects. Its resistance is nicely boxed and is given an official role as a phase in the policy structuring procedure. Seen from this angle, the separation barrier with its gates, walls, and permit system is a *joint governmental–petitioner project*.

The human rights lawyer's dilemma is a deadly one. The lawyer's question is not just 'is my existence a barrier to injustice and to human rights violations?' but also: 'am I nothing but a collaborator of this huge mechanism, which needs me to occasionally soften the sharp edges of the military domination and hence enable the occupation to operate?'

The human rights lawyer demands to know whether in winning he or she is actually losing and whether the petitioner successes are, in fact, what makes the occupation tick.

### **Academics and Practitioners**

This analysis leads to depressing conclusions. Limited success perfects the occupation and makes it sustainable; moreover, by lodging petitions to the Israeli Court, human rights lawyers act as public relations agents of the occupation by promoting the notion that Palestinian residents have a resource to justice.

This dilemma is not unique to the Israeli–Palestinian conflict. In recent years, American human rights lawyers have been waging internal legal battles to secure the rights of Guantanamo Bay detainees. The time-honoured rule denying American courts jurisdiction over US forces operating beyond US borders<sup>24</sup> has been eroded and is on the verge of being overturned.<sup>25</sup> The United States Supreme Court has insisted that American

courts have judicial review powers over Guantanamo Bay detentions even after Congress and the President decided to replace them with special tribunals.<sup>26</sup> These developments are creating a new field for internal legal battles. Similar dilemmas might also arise in the context of the American occupation of Iraq and Afghanistan.

It is difficult, maybe even impossible, to persuade a human rights lawyer not to use an open legal path on behalf of an individual whose rights are violated. Lawyers in general and human rights lawyers in particular, are programmed to act on behalf of individuals and to fight for the rights of their clients alone. The family who was reunited after years of separation does not care whether their rights were eventually recognized by court, out of court, or ‘in the shadow of the Court’. The farmer whose olive grove, and thus his livelihood, was saved does not think of the legitimizing affect of court proceedings. Professional ethics compels lawyers to use any legal means available to guard the rights of their clients. And one should not forget the moral considerations that prevent the human rights lawyer from sacrificing the interest of his or her individual client for the sake of the ‘collective struggle’. Isn’t the chance of saving one person’s liberty, tiny as this chance may be, worth the price of all the abovementioned ramifications of the court’s jurisprudence?

The lawyers’ ethical code shifts the onus of finding the answers to the academics. Legal sociologists and legal philosophers, unfettered by the constraints of legal practice, may and should provide lawyers and the court with a better understanding of the role of human rights internal opposition via litigation in shaping large scale rights abusing regimes. Academics have the privilege – and obligation – to rise above the specific case or client. They can and should zoom out and inspect the internal legal battlefield from a high altitude, where a single victim cannot be identified, but trends and systematic failures may be revealed. A serious academic discussion will help the human rights establishment to understand better the processes of which it is a part and to see the prices we are all paying for choosing to engage in internal opposition legal campaigns. Moreover, by uncovering the truth about the limited success of human rights victims in a given legal system, and by pointing to the processes that transform these limited successes into regime-empowerment tools, academic debate is likely to weaken those tools. Since at least some of the perils listed above are vested in the image-creating

24 *Johnson v. Eisentrager* 339 U.S. 763 (1950).

25 *Rasul v. Bush, President of the United States, et al. Nos. 03-334 and 03-343*, decided on 28 June 2004. The United States Supreme Court has ruled that the ‘respective jurisdictions’ of Courts in the federal habeas corpus statute relate to the area where the officials responsible for the detention are present rather than the areas where the detainees are held, thus enabling jurisdiction to American federal courts.

26 In *In Hamdan v. Rumsfeld* 548 U.S. 557 (2006); *Boumediene v. Bush* (Decided 12 June 2008).

force which internal opposition grants the regime, revealing them may defuse their sting. This can only be done by academics. And they have failed to do so for all too long.<sup>27</sup>

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### References

- Ben-Naftali, O. 2009. 'The Epistemology of the International Law Closet and the Spirit of Law'. In N. Ziv, and D. Hecker (eds). *Does Law Matter?* Tel-Aviv University Law Faculty, Ramot Publishers (Hebrew) (Forthcoming).
- Coetzee, J.M. 1980. *Waiting for the Barbarians*. Harmondsworth, Middlesex: Penguin Books.
- Dotan, Y. 1999. 'Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the Intifada'. *Law and Society Review* 33 (2).
- Ketzmer, D. 2002. *The Occupation of Justice*. New York: SUNY Press.

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27 A rare attempt to tackle these questions, in addition to Ketzmer's (2002) book, is to be found in Ben-Naftali (2009).