



Beit Sourik Village Council v Government of Israel and Commander of the IDF Forces in the West Bank Case (Isr)

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A. Synopsis

1. The *Beit Sourik* judgment is a landmark decision by the Israeli High Court of Justice (HCJ) handed down in 2004. It deals with the question of the legality of the separation barrier that the Israeli government had decided to construct, mostly within the land over the 1949 armistice line (the 'green line') between the sovereign territory of the State of Israel and the territories which had been conquered by Jordan on the West Bank of the Jordan river and subsequently conquered by Israel during the Six Day War of 1967. The importance of the decision from a comparative and international law perspective stems not only from the central principles dealt with, including that of → *proportionality*, but also from its uniqueness as a judgment which served as the catalyst for an ongoing judicial 'back and forth' between the HCJ and the → *International Court of Justice (ICJ)*, thereby providing a living example of a 'synergy between national and international judiciaries' (Gross (2006) 431).

2. The unanimous decision, written by HCJ President A. Barak, was given on 30 June 2004 and immediately sent shock waves throughout the country, after the Court accepted some of the arguments of Petitioners—mostly residents of the occupied territories—and decided that parts of the barrier were illegal, thereby voiding orders given by the Commander of the Israeli Defence Forces (IDF) in the West Bank (hereafter—the Military Commander). The Court found that while it was in fact legal to construct such a barrier—as long as it was for the purpose of security rather than for political reasons—parts of the proposed barrier would create such hardship for individuals and families in certain areas as to violate the legal principle of proportionality (→ *national security*). The HCJ therefore voided the relevant orders and instructed the Military Commander to come up with an alternative route for the separation barrier in those areas.

B. Background

3. As the Court noted in its decision, during the period leading up to the Government's decision to build the separation barrier, Palestinians had ramped up their attacks on Israelis both within the recognized → *borders* of the State of Israel and within the West Bank. The weapon of choice was often suicide bombers—who President Barak called 'guided human bombs'. In less than four years, from July 2000 until April 2004, there were 780 attacks within the borders of the State and another 8,200 attacks within the West Bank, killing 900 Israeli citizens and residents and leaving over 6,000 others maimed and wounded.

4. In April 2002, the Government began deliberating over ways to prevent such infiltrations into Israel and attacks on Israelis. From June 2002 until October 2003, the Government and the Ministerial Committee for National Security approved the construction in stages of different parts of a separation barrier as 'a security measure for the prevention of terror attacks'.

5. In most areas, at the heart of the barrier stands an electronic 'smart' fence, which makes use of technological measures to alert the IDF of any attempted breach. On the fence's external side lies a trench or other means to prevent vehicles from breaking through the fence, as well as another fence and a service road. On the internal side of the 'smart' fence, lies a dirt road to help discover the tracks of those who pass the fence, a patrol road, and a road for armoured vehicles, as well as an additional fence. The average width of the barrier, in its optimal form, is 50–70 metres, though in the area relevant to the petition before the HCJ, the width would not exceed 35 metres, except for topographical reasons.

6. In many areas where the separation fence was planned, land seizures were necessary. According to the relevant procedure, an order of seizure would be signed by the Military Commander and then publicized, with notification made to the residents and to the proper liaison body of the Palestinian Authority. A few days later, a survey would be taken of the area, with the participation of the landowners, to point out the exact land meant to be seized. Then, a one week

leave would be granted to the landowners to submit an appeal to the Military Commander and where possible, an attempt would be made to reach understandings with the landowners. If the appeal was denied, leave of one additional week would be given to the landowner, to allow a petition to the HCJ.

C. Legal Arguments of the Petitioners and the State

7. The petitions attacked the legality of various seizure orders issued by the Military Commander in relation to different areas of the proposed separation barrier, raising two types of arguments. First, the Petitioners claimed that the decision to construct the barrier was made for political rather than for military reasons and, as such, was inherently illegal according to international law. It was argued that if the considerations had been purely related to security, in order to separate Palestinians from the population centres of Israel, then the separation barrier would be built along the 'green line' itself. The second, and main focus of the petition, though, was on the argument that it was the route chosen for the barrier which made it illegal, since it infringed the human rights of thousands of Palestinian residents to such an extent that it violated the principle of proportionality. Among other issues, it was argued that the barrier's route violated the Palestinians' → *right to property* by seizing part of their lands and also violated their → *freedom of movement* and freedom of occupation (→ *freedom of occupation or profession*) due to the difficulty in tending to crops in areas on the other side of the barrier.

8. During the hearings themselves, the Petitioners received leave to submit an affidavit prepared by members of the Council for Peace and Security—an Israeli organization including retired IDF generals—in which they declared that the Council was an early advocate of a security barrier, but it had reservations from a security perspective, concerning the route chosen by the Military Commander. The Council claimed that security needs dictated that the barrier should not be close to Palestinian villages since IDF soldiers patrolling the barrier would then be more at risk; also, the Council argued that if the barrier was close to or within villages, it would increase friction with the Palestinian residents, as well as make it more difficult to distinguish terrorists from peaceful residents of the areas. The Council's position was that locating the barrier closer to the boundary between Israel and the occupied territories would be more beneficial security-wise for these reasons, as well as being more proportionate.

9. The State, on the other hand, argued that the decision to build the barrier was taken for security reasons and as such was legal according to international law. The State emphasized that the purpose of the barrier was to prevent uncontrolled passage of Palestinians into population centres where Israelis lived, prevent arms smuggling and the establishment of terror cells in Israel and protect IDF forces. To allow surveillance, it was claimed, the area of the separation barrier must have topographic command of its surroundings and to make pursuit possible in the event of infiltration, the barrier must pass through certain of the Palestinian areas themselves. These security considerations—rather than political considerations—dictated the construction of the barrier and its route. As far as the question of proportionality of the injury, the State claimed it had taken many steps to limit injury such that it would not be disproportionate, including: attempts to locate the barrier, where possible, on land not privately owned or cultivated; creation of agricultural gateways within the barrier in areas where an owner's crops lay on the other side of the barrier; addition of new roadways to help connect different villages and cities; opening up checkpoints 24 hours a day to allow constant access to various areas; and granting monetary compensation for injury that could not be avoided. In this way, argued the State, the proper balance was struck between the necessary security needs meant to save Israeli lives and prevent terror and the interests and rights of the Palestinian residents.

D. The Ruling of the Court

1. Legal Authority for Military to Erect Separation Barrier

10. All sides accepted that, at least for the purposes of this case, the relevant norms were the international law principles applying to occupation. According to these principles, if the barrier was constructed for political purposes it would be illegal according to international law, as President Barak emphasized:

Indeed, the military commander of territory held in belligerent occupation must balance between the needs of the army on one hand, and the needs of the local inhabitants on the other. In the framework of this delicate balance, there is no room for an additional system of considerations, whether they be political considerations, the annexation of territory, or the establishment of the permanent borders of the state. (para. 27)

11. In the event, however, the HCJ found on the facts before it that the overriding considerations for the construction of the barrier and its location were those of a military and security nature, and therefore legal under Regulation 43 of The Hague Regulations which tasks the occupying power with the duty to preserve 'public order and safety'. The overriding military purpose was reflected in the various decisions of the Government itself which included declarations that the barrier 'does not express a political border, or any other border'. The Court emphasized that it set aside no less than seven sessions to hear the Petition, during which time IDF officers were examined and cross-examined as to the specific military considerations leading to the design of the separation barrier and its placement.

12. The HCJ rejected the Petitioners' argument that true security considerations would have dictated that the separation barrier be built along the 'green line' itself. The Court stated that the 'green line' was in fact itself a political division, whereas true security requirements necessitated taking into consideration topographic issues, as well as other militarily relevant elements.

2. Legal Authority to Seize Land for Separation Barrier

13. The HCJ found that according to Arts 23(g) and 52 of the Hague Convention and Art. 53 of Geneva Convention IV, the Military Commander has legal authority to seize land if necessary for military purposes. In this case, the barrier was intended to take the place of combat units and operations by physically blocking terrorist infiltration into Israeli population centres, which is a quintessentially military purpose. Therefore, seizure of land for the barrier was within the Military Commander's authority under international law. Also, the Court emphasized that it found no defects in the seizure notification and appeal process.

3. Expertise Relevant to Cases Involving Military Questions

14. The HCJ made it clear that, as judges, they have no expertise in the realm of military and security issues. Therefore, as in similar situations where professional or other expertise is required, a court must make use of expert testimony in order to decide whether a reasonable military commander would have made the decision before it. That said, the Court acts according to a long-held view that where contradictory expert military testimony is before it, special weight must be given to the testimony of those military experts who are *actually responsible* for dealing with the security matter at issue. In this case, the HCJ considered the expert testimony both of the IDF officers who testified on behalf of the State and of the members of the Council for Peace and Security, whose military expertise was attested to by the IDF officers themselves, giving additional weight to the testimony of the active IDF experts where appropriate. The HCJ emphasized that its deference to expert military testimony was only relevant to military questions—such as whether the means used were rationally connected to the military objective. However, in matters that were essentially *legal questions*—such as whether certain military means were *proportionate* to the

injury caused—judges were those with the relevant legal-judicial expertise to decide.

4. Principle of Proportionality

15. The principle of proportionality, according to which the infringement or restriction of individuals' rights will only be legally justified if they are proportionate to a proper objective, is ubiquitous. It is the relevant test in this case under international law which uses the test to balance military requirements on the one hand and humanitarian considerations related to the residents in an occupied territory, on the other hand. The test of proportionality is also applicable under Israeli administrative law and constitutional law to any administrative decision—including that of the Military Commander. As such, the HCJ noted it had applied the proportionality test to decisions of the Military Commander in regard to: surrounding towns and setting up checkpoints; declaring an area 'closed military territory'; demolishing houses for operational or deterrence purposes; denying suspected terrorists a meeting with an attorney; and laying siege to holy places within which suspected terrorists were hiding.

16. The test, as applied in many countries including Israel, includes three component tests. First, the means used must be rationally connected to the objective (the 'rational means test'). Second, the means chosen to achieve the objective must be the least injurious to the individual harmed (the 'least injurious means test'). Third, the injury from the means used must be proportionate to the gain achieved (the 'proportionate means test').

5. The Route of the Separation Barrier and the Proportionality Test:

17. In order to decide the issue of proportionality, the Court first had to decide on a 'zone of reasonableness' to see if a reasonable military commander could have chosen this particular route for the separation barrier as being rationally connected to the security objective and constituting the least injurious means for achieving it (→ *reasonableness*). As these questions were in the area of military expertise, the Court made use of the expert testimony of the IDF officers who testified for the State and the expert testimony of the Council for Peace and Security brought before the Court, initially, by the Petitioners. This testimony was contradictory in that the Council was of the opinion that another route closer to the boundary between Israel and the occupied territories would have been more rationally connected to the security objective, as well as being less injurious. However, the Court, giving extra weight to the testimony of the experts actually charged with the responsibility for security, found that the Petitioners had not met the onus of proving that a reasonable military commander could not have come to such a decision.

18. Also, the Court found that the Military Commander did indeed believe that the route chosen for the separation barrier did not cause a level of injury that was disproportionate to the military objective. However, the HCJ reiterated that the question whether the means chosen, and the injury caused thereby, were proportionate was a legal question, not a military one. At this point, and over the next 36 paragraphs (constituting over 40 per cent of the judgment), President Barak examined in great detail the specific areas through which the barrier was planned, balancing the injuries of the residents against the military objective of that part of the barrier. In regard to certain sections of the barrier, President Barak found that the injury to the residents was disproportionate. For example in one area it was found that 13,000 Palestinians would be cut off from their agricultural lands, requiring them to wait in long queues to pass through a gate to get access to their produce, thereby constituting a severe and disproportionate injury to their rights and livelihood. In the area of the Beit Sourik village itself, Petitioners claimed—and the State did not dispute—that the route chosen for the barrier would require uprooting 10,000 trees, while leaving another 25,000 olive trees and 25,000 fruit trees belonging to villagers on the other side of the barrier.

19. The result of the Petition was that the HCJ voided seven out of eight orders of seizure, in whole or in part, after having found that the injury caused violated the principle of proportionality and that

an alternative route would achieve many of the security objectives—though not all—while limiting the injury to the Palestinian residents in such a way as to meet the ‘proportionate means test’.

6. Security and the Rule of Law:

20. *Beit Sourik* is considered an important precedent within comparative and international law since it involved a judicial authority ‘piercing the veil of security’ and intervening, on the basis of humanitarian concerns, not only in procedural issues but also in substantive matters (Gross (2006) 429–430). President Barak concluded this important judgment (para. 86) with an epilogue concerning the role of judges and the role of law in a society which is in a constant struggle to protect its citizens and its security:

Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state’s struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state’s struggle against the terrorism that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security ...

Only a separation fence built upon a foundation of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for.

E. Aftermath of Beit Sourik: International Legal and Scholarly Debate

1. The ICJ Advisory Opinion and the HCJ Judgment in Mara’abe

21. While the *Beit Sourik* case and other petitions against the separation barrier were still pending in Israel, the International Court of Justice (ICJ) was asked by the General Assembly of the United Nations to give an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

22. The ICJ rendered its opinion in the matter just ten days after the *Beit Sourik* decision. In contrast to the Israeli Court, the ICJ found that the construction of the entire barrier was illegal, and that Israel was under an obligation to dismantle the structure already built and to make reparations for all damages caused by its construction.

23. Just over a year later, the HCJ rendered another judgment about the legality of the barrier

—*Mara'abe v Prime Minister of Israel*—this time striking down a number of the Military Commander's orders in regard to the area of the settlements of Alfei Menashe on the basis of the proportionality test. Here the HCJ took the opportunity, to relate directly to the ICJ conclusions in its advisory opinion on the matter and to explicate the differences between their decisions. These differing applications of international law norms elicited much scholarly debate about the norms and principles themselves and about the fora and principals applying them.

2. Military v Political Purposes

24. Both the HCJ and the ICJ made it clear that if the purpose behind the construction of the barrier was political, it would certainly be contrary to international law. In *Beit Sourik*, though, the HCJ came to a clear-cut conclusion that the overriding purpose was a military one—and as such, legal. The ICJ, in contrast, concluded that the barrier was being constructed in order to achieve political rather than military purposes, pointing at the correlation between its route and the location of Israeli settlements in the occupied territories. Thus, the barrier was seen by the ICJ as creating a 'fait accompli' whereby territory would be annexed *de facto* to the state of Israel—and this unlawful purpose provided the basis for the ICJ to declare the entire barrier illegal, without conducting a detailed review of any particular section of it.

25. It should be noted that in *Beit Sourik*, the Council for Peace and Security, whose generals had submitted affidavits on behalf of those petitioning against the barrier, had themselves been in favour of the construction of a barrier—indicating that, within Israel at least, it was clear that military justification for a barrier did exist at the time. In fact, the HCJ itself opined in *Mara'abe* (paras 61–65) that the reason that the ICJ came to a different conclusion on this matter from that of the HCJ was the dearth of factual material made available to the ICJ concerning this question.

26. The HCJ noted further that, had the ICJ reviewed some of the particular portions of the barrier, it would have seen that some of the route had obviously been dictated indeed by pure security concerns and could not be viewed as part of an attempted annexation. For instance, almost 20 per cent of the barrier was to be located between 500 and 2,000 metres from the 'green line' in areas where no settlements exist, thus showing that in these areas '[t]he only reason for establishing the route beyond the Green Line is a professional reason related to topography, the ability to control the immediate surroundings, and other similar military reasons' (para. 70). Having emphasized that these areas included neither Palestinian towns nor agricultural lands, the HCJ continued: 'Upon which rules of international law can it be said that such a route violates international law?'

3. Proportionality —Security v Rights

27. As noted above, the vast majority of the HCJ decision in *Beit Sourik* was focused on applying the proportionality test. In the event, the HCJ annulled many of the orders of the Military Commander regarding various portions of the barrier after analysing whether the infringement of the rights of Palestinian residents and the damage caused to them were disproportionate to the gains in security.

28. The ICJ majority opinion, on the other hand, mentioned the word 'proportionality' only once in its entire judgment. Having cited Human Rights Committee decisions showing that, under the → *International Covenant on Civil and Political Rights (1966)*, restriction of rights must be 'the least intrusive instrument amongst those which might achieve the desired result', the ICJ simply stated (para. 136): 'On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.'

29. On this issue too, the HCJ took the opportunity afforded to it in the *Mara'abe* decision to clarify what it viewed to be some of the differences between the two courts on the matter. Again, the HCJ emphasized that the ICJ suffered from a lack of factual information—not only with regard to the

security questions (see above) but with regard to the actual extent of damage to Palestinian interests and rights (paras 66–67), which would make it difficult if not impossible to apply any real proportionality test.

30. The HCJ also took issue with the idea suffusing the ICJ majority opinion, whereby the legal/illegal status of the settlements could somehow affect the Military Commander's duty to safeguard the security of Israelis residing in the occupied territory and not allow him to take their safety into account as part of his military considerations (*Mara'abe* para. 19):

The authority to construct a security fence for the purpose of defending the lives and safety of Israeli settlers is derived from the need to preserve 'public order and safety' (regulation 43 of The Hague Regulations). It is called for, in light of the human dignity of every human individual. It is intended to preserve the life of every person created in God's image. The life of a person who is in the area illegally is not up for the taking.

4. Temporary v Permanent

31. The basic assumption of the laws of belligerent occupation is that one is dealing with a temporary situation; as such, the occupier is charged with safeguarding the situation of the territory's residents and is precluded from making changes of a permanent nature. This important principle of international law seems to have informed the decisions of both the HCJ and the ICJ.

32. The ICJ, as shown above, tended to view the construction of the barrier as a project of some 'permanence', thereby interpreting it as a political project fashioned in order to bring about permanent political gains—such as annexing territory and influencing the drawing of ultimate borders between states. Such steps would be illegal, not only due to the political purpose involved but also due to their permanence.

33. The HCJ, on the other hand, viewed the steps taken as inherently of a temporary nature. For example, in *Mara'abe* the HCJ took pains to emphasize (para. 16) that no land had in fact been confiscated or expropriated for the barrier's construction, but rather the Military Commander had issued orders of seizure—orders which included dates of termination (which could be renewed) and involved no transfer of ownership (→ *state interference with private property*). The temporary nature of the barrier in the eyes of the HCJ is reflected as well in its decision requiring actual dismantling of portions of the existing fence (*Mara'abe* para. 114).

5. Right of Self-Defence

34. As mentioned above, the *Beit Sourik* judgment based the Military Commander's authority to construct the barrier upon his duty to safeguard public order and safety under Regulation 49 of the Hague Regulations. The ICJ did not focus on this regulation but rather considered whether Israel could base a claim for the legality of the security barrier upon its right to self-defence under Article 51 of the UN Charter. Here the ICJ's conclusion was negative (para. 138), opining that Article 51 is generally relevant only where a state is attacked by another state, and that even the extended right to self-defence against international terrorism would not be applicable since the infiltrations into Israel originated not in another state but rather in territory occupied by Israel itself.

35. The HCJ in *Mara'abe* did not attempt a definitive answer to this issue, but rather cited many scholars who criticized the ICJ opinion on the matter (among them: Gross (2005), Wedgwood, Pomerance) and queried how such a position could conceivably be accepted given the challenges of the modern world:

We find this approach of the International Court of Justice hard to come to terms with. It is not called for by the language of § 51 of the Charter... It is doubtful whether it fits the needs of democracy in its struggle against terrorism. From the point of view of a state's right to self-defence, what difference does it make if a terrorist attack against it comes from another country or from territory external to it which is under belligerent occupation?

6. Academic Debate

36. The importance of the issues raised ensured that the ensuing debate was not confined to judicial chambers but rather was echoed and analysed in numerous academic articles and publications the world over. Some of the issues raised include:

- To what extent do conclusions regarding the application of international law norms vary according to the forum applying it and the methods used in so doing? (Barak-Erez)
- Which rights involved should be seen as protected by *ius strictum* norms which may not be restricted, and which are protected by *ius aequum* norms and are therefore subject to proportionality tests? (Kretzmer)
- To what extent do acts of terror vest the attacked state with a right to self-defence, notwithstanding where the threat originates? (Gross (2005))
- Does an international court have a responsibility to only render judgment when and where it has been provided with the requisite factual record to ensure that said judgment is 'well-founded'? (Wedgwood)

F. Conclusion

37. The decisions of the HCJ in the matter of the security barrier reflect the broad impact of international law on domestic adjudication. The *Beit Sourik* judgment continues to serve as a precedent for subsequent judicial decisions in Israel in regard to other sections of the separation barrier and in regard to application of the proportionality test in general, and in security matters in particular.

38. This judgment stands as an important example for the entire international community of a national court using international legal norms, basic human rights and humanitarian concerns as part of its active → *judicial review* of state action, including in regard to military and security issues. It has been relied upon as such by respected courts in jurisdictions ranging from Australia (*Al-Kateb v Godwin*; *Re Colonel Aird*) to England (*Home Secretary v MB*; *R (Corner House Research) v Serious Fraud Office*).

39. As one article on the case noted, 'protection of the basic rights and freedoms of the individual in times of crisis poses a serious and complex challenge to every democratic regime' (Gross (2005)). The *Beit Sourik* judgment, together with the subsequent decision of the ICJ and that of the HCJ in *Mara'abe*, provide the international legal community with a singular body of judicial material which serves to delineate and explore this challenge and some of the most pivotal issues facing modern international law and, indeed, modern states and society.

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