

# *Beit Sourik Village Council v. The Government of Israel: A Matter of Principle (and Neglected Rules)*

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## I. Introduction

On June 30, 2004, the Israel Supreme Court sitting in its capacity as the High Court<sup>1</sup> delivered a judgement concerning a section of the “separation fence”<sup>2</sup> being built by the Government of Israel in the territories occupied after 1967.<sup>3</sup> In the same days, the International Court of Justice was elaborating its Advisory Opinion on the legality of the construction of what had been defined by the United Nations General Assembly as a wall in the occupied Palestinian territory.<sup>4</sup> Both adjudicating bodies, the international and the domestic one, approached the same issue in the same period.

As is well known, the International Court of Justice clearly sanctioned the illegality of the construction of the “wall” giving rise to a heated debate both in international *fora*, *in primis* the United Nations, and amongst legal scholars.<sup>5</sup> By con-

<sup>1</sup> Hereinafter: HCJ or “the Court”. The legal basis of the jurisdiction of the Supreme Court when sitting as a High Court of Justice is founded on section 15 of the Basic Law: Judiciary. Section (d) para. 2 empowers the Court to “grant orders to state authorities, local authorities, their official and other bodies and persons fulfilling public functions under law, to do an act or to refrain from doing an act in lawfully performing their duties”. See: K r e t z m e r, *The Occupation of Justice – The Supreme Court of Israel and the Occupied Territories*, New York 2001, 10-11; Z e m a c h, *The Judiciary of Israel*, Jerusalem 1993, 69-73.

<sup>2</sup> As it often happens in legal issues with highly political connections, terminological questions arise. The barrier which is being erected in the West Bank has been termed “Wall”, “Apartheid Wall”, “Separation Fence”, “Fence”, “Obstacle”, “Barrier”, “Separation Barrier”. In the present judgement, the Israeli High Court constantly refers to the expression “Separation Fence”, without motivating the decision. Unless quoting from different sources, we will use the term “barrier” adding no adjective to it. We think that the term neutrally describes the varied nature of the object at issue and that qualifying *a priori* its purpose or its consequences would be methodologically incorrect. On the point see, Written Statement of the Government of Israel on Jurisdiction and Propriety (Israel Written Statement), paras. 2.6-2.8. For a different view, see: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory – Advisory Opinion, International Court of Justice, (hereinafter: ICJ Advisory Opinion), para. 67: “(...) the other terms used, either by Israel (“fence”) or by the Secretary General (“barrier”), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.” The ICJ Advisory Opinion, the Separate Opinions, as well as the Written Statements and the Oral Pleadings of the participants in the proceedings are available at: <www.icj-cij.org> (last accessed 20/03/05).

<sup>3</sup> The procedure consisted in several hearings and was rather complicated but quick, since the Court first heard the petition at the end of February 2004 and delivered its decision after four months.

<sup>4</sup> See resolution ES-10/13, 21 October 2003 and resolution ES-10/14, 8 December 2003.

<sup>5</sup> See Resolution A/ES – 10/ L.18/ Rev.1: The United Nations General Assembly voted (150 in favour, 6 against, 10 abstentions) a resolution calling Israel to comply with the Advisory Opinion of the International Court of Justice. For a comment on some issues raised by the Advisory Opinion, with particular reference to the adjudicating procedure followed by the International Court of Justice, see: S c o b b i e, *Smoke, Mirrors and Killer Whales: The International Court’s Opinion on the Israeli Barrier Wall*, 5 *German Journal of International Law* 9 (2004), 1107 et seq. For a comprehensive survey: F i s l e r D a m r o s c h / O x m a n (eds.), *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 *American Journal of International Law* 1 (2005), 1-141 (articles by W a t s o n, P o m e r a n c e, F a l k, W e d g w o o d, M u r p h y, S c o b b i e, K r e t z m e r, I m s e i s and D e n n i s). See also R. A b i S a a b, *Conséquences juridiques de l’édification d’un mur dans le territoire palestinien occupé*: quelques réflexions préliminaires sur l’avis consultatif de la Cour internationale de justice, 86 *Revue internationale de la Croix Rouge* 855 (2004), 633 et seq.

trast, the Judgement of the HCJ upheld in principle the legality of the decision to build a “separation fence” in the occupied territories but ordered the Military Commander of the IDF Forces in Judea and Samaria to modify its route. Somewhat paradoxically, at least in the short term, it is the latter decision that might bring about some changes on the grounds, reducing the impact on the life of the population involved.

This article aims at reviewing the Judgement of the HCJ, focussing in particular on the way the Court applied international law to the case at issue. The decision, confirming a trend emerged in the last years in the judgements concerning the Occupied Palestinian Territory, relies heavily upon international law.<sup>6</sup> Although the Judgement regards only a section of the “separation fence”, the legal arguments put forward by the Parties and the legal reasoning of the Court are generally applicable to the whole issue.

After shortly describing the factual background of the decision (section II), we will summarise the position of the parties (section III) and the legal reasoning of the Court (section IV). The second part of the article (section V) will comment upon the main legal issues arising from the judgement. Both international humanitarian law (subsection V.C.), which is the main legal basis of the decision, and other norms of international law (subsections V.D., V.E.), which the Court apparently ignored, will be taken into account. Reference to the Advisory Opinion of the International Court of Justice will be made throughout the article.

## II. The Background: The Construction of an “Obstacle” in the West Bank

### A. The Origin of the Barrier

The building of a wall separating Israel from the occupied territories was first proposed by prominent leftwing Israeli personalities and was regarded as Ehud Barak’s fallback plan in case of failure of the Oslo negotiating process.<sup>7</sup> The Likud party and the present Prime Minister initially opposed such a plan, which they later modified and implemented.<sup>8</sup> However, limitation of movement in the West Bank is not a new phenomenon: the building of a barrier may simply be regarded as a different phase in the policy that punctuated the area of roadblocks and vari-

<sup>6</sup> See, for instance, *Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip*, HCJ 4764/04, 30 May 2004, at: <[http://elyon1.court.gov.il/files\\_eng/04/640/047/a03/04047640.a03.pdf](http://elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf)>; *Ajuri v. IDF Commander in the West Bank*, HCJ 7015/02, at: <[http://elyon1.court.gov.il/files\\_eng/02/150/070/a15/02070150.a15.pdf](http://elyon1.court.gov.il/files_eng/02/150/070/a15/02070150.a15.pdf)> (last accessed 20/03/05). On the point see, however, Benvenisti, National Courts and the “War on Terrorism”, in: Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Oxford 2004, 307-330.

<sup>7</sup> Radin, *Israelis consider Wall of Separation*, *The Boston Globe*, 5 May 2002, A1.

<sup>8</sup> Cf. Benn, *Back to the Fence*, (*Haaretz* article 08/09/04), available on-line at: <[www.haaretz.com](http://www.haaretz.com)> (last accessed 08/09/04).

ous obstacles during the tensest years of the Israeli occupation. In 1996 permanent roadblocks were established along the seam zone. The measure was reinforced a year later by the deploying of Border Guard Forces and in November 2000 the establishment of a barrier against vehicles was decided.<sup>9</sup> The construction of separate obstacles in different areas was then considered.<sup>10</sup> On June 2002, two years after the beginning of the second intifada, in the midst of a violent phase of terrorist attacks and in a political scenario quite different from the days of Oslo,<sup>11</sup> the Israeli Government officially decided to begin the building of the first stage of a “separation fence” with a continuous route in the occupied territories.<sup>12</sup>

## B. The Position of the Government of Israel

According to the Government of Israel, the Barrier is meant to be a security measure aimed at preventing infiltration of terrorists from the West Bank to Israel. Although the main emphasis is being placed on preventing the infiltration of terrorists in the territory of Israel proper, it is to be noted that Israeli officials never denied, and occasionally even stated, that the defence of the settlements and of the settlers is amongst the purposes of the Barrier.<sup>13</sup>

The Barrier is said to be a non-violent and effective measure allegedly as demonstrated by the sealing off of Gaza and by the effects of the segments already erected in the West Bank. Notwithstanding the enormous financial effort deriving from the Barrier, the latter is to be considered a temporary measure. Would the security reasons justifying it be no longer relevant, the Government will be ready to dis-

<sup>9</sup> Petition for an Order Nisi and Interlocutory Order, in *Hamoked v. The Government of Israel*, HCJ 9961/03, 7, available at: <[www.hamoked.org](http://www.hamoked.org)> (last accessed 18/09/2004). The petition is uncontested on the point. See also: Report of the Secretary General prepared pursuant to General Assembly resolution ES-10/13, A/ES-10/248, (hereinafter: Report of the Secretary General), 2-3; Lein, *The Separation Barrier: Position Paper* September 2002, B’Tselem Position Paper, 3-6, at: <[www.btselem.org](http://www.btselem.org)> (last accessed 13/08/2004).

<sup>10</sup> Israel’s Security Fence, Israeli Ministry of Defense, available at: <[www.securityfence.mod.gov.il/Pages/ENG/purpose.htm](http://www.securityfence.mod.gov.il/Pages/ENG/purpose.htm)> (last accessed 17/09/04).

<sup>11</sup> The frequency of the terrorist attacks reached its peak in the month of March 2002. See Israel Written Statement, para. 3.65: “There were 37 separate terrorist attacks resulting in Israeli fatalities in the 31 days of March 2002. These attacks killed 135 and injured 721 others, many critically. Of the dead, 12 were children; 28 were in their 70s and 80s”.

<sup>12</sup> On June 2001 the Israeli Prime Minister, Mr. Sharon, established a Steering Committee to elaborate a plan aimed at stopping the infiltration of Palestinians in Israel. The Committee recommended the Government the building of a barrier against human beings in the sectors where the infiltration was more likely to happen. The Government approved the recommendation on April 2002 and established the “Seam Zone Directorate”. The latter elaborated a project for the construction of a first stage of the barrier, which was approved by the Government on 23 June. The Prime Minister and the Minister of Defense were charged to determine the route. In case of disagreement between the two, the matter had to be referred to the Defense Cabinet. B’tselem, *Behind the Barrier*, Position Paper April 2003, 4-5 at: <[www.btselem.org](http://www.btselem.org)> (last accessed 20/10/2004).

<sup>13</sup> See Benn, *Defense Ministry Official: Fence Won’t Run Along 1967 Line*, (Haaretz article, 29/07/04) available at: <[www.haaretz.com](http://www.haaretz.com)> (last accessed 13/09/04).

mantle it.<sup>14</sup> Israeli officials repeatedly stated that the Barrier is not a political border, its route being dictated exclusively by security reasons.<sup>15</sup> However the position seems ambiguous on the point, since the Prime Minister and members of the Government occasionally declared a different political agenda.<sup>16</sup>

The Israeli Government acknowledges that the “separation fence” causes a great hardship to Palestinians, but maintains that in the long term it will contribute to ameliorate the living conditions of the population in the occupied territories. Thanks to the Barrier, Israel will be able to reduce the presence of its forces in the area and might remove checkpoints and roadblocks.<sup>17</sup> Moreover the Israeli authorities are trying to mitigate the effects of the measure through changes in the route, selection of uncultivated land for requisition, construction of gates and other arrangements. From a legal point of view the necessity to protect the right to life of Israeli citizens is said to justify the limitation of the liberty to movement of the Palestinians. In the balancing of the two abovementioned rights, the first should obviously prevail on the latter, being by far more important.<sup>18</sup>

As will be seen later, the respondents’ attorneys refer to the main legal arguments of the official position of the Israeli Government in the present case.

### C. The Essential Features of the Barrier

Despite the amount of reports, studies and articles publicly available, the facts of the issue, and most of all the project of the Barrier, are quite difficult to ascertain precisely. The construction is a process evolving day by day through different stages according to a system of decision where several actors are involved. The Government of Israel approves in principle every stage of the construction, the issue is then examined by professionals and legal advisors, modifications of the route are to be re-approved by the Prime Minister and the Minister of Defence, then the orders of seizure of the land are issued by the Military Commander.<sup>19</sup> The land-

<sup>14</sup> According to the Deputy Attorney General Malchiel Balass, the end of terrorist attacks would not be sufficient to consider dismantling the Barrier, but a significant act would be needed such “the Palestine Liberation Organization’s 1993 letter to Premier Yitzhak Rabin”. See Y o a z, End to terror could make fence illegal, (Haaretz article 25/08/04), available on-line at: <www.haaretz.com> (last accessed 08/09/04).

<sup>15</sup> See Statement by the Israeli representative Mr. Dan Gillerman in the 23<sup>rd</sup> Meeting of the General Assembly Emergency Special Session, A/ES-10/PV.23, 6-7.

<sup>16</sup> On the “strategy of Bantustanization” of the Occupied Palestinian Territory, see Commission on Human Rights, Report by the Special Rapporteur Jean Ziegler, E/CN.4/2004/10/Add. 2, para. 18.

<sup>17</sup> Statement by Ambassador Dan Gillerman, Permanent Representative of Israel to the United Nations, 14 October 2003, at <www.israel-un.org/sec-council/gillerman\_14october03.htm> (last accessed 16/06/05).

<sup>18</sup> Preliminary Response on behalf of the Respondents, in *Hamoked v. The Government of Israel*, HCJ 9961/03, 12, available at: <www.hamoked.org> (last accessed 18/09/2004).

<sup>19</sup> *Ibid.*, 8-9.

owners are entitled to file an objection against the orders before the Military Administration and might subsequently decide to petition the High Court against the administrative decision.<sup>20</sup> The result of the legal proceedings may bring about changes to the route, which must be re-evaluated by the Government in case of “major” changes.<sup>21</sup>

In view of the changing characteristics of the project, quoting sharp figures might not be so relevant in the case at hand; nonetheless some features are to be pointed out in order to assess its legality.

The Barrier is not a fence, nor a wall, but is a complex and multishaped structure. Depending on location, it is made of different components: four-meter deep ditches on either side with stacks of barbed wire; a dirt path to which access is forbidden; a trace path to discover footprints; an electronic warning fence; a patrol road; a road for armoured vehicles; observation systems and guard towers at regular intervals.<sup>22</sup> Nearby populated areas, the Barrier might take the form of an eight meters high concrete wall allegedly to prevent gunfire.<sup>23</sup> At times buffer zones are established next to the Barrier<sup>24</sup> and, in some areas, the structure is accompanied by “secondary barriers”.<sup>25</sup>

The final location and the total length of the Barrier are not certain. The route has been the outcome of a bargaining process not yet finished in which the decisions of the jurisdictional bodies have been taken into account.<sup>26</sup> Before the present decision, the High Court issued a number of injunctions prohibiting the completion of certain sections.<sup>27</sup> The route then underwent revision to address the decision of the High Court that is being reviewed here.

<sup>20</sup> It is to be noted that, according to different sources, the orders of seizure are sometimes never delivered or delivered late to the landowners thus rendering impossible the filing of an objection. See Report of the Secretary General, para. 18; World Bank, *The Impact of Israel's Separation Barrier on Affected West Bank Communities*, Report of the Mission to the Humanitarian and Emergency Policy Group (HEPG) of the Local Aid Coordination Committee (LACC), hereinafter HEPG Report May 2003), para. 38.

<sup>21</sup> See *Benn, Sharon: No Changes to Fence Route without Government Approval*, (Haaretz article, 08/09/04), available at: <[www.haaretz.com](http://www.haaretz.com)> (last accessed 08/09/04).

<sup>22</sup> HEPG Report May 2003, para. 6; see also the description of the “Separation Fence” in general according to the HCJ: HCJ 2056/04, 5.

<sup>23</sup> Report of the Secretary General, 4. The Israeli authorities often highlighted that the portion of the barrier constituted by concrete wall is really limited and they rightly pointed out that the term “wall” is therefore inapt to describe the issue. (see, *inter alia*, Israel Written Statement, para. 2.6). Nevertheless one may cast some doubts on the necessity of gunfire prevention when the concrete wall divides two Palestinian populated areas as in Abu Dis.

<sup>24</sup> Information available at the Seam Zone website of the Government of Israel: <[www.seamzone.mod.gov.il](http://www.seamzone.mod.gov.il)> (last accessed 29/03/05).

<sup>25</sup> Cf. Report of the Secretary General, para. 10.

<sup>26</sup> See Preliminary Response, *supra*, note 18, 10.

<sup>27</sup> See E/CN.4/2004/6, (Hereinafter: Dugard Report). With regards to the temporary injunctions issued by the High Court before the present decision, see, B'tselem, *Changes to the Barrier – Israeli and International Ruling Issued*, available at: <[www.btselem.org/English/Special/040715\\_Barrier\\_Updates.asp](http://www.btselem.org/English/Special/040715_Barrier_Updates.asp)> (last accessed 10/09/2004).

The Barrier is almost totally located in the occupied territory and encompasses the most populated Israeli settlements.<sup>28</sup> The route encircles a number of Palestinian villages, which are reachable only through a single road controlled by a check-point. Before the revision, the total length of the project exceeded 700 km, nearly twice as long as the green line.<sup>29</sup> As a result of the construction, more than 16 % of the West Bank would have been incorporated in the area between the Barrier and the green line.<sup>30</sup> The average width varies between 50 and 70 metres; it has been reported that it reaches 100 metres in some sectors.<sup>31</sup>

The area between the green line and the Barrier is declared a “closed zone” and is subject to a new legal regime.<sup>32</sup> Palestinian residents have to request the Israeli authorities a permit to stay, which is issued for a limited period.<sup>33</sup> Entrance by Palestinian non-residents is possible through a number of gates in the Barrier and is conditioned on the possession of a personal permit.<sup>34</sup> Palestinian landowners and farmers whose land is on the “other” side of the Barrier also need to possess a permit to enter the closed zone. By contrast, Israeli citizens and settlers, persons who fulfil the conditions for immigration to Israel under the law of return, and tourists do not need any specific authorisation.

#### D. The Segment of the Barrier Relevant to the Present Decision

The length of the sector of the Barrier subject to the petition, which is never replaced by a concrete wall,<sup>35</sup> is approximately 40 km and is entirely located in the Occupied Territory. The route starts east of the town of Maccabim, continues

<sup>28</sup> According to the Report of the Secretary General, para. 8, 320.000 settlers (178.000 in East Jerusalem) would be “incorporated” by the route of the Barrier.

<sup>29</sup> The route of the Barrier was revised on 30 June 2004 and on 25 February 2005. See United Nations Office for the Coordination of the Humanitarian Affairs, Preliminary Analysis of the Humanitarian Implications of Latest Barrier Projections, 8 July 2004, available at: <[www.humanitarianinfo.org/opt/docs/UN/OCHA/update3barrierprojections9July04\\_maps.pdf](http://www.humanitarianinfo.org/opt/docs/UN/OCHA/update3barrierprojections9July04_maps.pdf)> (last accessed 29/02/05). The updated map of the route is published on the Seam Zone website, at: <<http://www.seamzone.mod.gov.il/Pages/ENG/route.htm>> (last accessed 15/6/05).

<sup>30</sup> Report of the Secretary General, para. 8.

<sup>31</sup> Report of the Secretary General, para. 9.

<sup>32</sup> See Order Regarding Defense Regulations (Judea and Samaria) (No. 378), 5730 - 1970, Regulations Regarding Crossing in the Seam Area, and Regulations Regarding Permits to Enter and Stay in the Seam Area, available on-line at: <[www.domino.un.org](http://www.domino.un.org)> (last accessed 16/09/04). Cf. Preliminary Response, *supra*, note 18, 9.

<sup>33</sup> Cf. Report of the Secretary General, Annex I, Summary legal position of the Government of Israel, para. 10. See Declaration Concerning the Closure of Area Number s/2/03, 2 October 2003, art. 5 a, available at: <<http://domino.un.org/unispal>> (last accessed 16/09/04).

<sup>34</sup> Permits are valid for entrance through one of the gates only, see World Bank, The Impact of Israel's Separation Barrier on Affected West Bank Communities, Follow Up Report of 30 November 2003 (Update Number 3) to the Humanitarian and Emergency Policy Group (HEPG) and the Local Aid Coordination Committee (LAAC), (hereinafter HEPG November 2003 Report), paras. 18-29.

<sup>35</sup> HCJ 2056/04, para. 7.

south to Mevo and reaches Jerusalem. The Route is winding, passes through several Palestinian villages and divides some of them from Israeli settlements (Ma'aleh HaChamisha, Har Adar, Har Shmuel, New Giv'on, Giv'at Ze'ev). With the possible exception of the town of Maccabim, which is situated in the no man's land across the green line, the segment of the Barrier at issue is never located in proximity to Israeli towns, but separates Israeli settlements from Palestinian populated areas. The Palestinian village of Beit Sourik is encircled by the route, which climbs "major hills" gaining "topographical control of Jerusalem" and reaching "a major traffic route" connecting Jerusalem to the centre of Israel.<sup>36</sup>

### E. The Process of Seizure of the Land

Private property on which the route of the Barrier is located is seized by requisition orders issued by the military commander for military needs.<sup>37</sup> The validity of the orders is limited to a period of three or five years, but they are renewable without limits.<sup>38</sup> The orders are valid from the date they are signed and deliverance to the interested owners is not a necessary condition. In two weeks, the latter can file an objection to the Legal Advisor of the Military Commander of the West Bank who submits a petition to an Appeals Committee of the IDF. The decisions of the Appeals Committee do not bind the military commander. Affected landowners can also petition the Supreme Court sitting as the High Court. Failures have been reported with regard to the deliverance of the orders of seizure, thus affecting the possibility of lodging appeals challenging the orders.<sup>39</sup>

It has been reported that some of the orders allow for the possibility to request usage fees of compensation for the land seized. Nonetheless no compensation is given for the land located between the Barrier and the green line, although access is conditioned to the issuance of personal permits.

## III. The Position of the Parties

### A. The Petitioners' Position

The present decision of the High Court originated in a petition presented by a group of Palestinian landowners and a number of Village Councils affected by the building and located North and Northwest of Jerusalem. The petitioners chal-

<sup>36</sup> See the description of the relevant sector in HCJ 2056/04, para. 49.

<sup>37</sup> Given the annexation by Israel, in East Jerusalem requisition orders are issued by the Ministry of Defense. On the seizure of the land, see HEPG May 2003 Report, paras. 34-45. Some orders of seizure are available at: <[www.hamoked.org](http://www.hamoked.org)> (last accessed 24/09/2004).

<sup>38</sup> Ibid.

<sup>39</sup> International Commission of Jurists, *Israel's Separation Barrier – Challenges to the Rule of Law and Human Rights*, 14-16, at: <[www.icj.org](http://www.icj.org)> (last accessed 20/11/2004).



lenged the legality of the military orders through which the Commander of the IDF Forces in Judea and Samaria seized the land on which the Barrier was to be erected. Technically, the petitioners asked the Court to adopt both an *order nisi*, aimed to ask the respondents to justify the legality of their acts, and a temporary injunction aimed to suspend construction pending the decision.

As it has already been seen, the route of the Barrier is situated both on private land, which is taken through an order of seizure, and on land that is not privately owned.<sup>40</sup> According to the petition, the building of the Barrier does not affect only the right of property of the landowners, but also infringes upon the “villages’ ability to develop and expand”.<sup>41</sup> The taking of the land on which the Barrier is located is just one of the elements of the issue, since the difficulties in reaching the land caught between the obstacle and the armistice line must also be taken into account. The petitioners maintain that the Barrier would severely limit or make impossible “people’s ability to go from place to place” in general, access to agricultural lands, access to wells, shepherding, access to medical services, access to school and to Universities.

The petition aimed to void the orders of seizure issued by the Commander of the IDF Forces in the West Bank, affirming their illegality with respect to Israeli administrative law and to “the principles of public international law” applicable to the dispute.<sup>42</sup>

From an international law perspective the arguments put forward by the petition can be summarised under two basic propositions. First, the international law of occupation forbids the building of the Barrier so that the respondent, being a belligerent occupant in the West Bank, lacks the authority to seize the land. In fact, the Barrier does not serve the interests of the population of the occupied area, nor “the needs of the occupying power in the occupied area”.<sup>43</sup> The concept of military necessity cannot therefore provide a legal justification for the construction and does not require the construction along the planned route. In the petitioners’ view,

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<sup>40</sup> The definition “State Land” is somewhat misleading when applied to the land not privately owned in the West Bank, where the State of Israel is entitled to exercise only the powers of the belligerent occupant. While the status of the land might be public also in the occupied territories, according to the normative framework applicable there, public land cannot be regarded as land of the State of Israel. One might wonder whether the Court itself might have acknowledged this, having had recourse to the complicated phrase “land which is not privately owned”. On public land in the Occupied Territory, with reference to the case law of the HCJ, see K r e t z m e r, *supra*, note 1, 90-98.

<sup>41</sup> HCJ 2056/04, para. 9.

<sup>42</sup> As concerns domestic law, which is not of primary concern in this article, the petition relies mainly on the alleged illegality of the procedure for the determination of the route of the separation fence. Petitioners were not informed regularly of the orders of seizure; they were not heard; they were granted extensions of only a few days to submit appeal; they were not allowed to participate in the determination of the route.

<sup>43</sup> See HCJ 2056/04, para. 10.

it is clear that the aim of the Barrier, especially considering the chosen route, is annexation, which bluntly violates international law.<sup>44</sup>

Second, the building of the Barrier infringes several fundamental rights of the local population and such violations could not be legally justified or excused under the present circumstances. The rights explicitly referred to by the petition are the right to property, the right of education, freedom of movement, freedom of occupation and freedom of religion. In particular, violations of fundamental rights in the case at issue would not be compatible with the proportionality principle and would moreover amount to collective punishment of the local population. Notwithstanding the wording of the orders of seizure, in the petitioners' opinion it is clear that the Barrier is meant to be a permanent structure and the wound inflicted upon the interested population is disproportionate to its benefits.<sup>45</sup>

Interestingly enough, some residents of the Israeli town of Mevasseret Zion joined the petition claiming the inefficacy of the route of the Barrier. According to them the route should be adjacent to the green line in order to avoid the deterioration of the relationship between the two neighbouring communities.

## B. The Respondents' Position

The respondents to the petition are the Government of Israel and the Commander of the IDF forces in the region. According to them, the exclusive aim of the Barrier is defending the lives of the citizens (soldiers included) and residents of Israel, which are facing "a wave of terror supported by the Palestinian population and leadership".<sup>46</sup> Operational-security reasons have thus determined the route. The advantages brought about by the Barrier, which is said to have proved its efficiency in the areas where it has been erected, are twofold: it would have both a preventive and a protective function. With regard to the first aspect, the Barrier would prevent the infiltration of Palestinians into Israel and into Israeli towns located in the area. It would also limit the smuggling of arms and the attacks on the Israeli forces. As concerns the protective function, the Barrier, which must have topographic command of the area, will allow surveillance of residents therefore enhancing the security of the soldiers and protecting Israeli towns on both sides of it.<sup>47</sup>

With reference to the consequences of the wall, the respondents deny the severity of the injure and maintain that all efforts have been made to abide to the principle of proportionality. The route would have been determined in order to achieve a

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<sup>44</sup> According to the petitioners, they would have no complaint in case that the route chosen passed along Israel's border (the so called "green line"). HCJ 2056/04, para. 10.

<sup>45</sup> On the orders of seizure, see subsection II.D. above.

<sup>46</sup> HCJ 2056/04, para. 12.

<sup>47</sup> As will be seen later in more detail, it is to be underlined that the reference to Israeli towns on both sides of the fence and to Israeli citizens explicitly includes the defence of the settlements and of the settlers amongst the objectives justifying the building of the Barrier and its route. See subsection V.C.5. below.

proper balance between security considerations and the needs of the local population. When possible, the Barrier would have not been located on agricultural or privately owned land.

The respondents regard the legal basis of the adopted measure as mainly grounded in the natural right of the State of Israel to defend itself against threats from outside the borders. In pursuing such an objective the laws of belligerent occupation would empower officials to take the land for combating purposes. No other legal arguments are referred to, thus leaving a more detailed legal qualification of the facts to the Court.

### C. The Affidavits of the Council for Peace and Security

The Council for Peace and Security – an Israeli association of former officers of the IDF and of the security services, retired diplomats, academics and professors – joined the petition as *amicus curiae*.<sup>48</sup> In view of their technical knowledge in security issues, they contradicted the Military Commander’s evaluation of the route, affirming that it should be located near the “border” with Judea and Samaria rather than deep inside the occupied territories. A Barrier with such a route would require gateways and passages thus diminishing security and increasing friction with the local population. Considering the short distance between the Barrier and Palestinian villages, it may be argued that attacks on the patrolling forces would occur more frequently and that distinguishing between terrorists and inhabitants not involved in terrorist activities would be more difficult. Where necessary, the Barrier should be built in the neighbourhood of Israeli towns and be reinforced in order to tackle infiltration. A long and irregular route, distanced from Israeli towns, would seriously affect the efficacy of the Barrier.

Availing themselves of those technical arguments, the petitioners maintained that the route is not in line with the principle of proportionality. First, they described the planned Barrier as ineffective in that it would increase the danger for the soldiers and the State’s security in general. Secondly, they stated that other less injurious options were available, namely the moving of the Barrier closer to Israel.<sup>49</sup>

<sup>48</sup> The text of one of the affidavits is available in Hebrew at: <[www.peace-security.org.il/engbg.html](http://www.peace-security.org.il/engbg.html)> (last accessed 04/09/2004). On the relationship between the Council for Peace and Security and the petitioners, see: “Fence and Defense”, (Haaretz article, 19/03/2004), at: <[www.rebuildingalliance.org/wl/pj-separation-wall/archives/000272.html](http://www.rebuildingalliance.org/wl/pj-separation-wall/archives/000272.html)> (last accessed 24/09/2004).

<sup>49</sup> The Military Commander, while respecting the technical experience of the members of the Council in security matters, replied that he was responsible for the security of the residents of Israel and that his opinion should therefore be regarded as having a greater weight. He regarded the border with Judea and Samaria as a political, not a security one. Therefore, while the option of locating the barrier along the border had to be taken into account to minimise the damage to local population, topographical considerations had not to be disregarded. Considering the protective and preventive functions of the barrier, the Military Commander might move the route into Judea and Samaria to establish a separation zone allowing him to pursue the terrorists who eventually succeed in crossing the Barrier.

## IV. The Judgement of the High Court

### A. The Structure of the Decision and the Normative Framework

The content of the operative part of the decision at hand can be divided in three parts. The first part spells out the normative sources applicable to the case, the second examines whether the IDF Commander had the “authority” to erect the Barrier and the third analyses the route of the Barrier in light of compliance with the principle of proportionality. Then follows the application of the normative framework determined by the Court to each order of seizure challenged by the petitioners. Each order is scrutinised in detail to ascertain its compatibility with the principle of proportionality.

The fundamental assumption, which lies behind this approach, is that the international humanitarian law of occupation is founded on two (conflicting) principles. The first is protection of the population of the occupied territory; the other is the concern for the security interests of the occupying power, with reference to the concept of military necessity.<sup>50</sup> In this context, the rule of proportionality, which is deemed to be a common principle both of international law and Israeli administrative law, is interpreted as a normative tool that reconciles the competing interests of the population of the occupied territory and of the occupying power.

The point of departure for the determination of the applicable law is the analysis of the status of the territory in which the main part of the Barrier is located. The Court clearly states that Israel holds the West Bank “in belligerent occupation”. The authority of the military commander would flow from the provisions of public international law concerning belligerent occupation and should be regulated accordingly by Israeli administrative law. The relevant international provisions should be found in the Hague regulations and in the Fourth Geneva Convention. Both instruments are considered applicable to the case.

No reference is made to other provisions of international law, which are dealt with in the Advisory Opinion of the International Court of Justice, namely international human rights norms of conventional or customary nature, the principle of self-determination and the law of self-defence.<sup>51</sup>

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Moreover, reinforcing the Barrier in proximity of Israeli towns does not prevent the risk of shooting attacks and infiltration. Nevertheless, in view of the material before him, the Military Commander stated that he was ready to change part of the route. See HCJ 2056/04, para. 20.

<sup>50</sup> See HCJ 2056/04, 15: “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.”

<sup>51</sup> For a discussion of the applicability of those legal sources to the present case, see section V.E., and subsections V.E.1., V.E.2.

## B. The Authority to Construct the Barrier

According to the Court, the first legal question to be analysed regards the authority to construct the Barrier. Only after ascertaining whether the military commander is authorised under the applicable law to order the construction of the Barrier, the issue of the location can be dealt with. The question is considered to be preliminary and is said to be “complex and multifaceted” not having found full expression in the arguments raised by the parties. Limiting its analysis to the claims of the petitioners, the Court asserts that the lack of authority of the Military Commander could be based upon two different considerations. The first questions the legality of the purposes pursued by the Military Commander in ordering the construction of the Barrier. The second assumes that, lacking a legal basis in the law of occupation, the seizure of the privately owned land on which a substantial part of the Barrier is located is illegal.

With regard to the first issue, the Court examines whether the decision to build the Barrier is founded on political reasons, namely the will to annex portions of the occupied territory, or on security concerns. In principle, the Court accepts that pursuing annexation would rule out the legality of the decision of the military commander. In adopting its decisions relating to the occupied territory, the latter would be allowed to take into consideration and balance solely between two elements: the needs of the army and the needs of the population of the occupied territory. No additional considerations such as annexation or the establishment of the borders of the State would be admitted.

Relying on the official motivation of the decisions of the Government and on a written affidavit of the military commander, the Court affirms to be convinced that the Barrier is motivated by security concerns. According to the Court the petitioners failed to carry their burden and did not prove that the route itself demonstrated the political purposes lying behind the Barrier. Assuming that if the Barrier was security based it would have to be located on the green line, the petitioners missed the point, since the route of the armistice line itself is not motivated by security reasons. To the contrary, the security perspective would impose to examine the route of the Barrier without reference to the green line. Therefore the Court has no reason not to believe the sincerity of the military commander. The fact that he has been open to suggestions during the hearings and agreed to move sections of the Barrier is also considered in this respect.

The Court then examines the second argument raised by the petition in relation to the authority to build the Barrier. The seizure of the private land on which part of the Barrier is located is considered legal for two reasons. First, with reference to Israeli administrative law, the Court states that it found no defects in the procedure followed in the issuing of the orders of seizure and in the granting of the opportunity to appeal. Secondly, the Court believes that, when necessary for the needs of the army, the military commander is authorised by the international law of occupation to take possession of land as long as he provides compensation for the use of it. Regulations 23 (g) and 52 of the Hague Convention and art. 53 of the Fourth

Geneva Convention are said to be the legal basis of the conduct of the military commander. A detailed legal analysis of the quoted provisions is missing; the Court lists a number of previous decisions in which it recognised the legality of land and house seizure with reference to military needs and for different purposes.<sup>52</sup> Being necessitated by military needs, the construction of the Barrier would fall within this framework. The infringement of property rights would not entail the taking away of the authority of the military commander to seize privately owned land for security reasons. The military necessity of the “separation fence” would be highlighted by the fact that it would block “terrorist infiltration in Israeli population centres” taking the place of “combat military operations”.<sup>53</sup> According to the Court, the needs of the local population are to be considered in deciding the location of the route of the fence, but the issue does not regard the authority to build the fence.

### C. The Proportionality of the Route of the Barrier

After finding that, under the law of occupation, the military commander is vested with the formal power to seize privately owned land in order to erect the Barrier, the judgement analyses the legality of the route chosen. The Court recognises that the position of the military commander in the occupied territory is not that of the legitimate sovereign, who can act for general purposes. Under the law of occupation, the authority of the occupying power would be limited to securing two different values: security interests of the holder of the territory and the needs of the local population. As concerns the former value, the Court regards security interests as not limited to the security of the area held in belligerent occupation but extending to the security of the whole country and of its citizens. The latter would require that the military commander not only administers the occupied territory, but also actively pursues the well being of the local population.<sup>54</sup> The military commander would be bound by a negative obligation not to injure the local inhabitants but also by a positive obligation to take actions “to ensure that they shall not be injured”.<sup>55</sup>

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<sup>52</sup> HCJ 2056/04, para. 32. Quoted purposes are “the construction of military facilities”; “the paving of detour roads”; “the building of fences around outposts”; “the ensuring of unimpaired traffic on the roads of the area”; the construction of civilian administration offices”; “the seizing of buildings for the deployment of a military force”.

<sup>53</sup> Ibid.

<sup>54</sup> In line with its case law, the Court abides to what has been defined as the “benevolent occupant” approach: The law of occupation is interpreted as requiring something more than the mere preservation of the *status quo*. See Kretzmer, *supra*, note 1, 57-72; Benvenisti, *The International Law of Occupation*, Princeton/Oxford 1993, 123-129.

<sup>55</sup> HCJ 2056/04, para. 35.

The legal basis of this assumption would be the combined reading of art. 46 of the Hague regulations and art. 27 of the IV GC: two general provisions of the law of occupation concerning protection of the protected persons’ human rights.<sup>56</sup>

Then reference is made to some norms dealing specifically with the issue of the land: Regulation 23 (g) and art. 53 of the IV GC, with regard to the destruction or seizure of property by the occupying power, and regulation 52, concerning requisitions in kind.

In the Court’s opinion, the combination of the quoted general and specific provisions creates “a single tapestry of norms”<sup>57</sup> that highlights that the military commander must act balancing the needs of the local population and security considerations.

The problem of balancing between the competing values of security and liberty is deemed to be a general one and would have to be solved having recourse to the principle of proportionality. The Court explains in general terms the meaning of the principle as connected to the “relationship between the objective whose achievement is being attempted, and the means used to achieve it”.<sup>58</sup> The proportionality of an act might be ascertained applying three subtests that clarify the content of the principle. The first is the “rational means test”, according to which the means employed by the administrative authority must rationally lead to the achieving of the objective. The second subtest, the “least injurious means test”, requires choosing the least injurious means for the individual amongst the ones satisfying the first subtest. Finally, the third subtest, “the proportionate means test”, revolves around the evaluation of the proportionality between the damage to the individual and the advantage brought about by the adopted act.<sup>59</sup> All three subtests must be satisfied in order for an administrative act to be proportionate.

The principle of proportionality and the three subtests are then applied to the evaluation of the legality of the Barrier and in particular to its route.<sup>60</sup> The Court states that the scope of its judicial review with regard to the first and the second subtests can only be limited. Evaluating whether the route chosen by the military

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<sup>56</sup> See *infra* subsection V.C.4.

<sup>57</sup> HCJ 2056/04, para. 35

<sup>58</sup> *Ibid.*, para. 40.

<sup>59</sup> According to the Court, the third subtest can be applied in an absolute or relative manner. In the first case the advantage and the damage deriving from the administrative act are directly compared. In the second case, it is necessary to consider an alternate act, the benefit of which is smaller than the original one. The latter is to be considered disproportionate if, employing alternate means, a reduction of the advantage gained is accompanied by a substantial reduction of the damage. HCJ 2056/04, para. 41.

<sup>60</sup> From this standpoint the key questions are: Is there a rational connection between the route of the Barrier and the objective that is sought to achieve? (rational means test); Amongst the routes achieving the objective, is the one chosen the least injurious for the individuals involved? (least injurious means test); Is the security benefit of the Barrier proportionate to the injury? (proportionate means test in the absolute form); Does an alternate route with a smaller security advantage reduce in a substantial manner the damage deriving from the original route? (proportionate means test in the relative form).

commander achieves its stated objectives would be a question of military nature, which must be addressed by military experts. Therefore the Court could not substitute its discretion to that of the military commander, but could only assess the legality, i.e. the reasonableness, of the military commander's decision.<sup>61</sup> To the contrary, the Court regards itself as entitled to analyse a "legal question" such as the existence of a proper proportion between the military advantage of the route chosen and the adverse consequences on the affected population.

Each order of seizure is analysed with reference to the proportionality test in the narrow sense, i.e. the balancing between the military advantage and the adverse humanitarian effects of the route chosen. Formally the Court scrutinises each order also with reference to the first and the second subtest of the proportionality rule, but states that interference with the military perspective that justified the adoption of the route is precluded.<sup>62</sup> The evaluation of the military commander is never found unreasonable in this respect.<sup>63</sup>

The Court refers explicitly to the freedom of movement and to the right to property of the local inhabitants, and implicitly, to their rights to food, to work, and to earn a living.<sup>64</sup> The application of the proportionality test focuses on the position of the landowners and on the infringement of the right to property. At times, the affidavit of the Council for Peace and Security is referred to as evidence that a different route, with an acceptable proportion between military advantages and humanitarian consequences, is possible, but the military commander is regarded as the one who has to determine a different and more proportionate technical solution. Therefore the decision does not bind the commander to adopt a precise route, but establishes a number of criteria for a proportionate solution minimising the damage to the affected population.<sup>65</sup> The Court states clearly that the system of the gates and the licensing regime is largely ineffective and cannot be considered a solution to the infringement of the rights of the local inhabitants. Therefore the military commander is above all called to reduce to the minimum the effects of the wall on cultivated land. Separation between farmers and cultivated land should be avoided to the extent possible. When separation is unavoidable the military commander should allow passage to the extent possible. Since in the circumstances of the case farmers "make their living from the land", the Court lastly urges the military commander to substitute monetary compensation by providing

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<sup>61</sup> See HCJ 2056/04, para. 48. Rather unusually, in the case at issue, the Court, which is not a military expert, is given two contradictory military assessments of the route of the Barrier. As has been seen in subsection III.C. above, the Council for Peace and Security joined the petition and took a totally different view of the ideal route of the Barrier. See also subsection V.C.5. below.

<sup>62</sup> Cf. HCJ 2056/04, para. 60 and para. 80.

<sup>63</sup> To simplify the analysis the Court divides the sector of the Barrier at issue in 6 subsectors. 7 orders of seizure out of 9 are voided on the grounds that the consequences are not proportionate to the military advantage. One order is declared valid since its content is considered undisputed by the parties. Another is partially voided since part of its effects regards a village that is not party to the dispute.

<sup>64</sup> HCJ 2056/04, para. 60 and para. 83.

<sup>65</sup> *Ibid.*, para. 82 and 83. For a comment on the point, see subsection V.C.5. below.



the farmers with other lands in exchange. According to the Court, the exchange of land by way of compensation is due both for the lands on which the Barrier is directly located and for the lands from which farmers are physically separated.<sup>66</sup>

## V. An Evaluation of the Decision

### A. The Court’s Assessment of the Facts

As it has been seen in the first part of this article, the building of the Barrier is a multifaceted activity, which might fit into several legal qualifications. A careful analysis of the facts is therefore needed in order to understand which norms apply to all the acts and the consequences connected with the adopted measure. Apparently, the only sources relied upon by the Court as concerns factual issues are the affidavits of the parties to the case.<sup>67</sup> Respondents’ affidavits seem to be the main source for the examination of the background and of the physical nature of the Barrier.<sup>68</sup> However, the petition is also taken into account with regards to the factual analysis of the magnitude of the consequences of the Barrier, as regards the extension of the requisitioned land and the involved population.<sup>69</sup>

The analysis of the facts is introduced by a paragraph in which the Court recalls the background of the present case and places the decision to build the Barrier in the general context of the second intifada. Referring to the respondent’s affidavit, the number and the intensity of the terrorist attacks directed against Israel are briefly described and the situation is legally qualified as constituting an “armed conflict”.<sup>70</sup> While being placed at the very outset of the judgement, by way of introduction, the legal qualification of the general situation cannot be regarded as an *obiter dictum*, but is fraught with legal consequences. Firstly, as will be seen in subsection V.B.1., art. 23 (g), one of the legal basis of the judgement, is applicable solely on the assumption that the situation amounts to a situation of hostilities. Secondly, as will be seen *infra*, under the relevant provisions, the scope of military necessity is inherently connected to the objectives of the military action and to the extension of the security risks that the military has to face.<sup>71</sup>

<sup>66</sup> Ibid., para. 83.

<sup>67</sup> Cf. Benvenisti, *supra*, note 54, 120: “Since the fact-finding procedure in the Israeli High Court of Justice when it sits as the High Court of Justice is usually based only on affidavits, it is generally difficult to challenge the motives put forward by the authorities.” See also *ibid.*, n. 69.

<sup>68</sup> See, HCJ, 2056/04, 2.

<sup>69</sup> Ibid., see, for instance, 42.

<sup>70</sup> This is in line with the precedents of the Court after the beginning of the Al Aqsa intifada in 2000, see, for instance, *Ajuri v. IDF Commander in the West Bank*, HCJ 7015/02, *supra*, note 6, paras. 1-4.

<sup>71</sup> Cf. Jordan Written Statement, para. 5.83: “the general body of rules comprising the special regime of military occupation seeks to establish a balance between the military needs of the occupying State in prosecuting its hostilities against the enemy and the continuing rights of the local population of the territory which it has occupied. It follows that in interpreting and applying those rules the gen-

While the seriousness of the terrorist attacks against Israel cannot be put into question, one cannot forget that the legal qualification of the general context is debatable.<sup>72</sup> In general terms, the view might be taken that the numerous attacks are isolated and might be considered as not being part of a strategy of confrontation between two armies or between an army and an organised group.<sup>73</sup> In this respect, the situation could be also qualified as a low intensity conflict not reaching the threshold of the armed conflict.<sup>74</sup> Furthermore, the building of the Barrier itself, which requires on-site studies, inspective missions for experts, seizure of property through a complex procedure, demonstrates that the threshold of the state of hostilities has not been met and that Israel has complete control of the territory.<sup>75</sup> Absent the control of the territory, the construction of a complex structure such as the Barrier would not be possible.

In relation to aspects where technical-military evaluation is needed the judicial review of the Court is allegedly limited to the examination of the military commander's reasonableness. The Court introduces a presumption of validity of the

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eral level of active hostilities existing at the relevant time is a factor to be taken into account. *The more active the general level of hostilities, the more credence may be given to claims by an occupying State that it must be allowed to do certain things in furtherance of its military needs; on the other hand, when (...) the general level of hostilities has virtually diminished to a vanishing point, the military needs of the occupying State are correspondingly reduced and provisions defining its powers need to be interpreted restrictively (...)* (emphasis added).

<sup>72</sup> The legal qualification of the Israeli-Palestinian "conflict" in general and after the beginning of the second intifada is controversial amongst legal scholars. For an overview of the subject, see the on-line interviews to a number of scholars (Marco Sàssoli, Eyal Benvenisti, Charles Shamas, Fritz Kalshoven) and the "expert analysis" at: <[www.crimesofwar.org](http://www.crimesofwar.org)> (last accessed 28/10/2004). Cf. also Ben Naftaly/Michaeli, Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings, 1 *Journal of International Criminal Justice* 2 (2003), 368-405, at 402, note 174: "The Israeli Palestinian conflict has by now escalated into an armed conflict owing to its duration, intensity and the high level of organisation exercised by the various Palestinian armed militias and organisations." See also ICJ Advisory Opinion, para. 124. The Court rejection of the applicability of regulation 23 (g) HR might imply that the qualification of the situation in Israel and the Occupied Territory does not amount to an armed conflict. Cf. Kretzmer, The Advisory Opinion: The Light Treatment of International Humanitarian Law, 99 *American Journal of International Law* 1 (2005), 94-96.

<sup>73</sup> Lacking general consensus on the definition of armed conflict, reference is generally made to the decision of the Appeals Chamber of the United Nations Tribunal for former Yugoslavia in the Tadic case. The Chamber put forward the following definition: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State". See *Prosecutor v. Dusko Tadic a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70, available on-line at: <[www.un.org/icty/tadic/appeal/decision-e/51002.htm](http://www.un.org/icty/tadic/appeal/decision-e/51002.htm)> (last accessed 23/11/04). Cf. Greenwood, International Humanitarian Law and the Tadic Case, 7 *European Journal of International Law* 2 (1996), 265-283 at 269-275; Partsch, Armed Conflict, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam 1981-1990, 249 et seq.; Stewart, Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict, 85 *Revue internationale de la Croix-Rouge*, 850 (2003), 313-350 at 344-349.

<sup>74</sup> See Oxford Public Interest Lawyers, *Legal Consequences of Israel's Construction of a Separation Barrier in the Occupied Territory*, Oxford 2004, 21, para. 115.

<sup>75</sup> *Ibid.*

military commander’s evaluation of the facts and of military necessity. This approach might be considered as understandable and dependent on the structural limits of the review of a jurisdictional body, which is never entitled to substitute its discretion to that of the administrative body.<sup>76</sup> Nevertheless, it has to be pointed out that the Court seemed generally to avoid inferring from the facts any autonomous deduction with respect to fundamental aspects such as the purpose of the Barrier and its permanent or temporary nature. Those are essential elements for the application of a number of international norms, which are relevant in the present case, such as the prohibition of annexation, the right to self-determination of the Palestinian people, the prohibition of altering the demographic situation in the occupied territory, the duty to protect the local populations’ human rights. The official declarations of the Government and of the military commander are never questioned in relation to the facts in front of the Court. With regards to the purpose of the Barrier, one might think that the Court did not have the political strength or the will to explicitly doubt the *bona fide* of the Government. Questioning a consistent path of declarations, at all levels, stating that the Barrier is motivated by security aims and is not to be considered a political border, the Court would have openly attacked the Government simply on the assumption that according to its opinion the facts demonstrated the contrary.<sup>77</sup>

## B. The Legal Basis of the Judgement

The decision finds its legal basis in the principle of proportionality, considered as a common principle of international law and of Israeli administrative law, and in the norms of two international instruments: The Hague regulations annexed to the Fourth Hague Convention and the Fourth Geneva Convention.

Although Israel is not a Party to the Hague Conventions, the Hague regulations have been long since deemed applicable by the HCJ on the assumption that they had acquired customary nature.<sup>78</sup> To the contrary, Israel ratified the Fourth Geneva Convention, but for a long period the Court regarded the instrument as inapplicable due to the lacking of internal legislation of incorporation.<sup>79</sup> Incorporation of international law in the Israeli domestic legal system follows the British tradi-

<sup>76</sup> Cf. Benvenisti, *Judicial Review of Administrative Action in the Territories Occupied in 1967*, in: Zamir/Zysblat (eds.), *Public Law in Israel*, Oxford 1996, 371 et seq.

<sup>77</sup> On the political implications of the relationship between the High Court and the Government, see Kretzmer, *supra*, note 1, 89, who argues that would the Court have been more “courageous”, the Government would have probably decided to push for a legislative re-definition of its jurisdiction on the occupied territories.

<sup>78</sup> See *Ayyub v. Minister of Defense*, (*Beth El* case) excerpted in English in *Israel Yearbook of Human Rights*, 1979, 337 et seq.; *Affo v. Commander Israel Defence Force in the West Bank* (HC 785/87) (*Affo* case), 83 *International Law Reports*, 163 (also at: <[http://elyon1.court.gov.il/files\\_eng/87/850/007/z01/87007850.z01.pdf](http://elyon1.court.gov.il/files_eng/87/850/007/z01/87007850.z01.pdf)>); Kretzmer, *supra*, note 1, 31-42.

<sup>79</sup> Cf. *Affo* case, 44.

tion. Customary law is considered as part of the law of the land and is automatically incorporated, while conventional law requires incorporating legislation in order to be enforced by domestic courts.<sup>80</sup>

On the international level, the Government of Israel, relying mainly on the so-called “missing reversioner argument”, regards the Fourth Geneva Convention as not applicable to the occupied territories.<sup>81</sup> The Government has nevertheless repeatedly maintained to be ready to apply *de facto* the humanitarian provisions of the instrument.<sup>82</sup> As concerns the practical value of this approach, one may wonder what the non-humanitarian provisions of an instrument that could be considered humanitarian in nature are.<sup>83</sup> Considering the law of occupation in its entirety, one might affirm that the Hague regulations contain both humanitarian provisions and provisions regarding the protection of the interests of the ousted sovereign.<sup>84</sup> Yet it is clear that the Fourth Geneva Convention seems to be exclusively concerned with the protection of civilians and the validity of the humanitarian criterion to discriminate amongst its provisions is doubtful.

<sup>80</sup> Customary law is automatically incorporated as part of the law of the land, but can be superseded by following legislation with explicit derogatory intent. On the contrary, international treaty law requires the enactment of internal legislation, in the absence of which courts should construe internal legislation in accordance with treaty law. See Dinstein, Introductory Report, in: Bothe/Macalister-Smith/Kurzidem (eds.), *National Implementation of International Humanitarian Law*, Dordrecht 1990, 29-33; Lapidot, *The Expulsion of Civilians from Areas which came under Israeli Control in 1967: Some Legal Issues*, 2 *European Journal of International Law* 1 (1991), 97-107, at 99-101. See also, as concerns treaty law, HC 69/81, excerpted in 13 *Israel Yearbook of Human Rights* (1983), 348.

<sup>81</sup> The missing reversioner argument is coupled with a literal interpretation of para. 2 of common art. 2 of the four Geneva Conventions. According to the Israeli authorities the text of the provision would limit the applicability of the Convention to the territories belonging to “a High Contracting Party”. On the point, see Shamgar, *The Observance of International Law in the Administered Territories*, 1 *Israel Yearbook of Human Rights* (1971), 262 et seq.; Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *Israel Law Review* (1968), 279. Cf. Dinstein, *The International Legal Dimensions of the Arab-Israeli Conflict*, in: Kellerman/Siehr/Einhorn, *Israel Among the Nations*, The Hague 1998, 150-152. To the contrary, the virtual unanimity of the international community regards the Fourth Geneva Convention as applicable to the occupied Palestinian territory, cf. Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 *American Journal of International Law* 1 (1990), 44 et seq., at 69-70; Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 *American Journal of International Law* 1 (2005), 102-118, at 103-105.

<sup>82</sup> According to Roberts, *supra*, note 81, 62, the distinction between *de jure* and *de facto* applicability of the Fourth Geneva Convention was put forward at the beginning of the Seventies by the then Attorney General of Israel, Meir Shamgar. See Shamgar, *supra*, note 81, 262 et seq.

<sup>83</sup> Cf. Dinstein, *ibid.*, 151; Gasser, *Protection of the Civilian Population*, in: Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, Oxford 1995, para. 524, who states: “(...) GC IV appears as a bill of rights with a catalogue of fundamental rights which, immediately upon occupation and without any further actions on the part of those affected becomes applicable to the occupied territory and limits the authority of the occupying power”; Palestine Written Statement, para. 411. In this respect, it is to be noted that the Israeli authorities have never officially clarified which are the provisions of the Convention that they regard as humanitarian.

<sup>84</sup> Benvenisti, *supra*, note 54, 3-6.

Be that as it may, the Fourth Geneva Convention was often applied by the Israeli High Court with reference to the consensus of the Government in each single case.<sup>85</sup> In other decisions, the Court applied the Convention refraining from discussing the basis of its choice.<sup>86</sup> In the present decision the Court stated that it was not necessary to examine in detail issues of applicability since both parties agreed on the applicability of the humanitarian rules of the Convention to the case.<sup>87</sup> However, the consensus of the parties to the dispute seems a debatable technical argument on which to base the applicability of an international instrument officially binding upon the State. In particular, one may fail to understand how those who are subject to the authoritative jurisdiction of the Court may determine the law applicable in the review of their acts.<sup>88</sup>

Assuming that the consensus of the parties is a valid legal basis for the application of the Fourth Geneva Convention, it is nevertheless not clear whether the Court refrained from applying some provisions of the Convention in the present case on the basis that they are not humanitarian in nature. The distinction between humanitarian and non-humanitarian rules seems not to be given, at least explicitly, any practical value in the determination of the applicable norms. To the contrary, it is to be noted that the authority of the military commander is explicitly qualified as “anchored in IV Geneva Convention”.<sup>89</sup> This statement seems to hint that the Court, while paying mere lip service to the official position of the Government, is prepared to admit much more than the *de facto* applicability of the humanitarian norms.

As concerns the principle of proportionality, from a theoretical point of view, one might doubt the statement of the Court that it is to be considered a principle underlying the whole body of international law. While the principle is recognised as valid in different sectors of international law, its unitariness has been questioned on the grounds that it would have different meanings and effects depending on the

<sup>85</sup> For a recent judgement applying the Fourth Geneva Convention on the basis of the consensus of the Government, see: *The Center for the Defense of the Individual founded by Dr. Lota Salzberger et al. v. Commander of the IDF High Forces in the West Bank*, HCJ 3278/02, para. 23, English translation available on-line at: <[www.hamoked.org](http://www.hamoked.org)> (last accessed 24/10/2004). The Court found that the directives of the Fourth Geneva Convention regarding detention conditions were humanitarian in nature.

<sup>86</sup> See *Physicians for Human Rights*, *supra*, note 6, 4.

<sup>87</sup> In general terms, maintaining that a provision of the law of occupation is dictated purely by non-humanitarian reasons is always difficult, since the *rationale* seems to be most of the times multifaceted. Cf. *Benvenisti*, *supra*, note 54, 105-106.

<sup>88</sup> Since the *Jama't Ascan* case (H.C. 393/82, *Jama't Ascan, etc. Co-op Soc. reg. with Judea and Samaria Region H.Q. v. Commander of IDF Forces in Judea and Samaria Region*) the Court regarded the legal basis of its jurisdiction on the activities carried out by Israeli authorities in the occupied territory as based on Israeli Law. Being public servants, the military commander and the members of the army were to be regarded as subject to the statutory jurisdiction of the High Court. Cf. *Kretzmer*, *supra*, note 1, 20-21.

<sup>89</sup> See HCJ 2056/04, para. 23.

area of application.<sup>90</sup> Nonetheless, the view that the principle of proportionality, although never finding explicit recognition, operates in the application of international humanitarian law can be safely shared. The principle is the normative tool that reconciles the opposing values of humanity and military necessity. However, contrary to what the reasoning of the Court seems to imply, it is submitted that the reasons of military necessity are not recognised by every norm applicable to the case at hand and that the balancing operated through the principle of proportionality is possible only when reference to military necessity is explicitly admitted in a derogatory clause.<sup>91</sup>

### C. The Interpretation and the Application of International Humanitarian Law

In order to simplify the analysis of the decision, a distinction may be drawn between activities that are necessary to the construction of the Barrier and consequences of the Barrier on the population.<sup>92</sup>

With regard to the first issue, the legality of the seizure and the destruction of the land can be questioned. From this point of view, the evaluation of the facts does not seem too difficult: the orders of seizure are there, their formal content is not contested.<sup>93</sup>

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<sup>90</sup> On the role of the principle of proportionality in the context of the different branches of the international legal system, see *Cannizzaro*, *Il principio della proporzionalità nell'ordinamento internazionale*, Milano 2000; *Higgins*, *Problem and Process: International Law and How We Use It*, Oxford 1994, 219-237. With reference to International Law and International Humanitarian Law: *Gardam*, *Necessity, Proportionality and the Use of Force by States*, Cambridge 2004; *Cannizzaro*, *The Role of the Principle of Proportionality in the Law of International Countermeasures*, 12 *European Journal of International Law* 5 (2001), 889-916; *Venturini*, *Necessità e proporzionalità nell'uso della forza militare in diritto internazionale*, Milano 1988. With reference to EC Law and European Law: *Ciciriello*, *Il principio di proporzionalità nel diritto comunitario*, Napoli 1997; *Ellis* (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford 1999; *Arai-Takahashi*, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp 2002; *Cremona*, *The Proportionality Principle in the Jurisprudence of the European Court of Human Rights*, in: *Beyerlin* (ed.), *Recht zwischen Umbruch und Bewahrung*, Berlin/Heidelberg 1995, 323 et seq.; *Schwarze*, *The Principle of Proportionality and the Principle of Impartiality in European Administrative Law*, 53 *Rivista trimestrale di diritto pubblico* 1 (2003), 53-75. With reference to International Trade Law: *Hilf*, *The Principle of Proportionality on Its Way into WTO/GATT Law*, in: *von Bogdandy/Mavroidis/Mény* (eds.), *European Integration and International Co-ordination – Studies in International Economic Law in Honour of Claus-Dieter Ehlermann*, 2002, 199 et seq.; *Desmedt*, *Proportionality in WTO Law*, 4 *Journal of International Economic Law* 3 (2001), 441-480.

<sup>91</sup> See subsection V.C.5. below.

<sup>92</sup> For the same approach see, *Palestine Oral Pleading*, 49.

<sup>93</sup> Nevertheless, taking into account all the circumstances of the case, one might maintain that the substantive effect of the questioned acts is not compatible with their form. As will be seen later, the HCJ does not follow this line of reasoning. Cf. subsection V.C.3.

As a second step, one may assess the consequences of the existence of the Barrier in order to understand how the life of the population is affected. This kind of judgement requires the assessment of the situation in the future and is therefore rather difficult in the initial phase of the construction of the Barrier. While one might easily infer that the existence of the Barrier will lower the standard of living of the local inhabitants, assessing the degree of the infringement of single human rights such as the freedom of movement, the freedom of religion, the right to food, the right of education, requires a prediction judgement.<sup>94</sup>

As concerns the application of international humanitarian law to the facts of the issue, the main criticism of the legal approach followed by the Court consists in observing that a detailed analysis of the applicable law is missing. The Court referred to general norms to sketch the obligations of the occupying power towards the local inhabitants and to specific norms regarding the legal basis of the acts strictly connected with the erection of the Barrier (i.e. seizure and destruction of property). All those norms are said to constitute a “single tapestry”, which recognises both “human rights and the needs of the local population” and “security needs from the perspective of the military commander”.<sup>95</sup>

Allegedly interpreting the content of the petition, the Court divided its legal reasoning in two separate issues: the authority to build the Barrier and the proportionality of its route.<sup>96</sup> The analysis of the issues regarding the seizure and the destruction of the land falls into the first heading. In the same context, the analysis of the legality of the purpose of the Barrier is considered as a preliminary condition to be examined before assessing the existence of specific norms authorising the occupying power to undertake all the activities that are necessary to build it. According to the Court, as long as the decision is motivated by security (and not political) reasons and as long as the applicable law entitles the military commander to seize and destruct the land for security reasons, the formal power to construct cannot be questioned. Under the heading “authority to build the fence”, the Court actually scrutinised the legality of the objective of the Barrier and the existence of an abstract legal basis for the seizure of the land.

By contrast, all the legal aspects regarding the consequences are dealt with in the second part of the decision through the application of the principle of proportionality to the route of the Barrier.

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<sup>94</sup> As will be seen in subsection V.C.4., in line with its case law (see *Physicians for Human Rights, supra*, note 6), the Court does not refrain from *ex ante* judicial review although it does not take the view that the consequences of the construction, i.e. the infringement of human rights, might put into question the authority to build the Barrier.

<sup>95</sup> See HCJ 2056/04, para. 35.

<sup>96</sup> The core of the legal reasoning of the Court can be subsumed under three tests. The first test regards the nature of the purpose of the Barrier: Has the measure been adopted for security or political reasons? If proved correct, the second option would obviously rule out the authority to adopt the measure. The second test concerns the existence of the formal power to fulfil the activities connected with the building of the Barrier: Are the seizure and the destruction of the land on which the Barrier is located authorised? The third test consists in applying the rule of proportionality to a single aspect of the Barrier considered in its actual features: Its route.

Such an approach rests on different assumptions. It is submitted that most of them are not compatible with international law. In particular, the following statements will be demonstrated:

- the provisions composing the “single tapestry”, when considered in detail, are not applicable to the case at issue, or they do not justify the acts adopted by the military commander;
- the Court misinterpreted nature and scope of the concept of “security reasons” and failed to acknowledge that contemporary international humanitarian law does not envisage a general exception of military necessity underlying the “single tapestry” of norms individuated in the decision at hand, let alone the whole body of the law of occupation;
- with regard to the application of the proportionality rule, the Court actually limited the scope of its judicial review to the analysis of proportionality in the narrow sense and never questioned the “efficiency” of the route adopted;
- other international humanitarian law provisions, questioning the authority to build the Barrier or influencing the burden of proof distribution, were ignored by the Court.

In the next sections the first proposition will be discussed with regards to the purpose of the Barrier (V.C.2.), the existence of the formal power to build it (V.C.3.), and the assessment of its consequences (V.C.4.). The scope of the concept of security reasons as well as the application of the principle of proportionality to the case will be considered in subsection V.C.5.

The last submission will be dealt with in subsection V.D., with reference to the duty not to alter the demographic equilibrium of the occupied territory (V.D.1.), and the general presumption against changes to the occupied territory (V.D.3.).

### **1. The “Single Tapestry” Approach Disassembled**

It is the purpose of this paragraph to analyse in detail the provisions composing the “single tapestry” individuated by the Court, considering their applicability to the case at issue and their substantive content. With reference to the formal power to build the Barrier, we will comment upon regulation 23 (g) HR, regulation 52 HR and art. 53 IV GC. As concerns the consequences of the erection of the Barrier, art. 27 IV GC and regulation 46 HR will be considered. Before coming to the point, the issue of annexation, which is regarded as preliminary by the Court, will be dealt with.

### **2. The Analysis of the Purpose of the Barrier and the Prohibition of Annexation**

Analysing the purpose of the Barrier and of the orders of seizure, the Court correctly stated that if the Barrier pursued political purposes, e.g. annexation, it would be illegal under international law. Annexation is prohibited by general international law and the prohibition is explicitly mirrored in the law of occupation by a



non-derogable provision of the Fourth Geneva Convention: art. 47.<sup>97</sup> Protected persons cannot be deprived of their rights *inter alia* “by any annexation of the whole or part of the occupied territory”.<sup>98</sup> Annexation is thus correctly considered as an improper purpose for the military commander to adopt the orders of seizure.

Nevertheless it is to be noted that annexation, besides being an improper purpose for seizure, might be related also to the consequences of the erection of the Barrier.

In the framework of the law of occupation, the prohibition of annexation is directly connected to the nature of the concept of occupation. The latter is a factual concept, which is integrated by the control of enemy territory by one of the belligerents and does not transfer any form of sovereignty on the occupying power.<sup>99</sup> One of the foundations of the law of occupation is the freezing of the status of the territory until a conventional settlement of the issue is feasible.<sup>100</sup> As a consequence of the *jus contra bellum* prohibition of the appropriation of any territory by force, final status issues can be dealt with only in a peace treaty.<sup>101</sup> Any formal declaration of annexation of the occupied territory as long as any extension of the occupying power’s legislation to the occupied territory is to be regarded as null and void. In addition, it is to be underlined that formal and explicit declarations from the occupying power, extending its sovereignty on the occupied territory, are not the only acts precluded by the inherently temporary nature of occupation. Every conduct of the occupying power that prejudices the outcome of the final settlement of the status of the territory is prohibited.<sup>102</sup> If not, the protection provided for by art. 47 would be meaningless.

Relying on the official declarations of the Government, the Court interpreted the prohibition of annexation in a formalistic way. Notwithstanding the extension of the appropriation and destruction of the land, of which the Court was made aware by the petitioners and by the respondents themselves, the Government’s affirmation of the reversible nature of the situation was never doubted. It is submitted that the Court, while avoiding the questioning of the *bona fide* of the Government, might have evaluated more carefully the general features of the Barrier. In

<sup>97</sup> The prohibition of annexation pre-exists the Geneva Convention and is directly connected to the customary law ban on the use of force in international relations. Art. 47, while not recalling explicitly that annexation is prohibited, states that the status of protected persons cannot be changed by the annexation of the territory. Cf. *Krupp Trial Case*, in *Trials of War Criminals*, Vol. 10, 1949, 130 et seq.

<sup>98</sup> Art. 47 IV GC.

<sup>99</sup> The concept of occupation is explicitly connected to the effectiveness of the control exercised on the territory by the occupying power. Cf. regulation 42 HR, which states: “1. Territory is considered occupied when it is *actually placed under the authority of the hostile army*. 2. The occupation extends only to the territory *where such authority has been established and can be effectively exercised*” (emphasis added). Cf. Roberts, *What is a Military Occupation?*, 55 *British Yearbook of International Law* (1984), 249-305, 255-260.

<sup>100</sup> Cf. Schwarzenberger, *International Law*, Vol. II, *The Law of Armed Conflict*, London 1968, 166-167.

<sup>101</sup> See Kolb, *Ius in bello – Le droit international des conflits armés*, Basel 2003, 191.

<sup>102</sup> Cf. Jordan Written Statement, para. 5.105.

view of the extension of the appropriation and of the destruction of land, the number of the population involved, and the costs of the measure, one might take the view that, despite governmental statements to the contrary, the Barrier is inherently a non-temporary or long-term measure. The Court might have considered that, while the Government might be ready to remove the Barrier in the future, that option is to be considered highly improbable. It is also to be considered that the hardships imposed by the Barrier and by its legal regime on the affected population might force a substantial part of the local residents to leave the area, therefore having repercussions on the prospective final status negotiations.

As explicitly recognised by the Advisory Opinion of the ICJ, the consequences of the erection of the Barrier are likely to lead to a *de facto* annexation of a substantial part of the occupied territory.<sup>103</sup> The Israeli High Court did not consider that the application of the prohibition of annexation is not necessarily limited to the analysis of the formal will of the Government. Indeed, in this respect, the petition itself seems to emphasise the qualification of annexation as an improper purpose and not as a possible consequence of the building of the Barrier. As has been noted before, the Court was not petitioned on the illegality of the wall in general, but had to judge the legality of a number of orders of seizure related to a small portion of the Barrier. In this perspective, the assessment of the general consequences of the entire Barrier in the future requires a difficult prediction judgement from which the Court refrained. Nevertheless, the evaluation of the likelihood of a *de facto* annexation as a consequence of the erection of the Barrier should not necessarily be considered *ultra petita*. The Court was fully aware of the general features of the overall route and the petitioners clearly highlighted that they regarded the Barrier as a non-temporary measure irrespectively of the language of the orders of seizure.<sup>104</sup> In this respect, each order covered by the petition could have been considered as causally related to the general process of *de facto* annexation and therefore contrary to international law.

### 3. The Legal Basis of the Formal Power to Build the Barrier

The central argument of the petition is that the Military Commander lacked the authority to build the Barrier in the occupied territory. The orders of requisition of the private land owned by the petitioners would therefore be illegal. According to this reasoning, the occupying power is not vested with the general rights of the sovereign and all its actions must find a legal basis in the law of occupation. In addressing this argument, the Court stated that “the military commander is authorised – by the international law applicable to an area under belligerent occupation – to take possession of the land, if this is necessary for the needs of the army”.<sup>105</sup> The

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<sup>103</sup> ICJ Advisory Opinion, para. 121.

<sup>104</sup> See HCJ 2056/04, para. 11.

<sup>105</sup> Ibid., para. 32.

Court referred to regulation 23 (g) HR, regulation 52 HR and art. 53 IV GC, implying that they constituted the legal basis of the specific activities connected to the erection of the Barrier: the taking and the subsequent destruction of the land.

Regulation 23 (g) prohibits in general terms the destruction and the seizure of enemy property when not “imperatively demanded by the necessities of war”. The provision clearly precludes deliberate attacks against civilian properties during armed conflicts. Destruction is only possible when inevitable and justified by military necessity in the form of the necessities of war.<sup>106</sup> The article is placed in section II of the Hague Regulations, concerning the regulation of hostilities, and in chapter I, which is titled: “means of injuring the enemy, sieges, and bombardments”. Reference to the “necessities of war” in the text of the provision demonstrates that the existence of a state of hostilities is a precondition for its applicability.<sup>107</sup> By contrast, when a state of occupation occurs and the control of the territory is not disputed, the applicable norms are to be found in section III of the Hague Regulations and in the relevant provisions of the Fourth Geneva Convention.<sup>108</sup>

The status of private property in the occupied territory is regulated by regulation 46 HR and art. 53 IV GC. The general rule is stated by regulation 46 HR, which explicitly requires respect for private property and prohibits confiscation. Derogation to the prohibition of destruction and appropriation of private property in the occupied territory is exceptional in nature and is to be found in other specific provisions.<sup>109</sup> In this respect, art. 53 IV GC, after recalling that deliberate destruction of private property is prohibited, admits such destruction when “rendered absolutely necessary by military operations”. According to the *travaux préparatoires*, in light of the peculiar situation of occupied territories, the article was meant to specify and restrict the scope of the general rule put forward in regulation 23 (g).<sup>110</sup> In general terms, when combat is in progress, destruction might be admitted provided that it is necessary for war. In the occupied territory, destruction must be necessary for military operations. Both provisions recognise that under certain conditions the destruction of property is inevitable and link it with the overcoming of the enemy forces.<sup>111</sup>

The applicability of regulation 23 (g) to the facts of the present issue is highly doubtful. Systematic interpretation clarifies that the provision is applicable during a state of hostilities<sup>112</sup> and, as has been said in subsection V.A., one may think that

<sup>106</sup> Kolb, *supra*, note 101, 121.

<sup>107</sup> Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge 2004, 218-219; David, *Principes de droit des conflits armés*, Bruxelles 2002, 268-269.

<sup>108</sup> According to this reasoning, the International Court of Justice denied the applicability of regulation 23 (g) and of the other provisions of section II of the Hague regulations to the present situation in the occupied territory. Cf. ICJ Advisory Opinion, para. 124.

<sup>109</sup> Cf. David, *supra*, note 107, 268.

<sup>110</sup> Pictet (ed.), *IV Geneva Convention – Commentary*, Geneva 1958, 300-301.

<sup>111</sup> Dinstein, *supra*, note 107, 218-219; Bothe/Partsch/Solf, *New Rules for Victims of Armed Conflicts*, The Hague 1982, 320.

<sup>112</sup> Cf. David, *supra*, note 107, 268-269.

the situation in the West Bank and Israel cannot be considered a classical armed confrontation. The situation might be classified as a low intensity conflict in an occupied territory, which has to be addressed by actions of policing.

In this respect, the Court clearly recognised that Israel holds the West Bank as a belligerent occupant, but contextually applied, as parts of the “single tapestry”, both regulation 23 (g) and art. 53 IV GC. It is submitted that the different wording and the systematic position of the abovementioned provisions preclude their contextual applicability in that a relationship of speciality would exist between them. The purpose of art. 53 IV GC would be frustrated by the concurrent applicability of regulation 23 (g).<sup>113</sup>

The main issue is whether the destruction of the land carried out to build the Barrier can be considered absolutely necessary for military operations according to art. 53 IV GC. The analysis of the concept of absolute necessity requires the assessment of a preliminary issue: is the erection of the Barrier a military operation? A negative answer seems unavoidable. The relationship between art. 53 IV GC and regulation 23 (g) HR demonstrates that the concept of “military operations” relates to the combat activities and the active operations that an army may have to carry out also in occupied territories.<sup>114</sup> The Barrier, as a complex project, planned over the years and preventive in nature is therefore quite different from the traditional concept of military operations. A flexible interpretation of art. 53 IV GC is required to include the Barrier amongst military operations. Such a solution, however, seems to be precluded by the wording of the article that, after stressing the overall prohibition of the destruction of property, recognises the necessities of military operations in a derogatory clause. As for all derogatory clauses strict interpretation is required.

Assuming for the sake of argumentation that the Barrier could be regarded as a military operation, it should also be assessed in light of necessity. The point will be dealt with in subsection V.C.5. It is however to be pointed out that the minimum requirement to pass the test of necessity is that the measure adopted be relevant (i.e. effective) to achieve its objective. In this respect one may take the view that a generic military advantage would not be sufficient since necessity is qualified by art. 53 as “absolute”.<sup>115</sup>

<sup>113</sup> Cf. Schwarzenberger, *supra*, note 100, 263 who states that regulation 23 (g) could be applied to occupied territories only on the basis of “analogy”.

<sup>114</sup> Cf. Dinstein, *supra*, note 107, 218-219. See also Scobbie, *The Wall and International Humanitarian Law*, 9 Yearbook of Islamic and Middle Eastern Law, 2002-2003, 495-506, at 504, arguing that the Commentary on art. 51.1 of Additional Protocol I demonstrates that the concept of military operations is related to violent activities.

<sup>115</sup> As will be seen later, the Court refrained from analysing in detail the requirements of military necessity and was satisfied to find that the erection of the Barrier was motivated by “security reasons”. A legal analysis of the effectiveness of the Barrier and of the military advantages that it might bring about is missing. See subsection V.C.5. below.

In short, art. 53 IV GC seems not to provide a legal basis for the destruction of the land carried out in the present case and the applicability of regulation 23 (g) to the facts of the issue is doubtful.

The legal basis of the appropriation of the land – the other preliminary activity for the building of the Barrier – is also uncertain. While regulation 23 (g) explicitly mentions destruction and seizure, art. 53 IV GC does not make any reference to appropriation of private property by the occupying power. In the abstract, the occupying power might gain possession of private property in the occupied territory under regulation 52 HR. The provision deals with “requisitions in kind” and services for the “needs of the army of occupation” and is considered by the Court as part of the “single tapestry”. Requisitions of private property are admitted provided that they are proportionate to the resources of the country and demanded on the authority of the military commander of the area. Payment is to be given as soon as possible.

The application of regulation 52 HR to the case at issue requires the assessment of the concept of “requisition in kind” and the analysis of the scope of the expression “needs of the army”. As a first step, it is to be considered whether the extensive appropriation of land carried out to build the Barrier is compatible with the concept of requisition. Secondly it is to be assessed whether the needs of the army might include the building of the Barrier.

With regard to the first question, two arguments cast serious doubts on the applicability of regulation 52 HR to the seizure of the land on which the Barrier is located.

The *travaux préparatoires* demonstrate that the concept of requisition was meant to be applicable only to the seizure of properties connected to the maintenance and the supplying of the occupying forces in the occupied territory. Goods such as clothing and footwear, foodstuffs, *attelage*, and vehicles were referred to.<sup>116</sup> The emphasis is on movable property while reference to immovable property mainly concerned housing. From this point of view, it is not clear whether the concept of requisition in kind is applicable to large-scale requisitions of immovable properties such as land.<sup>117</sup> With regard to the legal effects of requisition, translation

<sup>116</sup> Mechelynck, *La Convention de La Haye d’après les Actes et Documents des Conférences de Bruxelles de 1874 et de La Haye de 1899 et 1907*, Gand 1915, 369. Cf. the statement of Baron Jolimini, representative of Russia at the Bruxelles Conference of 1874: “quand l’armée d’occupation, par des nécessités de guerre, exige de la population locale *des objets d’approvisionnement, d’habillement, de chaussures et autres nécessaires à son entretien*, elle est tenue ou d’indemniser les personnes qui lui cèdent leur propriété, ou de leur délivrer des quittances” (emphasis added).

<sup>117</sup> Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation*, Minneapolis 1957, 186; *contra* Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 *Israel Yearbook of Human Rights* (1978), 134; cf. Schwarzenberger, *supra*, note 100, 268-288; Oppenheim, *International Law*, 7<sup>th</sup> ed., Vol. 2, 405, who admitted the (temporary) quartering of soldiers and their horses on private property as a special form of requisition not specifically referred to by regulation 52, but implied by it.

of the right to property would be possible on the condition that a payment is given.<sup>118</sup>

On the contrary, as for the second argument, it might be pointed out that requisition of private immovable is generally regarded as temporary.<sup>119</sup> The systematic interpretation of regulation 52 HR would render the concept of requisition incompatible with a permanent transfer of immovable property. In this respect, the word “requisition” should be read in opposition to “confiscation”, which is prohibited in general terms in the occupied territory by regulation 46 HR. Regulation 52 is framed as an exception to the principle of respect for private property and prohibition of confiscation sanctioned by regulation 46.<sup>120</sup> The combined reading of the two provisions leads one to think that, in the occupied territory, permanent appropriation of immovable private property is ruled out, while temporary use is lawful under the concept of requisition when the conditions mentioned above are fulfilled. The nature of the requisitioned properties seems to be relevant in this respect. As concerns goods for consumption such as foodstuff and clothing, the transfer of property is unavoidable, while for immovable goods or durable goods the general prohibition of confiscation applies and only temporary use is admitted.<sup>121</sup>

In view of what has been said, the requisition of the land carried out in the present case does not seem compatible with regulation 52 HR. While the orders of requisition formally comply with the requirements of the provision, qualifying the extensive seizure of the land as a temporary requisition is very problematic.<sup>122</sup> After the seizure the land is transformed and cultivation is permanently destroyed. The view might be taken that, in light of such a permanent alteration, the facts of the issue might amount to a *de facto* expropriation, which is incompatible with the

<sup>118</sup> Mechelynck, *supra*, note 116, 373-374.

<sup>119</sup> Gasser, *supra*, note 83, paras. 532, 558; Scobbie, Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty, in: Bowen (ed.), Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territory, The Hague 1997, 229-230. At least formally, the HCJ acknowledged in its case law concerning the settlements on the occupied territory that requisition of private land could only be carried out on a temporary basis. See *Beth El* case, *supra*, note 78, 345; *Dwaikat and others v. The State of Israel and others*, (the *Elon Moreh* case), HC 390/79, English translation in: Zamir/Zysblat (eds.), *supra*, note 76, 389. In a case concerning the quartering of IDF soldiers on privately owned land (HCJ 290/1989), *Goha v. Military Commander of the Judea and Samaria Region*, excerpted in 23 Israel Yearbook of Human Rights (1993), 323, the HCJ pointed out that “except in circumstances of continuing actual warfare, the seizure must be limited to a defined period of time”.

<sup>120</sup> The importance of the protection of property in the occupied territory is highlighted by the fact that extensive destruction and appropriation of property, when not justified by military necessity and carried out unlawfully and wantonly is a grave breach under art. 147 IV GC and a war crime under art. 8(2) (a) (iv) of the Statute of the ICC.

<sup>121</sup> Cf. Schwarzenberger, *supra*, note 100, 276; Scobbie, *supra*, note 119, 230.

<sup>122</sup> Some orders of seizure are available on-line at: <[www.hamoked.org](http://www.hamoked.org)> (last accessed 24/09/04). The orders do not explicitly bring about a change in the ownership of the land, which is temporary requisitioned for a time of three or five years. See subsection II.E. above.

temporary nature of requisition.<sup>123</sup> Moreover, as has been said before, one might consider that despite formal statements to the contrary the Barrier is inherently a long-term measure, which precludes the future restitution of property. Historical precedents are relevant in this respect. The issuing of (formally) temporary orders of requisition lies at the basis of the seizure of the land on which the Israeli settlements have been located in the occupied territory.<sup>124</sup> One may think that future restitution of such requisitioned property is quite uncertain.<sup>125</sup>

Finally, as to the scope of the “needs of the army” it is to be pointed out that the concept was conceived as connected to the logistical needs and the practical necessities related to the maintenance of the army on the occupied territory.<sup>126</sup> Admittedly, the historical framing of the provision is not legally conclusive and one might perhaps take the view that the needs of the army are related to the functions of the military. From this point of view, defending the country being the first duty of the military, one might assume that an allegedly defensive measure falls under the scope of the concept at issue. The way the Court interpreted the scope of military necessity will be dealt with in subsection V.C.5. It has however to be noted again that the expression “needs of the army” constitutes an exception to a prohibited conduct and that, in such a case, strict interpretation is needed.

#### 4. The Assessment of the Consequences of the Barrier

In the second part of the judgement, after ascertaining that the military commander was entitled to seize and destruct the land and therefore vested with the formal power to erect the Barrier, the Court analysed the legality of the consequences brought about by the measure adopted. The petition pointed out that the Barrier infringed upon several rights of the local inhabitants.<sup>127</sup> Leaving aside the right to property, the possible infringement of which was analysed by the Court in the first part of the decision, reference was made to freedom of movement, freedom of occupation, freedom of religion, the right to education, the right to family life. The limitation of the freedom of movement can be considered as the starting

<sup>123</sup> On *de facto* expropriation, cf. International Commission of Jurists, *supra*, note 39, 40-42; Jordan Written Statement, 134-138.

<sup>124</sup> See *Lein/Yehzekel*, Land Grab: Israel’s Settlement Policy in the West Bank, B’Tselem Report, 2002, 31; HEPG Report November 2003, para. 52. Cf. *Gasser*, *supra*, note 83, para. 558.

<sup>125</sup> At present, in the West Bank, the expansion of the existing settlements is continuing steadily, being authorised by the Government, see *Ben*, Israel still expropriating land to expand settlements, (Haaretz article, 26/9/04) available at: <[www.haaretz.com](http://www.haaretz.com)> (last accessed 06/10/2004). Apparently up to 13 % of the territory of the West Bank is undergoing a process of review possibly to be designated as State Land. After the *Elon Moreh* case, the designation of a land as “State Land” is the habitual method for the Israeli authorities to appropriate the land where settlements might be established. In the same context, illegal outposts are being established by the settlers. See *Shragai/Harel*, Court turns down petition against removal of outposts, (Haaretz article, 27/09/2004) available on-line at: <[www.haaretz.com](http://www.haaretz.com)> (last accessed 01/10/04).

<sup>126</sup> Cf. League of Arab States Written Statement, para. 9.13.

<sup>127</sup> See subsection III.A. above.

point from which a number of other precise human rights violations derive.<sup>128</sup> The difficulties that the inhabitants find in going from place to place give rise to consequences connected to all the aspects of their life: work, education, medical care, relationships.

As has been seen in subsection V.B., the Court refrained from analysing in detail the applicability and the substantive content of the provisions protecting the above mentioned rights. Reference was made to two general provisions of the Hague regulations and of the Fourth Geneva Convention (regulation 46 HR and art. 27 IV GC), deriving from their somewhat vague text the protection of some human rights of the affected population.

The relevant part of regulation 46 states that: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected". Art. 27, affirming the general principle of human treatment, supplements and clarifies regulation 46. Para. 1 reads: "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs". The protection deriving from art. 27 is limited by the recognition in the last paragraph that "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war". Both provisions are framed in general terms and, although it is clear from their wording that they are meant to provide for a wide protection of human rights, the specific rights protected are not clearly defined.<sup>129</sup> However the phrase "in all circumstances" makes clear that the rights deriving from the values spelled in art. 27 para. 1 are not subject to any derogation and are to be considered absolute rights.<sup>130</sup> On the contrary, the derogating clause introduced by the last paragraph clarifies that freedom of movement is conceived as a relative right, which is to be balanced with reasons of security.<sup>131</sup>

According to the legal framework provided for by regulation 46 and art. 27, the Court seems to draw an overall picture of the rights protected and to apply then the principle of proportionality, refraining from specifying the scope and the limits of each single right of the affected population. The content of the rights that might have been infringed by the building of the wall is not considered in detail as the Court is satisfied to note that the relevant norms recognise the opposing values of security and humanity. The core of the reasoning consists in setting the point of equilibrium between the two values through the application of the principle of proportionality, without having to deal with the constraints of precise legal texts.

In this respect it is to be pointed out that the legal framework referred to by the Court could have been supplemented and clarified by other specific provisions,

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<sup>128</sup> See Palestine Written Statement, para. 495.

<sup>129</sup> Gasser, *supra*, note 83, para. 502.

<sup>130</sup> Pictet (ed.), *supra*, note 110, 204-205.

<sup>131</sup> *Ibid.*, 201-202; David, *supra*, note 107, 487-491.



which were ignored in the present decision. Two sources of integration were available on this specific point:

- human rights treaties binding Israel (on the assumption that they are applicable to the occupied territory);
- other norms of international humanitarian law dealing with human rights protection.

With regard to the first source, one might recall that in the early nineties Israel ratified the most important UN Treaties on human rights protection.<sup>132</sup> As demonstrated by the Advisory Opinion of the ICJ, one might regard those treaties as containing provisions in the abstract applicable to the case at issue, especially as concerns the legal qualification of the consequences of the Barrier on the affected population. Liberty of movement, the right to family life, the right to work, the right to food: all are potentially infringed by the decision to build the Barrier and are protected by relevant conventional provisions binding Israel on the international level.<sup>133</sup>

As directly concerns the present judgement, one has to note that those international norms, while binding the State of Israel, are formally not applicable by the Israeli Courts due to the lacking of incorporating legislation.<sup>134</sup> Moreover, the Government has repeatedly stated that it regards human rights conventional norms as not applicable to the occupied territory.<sup>135</sup>

Such an approach has been widely criticised by human rights monitoring bodies and the majority of the legal scholars who affirm the contextual applicability of human rights treaties and humanitarian norms.<sup>136</sup> On its part, the HCJ never en-

<sup>132</sup> Amongst the international conventional instruments dealing with human rights protection, Israel ratified: The International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. See Ben Naftali/Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 *Israel Law Review* 1 (2004), also available at: <www2.colman.ac.il/law/concord/publications/livingind denial.pdf> (last accessed 20/10/2004), 5-6.

<sup>133</sup> ICJ Advisory Opinion, paras. 102-114.

<sup>134</sup> Ben Naftali/Shany, *supra*, note 132, 46-51.

<sup>135</sup> Two legal arguments are mainly relied on in this respect. Firstly, Israel denies that human rights treaties might involve extraterritorial application. In contrast with the established “jurisprudence” of the main human rights monitoring bodies, the Jewish State abides to a strictly territorial approach as concern human rights protection. Since human rights are traditionally connected to the relationship between a sovereign and the individuals under its sovereignty, the scope of human rights protection would be limited to the boundaries of the State. Secondly, human rights norms are said to be applicable only in times of peace. There would be a conceptual difference between humanitarian norms and human rights protection. The latter protects individuals from the sovereign power, while the former provides the legal regime of the relationship between the belligerents and individuals with different nationality which fall under their rule during the war. As a consequence, between the two bodies of norms there would be a relationship of exclusion. For a comprehensive survey, see: Ben Naftali/Shany, *supra*, note 132, 5-15.

<sup>136</sup> Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 *Israel Yearbook of Human Rights*, (1998), 1 et seq. With reference to the ICJ Nuclear Weapons Advisory Opinion, see Gardam, *The Contribution of the International Court of Justice to International Humanitarian Law*, 14 *Leiden Journal of International Law* 2 (2001), 349-365 at 360-364.

dorsed clearly the position of the Government. Despite the formal inapplicability of non-incorporated treaty norms, the Court did not refrain from referring to international human rights provisions of conventional nature in its previous decisions concerning the occupied territory.<sup>137</sup> In cases concerning detention and detention conditions of Palestinians, the Court relied on conventional human rights norms on the assumption that they had acquired customary status.<sup>138</sup> In other cases the Court made reference to human rights conventional law binding Israel as an interpretative tool to specify and reinforce human rights protection derived from different sources.<sup>139</sup>

To the contrary, in the present decision, the Court never referred to the human rights treaties at issue, but derived the rights of the population affected by the building of the wall exclusively from the general provisions of international humanitarian law. In this respect, as concerns the second source of integration, it is to be noted that regulation 46 HR and art. 27 IV GC are not the only norms dealing with human rights protection in the body of norms that the Court considered applicable to the case. International humanitarian law, particularly the Fourth Geneva Convention, is primarily concerned with human rights and states in detail the relevant obligations of the occupying power.<sup>140</sup> Art. 55 IV GC binds the occupying power to ensure food and medical supplies to the population “to the fullest extent of the means available to it”. Art. 56 concerns the duty of ensuring and maintaining “the medical and hospital establishments and services, public health and hygiene in the occupied territory”. According to art. 50, the occupying power shall “facilitate the proper working of all institutions devoted to the care and education of children”. As for all social rights, it is quite difficult to ascertain precisely when a violation occurs. It may be argued that the degree of protection required is quite high because two of the mentioned provisions are qualified by the phrase “to the fullest extent of the means available”.<sup>141</sup> However, being the requirement of the “fullest extent” limited by the indefinite concept of availability to the occupying power, uncertainty remains.

It is nonetheless certain that the consequences of the erection of the Barrier will render compliance with those obligations more difficult and it may be argued that

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On the relationship between international humanitarian law and human rights protection in the “jurisprudence” of the human rights monitoring bodies, see *Martin*, *Le droit international humanitaire devant les organes de contrôle des droits de l’homme*, 1 *Droits fondamentaux* (2001), 119-148, at: <[www.droits-fondamentaux.org](http://www.droits-fondamentaux.org)> (last accessed 20/10/2004).

<sup>137</sup> *Ben Naftali/Shany*, *supra*, note 132, 46-51.

<sup>138</sup> See HCJ 3278/02, *The Center for the Defense of the Individual v. The IDF Commander in the West Bank*, para. 25, available at: <[http://elyon1.court.gov.il/files\\_eng/02/780/032/a06/02032780.a06.pdf](http://elyon1.court.gov.il/files_eng/02/780/032/a06/02032780.a06.pdf)> (last accessed 18/01/05); *Yassin v. Ben-David, the Military Commander of Ketziot Detention Center*, para. 12, at: <[http://elyon1.court.gov.il/files\\_eng/02/910/055/a03/02055910.a03.pdf](http://elyon1.court.gov.il/files_eng/02/910/055/a03/02055910.a03.pdf)> (last accessed 18/01/2005).

<sup>139</sup> Cf. *Zysblat*, *Protecting Fundamental Rights Without a Written Constitution*, in: *Zamir/Zysblat* (eds.), *supra*, note 76, 47 et seq.

<sup>140</sup> *Gasser*, *supra*, note 83, para. 524.

<sup>141</sup> Art. 55 IV GC and art. 56 IV GC.

the quoted provisions could have been considered in assessing the facts of the present case. However, not all the activities constituting an obstacle to respecting a legal obligation should be regarded as a violation of the obligation, especially considering that the obliged party could commit itself in contextually adopting other measures aimed to fill the gap. Accordingly, for instance, the building of the Barrier is not necessarily an infringement of the obligation to facilitate education as long as Israel adopts measures suitable for nullifying the adverse effects of the Barrier on education. Admittedly, the question is unresolved and depends on the evaluation of the facts, but the Court did not even refer to those specific provisions despite their relevance to assess the consequences of the Barrier.<sup>142</sup> If not for asserting the illegality of the whole project, finding that it violated an absolute right, such obligations could have been considered to evaluate the proportionality of the route and to develop the criteria for the re-location of the Barrier.

One might recall that during the years the Israeli High Court has been used to developing human rights protection with no written basis.<sup>143</sup> Until the enactment of the basic law, human rights protection in Israel was completely elaborated by the Court according to the principles of the common law systems.<sup>144</sup> Nevertheless, reference to the main conventional human rights norms as an interpretative tool could have given the reasoning of the Court much more precision. Furthermore, the specific provisions of the Fourth Geneva Convention mentioned above are an integral part of what was described as the normative framework of the judgement. It is not clear, therefore, why the Court refrained from analysing their substantive content with respect to the facts of the issue. The analysis focussed on the conditions of the landowners and of the farmers and assessed the proportionality of the route of the Barrier mainly with respect to their economic situation. The Court analysed the changes in the life of the farmers stating that the route severely violated their right to property and their freedom of movement. As a result their right to work and their livelihood would have been impaired. Accordingly, the criteria that were put forward at the end of the decision revolve around the attempt to reduce the effects of the wall on the owners and the workers of the land. The licensing regime is considered as inapt “to prevent or substantially decrease the extent of

<sup>142</sup> It is unlikely that the lack of any reference to the mentioned provisions depends upon the implicit application of art. 6, para. 3 IV GC. The provision enumerates the articles of the Fourth Geneva Convention that are applicable in the occupied territory more than one year after the “general close of the hostilities” and excludes the majority of the human rights clauses. However, as Kretzmer points out (*supra*, note 72, 91), the Israeli High Court has not applied art. 6 para. 3 in its precedents. Furthermore, the view might be taken that, having qualified the situation as an armed conflict, the Court could not have applied a provision that is conditional on the close of hostilities. *Contra* see ICJ Advisory Opinion, para. 125. The ICJ seems to refer the phrase “general close of the hostilities” only to the hostilities that lead to the occupation of the territory. On the point, Imseis, *supra*, note 81, 105-109.

<sup>143</sup> Cf. Zysblat, Protecting Fundamental Rights without a Written Constitution, in: Zamir/Zysblat (eds.), *supra*, note 76, 47 et seq.; Kretzmer, The New Basic Laws on Human Rights, in: *ibid.*, 141 et seq.

<sup>144</sup> *Ibid.*

the severe injury to the local farmers”.<sup>145</sup> The government will have to reduce the effects of the Barrier on cultivated land, to reduce the area where local inhabitants are separated from their land, to allow passage to the extent possible and to prefer recourse to the exchange of the land to monetary compensation.<sup>146</sup> In any case, compensation shall be given not only for the land that has been seized and destroyed, but also for the land from which the owners are physically separated.

Apparently, the hardships imposed by the Barrier on the Palestinian population at large, and in particular on students, sick persons and families, were not seriously taken into account in the development of the criteria for the revision of the route. Perhaps the constraints of the *petitum*, which directly attacked the validity of the orders of seizure, might explain this approach. Only the direct consequences of the orders on the affected landowners and farmers were specifically dealt with. It is to be noted, however, that amongst the petitioners were also some village councils and that that could have given the analysis of the proportionality of the Barrier a wider scope. Indeed, in the very last part of the decision the Court generally stated that the injury brought about by the Barrier is not limited to the lands of the inhabitants and to their right to access them, but “strikes across the fabric of life of the entire population”.<sup>147</sup> The statement is quite vague and no precise criteria are drawn from it. However, the Court seems to imply that also this kind of consequences have to be taken into account in relocating the Barrier and trying to achieve a better balancing between security needs and rights of the local inhabitants.

##### 5. The Scope of Military Necessity and the Application of the Principle of Proportionality

The concept of military necessity and the principle of proportionality lie at the basis of international humanitarian law and constitute the core of the reasoning of the Court. In the preceding paragraphs, the legal basis of the judgement has been criticised mainly discussing the applicability of the norms that constitute the “single tapestry”. In the following paragraphs the legal basis will be further analysed, arguing that other norms of international humanitarian law were relevant and that other legal sources could have been taken into account.

Assuming that no questions of applicability arose, the way in which the norms that were considered applicable were interpreted and applied by the Court will be now discussed. The analysis will focus on the application of the concept of military necessity and of the principle of proportionality. Firstly, it will be argued that the Court misinterpreted scope and nature of the concept of “security reasons”. The Court failed to acknowledge that contemporary international humanitarian law

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<sup>145</sup> HCJ 2056/04, para. 82.

<sup>146</sup> *Ibid.*, para. 83.

<sup>147</sup> *Ibid.*, para. 84.

does not envisage a general exception of military necessity underlying the “single tapestry” of norms individuated in the decision at hand. The scope of the derogating clauses contained in the norms referred to in the decision is not compatible with the concept of security envisaged by the Court. Secondly, the scope of the Court’s judicial review will be discussed, arguing that the Court actually limited its analysis to proportionality in the narrow sense and never questioned the effectiveness both of the Barrier and of the route adopted.

With regard to the first submission, one has to recall that military necessity is framed in a different form in the context of each norm of humanitarian law and is always conceived as an exception to prohibitive norms. Traditionally, its core meaning is that all the use of armed force (and the destruction of life or properties) which are not necessary to achieve military goals are prohibited.<sup>148</sup> In modern international humanitarian law, that does not imply, however, the admissibility of every conduct anyhow related to military goals. Necessity is not an authorising principle detached from single provisions.<sup>149</sup> Every norm incorporates a peculiar equilibrium – which no external source can change – between the two conflicting values at the basis of humanitarian law: humanity and military concerns.<sup>150</sup> Military necessity can be regarded as a principle of humanitarian law considering that all provisions are drafted taking into account its existence. Yet the scope of the derogation varies according to the norms that come into consideration. In this respect relevant elements include the degree of the necessity required, the nature of the circumstances from which the necessity arises, and the objective pursued.

As concerns the present case, one of the consequences of the “single tapestry” approach is the nullification of these differences. The Court enumerated a number of norms and noted that each of them is derogable with reference to reasons connected to military necessity. The analysis of the objective of the Barrier follows, on the assumption that when adopted in pursuing “security reasons” the measure would automatically fall under the scope of the derogating clauses. As has been done with the tapestry, the catchall concept of “security reasons” must again be deconstructed in order to assess its compatibility with the scope of each derogating clause contained in the relevant provisions.

According to the Court, the needs of the army, and therefore military necessity, are to be equated with the concept of security. The central point is to understand

<sup>148</sup> Carnahan, Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity, 92 *American Journal of International Law* 2 (1998), 213-231, at 215. On the concept of military necessity, see Dinstein, *Military Necessity*, in: Bernhardt (ed.), *supra*, note 73, 395-397; Downey, *The Law of War and Military Necessity*, 47 *American Journal of International Law* (1953), 251-262; Venturini, *supra*, note 90, 123 et seq.; Greenwood, *Historical Development and Legal Basis*, in: Fleck (ed.), *supra*, note 83, paras. 130-132; Jaworski, “Military Necessity” and “Civilian Immunity”: Where is the Balance?, 2 *Chinese Journal of International Law* 1 (2003), 175-206.

<sup>149</sup> The concept of *kriegraison*, as an authorising principle potentially derogating from all the laws of war, is nowadays universally considered unacceptable. Cf., *inter alia*, Downey, *supra*, note 148, 253; Venturini, *supra*, note 90, 123-125.

<sup>150</sup> Dinstein, *supra*, note 107, 16-17.

whose security comes into question. In this respect it is stated that the military commander is entitled to “maintain security in the area and to protect the security of his country and of her citizens”.<sup>151</sup> The Court substantially referred the concept of military necessity to all the activities that are necessary to defend not only the occupying forces in the area, and the occupying power as a whole and its territory, but also all its citizens irrespective of their place of residence. It is thus clear, as emerges also from the respondent’s affidavits,<sup>152</sup> that the security of the settlers, of the settlements, and of the inhabitants of Israel is a meaningful consideration in the Court’s interpretation of military necessity.

To the contrary, considering all the provisions that constituted the legal basis of the decision, one might realise that each conceives military necessity in a different form, but that the concept of security mentioned above seems to be beyond the scope of all of them. Regulation 23 (g) HR and art. 27 IV GC explicitly link necessity to the exigencies related to a situation of war. As has been seen, such a qualification of the situation at hand is at least debatable. Art. 53 IV GC, dealing with destruction of property, contains a derogating clause related to “military operations”. The application of regulation 52, on the right to requisition, is conditional on the “needs of the army of occupation”. All these clauses seem clearly to refer to the actual needs of an army when engaged in combat activities or in a situation of belligerent occupation.

In order to render a different interpretation feasible, one could argue that the *raison d’être* of the army is defending its country and its citizens. Being the fulfilment of its mission the most important “need” for the military, the concept of military necessity would extend to the security of the country and its citizens. Equating military necessity to the concept of security would then be possible.

However, at least two arguments preclude such an approach. Firstly, in general terms, it has to be considered that the clauses are all framed as exceptional in nature and restrictive interpretation is needed. Moreover, as demonstrated by art. 64 para. 2 IV GC, provisions explicitly taking into account the security of the occupying power as a whole do exist.<sup>153</sup> When such a value is at stake the language of the text is clear. Systematic interpretation would then preclude nullifying the differences

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<sup>151</sup> HCJ 2056/04, para. 34.

<sup>152</sup> See subsection III.B. above.

<sup>153</sup> Art. 64 para. 2 IV GC reads: “The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to (...) ensure the *security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishment and lines of communication used by them*” (emphasis added). The interpretation of the second paragraph of the present article is a matter of doctrinal controversy. Arguing that the term “provisions” relates also to non-penal measures in opposition to the first paragraph, see Ben-venisti, *supra*, note 54, 100 et seq. For the traditional view: Pictet, *supra*, note 110, 335; Dinstein, The Dilemmas Relating to Legislation under Art. 43 of the Hague Regulations, and Peace-Building, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 2004, available on-line at: <[www.ihlresearch.org](http://www.ihlresearch.org)> (last accessed 26/11/2004).

between the wording of the derogating clauses, on the assumption that they must have been the result of a precise choice and their meaning is to be preserved.

Finally, whereas the admissibility of the equation between the needs of the army and the security of the country is debatable, it is to be excluded that the concept of military necessity could justify the adoption of measures to protect the settlers and the settlements. As will be seen *infra*, the Israeli settlements in the occupied territory are illegal under international law and must be removed.<sup>154</sup> Military necessity is not conceived as a circumstance precluding wrongfulness and cannot justify illegal activities.<sup>155</sup> That does not imply that the settlers cannot be defended from life threats, but the army shall not have to defend them derogating from the relevant provisions of international humanitarian law.

With regards to the second proposition put forward above, the concrete application of military necessity to the present case and the role of the principle of proportionality come into question. In this respect, it is to be underlined that the relationship between necessity and proportionality is one of conditionality: the first can be considered as a pre-condition of the latter. The application of the proportionality rule is only possible when a situation of military necessity exists. When the military commander is compelled to adopt a certain measure in order to tackle a necessity of military nature, the reasons of humanity and those of necessity will be evaluated in light of the proportionality test. If a situation of equilibrium is given, the measure complies with international law.

The starting point is the evaluation of the existence of a situation that gives rise to military necessity. In the first part of this subsection we discussed the possible purposes of an action taken under the concept of military necessity with reference to the concept of security reasons as interpreted by the Court. Since necessity is a relational concept, one has to understand for what a possible measure can legally be considered necessary.<sup>156</sup> It is now important to understand what is the core meaning of the concept of necessity. That is obviously a controversial issue, since the meaning of the term is to a certain extent indeterminate and the evaluation of the concept seems to be partially extraneous to the scope of the judicial review of the Court. It is nonetheless clear that the minimum content of necessity is the existence of a causal relationship between the measure adopted and the objective legally pursued through its adoption.<sup>157</sup> In other words, in order to be necessary, a measure has at least to be effective since a non-effective act is not necessary by definition. Effectiveness is defined “relevance” by some scholars: the minimum re-

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<sup>154</sup> See subsection V.D.1. below.

<sup>155</sup> Cf., for instance, the Nuremberg Military Tribunal in *United States v. List et al.* quoted in *Downey*, *supra*, note 148, 253: “Military necessity or expediency do not justify a violation of positive law”; *Dinstein*, *supra*, note 107, 16.

<sup>156</sup> *Bothe/Partsch/Solf*, *supra*, note 111, 194.

<sup>157</sup> See *ibid.*, 194-198; *McDougal/Feliciano*, *The International Law of War*, New Haven 1994, 524-525.

quirement is that the measure be relevant.<sup>158</sup> The degree of efficiency is open to discussion: it has been maintained that the concept of necessity does not imply a *conditio sine qua non* test,<sup>159</sup> but it is to be noted that the wording of some provisions requires a high degree of necessity.

Coming to the present case, regulation 23 (g) HR requires that destruction and seizures be “imperatively demanded by the necessities of war”. Similarly, art. 53 IV GC requires destruction to be “rendered absolutely necessary by military operations”. The meaning of imperatively and absolutely and the possible difference between them is not clear, but the view may be taken that the assessment of the necessity of a measure must be done very carefully.<sup>160</sup> In any case, a detailed analysis of the degree of the necessity required can be safely left aside in reviewing the present decision since no real assessment of the efficiency of the Barrier was preliminarily carried out.

From a purely theoretical point of view, two different levels of analysis were possible: the Court could have addressed the effectiveness of the Barrier in abstract terms and with reference to the actual features of the measure adopted.

According to the first perspective, the abstract decision to build the Barrier could have been evaluated in order to understand whether it was effective. In this respect, the relevance of the measure adopted and the possible existence of a more effective solution in addressing the terrorist threat were not considered.<sup>161</sup> As long as the military commander motivated the decision to erect the Barrier with security reasons and its statements were considered convincing, the Court never questioned the real effectiveness of the Barrier or ascertained whether a different measure was to be preferred on grounds of effectiveness. The only reference to the issue of relevance was in the phrase: “(...) the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers”.<sup>162</sup> Yet the point was more affirmed than legally argued.<sup>163</sup>

<sup>158</sup> Ibid., 525; Cf. Bothe/Partsch/Solf, *supra*, note 111, 194, n. 7, arguing that the term “relevant” should be substituted by “indispensable” when “rules of limitation which expressly provide for derogations from protective provisions for reason of ‘urgent’ or ‘imperative’ military necessity” are at issue.

<sup>159</sup> McDougal/Feliciano, *supra*, note 157, 524-528; Dinstein, *supra*, note 107, 16-17.

<sup>160</sup> McCoubrey, *International Humanitarian Law*, Aldershot 1998, 200.

<sup>161</sup> It has been argued that the Barrier is not the solution to the problem of the infiltration of terrorists. Statistics regarding previous bombings demonstrate that the vast majority of the attacks were carried out by people entering Israel through the check points and undergoing faulty checks. In this respect, due to its winding route, the Barrier will have several gates and the infiltration of terrorists would still be possible. The most effective solution would be achieving better practices in carrying out border controls and individuating “many means that jointly could provide a proper response”. See B’tselem, *supra*, note 12, 29-31.

<sup>162</sup> HCJ 2056/04, para. 32.

<sup>163</sup> Perhaps the limits of the petition might be relevant in this respect. The issue did not emerge clearly from the petition, which seemed to attack mainly the location of the route of the Barrier. Interestingly, the only hint to the possible inefficiency of the Barrier in general was put forward by the inhabitants of Mevasseret Zion, who joined the petition and pointed out that the construction of the



As to the effectiveness of the actual measure adopted, all its features are relevant. In this respect, it is to be noted that explicit reference to the reasons of necessity and to the test of effectiveness was made by the Court in applying the principle of proportionality only to a single element of the Barrier: its route. The first sub-test of the principle of proportionality, as described in the present decision, is in fact equivalent to the requirement of relevance under the concept of necessity. However, the Court, despite formal reference to the three subtests of the proportionality rule, actually limited the scope of its judicial review to the analysis of proportionality in the narrow sense. The effectiveness of the route adopted, which is an integral part of the concept of military necessity, was not questioned.<sup>164</sup>

The attitude of the Court is not difficult to understand in light of the inherent limits of judicial review.<sup>165</sup> Judicial bodies very seldom substitute administrative authorities in adopting a measure. The principle of the separation of powers would be infringed if the courts directly adopted specific measures substituting the politically legitimised authority.<sup>166</sup> Moreover, judicial institutions are said not to have the technical qualification to address issues that pertain to the expertise of a military commander. It is thus understandable that the Court did not regard itself as being in the position to address the military efficiency of the Barrier, although some recent cases demonstrate that, at times, the existence of military necessity is to a certain extent reviewed, either in abstract terms or with reference to the actual measure adopted.<sup>167</sup> Generally, however, interference with the technical discretion

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Barrier deteriorated the relationship between the two communities and “turned a tranquil population into a hostile one”. See HCJ 2056/04, para. 22.

<sup>164</sup> On the lack of effectiveness of the present project, see the following statement from Major Danny Rothchild, President of the Council for Peace and Security (quoted in HEPG Report July 2003, n. 38): “Why is it necessary to put up 600 kilometres of fence in order to bring more Palestinian population into our territory? This will make the project more expensive, delay it and demand of the IDF to allocate a great deal of manpower to guard the fence.”

<sup>165</sup> With specific reference to the jurisdiction of the Israeli High Court in the occupied territory, see Benvenisti, *supra*, note 76, 371 et seq.; Ben-Naftaly/Michaeli, *supra*, note 72, 373-380.

<sup>166</sup> Cf. Barak, *The Role of a Supreme Court in a Democracy, and the Fight against Terrorism*, 58 *University of Miami Law Review*, 1 (2003-2004), 138. The Author is the President of the Court in the present case and affirms: “The efficiency of the security measures is a matter that is in the proper jurisdiction of the other branches of government. As long as they are acting within the framework of the ‘zone of reasonableness’ there is no basis for judicial intervention.”

<sup>167</sup> At times the Court seems to be ready, at least in principle, to evaluate the effectiveness of the abstract decision of the military commander, see *Gusin v. IDF Commander in the Gaza Strip*, HC 4219/02, excerpted in English in 32 *Israel Yearbook of Human Rights* (2002), 379. After affirming that they examine the legality of an act, not its wisdom, the Court added that in the present case they had examined whether another proportionate measure, causing less damage to the petitioner could have been adopted but did not find one. In the *Ajuri* case, (*supra*, note 6, 261), with regards to the adoption of the specific measure of the assigned residence, after stressing the limits of its judicial review, the Court stated that “the danger presented to the security of the area by the actions of the petitioner does not reach the level required for the adoption of the measure”. See also *Barkebat et al. v. Commander of IDF Forces in the Central Region*, HC 3933/92, excerpted in 25 *Israel Yearbook of Human Rights*, (1995), 341, where the Court, in motivating its decision, examined the possibility of taking alternative more proportionate measures and concluded that there were none.

of the military is avoided by the judiciary. The approach is based on the assumption that the proper role of judicial institutions consists in evaluating the legality of the decisions of the other branches of government.<sup>168</sup> The most a court can do is offering guidance to the administrative authorities and limiting their discretionary power with reference to the concept of reasonableness.<sup>169</sup> The case law demonstrates that, unless the HCJ finds that the military commander acted unreasonably (and that happens very rarely), the relevance of the measure adopted is not put into question.<sup>170</sup> The concept of reasonableness seems to be equated to the propriety of the purposes: when the Court is satisfied that the commander genuinely acted for security reasons, its decision is presumed to be rationally connected to the achieving of those purposes.<sup>171</sup> Only demonstrating that the military was acting for improper (e.g. political) purposes, the petitioners could prove the infringement of the proportionality rule.

It is however to be noted that in other legal systems, the courts, relying on doctrines of avoidance, have been ready to decline jurisdiction in cases concerning security issues or the conduct of hostilities.<sup>172</sup> In many respects, the jurisdiction of the Israeli High Court is a unique example of judicial review on military actions.<sup>173</sup> On the assumption that every act of the administration is justiciable on grounds of reasonableness, the HCJ seldom declines its jurisdiction on security issues. It has been pointed out, however, that reasonableness sometimes seems to be scrutinised in a symbolic manner: the determination that all is justiciable might be devoid of meaning if the standard of reasonableness is applied reaching the conclusion that almost all is reasonable.<sup>174</sup>

Be that as it may, from an international perspective, one could question the actual validity of the arguments that lie at the basis of the limited scope of the Court's judicial review. In cases concerning respect for international law in an occupied territory, for instance, it is not clear what the use of the separation of powers to the petitioners is, considering that they are not citizens of Israel. One could perhaps argue that the principle of the separation of powers cannot limit the full

<sup>168</sup> Barak, *supra*, note 166, 136-138.

<sup>169</sup> On the concept of reasonableness in the jurisprudence of the Israeli High Court, see Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 *Harvard Law Review*, 1 (2002), 16-162, at 145-147; Zamir, Unreasonableness, Balance of Interests and Proportionality, in: Zamir/Zysblat, *supra*, note 76, 327 et seq.

<sup>170</sup> *Za'arub v. IDF Commander in the Gaza Strip*, HC 6996/02; *Bachar et al. v. IDF Commander in the West Bank*, HC 7473/02, both excerpted in English in 32 *Israel Yearbook of Human Rights* (2002), 383, 385. In *Physicians for Human Rights*, *supra*, note 6, para. 17, Barak J. held: "We do not review the wisdom of the decision to take military action. We review the legality of the military operations. As such, we presume that the operations in Rafah are necessary from a military standpoint."

<sup>171</sup> *Elon Moreh* case, *supra*, note 119, 381-382.

<sup>172</sup> Benvenisti, *supra*, note 6, 307 et seq.

<sup>173</sup> *Ibid.*, *supra*, note 165, 374-375.

<sup>174</sup> Barak-Erez, *Hasfitut Shel HaPolitica*, quoted in Ben Naftaly/Michaeli, *supra*, note 72, 9, n. 33.

application of those international norms aimed at protecting persons who do not have any political tie with the occupying power’s government.<sup>175</sup>

Furthermore, as concerns the problems connected with the evaluation of technical-military questions, the present case is very interesting. As it has been seen, the affidavits of the Council for Peace and Security presented the Court with a different evaluation of the security issues underlying the case<sup>176</sup> and, in many respects, a completely different technical solution to the same problems addressed by the military commander was authoritatively put forward. The Court was therefore in a situation where a choice was needed and clearly declared that, between technical solutions of equal authoritativeness, the military commander’s one is always to be preferred in that he bears responsibility for the security of the State.<sup>177</sup> A legal presumption seems to be relied upon in this respect.<sup>178</sup> The actual significance of the affidavit of the Council was limited to demonstrating that a different solution is possible, whatever it is. Accordingly, the military commander had to relocate the Barrier in light of the criteria indicated by the Court. In principle, it is also to be noted that the evaluation of proportionality in the narrow sense, which was carried out by the Court, does require technical knowledge to a certain extent. The Court considered that the right proportion between military advantages and humanitarian concerns was not achieved in the location of the route. The reasoning assumes that a certain reduction of the protection provided for by the Barrier is acceptable in order to reduce its humanitarian impact. In this respect, one might think that assessing the acceptability of the lowering in security and drawing a comparison with the increase in human rights protection requires a judgement that to a certain extent involves the evaluation of technical elements.

Realistically, it is clear that the Court cannot assess directly the issues arising from military necessity. From an international law standpoint, it is nonetheless to be stressed that the question of relevance is an integral part of military necessity.

<sup>175</sup> Cf. Kretzmer, *supra*, note 1, 69-70.

<sup>176</sup> See subsection III.C. above.

<sup>177</sup> HCJ 2056/04, paras. 47, 66. Cf. *Nazal et al. v. Commander of IDF Forces in the Judea and Samaria Region*, HC 6026/94, excerpted in English in 28 Israel Yearbook of Human Rights (1999), 264 et seq.

<sup>178</sup> Cf. HCJ 2056/04, para. 80: “As with other segments of the separation fence, here too *we begin from the assumption that the military-security considerations of the military commander are reasonable* and that there is no justification for our intervention” (emphasis added). The Court continued in the same paragraph: “We accept – *due to the military character of the consideration* – the high hill east of the village of Daku must be under IDF control” (emphasis added). For the same approach, see *Alkatsaf et al. v. Commander of IDF Forces in the Judea and Samaria Region*, HC 242/90, excerpted in Israel Yearbook of Human Rights, 1999, 263 et seq. The case concerned the sealing off of a house under Regulation 119. Barak J. stated that the petitioners had not proved that the measure adopted was not efficient. In any case he added: “*it is doubtful whether such a proof can be brought at all*, because the fact that despite the use of this measure terrorist activity did not cease does not indicate the inefficiency of the measure taken, since it is possible that without it the situation would have been far worse” (emphasis added). On the issue, see *Casese, Powers and Duties of an Occupant in Relation to Land and Natural Resources*, in: Playfair (ed.), *International Law and the Administration of Occupied Territories*, Oxford 1992, 419-442, 438-439.

While the uneasiness of the Court when required to evaluate the effectiveness of a security measure is justified, one should not forget that international law does require such an assessment. An (internal) judicial body might not be the institution in the best position to technically evaluate a military measure; nevertheless the effectiveness requirement remains the core of the judgement of necessity.<sup>179</sup> Therefore, the distinction drawn by the Court between technical and legal issues, the latter being equated with the assessment of proportionality in the narrow sense, is not justified. The assessment of the effectiveness of the Barrier lies at the heart of the concept of military necessity and, while requiring technical skills, it is nonetheless to be considered a legal question. One might take the view that such an evaluation is precluded to the Court's judicial review, but from an objective standpoint a precondition of respect for international humanitarian law is the existence of a rational connection between the measure adopted and the military purposes that it tries to achieve.

#### D. On Some Neglected Norms of International Humanitarian Law

As has been seen before, the applicability of the provisions constituting the legal basis of the decision is doubtful and their content might not justify the measure adopted. We will further argue in this section that the Barrier might infringe other non-derogable norms included in the body of law that the Court considered applicable to the case. Apparently those norms, which would question the authority to build the Barrier, were ignored in the present decision.

##### 1. On the Duty not to Alter the Demographic Equilibrium of the Occupied Territory: Art. 49 IV GC

In their affidavits, the respondents referred to the security of the settlers as one of the aims of the Barrier.<sup>180</sup> The Court did not explicitly comment upon this statement and did not question its compliance with international humanitarian law. According to the Court, the building of the Barrier would be authorised under the concept of military necessity in that it would physically block "terrorist infiltration into Israeli population centers".<sup>181</sup> The phrase "Israeli population centers" clearly refers both to towns situated in the territory of the State of Israel and to settlements in the occupied territory. Should one argue that the protection of the settlements is a legitimate aim for the administrative authority to adopt the orders of

<sup>179</sup> Dinstein, *supra*, note 148, 395-397.

<sup>180</sup> See HCJ 2056/04, para. 12. According to the Court, while stating that the Barrier was aimed at protecting the lives of the citizens and residents of Israel from terrorists trying to infiltrate into the territory of Israel, the respondents significantly added: "At issue are the lives of Israeli citizens residing in the area."

<sup>181</sup> *Ibid.*, para. 32.

seizure? Indeed the petitioners seemed to raise the point when they observed that the Barrier does not serve the needs of the occupying power in the occupied area, or the interests of the occupied territory’s population.

In previous decisions the Court admitted the establishment of the settlements in the West Bank as a defensive measure under the concept of military necessity.<sup>182</sup> According to this approach one may argue that a defensive measure adopted in order to protect legally established settlements falls under the justification of military necessity. Nevertheless it has to be pointed out that the relevant decisions, which were highly questionable even in light of the Hague Regulations, belong to the years when the Court did not regard the Fourth Geneva Convention as applicable by way of customary law to the occupied territory. To the contrary, it has been seen that the Fourth Geneva Convention is one of the bodies of norms to which reference is made in the present decision.<sup>183</sup> It is thus quite surprising that art. 49 para. 6 IV GC, which addresses the issue of the establishment of the settlements in the occupied territory, was not even quoted. In line with some legal precedents, one may perhaps think that the Court considered art. 49 as one of the political provisions of the Fourth Geneva Convention, therefore not covered by the consensus of the Government to apply the humanitarian norms.<sup>184</sup>

The relevant provision reads: “The Occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies.” It is clearly an absolute prohibition, which admits no derogation whatsoever, not even under the concept of military necessity. Relying mainly but not only on the provision at issue, the establishment of the settlements has been considered illegal by the international community and by the vast majority of the legal scholars.<sup>185</sup> The settlements have been vastly supported, funded and projected by the government of Is-

<sup>182</sup> See *Beth El Case*, *supra*, note 78, 337 et seq. For a survey of the relevant decisions, see *Kretzmer*, *supra*, note 1, 78-89.

<sup>183</sup> See subsection V.B. above.

<sup>184</sup> Cf. *Kretzmer*, *supra*, note 1, 22-23.

<sup>185</sup> *Drew*, Self Determination, Population Transfer and the Middle East Peace Accord, in: *Bowen* (ed.), *supra*, note 119, 119-167, 144-146; *Bennisti*, *supra*, note 54, 140-141; *Gasser*, *supra*, note 83, 530, n. 33; *Kretzmer*, *supra*, note 72, 91. International practice mainly qualifies the settlements as a violation of international law, see SC resolution 452/1979, SC resolution 465/1980; cf. *Roberts*, Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988, in: *Playfair* (ed.), *supra*, note 178, 25-85, 65-68. The illegality of the settlements was clearly sanctioned by the ICJ in its recent Advisory Opinion, see ICJ Advisory Opinion, para. 120. It has been pointed out that in the Oslo process the settlements were considered as one of the issues that should have been settled during the final status negotiations. Apparently, Israel infers from the point the existence of a conventional obligation between the parties to regard the status of the settlements as not in principle illegal but subject to the negotiating process. Cf. *Israel Written Statement*, para. 3.49, para. 3.52. See also *Wedgwood*, The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self Defense, 99 *American Journal of International Law* 1 (2005), 52-61, at 60-61. It is however submitted that this approach is incompatible with art. 47 IV GC, which states that the protected persons shall not be deprived of their rights under the Convention nor in any manner nor by “any agreement concluded between the authorities of the occupied territories and the Occupying Power”. Cf. *Quigley*, The PLO – Israeli Interim Arrangements and the Geneva Civilians Convention, in: *Bowen* (ed.), *supra*, note 119, 27-28.

rael. In the West Bank, the process started in the Seventies and has never ceased.<sup>186</sup> The core of the activity fulfils the requirements of art. 49 para. 6 in that it consists in the transfer by the occupying power of parts of its civilian population into the occupied territory. According to the prevailing interpretation of the text, not only deportation, but also voluntary transfer of parts of the occupying power's civilian population with the assistance of the government is to be considered prohibited.<sup>187</sup> It might be further noted in this regard that the concept of transfer should be interpreted in light of the objective of the norm, which aims to prohibit demographic changes to the occupied territory. According to this position, even assuming for the sake of argumentation, that the Israeli government did not participate in any manner in the settlement process, the mere toleration of it would constitute an infringement of art. 49 para. 6. As regards the settlements one might safely take the view that Israel is internationally bound by an obligation to cease the illicit conduct, which is a continuous one, and to terminate its effects restoring the situation *quo ante*.<sup>188</sup>

The main consequence of what has been stated is that every measure perpetuating the existence of the settlements, especially when it is a permanent or long-term measure, is precluded. In this respect it has been pointed out that the sections of the Barrier built in order to protect the settlements would be *ipso facto* forbidden as a direct consequence of the unlawfulness of the settlements.<sup>189</sup> The concept of military necessity and the derogating clauses referring to security reasons cannot be interpreted as a reference to the security of the settlers. Military necessity is an integral part of the norms of international humanitarian law and cannot derogate to non-derogable prohibitions, nor can it justify the perpetuation of a breach of the legality.

However, as has been anticipated before, although the settlements are illegal, that does not imply that the settlers are not to be protected when their right to life is threatened. Regulation 43 HR binds the occupying power to restore and ensure "*ordre public*". Since the concept of *ordre public* is not compatible with life threats and murders, the view might be taken that this provision implies the obligation to protect all the persons residing on the occupied territory, be their presence legal or not. Furthermore the settlers, leaving the issue of their status under international

<sup>186</sup> The Israeli Government and the World Zionist Organization established the Government Settlement Division in the Sixties. Its activities were officially recognised in 1998. See Cohen, PM mulls abolition of gov't settlement division, (Haaretz article 20/10/04). The funding of the settlements by the Israeli Interior Ministry has never ceased. See Khromchenko, Study: Settlements get more aid money than other town, (Haaretz article, 20/10/2004), available at: <www.haaretz.com> (last accessed 20/10/04). On the incentives to the settlers see Benvenisti, *supra*, note 54, 136.

<sup>187</sup> According to Drew, *supra*, note 185, 144-145, the Government of Israel assisted and facilitated the population transfer and the concept of "voluntary" transfer is to be interpreted as requiring both the consent of the transferees and of the indigenous population. *Contra* Dinstein, The International Law of Belligerent Occupation and Human Rights, 8 Israel Yearbook of Human Rights (1978), 124.

<sup>188</sup> With reference to the construction of the Barrier, cf. ICJ Advisory Opinion, para. 151.

<sup>189</sup> Buergenthal, Separate Opinion, para. 9.

humanitarian law aside, are individuals under the jurisdiction of Israel. If not under customary international law, Israel has the duty to protect their right to life under human rights conventional law. That is independent from the recognition of the settlers' right to security under international humanitarian law. They do not qualify as protected persons under the law of occupation and their country's duty of protection is a mere corollary of the obligation to ensure and enforce *ordre public*.<sup>190</sup> Therefore, the occupying power is not entitled to limit derogable rights of the protected persons or to infringe non-derogable provisions of the law of occupation in order to protect the settlers. Settlers' protection must be guaranteed temporarily, without infringing the local population's rights under the law of occupation, with a view to ensure *ordre public* and while operating to cease the illicit conduct and to remove the settlements. One cannot invoke the right to life of the settlers and assess its proportionality with the infringement of the rights of the protected persons. International humanitarian law does not admit the balancing between the two values; it cannot justify the construction of the Barrier and a limitation of the protected persons' rights.<sup>191</sup>

Finally, it is to be recalled that art. 49 not only prohibits the transfer of the occupying power's population, but also limits every form of demographic change in the occupied territory. In this respect, para. 1 precludes the deportation of the inhabitants of the occupied territory. Evacuation of protected persons is strictly regulated by the following paragraphs. Art. 49, considered in its overall content, aims at freezing the demographic equilibrium.<sup>192</sup> In this respect one might argue that the Barrier, and especially its legal regime with the limitation of the access and the staying in the closed zone, might force local inhabitants to leave the area. The hardships imposed on the population might result in an indirect violation of art. 49. As has been seen in subsection V.C.4., when dealing with the consequences of the Barrier, the Court focussed on the situation of landowners and workers, which were directly affected by the seizure of the land. Analysing the prospects of the alteration of the demographic equilibrium in relation to the building of the Barrier, the Court would have had to evaluate the consequences ... of the consequences. Likely as the demographic change may be, assessing the effects of the Barrier on the demography of the occupied territory would have required the Court to embark upon a difficult prediction judgement, which would have been probably untenable in light of the political reactions to it.

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<sup>190</sup> Cf. Pictet, *supra*, note 110, 45 et seq. The application *ratione personae* of the Fourth Geneva Convention is defined by art. 4, which explicitly excludes nationals of the occupying power.

<sup>191</sup> Cf. Oxford Public Interest Lawyers, *supra*, note 74, para. 105.

<sup>192</sup> On art. 49 para. 1, see Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation*, 23 *Israel Yearbook of Human Rights* (1993), 1-26, 12-24.

## 2. On the Presumption against Changes to the Occupied Territory and the Distribution of the Burden of Proof

In general terms, several provisions demonstrate that the international law of occupation embodies a strong presumption against the legality of any change to the legal order, to public life and to the physical features of the occupied territory.<sup>193</sup> We have already dealt with art. 47 IV GC and with the prohibition of depriving protected persons of their rights as a result of the occupation of the territory.<sup>194</sup> Regulation 43 HR requires the occupant to ensure and restore *ordre public* “while respecting unless absolutely prevented, the laws in force in the country”. According to regulation 48 HR, collection of taxes will have to be done as far as possible “in accordance with the rules of assessment and incidence in force”. As has been said, art. 49 of the Fourth Geneva Convention precludes any unjustified alteration of the demographic equilibrium of the occupied territory. Art. 53 limits the faculty of altering the status of public officials or judges.

In this context, regulation 55 HR states that the occupying power shall be regarded only as usufructuary or administrator of public real property and natural resources.<sup>195</sup> The use of public land by the occupying power and the legality of the Barrier as a whole are not directly under review in the present case. The petition attacks the orders of seizure of privately owned land and the Court rightly focussed on their legality. Nevertheless, it is to be noted that the respondents stated that they tried to avoid the seizure of private land and preferred locating the Barrier on public land to minimise the damage.<sup>196</sup> The Court, *inter alia*, inferred from this statement “the sincere desire of the military commander” to find a proportionate balance between security and military consideration.<sup>197</sup> However, the law of occupation does not entitle the occupying power to exercise any form of sovereignty on the territory and seizure of public land is strictly limited. In this respect, permanently changing the destination of the land is probably precluded to the usufructuary. It may perhaps be submitted that the occupying power might change the destination of some portion of public land to restore *ordre public* under art. 43 HR. That could be required by its obligations under the law of occupation. A very limited intervention could be compatible with the duties of the administrator who,

<sup>193</sup> For an overview, see David, *supra*, note 107, 497-531. The general principle underlying the entire framework of the law of occupation is that occupation is temporary, does not change the status of the territory and does not transfer sovereignty.

<sup>194</sup> See subsection V.C.2. above.

<sup>195</sup> Regulation 55 HR reads: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”

<sup>196</sup> See HCJ 2056/04, para. 13. The statement probably recalls a previous judgement of the HCJ (see *Elon Moreh* case, *supra*, note 119) where the legality of a settlement located on private land was denied on the grounds that the objective pursued was eminently political. Since then the use of not privately owned land has been preferred by the occupying power.

<sup>197</sup> HCJ 2056/04, 44.



acting in the interests of the administered territories, could intervene to change the destination of the land. Yet such an approach requires a non-literal interpretation of the word “usufructuary” and is therefore highly questionable. The text of the article is pellucid in requiring the occupying power to deal with public property only as administrator and usufructuary: the occupying power must be administrator and usufructuary at the same time. While the administrator – in the interest of the administered territories – might change the legal status of the land, that would be precluded to the usufructuary. Unless one considers reference to *usufructus* as merely mirroring a general principle concerning the obligation to minimise the changes to the land, any alienation of public land is prohibited. The textual interpretation of the entire provision reinforces such an approach since the final phrase of para. 1 refers to the need to “administer in accordance with the rules of usufruct”. The explicit reference to the “rules” of usufruct demonstrates that the necessity to administer public properties as a usufructuary must be interpreted in a restrictive way.

Although in the present case, art. 55 is not directly connected to the legality of the orders of seizure, one might take the view that the use of public land could not have been considered to evaluate the *bona fide* of the military commander. *Bona fide* cannot be deducted from an unlawful activity, such as the use of public land in violation of the duties of the usufructuary.

To say the least, this provision, together with the others mentioned above, can be considered as the expression of a fundamental principle of the law of occupation: changes of whatever nature to the occupied territory by the occupying power must be minimised.<sup>198</sup> That is in line with the very nature of belligerent occupation as a temporary condition through which the occupying power cannot acquire sovereignty over the occupied territory. Therefore an adverse presumption must be taken into account as concerns the right of the occupying power to act in the occupied territory. The existence of general powers does not find a legal basis in the law of occupation; it is up to the occupying power to demonstrate the entitlement to act in each single case.<sup>199</sup>

It is submitted that applying this principle to the present decision, the Court might have differently considered the distribution of the burden of proof, which is mainly to be carried by the petitioners.<sup>200</sup> As has been seen in subsection V.C.5., especially as concerns military necessity, the approach of the Court is equivalent to introducing a presumption of validity of the evaluation carried out by the military commander. Apparently, the petitioners could have challenged the assessment of security reasons put forward by the authorities only demonstrating that an improper purpose motivated the decision to adopt the measure. The different option provided for by the affidavit of the Council for Peace and Security was never discussed on its merits. While this distribution of the burden of proof partly depends

<sup>198</sup> Cf. Gasser, *supra*, note 83, paras. 530-531.

<sup>199</sup> Cf. Palestine Written Statement, para. 431.

<sup>200</sup> Cf. HCJ 2056/04, 17.

on the inherent limits of the scope of internal judicial review, it does not seem to mirror the rationale underlying the international law of occupation.

### E. Comments on the Applicable Law: On Some Neglected Norms of International Law

Apparently, the instant decision relies heavily on international humanitarian law. Nevertheless, with reference to the legal framework that constituted the basis of the Advisory opinion of the International Court of Justice, one might notice that not all the relevant norms of international law have been applied to the case at issue.<sup>201</sup> Self-defence, self-determination, and human rights treaty law: the relevant norms were dealt with by the ICJ in its Advisory Opinion and ignored by the HCJ in the present case.

Obviously, it is necessary to take into account the differences concerning the *petita* in the two cases: the request of the General Assembly questioned the legality of the whole Barrier, while the High Court had been petitioned with regard to a limited sector of the route.<sup>202</sup> However, in principle, almost all the legal arguments relating to the legality of the Barrier as a whole could be relevant in order to evaluate the legality of a single order of seizure as well. One might take the view that, the ICJ being an international judicial body, it is not surprising that it applied international law in a more comprehensive manner. On the other hand the reasons why the HCJ failed to examine all the international norms in the abstract pertaining to the case are various. In subsection V.C.4., we already commented upon the Court's decision to refrain from applying international human rights norms of conventional nature to supplement the relevant provisions of international humanitarian law. In the following two paragraphs we will examine the facts of the issue with reference to the right to self-defence and the right to self-determination.

#### 1. The Applicability of the Law of Self-Defence

As has been seen in subsection III.B., the respondents avoided a detailed legal qualification of their conduct. They mainly relied on the inherent right of the State of Israel to defend itself from the infiltration of terrorists. Accordingly, self-defence as an inherent right in customary law, recognised by art. 51 of the UN

<sup>201</sup> For a brief summary of the legal basis of the ICJ Advisory Opinion, see Harvard Program on Humanitarian Policy and Conflict Research, Recent Decisions on the Legality of the Separation Barrier under IHL, available at: <[www.ihlresearch.org](http://www.ihlresearch.org)> (last accessed 24/11/2004).

<sup>202</sup> The request of the Advisory Opinion formulated by the General Assembly reads: "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?"

Charter, was the main legal argument relied on by Israel at the international level.<sup>203</sup> One may therefore wonder why the Court did not analyse the right to self-defence as a possible legal justification detached from the international law of occupation. Indeed the Court referred to self-defence in previous decisions, apparently not as a circumstance precluding wrongfulness with reference to violations of the *jus in bello*, but as moral-legal justification of the “battle against a furious wave of terrorism”.<sup>204</sup>

It is submitted that in the present case the HCJ did not refer to self-defence simply because, in line with the legal qualifications of the facts that it provided for, it did not need to do so. When the Court referred to the right of Israel to defend its citizens and its territory, it constantly derived that right from international humanitarian law and, precisely, from the concept of military necessity in the form of security reasons. The High Court interpreted the right of the State to defend itself and its citizens as a corollary of military necessity, as an integral part of international humanitarian law.<sup>205</sup> That approach implies that self-defence is contained in the scope of the concept of military necessity and cannot derogate further to the norms of international humanitarian law. Relying on an extremely flexible interpretation of the concept of military necessity, interpreted more as an authorising principle than as a derogation clause, the Court did not need to have recourse to a circumstance precluding wrongfulness under general international law.<sup>206</sup> Nevertheless, as has been seen before, while finding the decision to build the Barrier legal in principle under international humanitarian law, the Court regarded the route of the Barrier as a violation of the principle of proportionality. One may therefore think that self-defence could have provided a legal justification for such a conduct, on the assumption that the requirement of proportionality under the relevant norms of international humanitarian law is not coincident with proportionality as a limit to the right to self-defence.<sup>207</sup>

From a theoretical point of view and for entirely different reasons, we regard as correct the choice of avoiding any reference to self-defence as a circumstance precluding wrongfulness. Three legal arguments may preclude reference to self-defence in the case at issue.

<sup>203</sup> See Statement of Ambassador Gillerman, *supra*, note 15, 6.

<sup>204</sup> *Almandi v. The Minister of Defense*, HCJ 3451/02, quoted in *Physicians for Human Rights, supra*, note 6.

<sup>205</sup> The Government of Israel explicitly maintained that action in self-defence is to be considered a military need in the sense of international humanitarian law in *Hamoked v. The Government of Israel et al.*, HCJ 9961/03, Respondents’ Response to Application for Temporary Injunction, para. 17, at: <[www.hamoked.org](http://www.hamoked.org)> (last accessed 10/07/2004).

<sup>206</sup> Actually, one could take the view that the Court had recourse implicitly to the concept of self-defence incorporating its content in the body of international humanitarian law. According to this line of reasoning, one might also argue that, avoiding any explicit reference to the concept of self-defence, the Court refrained from analysing the facts of the issue with reference to the legal limits of self-defence, namely proportionality with the attack, immediacy, and respect of *jus cogens*.

<sup>207</sup> On the different scope of proportionality in international humanitarian law and with reference to self-defence, see Venturini, *supra*, note 90, 33, 160-165.

Firstly, one has to consider that according to art. 51 of the UN Charter and to the prevailing interpretation so far, self-defence is only applicable to inter-state disputes. Such an approach has been considered formalistic and is said to derive more from the decision of the ICJ in the *Nicaragua* case than from legal constraints to be found in the text of art. 51.<sup>208</sup> Recent Security Council resolutions have established an explicit link between non-state terrorism and self-defence. It is not clear, however, whether such resolutions reflect state practice in general terms or are limited to the circumstances of the case.<sup>209</sup> In this respect, in view of the massive scale and impact of the September 11 attacks, it is highly doubtful that the present acts of terrorism in Israel could be considered as an armed attack in the sense of art. 51 of the UN Charter.<sup>210</sup>

Secondly, self-defence, being a necessary corollary of the prohibition of the use of force in international relations, only concerns forcible measures.<sup>211</sup> Non-forcible measures, as the construction of a defensive-preventive structure, could be regarded as countermeasures but fail to meet the requirements of a forcible reaction.

Thirdly and most importantly, self-defence concerns the *ius ad bellum* and, as such, cannot preclude the wrongfulness of measures violating the *ius in bello*.<sup>212</sup> The principle of equality in international humanitarian law requires that no *ius ad*

<sup>208</sup> Higgins, Separate Opinion, para. 33.

<sup>209</sup> The doctrinal debate on the point is increasingly extensive, see: Franck, Terrorism and the Right of Self-defence, 85 *American Journal of International Law* 4 (2001), 839-843; Condorelli, Les Attentats du 11 Septembre et leurs suites: où va le Droit international?, 105 *Revue générale de droit international public* 1 (2001), 829-848, at 835-836; Abi Saab, The Proper Role of International Law in Combating Terrorism, 1 *Chinese Journal of International Law* 1 (2002), 305-313; Cassese, Terrorism is also Disrupting some Crucial Legal Categories, 12 *European Journal of International Law* 5 (2001), 993-1001; Delbrück, The Fight against Global Terrorism: Self-Defence of Collective Security as International Police Action, 44 *German Yearbook of International Law* (2001), 9-24; Paust, Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions, 79 *Notre Dame Law Review* 4 (2004), 1335-1364; Wolfrum, The Attack of September 11, 2001, the Wars against the Taliban and Iraq. Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?, 7 *Max Planck Yearbook of United Nations Law* (2003), 1-74. See also: Buergethal, Separate opinion, 3.

<sup>210</sup> "Mega-terror attacks" have never happened in Israel so far. On the issue, see Israel Written Statement, 49-50.

<sup>211</sup> Higgins, Separate Opinion, para. 35. On defensive armed reprisals, see Dinstein, War, Aggression, and Self-Defence, 194-203.

<sup>212</sup> On the separation between *Ius in bello* and *Ius ad bellum*, see para. 5 of the Preamble of the First Additional Protocol of the Geneva Conventions: "Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, *without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties of the conflict*" (emphasis added). Cf. Condorelli/Naqvi, The War against Terrorism and Jus in Bello: Are the Geneva Conventions Out of Date?, in: Bianchi (ed.), *supra*, note 6, 25 et seq. With reference to Self-Defence in the Advisory Opinion of the ICJ, see Scobbie, *supra*, note 5, 1129-1130. With reference to recent trends towards revision of International Humanitarian Law to address the "terrorist threat", see Rafter, Revising the Geneva Conventions to Regulate Force by and against Terrorists: Four Fallacies, 7 *Israel Defence Forces Law Review* 1 (2003), 10-12.

*bellum* arguments be relevant in the interpretation and application of the *ius in bello*. The principle lies at the basis of the whole body of international humanitarian law. Admitting that questions concerning the legality of the recourse to armed force could influence the application of the norms regulating hostilities and occupation would bring them to collapse. All the parties to the conflict would inevitably claim the legality of their resort to war in order to have a free hand in the conduct of hostilities.<sup>213</sup>

## 2. The Right to Self-Determination

It is widely recognised in the international community that the Palestinians constitute a people under foreign domination entitled to exercise self-determination.<sup>214</sup> Several resolutions of the General Assembly and of the Security Council are relevant in this respect.<sup>215</sup> Moreover, it has been pointed out that Israel itself has recognised the existence of the Palestinian people<sup>216</sup>, and possibly their right to self-determination.<sup>217</sup>

Self-determination finds its legal basis both in international treaty law and in customary law.<sup>218</sup> It represents one of the main legal arguments in the Advisory

<sup>213</sup> Dinstein, *supra*, note 107, 4-5.

<sup>214</sup> A whole body of General Assembly and Security Council resolutions confirms that the Palestinians are a people entitled to self-determination achieving independence in a separate State. The two-state option was regarded as the solution of the Arab-Israeli conflict since 1947 (see GA Resolution 181 of 29 November 1947, which called for the establishment of two independent states, one Arab, one Jewish). See also, more recently, SC Resolution 1397 of 2 March 2002; GA Resolution 54/152 of 17 November 1999. Cf. Casese, Self-determination Revisited, in: Rama Montaldo (ed.), *El derecho internacional en un mundo en transformación – Liber amicorum en homenaje al Profesor Eduardo Jiménez de Aréchaga*, Montevideo 1994, 238; Drew, *supra*, note 185, 146-154.

<sup>215</sup> Cf., *inter alia*, GA Res. 2535B (XXIV); GA Res. 2672 C (XXV).

<sup>216</sup> Cf. Malanczuk, Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law, 7 *European Journal of International Law* 4 (1996), 485-500.

<sup>217</sup> One could argue that the language of GA resolution 273, admitting Israel to the United Nations, explicitly recalled resolution 181 and therefore made Israel admission conditioned to the recognition of the right of the Arabs to achieve self-determination in an independent state. Cf. Arab League Written Statement, para. 8.11. The thesis is debatable in that reference to resolution 181/1947 was made in the preamble. It is to be noted that Israel undertook to respect the territorial integrity of the West Bank and Gaza as a single territorial unit in the Oslo accord, although the issue of independent Palestinian statehood is not raised explicitly (see note 219 below, cf. Falk, Some International Law Implications of the Oslo/Cairo Framework for the PLO/Israeli Peace Talks, in: Bowen, *supra*, note 119, 17-19). However one of the explicit aims of the road map is “the emergence of an independent, democratic and viable Palestinian State living side by side in peace and security with Israel and its other neighbours”.

<sup>218</sup> The main conventional legal basis is common art. 1 of the ICCPR and the ICESCR, stating, *inter alia*, that all peoples have the right to freely determine their political status. As for the customary nature of the right to self-determination several resolutions of the General Assembly are relevant. Cf. Resolution 1514 of 14 December 1960 (Declaration on the granting of independence to colonial countries and peoples); Resolution 2625 of 25 October 1970 (Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations).

Opinion of the International Court of Justice with reference to the illegality of the Barrier. However, as one of the separate opinions highlighted, the constituting elements of a violation of the right to self-determination are difficult to ascertain.<sup>219</sup> When exactly is the right to self-determination violated? The answer is not an easy one, especially considering that the objective of the right is ascertainable but that international law does not discipline the process to achieve self-determination.<sup>220</sup> It is submitted that the Barrier might be considered in conflict with the Palestinian people right to self-determination under two perspectives, both are related to the essential elements of the right at issue. One is the integrity of the territorial unit in which the right is to be exercised and the other is the existence of a people entitled to claim the right.

Under the first perspective one might regard the Barrier as a permanent or long-term structure and take the view that it affects at least the extension of the territorial unit on which the Palestinian people are entitled to exercise their right to self-determination. In this respect two different approaches are possible.

According to the first one, one might consider that the Palestinians developed during the occupation the right to self-determination with respect to a precise territorial unit: the territory delimited by the green line and the frontier with Jordan, together with the Gaza Strip.<sup>221</sup> The mere trespassing of the Barrier – as a permanent structure – in the territorial unit described above would constitute a violation of the right to self-determination.

On the other hand, one may submit that while the Palestinian people have a right to self-determination, the territorial unit on which that right should be exercised is not defined yet. Building the Barrier in the occupied Palestinian territory would not *per se* violate the right to self-determination unless the Barrier interfered with the territorial continuity or the size of the territorial unit in such a way as to render the exercise of the right to self-determination impossible.<sup>222</sup> According to

<sup>219</sup> Ko o i j m a n s, Separate opinion, para. 32.

<sup>220</sup> C a s s e s e, *supra*, note 214, 238. As concerns the situation at issue, there is a wide consensus in the international community on the content of the Palestinian right to self-determination as a right to establish independent statehood. Since the UN partition plan of 1949, through the Oslo Accords and to the Road Map, the two-state solution has been the thread of the efforts of the international community to put an end to the Arab-Israeli conflict. See also note 215 above.

<sup>221</sup> See art. IV, Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Washington, September 13, 2003, I.L.M. (1993), 1525 et seq., 1528, which reads: “the two sides view the West Bank and the Gaza Strip as a single territorial unit whose integrity will be preserved during the interim period”. In a recent decision concerning orders of assigned residence from the West Bank to the Gaza Strip (*Ajuri* case, *supra*, note 6, para. 22), the HCJ affirmed that: “from a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit”.

<sup>222</sup> The UN Special Rapporteur John D u g a r d seems to follow the same approach: “A people can only exercise the right of self-determination within a territory. The amputation of Palestinian territory by the Wall seriously interferes with the right of self-determination of the Palestinian people as *it substantially reduces the size of the self-determination unit (already small) within which that right is to be exercised*” (emphasis added) quoted in Written Statement of the Arab League, 64. With reference to the “bantustan-ization” of the self-determination unit, see D r e w, *supra*, note 185, 151.

this approach, a substantial trespassing, leading to the questioning of the existence of any territorial unit, or at least any territorial unit capable to become a State for the Palestinian people, would constitute a violation of the right to self-determination.

As concerns the second necessary element of the right to self-determination, one might consider that the adverse consequences deriving from the Barrier might force the Palestinians to leave the area thus putting into risk the very existence of a people. From a theoretical point of view, the Barrier might infringe the right to self-determination irrespectively of its permanent effects on the territorial unit and of its permanent nature. The Barrier might be seen as a measure that contributes to the deportation of the persons entitled to exercise the right to self-determination. As has been seen, that is primarily a violation of the provisions of international humanitarian law aiming to avoid demographic changes in the occupied territory.<sup>223</sup>

Being universally recognised in the international community as a customary right, the right to self-determination is technically also part of the Israeli legal system. The lack of internal acts of incorporation of the relevant conventional law does not exempt the High Court from considering the application of the norm at issue. Nevertheless, putting forward a tentative explanation of the absence of any reference to self-determination in the decision at hand does not seem a difficult task. Several reasons might justify the Court’s approach.

The first regards the scope of the present decision, which unlike the Advisory Opinion of the ICJ, is not explicitly related to the legality of the Barrier as a whole. The petitioners only attacked the legality of a limited sector of the Barrier and of the relevant orders of requisition. Although every single order of seizure might be interpreted as a contribution to the infringement of the right to self-determination, only the examination of the entire route could effectively highlight the effects of the Barrier on the territorial unit. In this respect it is to be noted that, at least in the part of the decision regarding the authority to construct the Barrier, the Court did not refrain from dealing with legal arguments on the legality of the Barrier as a whole (with regards to the prohibition of annexation).

Nevertheless, in previous decisions, the Court constantly refrained to exercise its judicial review as concerns general policies of the Government in the occupied territories. While refraining from adopting the common law doctrine of justiciability, the Court might not be ready to review an administrative act as long as a precise violation of an individual’s right does not come into question.<sup>224</sup> Being self-determination a collective right of the Palestinian people and not of individuals, it is highly doubtful that individual Palestinian landowners or village councils have *locus standi* in this respect before the Israeli High Court. Both should stay in Court on behalf of their people and argue that their right to self-determination is being violated by each single order of seizure.

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<sup>223</sup> See subsection V.D.1. above.

<sup>224</sup> Cf. K r e t z m e r, *supra*, note 1, 22-24.

To the contrary, once the administrative act infringes their right to property or their human rights, the individuals affected might be entitled to challenge its validity on the grounds that the act is motivated by improper purposes, such as annexation. As has been seen, the Court is ready to accept in general terms that annexation is not a valid justification for the adoption of a requisition order.<sup>225</sup> Yet it would be quite difficult to consider also the violation of self-determination as a purpose of the orders of requisition, instead of a mere consequence of those acts.

Secondly, one must take into account the analysis of the facts. In order to exclude the assertion of the right to self-determination, the Barrier should be conceived as a permanent, or long-term, structure creating facts on the ground. If one admits that the Barrier can be removed (and that the Government is ready to do that, would the reasons that lie at the basis of the construction be no more relevant), the infringement of the right to self-determination would not be possible, at least under the perspective of the infringement of the integrity of the territorial unit. Analysing the military commander's authority with regards to the connected issue of the prohibition of annexation, the Court clearly regarded the Barrier as a non-permanent structure in line with the official position of the Israeli Government. Once annexation is ruled out, it is really difficult to qualify the same facts as an infringement of self-determination.

As concerns the effects of the Barrier on the demographic structure of the area, it has already been pointed out that the relevant provisions of the Fourth Geneva Convention were ignored. It is moreover to be noted that the Court limited its judicial review on the consequences of the Barrier to the effects connected to the position of the landowners and the farmers and avoided to evaluate indirect and long-term consequences. From this starting point, if one considers that even the effects on the right to education and the right to health have been scarcely examined, it is not difficult to understand why the overall consequences on the Palestinian people were not taken into consideration.

The last reason is primarily political. The language of the present and the previous decisions in general makes it abundantly clear that the HCJ regards itself as a part of a society under attack.<sup>226</sup> Under these conditions, only a revolutionary court might have voided a single order of seizure – an element of the construction of an allegedly defensive measure – on the grounds that it infringes upon ... the Palestinian people's right to self-determination. In light of what has been said, it is no wonder that the HCJ never referred to self-determination of the Palestinians in its decisions concerning the occupied territory. One might take the view that a certain degree of naïveté is needed in order to analyse, although theoretically, the facts of the present decision with reference to the right to self-determination. Nevertheless, it seems to the present writer that the complexity of the framework of the international norms applicable to the case had to be pointed out.

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<sup>225</sup> See subsection V.C.2. above.

<sup>226</sup> For an overview of recent decisions of the HCJ concerning security issues, see Navot, *The Supreme Court of Israel and the War against Terror*, 9 *European Public Law* 3 (2003), 323-333.



## VI. Concluding Remarks

As often happens in complex legal questions, there is no single provision assessing unambiguously the legal status of the erection of a Barrier in a territory under belligerent occupation. The legal qualification of the facts is to be found through the application of different provisions and, eventually, by having recourse to different legal sources. In this respect it has been noted that, despite explicitly affirming that international law constitutes the basis of the present decision, the Court ignored a substantial part of the norms applicable to the case and paid mere lip service to some others. While reference to self-determination and to self-defence was somewhat problematic and perhaps legally unfeasible, other provisions of international humanitarian law were set aside apparently without motivation.

The provisions that were considered applicable were grouped (in a “single tapestry”) and their essence distilled and reduced to a conflict between values: the conflict between humanity and security. Then the Court freely applied the principle of proportionality and, in line with the limits and the nature of its judicial review, focussed on the assessment of the relationship between military advantages and humanitarian damages. In general terms – especially with reference to the requirements of military necessity – the Court downplayed the importance of rules, refraining from a detailed legal analysis of each clause and preferring the realm of principles, where the balancing approach can be employed without constraints.

Nevertheless, while taking somewhat for granted the existence of the formal authority to build the Barrier, the Court carefully examined the proportionality of the measure adopted and developed a general framework to assess the legality of the whole route. The core of the judgement is the application of the test of proportionality in the narrow sense to a single feature of the Barrier: its route. As has been pointed out, the criteria referred to in the present decision are applicable to all the other sectors of the Barrier and focus on the situation of landowners and farmers, requiring the Government to minimise the damage.

From a political point of view, the approach is comprehensible. One should consider that the Court was fully aware that the Israeli society supports the construction of the Barrier.<sup>227</sup> In a context where terrorism is perceived as a direct threat to the existence of the State itself, a judicial decision sanctioning frankly the illegality of the Barrier might have been unfeasible in light of the reactions to it. Realistically, the Court took a middle position which aims to limit the effects of the measure on the population. In this respect it is to be noted that the Government of Israel re-evaluated the whole route of the Barrier after the present deci-

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<sup>227</sup> Cf. the closing paragraph of the decision: “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 the terror against the State and its citizens. *As any other Israelis, we too recognise the need to defend the country and its citizens against the wounds inflicted by terror (...)*” (emphasis added), HCJ 2056/04, 44.

sion.<sup>228</sup> The outcome of the process is not yet clear, but it seems that the Government focussed on increasing the number of gates and passages rather than on major changes to the route.<sup>229</sup> The Prime Minister publicly stated that the incorporation of the Ariel settlement, which is situated 22 km inside the green line, is not under review.<sup>230</sup> On the whole, one might think that the difference between a decision affirming the lack of the authority to build the Barrier (or some sectors of it) and the application of the proportionality rule to its route is not a minor one.

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<sup>228</sup> Benn/Yoaz/Regular, Sharon orders illegal sections of fence rerouted, (Haaretz article, 2/07/04) at: <[www.haaretz.com](http://www.haaretz.com)> (last accessed 13/09/04); Office for Coordination of Humanitarian Affairs, Beit Sourik: Re-routing the Barrier and its Humanitarian Impact, 23 July 2004.

<sup>229</sup> Benn, *supra*, note 13 and *ibid.*, New Plan for Separation Fence Route Nearing Completion, (Haaretz article, 19/07/04) at: <[www.haaretz.com](http://www.haaretz.com)> (last accessed 13/09/04). The new plan for the route of the Barrier was adopted on 25 February 2005. Substantial sectors of the route, however, are still under discussion. The map is available at: <[www.seamzone.mod.gov.il](http://www.seamzone.mod.gov.il)> (last accessed 24/05/2005).

<sup>230</sup> Benn, PM: Fence to Include Ariel, Ma'aleh Adumim, Gush Etzion Bloc, (Haaretz article, 09/09/04) at: <[www.haaretz.com](http://www.haaretz.com)>, (last accessed 13/09/04).