

*

Specific route of the Fence requiring the taking into account of the needs of the local population; military commander's authority to ensure security in the area and to protect the security of his country must be exercised by properly balancing it by the need to ensure the normal life of the local population; Regulation 46 of the Hague Regulations Article 27 of the Fourth Geneva Convention imposing a double obligation upon the military commander: a negative duty to refrain from harming local inhabitants, and a "positive" duty to ensure that they are not harmed; the criterion for balancing between security considerations and the need to ensure the normal life of the local population is the principle of proportionality, which balances a legitimate objective with the means for its achievement; principle of proportionality based on three sub-tests: the "appropriate" or "rational" means test, the "least injurious means" test, and the "proportionate means" test; examination of the Fence's route according to proportionality tests; cancellation of seizure orders on the ground that the relationship between the harm to the local inhabitants resulting mainly from their separation from their lands and the security benefit from the construction of the Fence, is not proportionate; military commander must consider alternatives which, even if resulting in a lower level of security, will cause a substantial reduction of damage to local inhabitants.

VII. H.C. 2056/04, Beit Sourik Village Council v. 1) Government of Israel, 2) IDF Commander in the West Bank

Not yet published.

Legality of seizure of private lands in an Occupied Territory for the building of a fence between it and the Occupying State as a means for fighting terror; authority of a military commander in an area under belligerent occupation deriving from international law regarding belligerent occupation; applicability of basic principles of Israeli administrative law; illegality of building a separation fence for political reasons, for "annexation" of territories or for drawing a political border; permanent projects in an area under belligerent occupation allowed only if motivated by military reasons, or by reasons of welfare of the local population; duty of balancing between the needs of the occupying army on one hand, and the needs of the local inhabitants on the other; erection of the Separation Fence motivated by genuine security considerations; legality of seizure of private land for the needs of the occupying army, while taking into account the needs of the local population; construction of the Fence permitted by international law because based on security grounds of physically blocking terrorist infiltration into Israeli population centers.

This is a comprehensive judgment on the question of legality of seizure of lands in the Judea and Samaria Region, on the West Bank (hereinafter: the Region) for the purpose of erecting a barrier or a separation fence between the Region and Israel (hereinafter: the Fence). The judgment – delivered after seven hearing sessions – rules on the questions of legality of the seizure orders, of building a fence in an Occupied Territory and of the route of the Fence.

The main opinion in the judgment was delivered by Barak J.P., who was joined by Mazza J. and Cheshin J., so that his opinion became the unanimous judgment of the Supreme Court sitting as the High Court of Justice.

*

a) Background for the Erection of the Fence and for the Petition

Barak J.P. opened his judgment by describing the factual situation which served as the background for the erection of the Fence:

Since 1967, Israel has been holding the Judea and Samaria Region under belligerent occupation. In 1993 Israel began a political process with the PLO, during which a number of agreements were signed, transferring control over parts of the Region to the Palestinian Authority. Israel and

the PLO continued political negotiations in an attempt to solve the remaining problems. The negotiations, whose final stages took place at Camp David in Maryland, USA, failed in July 2000.

Shortly after the failure of the Camp David talks, the Israeli-Palestinian conflict reached new heights of violence. As of September 2000, the Palestinians launched a heavy terrorist attack against Israel and Israelis. Terrorist attacks take place both in the Region and in Israel. They are directed against civilians and soldiers, men and women, elderly people and children, private citizens and public figures. Terrorist attacks are carried out everywhere, including public transport, shopping centers and markets, coffee houses and restaurants. Terrorist organizations use various means: gunfire attacks, suicide attacks, rocket fire, and car bombs. From September 2000 until the beginning of April 2004, more than 780 attacks were carried out within Israel, and more than 8200 attacks in the Region.

The armed conflict took (as of April 2004) the lives of 900 Israeli citizens and residents. More than 6000 were injured, some with serious wounds who remain severely handicapped. The armed conflict caused many dead and wounded on the Palestinian side as well.

Barak J.P. continued by describing the security situation, as already presented in H.C. 7015/02:³³

Israel's fighting is complex. The Palestinians use, among other things, human bombs. These suicide bombers reach every place where Israelis are found (within the boundaries of the State of Israel and in the Jewish settlements in Judea and Samaria and the Gaza Strip). They sow destruction and spill blood in the cities and settlements. The forces fighting against Israel are terrorists. They are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the Region, including inside Holy Sites; they are supported by part of the civilian Palestinian population in general, and by their families and relatives in particular.

Struggling against the Palestinian terror, the Government of Israel adopted decisions on erecting a Separation Fence on the "Seam Area" between Israel and the Region, in order to prevent the penetration of terrorists from Judea and Samaria into Israel. It was decided that the Fence will be erected in three

regions that were most vulnerable to the passage of terrorists into Israel: the Umm El-Fahm region; the Qalqilya-Tulkarm region; and the Greater Jerusalem region – altogether stretching 116 km.

The Government decisions relating to erection of the Fence stressed that "the Fence, like the other obstacles, is a security measure for the prevention of terrorist attacks and its construction does not mark a national border or any other border". These decisions also stated that "every effort shall be made to minimize, to the greatest extent possible, the disturbances to the daily lives of the Palestinians due to the construction of the obstacle".

Where the Fence is erected on private lands, the lands are seized from their owners pursuant to orders of seizure issued by the IDF Commander in the West Bank (Respondent 2). The present petition was submitted by several Palestinian villages and their inhabitants, against whom land seizure orders were issued for the construction of the Fence. It related to eight seizure orders issued for construction of a portion of about 40 kilometers of the path of the Fence, located west and northwest of Jerusalem.

b) Arguments of the Parties

The petitioners claimed that they are severely injured by the land seizure orders because over 42,000 dunams of their lands are affected. The Fence will separate the petitioners from more than 37,000 dunams of land, 26,500 of which are agricultural lands that have been cultivated for generations. Access to these agricultural lands will become difficult and even impossible. The petitioners' ability to go from one place to another will depend on a permit. Use of local water wells will not be possible and access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted. The Fence will separate villages from tens of thousands of additional trees. The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. The lives of 35,000 village inhabitants will be disrupted because the access roads to urban centers will be blocked off. Access to medical and other services in East Jerusalem and in other places will become impossible. Ambulances will encounter difficulty in providing emergency services to residents. Children's access to schools in the urban centers, and that of students to universities, will be impaired.

The petitioners argued that the seizure of lands for the purpose of erecting the Fence is illegal both under Israeli administrative law and under international law. Were the Fence constructed along Israel's border, it would be quite legal. But the route of the Fence passes through areas of Judea and Samaria, and it in fact annexes areas to Israel, which is contrary to international law. The petitioners further argued that all these injuries to the

³³ Excerpted in 33 *Israel Y.B. Hum. Rts.* 249 (2003).

local inhabitants cannot be justified by military and security considerations; and that these injuries do not fulfill the requirements of proportionality.

Replying to the petitions, the respondents stressed that Israel faces a wave of terror, supported by the Palestinian population and leadership. At issue are the lives of citizens of Israel, who are threatened by terrorists who infiltrate Israel from the Region. At issue are also the lives of Israeli citizens residing in the Region, on the West Bank. The Fence has already proved its efficacy in areas where it has been erected. The central consideration in choosing the route of the Fence was the operational-security consideration. The purpose of the Fence is to prevent the uncontrolled passage of residents of the Region into Israel and into Israeli towns located in the Region.

The respondents contended that in planning the route of the Fence, great weight was given to the interests of the residents of the Region, in order to minimize, to the extent possible, the injury to them. An effort is being made to build the Fence on property that is not privately owned or agriculturally cultivated; consideration is given to the existing planning schemes of Palestinian and Israeli towns; an effort is being made to refrain from cutting lands off from their owners. In the event of such a cutoff, agricultural gateways will allow farmers access to their lands. New roads will be paved which will provide for the needs of the residents. In cases where damage cannot be avoided, landowners will be compensated for the use of their seized lands. Efforts will be made to transfer agricultural crops instead of cutting them down.

The respondents declared that they are ready to change the route of the Fence in order to minimize the damage to local residents. They also declared that permanent checkpoints will be erected, which will be open 24 hours a day, every day of the year, which will allow the preservation of the fabric of life in the area. All this, argued the respondents, amounts to a proper balance between considerations for the welfare of inhabitants of the Region and the need to protect the lives of the Israeli population.

c) The Normative Framework

The main points in the judgment of Barak J.P. ruled under this heading may be presented as follows:

1. The point of departure is that Israel holds the Region in belligerent occupation.³⁴ In the areas under discussion, a military administration, headed

³⁴ See H.C. 619/78, excerpted in 10 *Israel Y.B. Hum. Rts.* 333 (1980); H.C. 69/81, excerpted in 13 *Israel Y.B. Hum. Rts.* 348 (1983); H.C. 606/78, excerpted in 9 *Israel Y.B. Hum. Rts.* 337 (1979); H.C. 393/82, excerpted in 14 *Israel Y.B. Hum. Rts.* 301 (1984).

by a military commander, continues to apply.³⁵ The authority of the military commander derives from the rules of international law regarding belligerent occupation. These rules are formulated principally in the 1907 Hague Regulations Concerning the Laws and Customs of War on Land (hereinafter: the Hague Regulations). The Regulations reflect customary international law. In addition to the Hague Regulations, the Military Commander's authority is also anchored in the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (hereinafter: the Fourth Geneva Convention). The question of the applicability of the Fourth Geneva Convention does not arise in the petition because the respondents agree that the humanitarian rules of the Convention apply to the petitions.³⁶

2. Together with the rules of international law, "the principles of the Israeli administrative law regarding the use of governmental authority by a public servant" apply to the Military Commander. Hence, he is subject to the norms of substantive and procedural fairness (such as the right to have arguments heard before expropriation, seizure, or other governmental actions), to the obligation to act reasonably, and to the norm of proportionality.³⁷ As the Court has already ruled in the past, "[e]very Israeli soldier carries, in his backpack, the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law".

3. This petition raises two separate questions: the *first* is whether the Military Commander in the Judea and Samaria Region was authorized, by virtue of the law applicable to him, to construct the Separation Fence in the Region? If an affirmative answer is given to this question, the *second* question arises, concerning the actual track or route of the Separation Fence.

d) Authority to Erect the Separation Fence

4. Replying to the Petitioners' claim that the decision on construction of the Fence was founded upon political – and not military – considerations, Barak J.P. stated as follows:

We accept that the military commander cannot order the construction of the Separation Fence if his reasons are political. The Separation Fence

³⁵ Cf. H.C. 2717/96, excerpted in 30 *Israel Y.B. Hum. Rts.* 330 (2003) (application of the military administration in "Area C").

³⁶ See H.C. 698/80, excerpted in 11 *Israel Y.B. Hum. Rts.* 349 (1981); H.C. 393/82, *supra* note 37; H.C. 7015/02, *supra* note 33; H.C. 3278/02, excerpted in 34 *Israel Y.B. Hum. Rts.* 293. See also M. Shamgar, "The Observance of International Law in the Administered Territories", 1 *Israel Y.B. Hum. Rts.* 262 (1971).

³⁷ See H.C. 69/81, *supra* note 31; H.C. 591/88, excerpted in 23 *Israel Y.B. Hum. Rts.* 300 (1993); H.C. 7015/02, *supra* note 33.

cannot be motivated by a desire to "annex" territories to the State of Israel. The purpose of the Separation Fence cannot be to draw a political border.

5. In H.C. 390/79,³⁸ the Court discussed the question of whether it is lawful to seize land in order to build a Jewish civilian settlement therein, when the purpose of the settlement is not the security needs and defence of the area, but rather a Zionist objective of settling the land of Eretz Israel, including Judea and Samaria. This question was answered by the Court in the negative. In the words of Landau J.V.P.:

The view regarding the right of the Jewish people ... is based upon Zionist ideology. However, the question before this Court is whether this ideology justifies the seizure of private property in an area under military government. The answer to that depends upon the interpretation of Article 52 of the Hague Regulations. It is my opinion that the "needs of the army" mentioned in that Article cannot include, by way of any reasonable interpretation, national security needs in a broad meaning of the term.

6. In the same spirit, Barak J.P. held in the H.C. 393/82³⁹ that the Military Commander is not allowed to consider the national, economic, or social interests of his State. Therefore:

The military government is not allowed to plan and execute a road system in an area held in belligerent occupation, if the only objective of this project is to serve the needs of his State. Such a project in an Occupied Territory can be done for military reasons ... or for reasons of the welfare of the local population, and not in order to serve the Occupying State.

7. The Military Commander of territory held in belligerent occupation must balance between the needs of the army on one hand, and the needs of the local inhabitants on the other. In the framework of this delicate balance, there is no room for additional considerations, such as political considerations, annexation of territory, or establishment of permanent borders of the State. The authority of the Military Commander is inherently

temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not within the competence of the Military Commander.

Indeed, the belligerent occupation of the Region is a prolonged one, and this fact affects the scope of the military commander's authority. Yet the passage of time cannot extend the authority of the Military Commander and allow him to take into account considerations beyond the proper administration of the area under belligerent occupation.

8. The evidence presented to the Court leads to the conclusion that the decision on erection of the Fence was motivated by security reasons. The Government decisions concerning the construction of the Fence emphasized that the Fence is a security measure for the prevention of terrorist attacks; and that its construction does not express a national, political, or any other border. In addition, Respondent 2 stated in his affidavit that the objective of the Security Fence is to help cope with the Palestinian terror by preventing the unchecked passage of inhabitants of the Region into Israel. In the opinion of Barak J.P., "these are genuine security considerations". Respondent 2 also testified that the topographic route of the Fence was based exclusively on security considerations, and that "it is not a permanent Fence, but rather a temporary Fence erected for security needs". Barak J.P. held that the Court does not have any reason not to give the testimony of Respondent 2 full weight, and not to believe in his sincerity. Moreover, during the hearing of the petition, the route of the Fence was altered in several locations, which proves that its objective is not political but rather based solely on security considerations.

9. Barak J.P. rejected the Petitioners' argument that the seizure of private land for construction of the Fence is illegal. The Court found no defect in the process of issuing the orders of seizure, or in the process of granting the opportunity to appeal against them. Relying on Articles 23(g) and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention, the Court already ruled in the past that the military commander is authorized to take possession of land in an area under belligerent occupation, if this is necessary for the needs of the army. Of course, he is obliged to pay compensation for his use of the land.

10. Barak J.P. affirmed that on the basis of the provisions of the Hague Regulations and the Fourth Geneva Convention, the Court has recognized in the past the legality of land and house seizure for various military needs, such as: the construction of military facilities;⁴⁰ the paving of detour roads;⁴¹ the building of fences around outposts;⁴² the temporary housing of soldiers;⁴³

³⁸ Excerpted in 29 *Israel Y.B. Hum. Rts.* 345 (1979).

³⁹ *Supra* note 34.

⁴⁰ H.C. 834/78, excerpted in 10 *Israel Y.B. Hum. Rts.* 330 (1980).

⁴¹ H.C. 202/81, excerpted in 13 *Israel Y.B. Hum. Rts.* 364 (1983).

⁴² H.C. 24/91, excerpted in 23 *Israel Y.B. Hum. Rts.* 337 (1993).

the ensuring of unimpaired traffic on the roads of the area;⁴⁴ the construction of civilian administration offices; the seizure of buildings for the deployment of a military force. Regarding all these acts, the military commander must consider the needs of the local population. Assuming that this condition is met, the military commander is authorized to take possession of land in areas under his control. The construction of the Fence falls within this framework. To the extent that construction of the Fence is a military necessity, it is permitted by international law. As already ruled, the Fence was erected on security grounds because it was intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers. Of course, the route of the Separation Fence must take into account the needs of the local population. Yet, the issue of the needs of the local population concerns the route of the Fence, and not the principal authority to erect it.

e) The Route of the Separation Fence

11. The focus of the present petition is the legality of the route chosen for the construction of the Fence, and not the authority to construct it in principle. Yet, it is not sufficient that the erection of the Fence be motivated by security considerations for its being legal. The military commander is not free to perform, in an area under belligerent occupation, every activity motivated by security considerations. He must act within the law of belligerent occupation. The law of belligerent occupation recognizes the authority of a military commander to maintain security in the area and to protect the security of his country and its citizens. However, this authority must be exercised by properly balancing it against the rights, needs, and interests of the local population. As stated by Dinstein:

The law of war usually creates a delicate balance between two magnetic poles: military necessity on one hand, and humanitarian considerations on the other.⁴⁵

12. Ever since the Six Day War, the Court has emphasized in its case-law that "together with the occupant's right to hold the territories, arises his duty to take care of the welfare of the population". The rights and duties of a military administration are defined, on one hand, by its own military needs

⁴³ H.C. 290/89, excerpted in 23 *Israel Y.B. Hum. Rts.* 323 (1993).

⁴⁴ H.C. 401/88, excerpted in 23 *Israel Y.B. Hum. Rts.* 296 (1993).

⁴⁵ Y. Dinstein, "Legislative Authority in the Administered Territories", 2 *Tel Aviv Univ. L. Rev.* 505, 509 (Hebrew, 1973).

and, on the other, by the need to ensure, as much as possible, the normal life of the local population.⁴⁶ In H.C. 393/82⁴⁷ Barak J.P. held, more than twenty years ago, that:

The Hague Regulations revolve around two main axes: one – the ensuring of the legitimate security interests of the holder of a territory held in belligerent occupation; the other – the ensuring of the needs of the local population in the territory held in belligerent occupation.

Subsequently, in H.C. 72/86,⁴⁸ Barak J.P. also held that:

In using their authority, respondents [Military Commanders] must consider, on one hand, security considerations and, on the other hand, the interests of the civilian population. They must achieve a balance between these different considerations.

In the same vein Barak J.P. ruled in H.C. 2977/91:⁴⁹

The obligation of the military administration, as defined in Regulation 43 of the Hague Regulations, is to preserve the order and the public life of the local population; and to do so by properly balancing between the interests of the population in the territory, and the military and security needs of soldiers and citizens present in the [Occupied] Territory.

13. The Court based its above-mentioned rulings on the humanitarian rules of international law, as reflected in Regulation 46 of the Hague Regulations and in Article 27 of the Fourth Geneva Convention. Regulation 46 of the Hague Regulations provides:

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Article 27 of the Fourth Geneva Convention provides:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and

⁴⁶ H.C. 256/72, excerpted in 5 *Israel Y.B. Hum. Rts.* 381 (1975).

⁴⁷ *Supra* note 34.

⁴⁸ Excerpted in 19 *Israel Y.B. Hum. Rts.* 371 (1989).

⁴⁹ Excerpted in 25 *Israel Y.B. Hum. Rts.* 330 (1995).

practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof However, 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.

As explained by the Court in H.C. 4764/04,⁵⁰ these provisions were founded upon the recognition of the human value and sanctity of human life.

14. Regulation 46 of the Hague Regulations and Article 27 of the Fourth Geneva Convention impose a double obligation upon the military commander: he must refrain from actions that injure the local inhabitants. This is his “negative” obligation. Also, he must take the required actions in order to ensure that the local inhabitants are not injured. This is his “positive” obligation. In addition to these fundamental provisions, there are additional provisions that deal with specifics, such as the seizure of land (Regulation 23(g) and 52 of the Hague Regulations; Article 53 of the Fourth Geneva Convention). These provisions recognize human rights and the needs of the local population, on the one side, as well as security needs of the military commander, on the other. If these norms are conflicting, a proper balance between them must be made.

f) Proportionality

15. A military commander of an area under belligerent occupation has to use his discretion by balancing between security and freedom. The criterion for balancing may be found in the principle of proportionality, which balances the legitimate objective with the means for achieving it. According to this principle, the freedom of the individual (in this case, the freedom of the local population in an area under belligerent occupation) can be limited in order to achieve a worthy purpose (in this case, security of the occupying State and its citizens, and of the occupied area itself), provided that the restriction is proportionate.

16. Proportionality is recognized as a general principle of positive international law.⁵¹ Proportionality also plays a central role in the international law of armed conflict. During such conflicts, there is often a

need to balance military needs with humanitarian considerations.⁵² As explained by Pictet,⁵³ Fenrick⁵⁴ and Gasser,⁵⁵ proportionality is a standard for balancing between military requirements and humanitarian law.

17. Proportionality is also a general principle of Israeli administrative law,⁵⁶ which applies to the acts of the military administration. Originally, it was a principle of Israeli case-law, but as from 1992 it became a constitutional principle enshrined in Section 8 of the Basic Law: Human Dignity and Freedom. The principle of proportionality applies to every act of the Israeli administrative authorities. It also applies to the use of the military commander’s authority under the law of belligerent occupation.

18. Application of the principle of proportionality as a standard restricting the authority of the military commander in the Occupied Territories has been recognized in the Court’s jurisprudence. Thus, for example, the Court examined, by use of the standard of proportionality, the authority of the military commander to perform certain actions, such as: to issue an order assigning a place of residence,⁵⁷ to establish checkpoints on roads in order to prevent terror;⁵⁸ to declare the Region as a “closed military area”;⁵⁹ to destruct houses for operational needs⁶⁰ and for deterrence purposes;⁶¹ to determine the living conditions of detained suspects in the area;⁶² to deny a meeting between a detainee and an attorney;⁶³ or to impose a siege of those hiding in Holy Places.⁶⁴

⁵⁰ H.C. 4764/04, excerpted in this Volume.

⁵¹ R. Higgins, *Problems and Process: International Law and How We Use It* 219 (1994); J. Delbrück, “Proportionality”, 3 *Encyclopedia of Public International Law* 1140, 1144 (1997).

⁵² J.G. Gardam, “Proportionality and Force in International Law”, 87 *Am. J. Int’l L.* 391 (1993); Y. Dinstein, “Military Necessity”, 3 *Encyclopedia of Public International Law* 395 (1997); A. Roberts, “The Laws of War in the War on Terror”, 32 *Isr. Y.B. Hum. Rts.* 193 (2002).

⁵³ J.S. Pictet, *Developments and Principles of International Humanitarian Law* 62 (1985).

⁵⁴ W.J. Fenrick, “The Rule of Proportionality and Protocol I in Conventional Warfare”, 98 *Mil. L. Rev.* 91, 94 (1982).

⁵⁵ H.P. Gasser, “Protection of the Civilian Population”, in *The Handbook of Humanitarian Law in Armed Conflicts*, *supra* note 24, at 220.

⁵⁶ See Z. Segal, “The Cause of Action of Disproportionality in Administrative Law”, *HaPraklit* 50 (Hebrew, 1990).

⁵⁷ H.C. 7015/02, *supra* note 36.

⁵⁸ H.C. 2847/03, not yet published; H.C. 2410/03, not yet published.

⁵⁹ H.C. 9293/01, excerpted in 32 *Israel Y.B. Hum. Rts.* 354 (2002).

⁶⁰ H.C. 4219/02, excerpted in 32 *Israel Y.B. Hum. Rts.* 379 (2002).

⁶¹ H.C. 5510/92, excerpted in 25 *Israel Y.B. Hum. Rts.* 347 (1995); H.C. 1730/96, excerpted in 29 *Israel Y.B. Hum. Rts.* 272 (1999).

⁶² H.C. 3278/02, excerpted in 34 *Israel Y.B. Hum. Rts.* 293 (2004); H.C. 5591/02, excerpted *ibid.*, 300.

⁶³ H.C. 3239/02, excerpted in 34 *Israel Y.B. Hum. Rts.* 307 (2002).

⁶⁴ H.C. 3451/02, excerpted in 32 *Israel Y.B. Hum. Rts.* 373 (2002).

g) The Meaning of Proportionality and its Elements

19. The principle of proportionality means that an administrative decision is lawful only if the means used to achieve its objective is of proper extent. It focuses on the relationship between the objective and the means used to achieve it. Both in international law as well as in Israeli law, the specific content of the principle of proportionality is based on three sub-tests:

- a) The first sub-test is that the objective must be related to the means. The means that the administrative body uses must be suitable to the objective that the administrative body wishes to achieve. The means used by the administrative body must rationally lead to the achievement of the objective. This is the “appropriate” or “rational” means test.
- b) The second sub-test provides that the means used by the administrative body must be such as to injure the individual to the least possible extent. In the variety of means that can be used to achieve the objective, the least injurious means must be chosen. This is the “least injurious means” test.
- c) The third sub-test requires that the damage caused to the individual by the means used by an administrative body must be of proper proportion to the advantage gained by that means. That is the “proportionate means” test (or proportionality “in the narrow sense”).

The test of proportionality “in the narrow sense” is commonly applied by directly comparing the advantage of the administrative act with the damage that results from it. But it is also possible to apply the test of proportionality “in the narrow sense” in a “relative manner”, meaning that the original administrative act is tested in relation to an alternate act, whose benefit will be smaller than that of the original one. Accordingly, the original act would be considered disproportionate in the narrow sense if a certain reduction in the advantage gained by the act due to employment of alternate means – ensures a substantial reduction in the injury caused by the act.

20. The means used by an administrative authority are proportionate only if all three sub-tests are satisfied. Satisfaction of one or two of these subtests is insufficient. All three of them must be satisfied simultaneously. Frequently, there are a number of ways by which the requirement of proportionality can be satisfied. In these situations, a “zone of proportionality” should be recognized (similar to a “zone of reasonableness”), so that all means chosen and falling within the “zone of proportionality” should be considered proportionate. As already ruled by the Court,⁶⁵ this meaning of the principle of proportionality (as based on the three sub-tests) applies to the exercise of authority by the military commander in an area under belligerent occupation.

⁶⁵ H.C. 7015/02, *supra* note 33.

h) Proportionality of the Route of the Separation Fence

21. The principle of proportionality applies to examination of the legality of the Fence. Its application is reflected in the Government’s decision that “during the planning, every effort shall be made to minimize, to the greatest extent possible, the disturbance to the daily lives of the Palestinians due to the construction of the obstacle”. As already stated, the Court reached the conclusion that the Fence is intended to realize a security objective that the military commander is authorized to achieve. However, the key question is whether the chosen route of the Fence is proportionate. Proportionality of the route of the Fence must be decided by three questions, which reflect the three sub-tests of proportionality:

- a) First, does the route pass the “appropriate means” test (or the “rational means” test)? The question is whether there is a rational connection between the route of the Fence and the goal of the construction of the Fence.
- b) Second, does it pass the test of the “least injurious” means? The question is whether, among the various routes which would achieve the objective of the Fence, the chosen one is the least injurious.
- c) Third, does it pass the test of proportionality in the narrow sense? The question is whether the Fence route injures the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit. According to the “relative” examination of this test, the route of the Fence chosen by Respondent 2 (original route) will be considered disproportionate if an alternate route is suggested, which although having a smaller security advantage, will cause significantly less damage than the original route.

i) The Scope of Judicial Review

22. The judicial review of the route of the Fence will be based on the assumption – which was not rebutted – that the Government decision to construct the Fence was motivated by security, and not political, considerations. Further, the Court will proceed on the assumption that the military commander fixed the route of the Fence on military considerations which, to the best of his understanding, are capable of realizing the security objective of the Fence. Also, the Court assumes that the military commander considers that the injury to local inhabitants is proportionate.

Relying on this factual basis, the Court will examine two questions:

- a) Whether the route of the Fence is well-founded from a military standpoint.
- b) Whether the route of the Fence is proportionate.

j) The Military Nature of the Route of the Separation Fence

23. This question deals with the military character of the route and it examines whether the route chosen by the military commander for the Fence achieves its stated objectives, and whether there is no route that achieves this objective better. The Court will not examine whether the military commander's military opinion corresponds to that of the Court. All it will determine is whether a reasonable military commander would have set out the route as this military commander did. As ruled by the Court the past, in exercising judicial review, the Court does not substitute the discretion of the commander with its own. Yet, the security of the State is not a "magic word" which makes judicial review disappear. The Court is not prevented from reviewing the decisions of the military commander simply because of the important security considerations underlying them. In such cases the Court examines the legality of the discretion of the military commander in order to ensure that his decisions fall within the "zone of reasonableness".

24. The petition is exceptional in that opinions were submitted by the Council for Peace and Security⁶⁶ on the military aspects of the Fence, which contradict those of Respondent 2. In this situation, the Court has to adopt the opinion of the military commander because he bears the responsibility for security. It has been the consistent approach of the Court that it must give special weight to the military opinion of the person who is responsible for security. In a dispute regarding military-professional questions, in which the Court has no knowledge of its own, the testimony of those actually responsible for the preservation of security benefit from the presumption that the professional reasons are sincere reasons. Rebuttal of this presumption requires very convincing evidence, which was not provided by the Petitioners. Consequently, the Court will base its decision on the expert opinion of the military commander.

k) The Proportionality of the Route of the Separation Fence

25. This question relates to the extent of the injury caused to the local inhabitants by the route decided upon by the military commander, namely, to humanitarian considerations. The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury was proportionate. The standard is objective. The question is whether, by legal standards, the route of the Separation Fence passes the tests of

⁶⁶ The Council is a private organization of experts in security matters, including high-ranking retired officers.

proportionality. This is a legal question, which will be examined by the Court on the plane of humanitarian law. In the words of Barak J.P.:

The military commander is the expert on the military aspects of the Fence's route. We [the Court] are the experts of the humanitarian aspects of the route. The military commander can determine the geographical path of the Fence. This is his expertise. We review whether the military commander's route inflicts disproportionate injury upon the local inhabitants. This is our expertise.

Hence, the question that will be examined is whether the injury to local inhabitants by the Fence is proportionate, or if it is possible to satisfy the main security concerns by choosing another route whose injury to the local inhabitants is lesser and, as such, proportionate.

Examination of the Proportionality of the Land Seizure Orders

Barak J.P. proceeded "from the general to the specific" and examined the proportionality of each land seizure order issued along the route of 40 kilometers, as chosen by the military commander for construction of the Fence.

The examination of the proportionality was carried out according to its three sub-tests. Most of the eight orders concerned passed the first sub-test of "rational connection" (between the objective of the Fence and its chosen route) as well as the second sub-test of "least injurious means". It was the third sub-test (the "proportionate means test" or proportionality "in the narrow sense") that led to cancellation of six of the seizure orders, on the ground that the relationship between the injury to the local inhabitants and the security benefit from the construction of the Fence, is not proportionate.

Applying the "proportionate means test", the Court stressed the need for a proper proportion between the benefit to the public and the damage to the citizen. It explained that according to this subtest, a decision of an administrative authority must reach a reasonable balance between public needs and the damage done to the individual. The purpose of this sub-test is to determine whether the severity of the damage to the individual and the reasons brought to justify it stand in proper proportion to each other.

The Court also stressed that its ruling must be based on the normative framework that it established, which recognizes the application of the Hague Regulations and the humanitarian provisions of the Fourth Geneva Convention to the Region, mainly to the military commander's duty of ensuring the needs and welfare of the local inhabitants.

Every land seizure order was examined by Barak J.P. separately and in detail, by describing the path to which it applies; by presenting the complaints raised by the Petitioners as to its alleged damage, and the stance of the respondents as to its security importance; and by referring to the suggestions of the Council for Peace and Security as to alternative paths, which would meet the security aims while reducing the damage to the petitioners.

Thus, six of the orders were cancelled by the Court following its conclusion in relation to each one of them that the injury to the local inhabitants is not proportionate to the security benefit from the Fence in the route chosen. The reasons for these conclusions were detailed by the Court in relation to each portion of the route examined. For example, the reasons for canceling three orders relating to a portion of 10 kilometers of the Fence's route were formulated by the Court as follows:

The route disrupts the delicate balance between the obligation of the military commander to preserve security and his obligation to ensure the needs of the local inhabitants. The route separates the local inhabitants from their agricultural lands and thereby injures them in a severe and acute way, while violating their rights under humanitarian international law. More than 13,000 farmers (falohim) are cut off from thousands of dunams of their land and from tens of thousands of trees which are their livelihood, and which are located on the other side of the Fence. No attempt was made to seek out and provide them with substitute land, despite the Court's repeated proposals on that matter. Indeed, the separation is not hermetic: the military commander announced that two gates will be constructed, from each of the two villages, to its lands, with a system of licensing. But this situation injures the farmers severely, as access to their lands (early in the morning, in the afternoon, and in the evening), will be subject to restrictions inherent to a system of licensing. Such a system will result in long lines for the passage of the farmers themselves; it will make the passage of vehicles (which themselves require licensing and examination) difficult, and will distance the farmer from his lands (since only two daytime gates are planned for the entire length of this part of the route). As a result, the lives of the farmers will change completely. The route of the Fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired. The difficult reality of life from which they have suffered until now (due to, among other things, high unemployment in that area) will only become more severe.

After examining the portion of the Fence's route (of approximately 5 kilometers) which passes from the village of Beit Sourik (population: 3,500) to the village of Bidu (population: 7,500), Barak J.P. held that:

The injury to these villages is great. It appears from petitioners' data (not rebutted by Respondent 2) that 500 dunams of the village of Beit Sourik will be directly damaged by the positioning of the obstacle [Fence]. An additional 6,000 dunams will remain beyond it (5,000 dunams of which are cultivated land), including three greenhouses. A quantity of 10,000 trees will be uprooted and the inhabitants of the villages will be cut off from 25,000 thousand olive trees, 25,000 fruit trees and 5,400 fig trees, and from many other agricultural products. Moreover, these numbers do not reflect the entire severity of the damage. One must take into consideration the total consequences of the obstacle for the way of life in this area. The route as determined in the Order turns the village of Beit Sourik bordered tightly by the obstacle on its west, south, and east sides. This is a veritable chokehold, which will severely injure daily life. The fate of the village of Bidu is not much better. The obstacle surrounds the village from the east and the south, and impinges upon lands west of it. From a study of the map attached by the respondents it appears that on this segment of the route, one seasonal gate will be established south of the village of Beit Sourik. In addition, a checkpoint will be positioned on the road leading eastward from Bidu. ... The injury caused by this part of the route is most severe. ... Although during the hearing of the petition, a number of changes in the route were made in order to ease the situation of the local inhabitants, even after these changes, the injury is still very severe. The rights of the local inhabitants are violated. Their way of life is completely undermined.

Consequently, the Court ruled that "there is no escaping from the annulment of the Order, to the extent that it applies to the central part of the Fence", and that the military commander must consider alternatives which, even if they result in a lower level of security, will cause a substantial (even if not complete) reduction of the damage to the lives of the local inhabitants.

Overview of the Proportionality of the Injury Caused by the Orders

After having completed the examination of the proportionality of each order separately, Barak J.P. opined that the Court should "look over the proportionality of the entire route of the part of the Separation Fence which is the subject of this petition". In the framework of this overview, the Court stated as follows:

The length of the part of the Separation Fence to which these orders apply is approximately 40 kilometers. It causes injury to the lives of 35,000 local inhabitants. A total of 4000 dunams of their lands are taken up by the route of the Fence itself, and thousands of olive trees growing along the route itself are to be uprooted. The Fence separates the eight villages in which the local inhabitants live from more than 30,000 dunams of their lands. The great majority of these lands are cultivated, and they include tens of thousands of olive trees, fruit trees and other agricultural crops. The licensing regime which the military commander wishes to establish cannot prevent or substantially decrease the extent of the severe injury to the local farmers. Access to the lands depends upon the possibility of crossing the gates, which are very distant from each other and not always open. Security checks, designed to prevent the passage of vehicles, will naturally cause long lines, so that many hours of waiting will be wasted at the gates. These do not go hand in hand with the farmer's ability to work his land.

Barak J.P. observed that during the hearings the Court asked the respondent whether it would be possible to compensate the petitioners by offering them other lands in exchange for the lands that were taken to build the Fence and the lands that they will be separated from, but it "did not receive a satisfactory answer". In the Court's opinion, since the petition concerns farmers who make their living from the land, the taking of their lands obligates the respondent to attempt to find other lands in exchange for the lands taken. Monetary compensation may only be offered if there are no substitute lands.

Finally, the Court added that the injury caused by the Fence is not restricted to the lands of the inhabitants or to their access to these lands. In its view:

The injury is of far wider scope. It is the fabric of life of the entire population. In many locations, the Separation Fence passes right by their homes. In certain places (like Beit Sourik), the Fence surrounds the village from the west, the south and the east. The Fence directly impedes the access of the local inhabitants to the urban centers. This access is impeded even without the Fence. This difficulty is increased sevenfold by the construction of the Fence.

Before terminating, the Court observed that it is aware of the difficult task of the military commander, who must delicately balance security needs with the needs of the local inhabitants. The Court was impressed by his sincere desire to find a proper balance. Nonetheless, the balance found by him is not

proportionate. Therefore, there is no escape of a renewed examination of the track of the Fence, according to the standards of proportionality set out by the Court.

The judgment ends with a "Final Word", in which the Court expressed its feelings about the ruling it delivered:

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 frequently struck by ruthless terror. We are aware of the killing and destruction wrought by terror against the State and its citizens. As any other Israeli, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make easier the State's struggle against those rising up against it. But we are judges. We act according to our best conscience and understanding.

The Court also cited its statement in H.C. 5100/94,⁶⁷ where it expressed its opinion that:

A democracy must sometimes fight with one hand tied behind its back. Nonetheless, democracy overcomes, because the rule of law and recognition of individual liberties constitute an important component in its security concept.

Applying this view to the petition, the Court ruled that "only a Separation Fence built on a base of law will grant security to the State and its citizens", and that "only a separation route based on the path of law will lead the State to security".

Operatively, the Court declared void six of the seven land seizure orders on the ground that their injury to the local inhabitants is disproportionate.

⁶⁷ *Supra* note 21.