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The Legacy of Justice Aharon Barak: A Critical Review

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"Here in the penal colony I have been appointed as judge"[1]

I.

Former Chief Justice Aharon Barak is definitely the most outstanding judge in Israel's history. No other judge has left as many significant fingerprints on Israel's Supreme Court (ISC). No judge has influenced Israeli law and society as well as its image abroad as much as he did. Barak's meticulous rulings and academic scholarship cover an impressive range of fields of law and knowledge and have promoted rights-minded discourse inside Israel. Given this background, however, Barak's record on the Occupied Palestinian Territories (OPT) is overwhelmingly disappointing.

Legal interpretation, Robert Cover argues, cannot be understood separately from the violence of the judge: "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[2] Following Cover, this short article attempts to expose this violence and to bring its victims to the center of the discussion of Barak's jurisprudential legacy—those very victims that the "activist-judge" is supposed to be crusading to defend. Indeed, any assessment or evaluation of Barak's legacy will be incomplete and inaccurate without assessing the impact of Barak's legacy on the Palestinians in the OPT.[3] I would like to contextualize Barak's legacy as internal to a framework of domination and subordination within which he, as a former judge in the Israeli judicial system, operated. Barak as a leading judge and as a Chief Justice did not only work within this

[1] FRANZ KAFKA, *In the Penal Colony*, in THE METAMORPHOSIS AND OTHER STORIES 116 (Malcolm Pasley trans., 1992).

[2] *See* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

[3] Due to lack of space, this article will not deal with Barak's attitudes toward the Palestinian citizens of Israel. An examination of these attitudes would reveal that Barak's ethnocentric framing of the issues and submitting equality to Jewishness as the *Grundnorm* largely go unnoticed and unscrutinized.

framework but also has justified it, refined it, and explained and represented it as a "diplomat-judge."

My emphasis will be less on what Barak has said and written, but rather on what he has done, the impact of his opinions on the victims he has left behind, and the alternative narratives he has so powerfully destroyed. The primary source of the distortion in discussing Barak's legacy rests on the emphasis on his "liberal" rhetoric while at the same time ignoring the illiberal outcomes of his Supreme Court opinions. As will become apparent in the course of this article, Barak's legacy is not liberal in any convincing way. The article will also highlight the totally ignored aspect of Barak's work as a "diplomat-judge": a judge who is the main representative of his state's policies abroad.

II.

Under the all-seeing eye of the judicial review exercised by the ISC and promoted and led by Barak, a sophisticated system of oppression has developed in the OPT. Confiscation of land and colonization (allowing the population of the occupier to settle in the occupied territory);[4] two different systems of law applying to two populations within the same territory (the Palestinians on the one hand and the privileged Israeli settlers on the other hand);[5] a military court system virtually immune from the ISC's intervention;[6] a widespread and long-standing policy of house demolition;[7] extrajudicial executions;[8] a hostile family unification policy;[9] arbitrary manned and unmanned checkpoints and roadblocks preventing ordinary life;[10] the separation wall;[11] detention – including administrative detention – of large numbers of

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[4] *See e.g.*, RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK (1988).

[5] *See e.g.*, B'Tselem, *Free Rein: Vigilante Settlers and Israel's Non-Enforcement of the Law* (2001), *available at* http://www.btselem.org/Download/200110_Free_Rein_Eng.pdf; B'Tselem, *Forbidden Roads: The Discriminatory West Bank Road Regime* (2004), *available at* http://www.btselem.org/Download/200408_Forbidden_Roads_Eng.pdf.

[6] *See e.g.*, LISA HAJJAR, COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA (2005).

[7] *See e.g.*, Amnesty International, *Israel and the Occupied Territories: Under the Rubble: House Demolition and Destruction of Land and Property* (2004), *available at* http://web.amnesty.org/library/index/ENGMDE150332004.

[8] *See e.g.*, Public Committee Against Torture in Israel & LAW – The Palestinian Society for the Protection of Human Rights and the Environment, *Mdeneyot ha-Hesulim shel Mdenat Yisrael, November 2000 – Yanuar 2002* [*The Assassinations Policy of the State of Israel, November 2000 – January 2002*] (2002), *available at* http://www.stoptorture.org.il//heb/images/uploaded/publications/46.doc.

[9] *See e.g.*, B'Tselem and Hamoked, *Families Torn Apart* (1999), *available at* http://www.btselem.org/Download/199907_Families_torn_apart_Heb.pdf.

[10] *See e.g.*, *It's the Little Things That Make an Occupation*, THE ECONOMIST, Jan. 20, 2007, at 64.

[11] *See e.g.*, B'Tselem, *Behind the Barrier: Human Rights Violations as a Result of Israel's Separation Barrier*, Position Paper (2003), *available at* http://www.btselem.org/Download/200304_Behind_The_Barrier_Eng.pdf.

Palestinians and inhumane conditions of incarceration and torture;[12] expulsion and deportation;[13] curfews and closures;[14] and killings with impunity[15] are the highlights of this system that Barak justified and, hence, advanced.[16]

Justice Barak has employed a manifold of interconnected legal and rhetorical strategies within his judicial review to allow the evolution of this oppressive system. As I explain and demonstrate below, these strategies include oppression-blind jurisprudence, concealment of the general context, fragmentation of reality, the practice of non-intervention and submission to dubious "security" considerations disguised rhetorically by "balancing" and "proportionality" tests, and declining to provide meaningful and timely legal remedies.

The legal reasoning of Justice Barak and his Court, according to David Kretzmer, exemplifies the attitude of a "benevolent occupation," within which the "belligerent occupier" transforms rhetorically his interests into the interests of the local population (or the "protected persons") while ignoring the broader political context.[17]

Kretzmer also points out that Barak's rhetoric on widening the scope of judicial review did not bring with it any significant change in the ISC's willingness to interfere in security-based decisions. Indeed, even in the torture case of 1999[18] – widely perceived as a departure from the Court's policy of non-intervention and considered by many as the main case where Barak challenged the security establishment – Barak expressed his identification with the security considerations. This identification explains why the Court delayed its decision for years, though knowing that torture had become a widespread practice not limited to "ticking bomb" situations, and refused to grant (or revoked) interim injunctions preventing torture in spite of the clarity of the legal position.[19] The limited nature of the decision, which legitimated some interrogation practices through the "necessity" defense, and the reluctance of

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[12] *See e.g.*, FIDH, *Palestinian Detainees in Israel: Inhuman Conditions of Detention* (2003)*, available at* http://www.fidh.org/IMG/pdf/ps365a.pdf.

[13] *See e.g.*, B'Tselem, *Deportation of Palestinians from the Occupied Territories and the Mass Deportation of December 1992* (1993)*, available at* http://www.btselem.org/Download/199306_Deportation_Eng.doc.

[14] *See e.g.*, B'Tselem, *Collective Punishment in the West Bank and the Gaza Strip* (1990), *available at* http://www.btselem.org/Download/199011_Collective_Punishment_Eng.pdf.

[15] See B'Tselem, *Trigger Happy: Unjustified Shooting and Violation of the Open-Fire Regulations during the al-Aqsa Intifada* (2002), *available at* http://www.btselem.org/Download/200203_Trigger_Happy_Eng.pdf.

[16] *See generally* Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, John Dugard*, U.N. Doc A/HRC/4/17 (Jan. 29, 2007), *available* http://ap.ohchr.org/documents/dpage_e.aspx?m=91.

[17] DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 68-71 (2002).

[18] HCJ 5100/94 Public Committee Against Torture in Israel v. Government of Israel [1999] IsrSC 53(4) 817.

[19] KRETZMER, *supra* note 17, at 141-42.

the Court can also explain, even if only partially, the fact that evidence of torture still exists in the wake of this ruling.[20]

Ardi Imseis exposes the limited scope of Barak's decision: the Court did not examine all the interrogation methods of the General Security Service (GSS) and did not obligate the state to disclose all these methods for the purpose of judicial examination.[21] It ruled only regarding five physical interrogation methods.[22] It also did not examine interrogation methods by state organs other than the GSS, such as the Israeli army itself, and it did not examine the treatment of Palestinian detainees in the period between detention and interrogation.[23] Furthermore, Imseis points out two additional shortcomings of Barak's decision. First, Imseis notes the Court's "overly simplistic contextualization of the case before it as merely requiring a balance between respecting the liberty rights of 'hostile terrorists' and protecting the 'security' of the state."[24] Second, the Court outlawed the specific interrogation methods under review because they were not authorized by Israeli law, not because they amount to torture or because they violate international law.[25] Additionally, Barak ignored the question of the effect—or more accurately, the lack thereof—of this ruling on all the past rulings in which the Court legitimated torture. Specifically, he completely ignored the claims of Palestinian torture victims, who had been doubly victimized, first by GSS torture, then by the Court's string of legitimating decisions up to 1999.[26] Indeed, the ISC's inadequate response to torture "calls into question the very notion of the 'rule of law' in a democratic society."[27]

One of the most devastating examples of this oppression-blind approach of non-intervention due to security considerations was, without a doubt, the Court's unwillingness to reject the policy of punitive home demolitions, wherein the houses of families of suspected security offenders were demolished. Under both Meir Shamgar's and Barak's presidencies, the Court granted the security establishment virtual *carte blanche* to destroy Palestinian houses and refused to characterize it as a

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[20] *See e.g.*, Public Committee Against Torture in Israel, *Back to a Routine of Torture: Torture and Ill-Treatment of Palestinian Detainees during Arrest Detention and Interrogation, September 2001 – April 2003* (2003)*, available at* http://www.stoptorture.org.il//eng/images/uploaded/publications/58.pdf.

[21] Ardi Imseis, *"Moderate" Torture On Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of the General Security Service Interrogation Methods*, 19 BERKELEY J. INT'L L. 328, 341-43 (2001).

[22] *Id.*

[23] *Id.*

[24] *Id.* at 349.

[25] *Id.* at 346.

[26] *Cf.* Gideon Levy, *Good Morning, High Court*, HAARETZ, April 16, 2000 ("Who will pay reparations to the tens of thousands of people who were tortured with your authorization before torture became illegal and thus immoral?")

[27] Barak Cohen, *Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories*, 12 IND. INT'L & COMP. L. REV. 75, 76 (2002).

form of collective punishment prohibited by international law.[28] Legal interpretation could have been a handy device to limit and restrict these demolitions if there had been a willing judge. But both Shamgar and Barak were unwilling. The main argument that the Court used – adopting the security establishment's reasoning – was "deterrence."[29] In 2003 and 2005, however, two internal military committees formed by the Israeli army concluded that "no effective deterrence was proven," and that "deterrence, limited if at all, paled in comparison to the hatred and hostility toward Israel that the demolitions provoked among the Palestinians."[30] The committees recommended ending this policy. Moreover, even if we assume that this draconian policy was effective, that does not mean that the policy of home demolitions is permissible under international law.[31]

The fact that Justice Mishael Cheshin, a generally conservative judge, has represented a dissenting view within the Court by opposing punitive home demolitions in some cases indicates that Barak could have taken another path, a more rights-minded one. Barak, however, chose to affirm state power. This position is also clear upon examining Barak's rulings concerning the massive home demolitions during military operations in the second *intifada*.

The ruling on the expulsion of 415 Palestinians from the OPT into Lebanon in December 1992 by the Yitzhak Rabin government remains the most striking example of the ISC's capitulation to state security officials with no regard for due process and human rights.[32] The Court issued a unanimous decision legitimating the mass expulsion of these Palestinians, who had not had a legal hearing prior to their expulsion. The Court ruled, *ex post facto*, that the deportees had had a formal right to a hearing, and it did not prevent, or even criticize, the deportations. After initially having issued an interim injunction to stop the deportation process and having adopted the position that the deportations were illegal in the Court's internal deliberations, Barak capitulated to Chief Justice Shamgar's pressure.[33] According to Nomi Levitsky, Barak later regretted his ultimate position.[34] Unfortunately his sense of regret did not evolve into a jurisprudence of regret. In fact, Barak continued this

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[28] *See* Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT'L L. 1, 4 (1994). Simon mentions that in the period 1979 to 1994 the Supreme Court issued 94 rulings dealing with house demolitions: "The Court's record displays almost uniform support of the practice …. The Supreme Court's approach of demolitions in the face of legal and moral challenges has corrupted Israeli law and has undermined the legitimacy of the Court itself." *Id. See also* KRETZMER, *supra* note 17, at 162.

[29] KRETZMER, *supra* note 17, at 161-62.

[30] Amos Harel, *IDF Panel Recommends Ending Policy of House Demolitions*, HAARETZ, Feb. 17, 2005.

[31] *See* Martin Carroll, *The Israeli Demolition of Palestinian Houses in the Occupied Territories: An Analysis of its Legacy in International Law*, 11 MICH. J. INT'L L. 1195 (1990).

[32] HCJ 5973/92 The Association for Civil Rights in Israel v. Minister of Defense [1993] IsrSC 47(1) 267.

[33] NOMI LEVITSKY, KEVODO: AHARON BARAK: BIYOGRAFYAH [YOUR HONOR: AHARON BARAK: A BIOGRAPHY] 183-87 (2001).

[34] *Id.* at 188.

tradition of submitting to "security" considerations. For instance, in the Ajori case in 2002, Barak allowed the deportation of Palestinians from the West Bank to the Gaza Strip.[35]

We can find further evidence of that same approach in Barak's later rulings where we again see the Court's reluctance to deliver a remedy to the petitioners in real time. The main petition against the extrajudicial executions ("targeted assassinations" in the Israeli jargon), to take one example, was delayed for years while the policy continued on the ground. At the end of the day, Barak decided that these extrajudicial executions are not always permissible and not always prohibited.[36] The army understood the ruling as validating its current policies.[37] Barak, of course, could have chosen another path. In an expert opinion submitted to the Court, international law scholar Antonio Cassese argued that "killing civilians suspected of terrorism, while they are not engaged in military action," is a war crime.[38]

While the International Court of Justice (ICJ) decided in an advisory opinion that the separation wall Israel is building is illegal as a whole insofar as it is built inside the OPT, and that it should be dismantled,[39] Barak decided to take a different approach. Declaring his "factual superiority" over the ICJ, Barak refused to rule on the general legality of the separation wall. Instead, he decided that there should be an examination of specific portions of the wall while "balancing" between security needs and Palestinian rights and examining the "proportionality" of the means.[40] While the ISC rejected some of the first portions of the separation wall presented to it, the Court eventually approved most of the other portions in a series of later petitions.[41] The same legal strategy has been used in answering the question of the legality of the Israeli settlements inside the OPT.[42] In both situations, the ISC legitimated the overall

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[35] HCJ 7015/02 Kifah Ajori v. IDF Commander in Judea and Samaria [2002] IsrSC 56(6) 352, *available at* http://www.court.gov.il/heb/home.htm.

[36] HCJ 769/02 The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al. [2006] [hereinafter Extrajudicial Executions Policy Case], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM.

[37] Scott Wilson, *Israeli High Court Backs Military On Its Policy of 'Targeted Killings'*, THE WASH. POST, Dec. 15, 2006; Hanan Greenberg, *Military Advocacy Relieved over Targeted Killing Ruling*, YNET, Dec. 14, 2006.

[38] Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law*, 20, *available at* http://www.stoptorture.org.il//eng/images/uploaded/publications/64.pdf.

[39] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, *available at* http://www.icj-cij.org/docket/files/131/1671.pdf [hereinafter Advisory Opinion].

[40] HCJ 2056/04 Local Municipality Beit Sureik and others v. The Government of Israel [2004] IsrSc 58(5) 807; and HCJ 7957/04 Zahran Mara'abeh et. al. v. Prime Minister of Israel et. al. [2005], *available at* http://elyon1.court.gov.il/files/04/570/079/a14/04079570.a14.pdf.

[41] *See e.g.*, HCJ 4289/05 Local Municipality Beer Nabalah and 149 others v. Government of Israel [2006], *available at* http://www.court.gov.il/heb/home.htm; HCJ 11395/05 Maamon Kayed, Head of the Local Municipality Sabastia et. al. v. State of Israel [2006], *available at* http://www.court.gov.il/heb/home.htm.

[42] HCJ 390/79 Dweikat v. The Government of Israel [1979] IsrSc 34(1) 1.

project.[43] Unlike the ICJ, the ISC refrains from addressing what it considers to be "general" questions. Thus, neither the "general" framework of oppression nor the "general" means of oppression can be successfully challenged in the Court.

The Court fragments reality into small pieces and conceals the generality of oppression while stripping it from its background and context.[44] Despite four decades of continued occupation, Barak has never addressed the occupation directly; had he done so he might have reached the conclusion that the very system of the Israeli occupation is itself "intrinsically illegal" and amounts to a de facto annexation,[45] or that the colonies in the OPT (including the annexation of East Jerusalem) are an illegal project.[46]

III.

One can dismiss this argument by saying that a judge, even an "activist-judge" like Barak, did not create the occupation and will not be able to resolve it. However, this argument conceals the complicity of judges in creating and shaping this system of oppression. After all, Barak himself argues, "I regard the judge as a partner in creating law. As a partner, the judge must maintain the coherence of the legal system as a whole."[47] It also ignores all the lost opportunities in which Barak could have used his legal tools to block some of the oppressive practices that have developed under his power of judicial review, but he chose instead to employ an oppression-blind jurisprudence. Moreover, it should be clear by now that Barak cannot be characterized as an "activist judge" at least when it comes to his rulings vis-à-vis the Palestinians.

Leon Sheleff has argued that the ISC is activist inside Israel proper but not in the OPT.[48] This paradigmatic distinction in the Court's approach rests on a false assumption that Israel can sustain a democratic regime inside its borders unaffected by its oppressive practices in the OPT. In reality, however, the internal processes of Israeli society went hand-in-hand with the continuous evolution of the occupation regime and its internal logic. Indeed, as Baruch Kimmerling has argued, Israel and the

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[43] *See* Ronen Shamir, *Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24(3) LAW & SOC'Y REV. 781, 788-89 (1990) (discussing the ISC's rulings on the settlements); Michael Lynk, *Down By Law: The High Court of Israel, International Law, and the Separation Wall*, 35(1) J. PALESTINE STUD. 6 (2005) (discussing the ISC's rulings on the separation wall).

[44] *See* Nimer Sultany, *The Perfect Crime: the Supreme Court, the Occupied Territories, and al-Aqsa Intifada*, 3 ADALAH'S REV. 49, 53-4 (2002).

[45] Orna Ben-Naftali, Aeyal Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551 (2005).

[46] Advisory Opinion, *supra* note 39, ¶120.

[47] Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 25 (2003).

[48] Leon Sheleff, *Gvol ha-Activism Who ha-Kav ha-Yaruk: Bishuli o-Bishveli ha-Psikah shel Beit ha-Mishpat ha-Gavoah la-Tsedek ba Shtahim* [*The Green Line is the Border of Judicial Activism: Queries about High Court of Justice Judgments in the Territories*], 17 TEL AVIV U. L. REV. 757 (1993).

OPT should be seen as one control system.[49] Accordingly, Hassan Jabareen argues that "Barak cannot draw a line between himself and the Palestinians."[50] In other words, Barak cannot separate himself from his Other. He cannot seriously claim that he is a democratic judge without regard of his legacy in the OPT.

Needless to say, security in the final analysis is not a neutral notion; rather it is part and parcel of the ideology of the state as a Jewish and Zionist state. Thus, submission to security-based arguments is another demonstration of submission to state ideology.

The complicity of Israeli judges in the occupation is also apparent in the symbolic power they exercise and the symbolic capital they possess. These are used and invested by the judges and by the state to legitimate existing power relations and conceal their oppressive nature. In this case, the "activist-judge" becomes an activist of the oppressive system. He is an essential part of it. His symbolic power and his symbolic capital are constituted by power relations. The judge, in his turn, constitutes these relations by reproducing them as legitimate. Undoubtedly, Barak and Israel were aware of his symbolic power. In this sense, Barak served as a "diplomat-judge." Israel has used Barak's rhetoric before U.N. human rights bodies and turned him into "Israel's public defender abroad."[51] In July 2004 following the ISC's decision on the separation wall and before the ICJ's ruling, Prime Minister Ariel Sharon declared that, "the stature of the Israeli Supreme Court and of its president Justice Aharon Barak in the world [makes] their rulings helpful to us at The Hague. They provide a legal rejoinder."[52] In a separate instance, Barak similarly defied international norms and admitted that the ISC's judicial review helps Israeli soldiers by making it harder for the International Criminal Court to try them.[53] Another illustration of Barak's awareness of his role as a "diplomat-judge" is the fact that his ruling on the separation wall was delivered several days before the ICJ's ruling and immediately translated into English.

One wonders, upon examining Barak's statements and judicial legacy, if his change-of-office from the legal advisor of the government – Attorney General – to Supreme Court justice was at all accompanied by a change-of-paradigm in his perception of his role.

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[49] *See* Baruch Kimmerling, *Boundaries and Frontiers of the Israeli Control System: Analytical Conclusions*, *in* THE ISRAELI STATE AND SOCIETY: BOUNDARIES AND FRONTIERS (Baruch Kimmerling ed., 1989).

[50] Hassan Jabareen, *Ignoring the 'Other'*, HAARETZ (Books Supp.), June 17, 2005.

[51] *Id. See also* Yehuda Ben Meir, *Ha-Shakhpats shel ha-Mdinah* [*The Bulletproof of the State*], HAARETZ, Dec. 20, 200.

[52] Diana Bechur-Nir, *Sharon: Psikat Bagats Ta'zor Bihag* [*Sharon: High Court's Ruling Will Help at The Hague*], YNET, July 4, 2004.

[53] *Noted in* Moshe Gorali, *Ha-Mishpat Hacham 'al Halashim. Shalosh Dogma'ot* [*The Law is Smart on The Weak. Three Examples*], HAARETZ, June 1, 2003.

IV.

Interestingly, Barak has justified the fact that he had never visited the OPT to see the living conditions of the Palestinians by claiming that he retains his "objectivity" this way.[54] On the other hand, he has on many occasions stressed in his rulings and writings the fact that he – along with his fellow judges – does not live in an ivory tower but rather amongst his own people. Barak, so it seems, does not take into account the effect of his own situational biases on his "objectivity" and on his judicial role. He rationalizes his willful blindness concerning the conditions of his own victims into a removal of obstacles facing his refined reasoning. Elsewhere Barak has argued, "[I]t is a myth that judges always give expression to their subjective beliefs. According to my view – both normatively and descriptively – a judge gives expression not to his or her own beliefs but to the deep, underlying beliefs of society. The key concept is judicial objectivity."[55] Regardless of the problematic legal and theoretical nature of this argument, Barak – a self-declared Zionist – does not contemplate the otherness of Palestinians in the eyes of the Israeli society, including the judges.[56] In the "deep, underlying beliefs" of the Zionist project, the Palestinian stands as the Other.

Barak has emphasized in his rulings the security situation that Israel faces and his identification with its security concerns. Palestinian organizations sew destruction and terror, according to his description. Thus, Israel has the right and obligation to defend its citizens. It is a "defensive democracy" reacting to attacks. This reasoning holds not only for Israel but for other democratic countries that now face the same situation.[57] Barak sees no difference between the prolonged Israeli occupation and the situation of Western democracies. Israel in his story is a passive victim without a political agency. The *intifada* is too easily and uncritically characterized by Barak as a form of "terrorism." No attention is paid to the period that preceded the outbreak of the *intifada*; and no attempt is made to understand the causes that led to its outbreak. In short, it is terrorism without context, violence without reason. The "balancing" that the judge invokes is between (Israeli) "security needs" and (Palestinian) "individual rights."[58] The context of occupation and the right of self-determination is not allowed to enter the juridical picture. In fact, Barak and his Court have never used the word "occupation" (*kibbush* in Hebrew) in their rulings. The Court translates the English phrase "belligerent occupation" into the Hebrew *tfisah lohmatit* ("belligerent possession") leaving the word occupation out. Likewise, the phrase "occupied territories" is never used by the Court, but rather *ha-Ezur* ("the Area"). For the Court, the occupation does not exist.

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[54] Barak's statement to this effect is reported in a conversation with former U.S. President Jimmy Carter. *See* LEVITSKY, *supra* note 33, at 290. *See also* JIMMY CARTER, PALESTINE: PEACE NOT APARTHEID 126 (2006).

[55] Barak, *supra* note 47, at 51.

[56] One of Barak's former clerks stated that "deep inside" Barak perceives the Palestinians as "bitter and dangerous enemies." *Quoted in* LEVITSKY, *supra* note 33, at 290-91.

[57] *See* Barak, *supra* note 47, at 148.

[58] *See* Extrajudicial Executions Policy Case, *supra* note 36, ¶63.

What Barak's description ignores and conceals is the destructive effect of the subjugation of life by the power of death in late colonial regimes.[59] Achille Mbembe argues that the "most accomplished form of necropower [power of death] is the contemporary colonial occupation of Palestine" since it combines "the disciplinary, the biopolitical, and the necropolitical."[60] "To live under late modern occupation," writes Mbembe, "is to experience a permanent condition of 'being in pain.'"[61]

Instead of weakening this grip of the occupation's power-of-death on the daily life of the Palestinians by defending human rights, Barak and the ISC allowed the development of the occupation machine. The Court's narration of violence has deliberately erased all traces of the production of death and destruction by the occupation. Moreover, the Court has provided the legal reasoning required for its justification. This justification coupled with the illusion of the Palestinian voice being heard in the Court and the availability of an option for "legal remedy" resulted in legitimating the occupation. The Israeli historian Tom Segev writes:

> An eminent, liberal, sympathetic and paternal jurist who did not hold himself above the people, Barak also gave the horrors of the oppression a legitimate front; decent people can tell themselves that if Barak could live with the occupation, then so can they. His guilt is therefore greater than that of the people doing the dirty work out in the field.[62]

V.

"A judge," Barak writes, "should not advance the intent of an undemocratic legislator. He must avoid giving expression to undemocratic fundamental values."[63] It cannot be said however that Barak practiced what he preached. At the same time human rights violations in the OPT were reaching new heights in the second *intifada*, and human rights organizations and activists became highly critical of Israel, Barak and his fellow justices continued their work as usual. "Balancing" tests employed as usual. "Proportionality" tests employed as usual. "Security" employed, unhindered, as usual. Oppression justified as usual.

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[59] *Cf.* Achille Mbembe, *Necropolitics*, 15(1) PUBLIC CULTURE 11 (2003) (discussing Mbembe's theory of the power of death with reference to the OPT).

[60] *Id.* at 27.

[61] *Id.* at 39.

[62] Tom Segev, *What Aharon Barak Leaves Behind*, HAARETZ, Sept. 14, 2006.

[63] Barak, *supra* note 47, at 25.