

Comments on the Israeli Supreme Court decision of June 30, 2004 HCJ 2056/04 Beit Sourik Village Council versus Government of Israel

1) Supreme Court considers Barrier segment disproportionate

The ICJ welcomes the decision on 30 June 2004 of the Israeli Supreme Court (sitting as the High Court of Justice) to declare invalid a number of orders under which land was seized to construct the Separation Barrier in the Occupied Territories. The decision is the first such decision in Israel concerning the legal status of the Separation Barrier. The Supreme Court decided that a 40 km segment of the Barrier disproportionately impacts on the lives of Palestinians and should be moved.

2) Security, the rule of law and the Barrier

The judges expressly reaffirmed the rule of law in stating that “there is no security without law” and that “only a separation barrier built on a base of law will grant security to the state and its citizens”. Their judgment reflects that even the fight against terrorist acts must be conducted within the rule of law and not by abrogating the law.

3) Need for re-evaluation of the entire course of the Barrier

The judgment lays the foundations for further challenges to the acute effect of the Barrier and its legal regime on the lives of Palestinians. However, the broader, practical value of this decision will be judged on whether the Israeli Government urgently re-evaluates the Barrier, not only in this 40 km stretch, but along its entire route and swiftly makes substantial changes based on the reasoning set out by the three judges.

4) Israel’s international human rights law obligations

The Israeli Supreme Court based its decision on Israeli administrative law and international humanitarian law.¹ The ICJ would emphasize that the construction and operation of the Barrier is also subject to Israel’s binding obligations under international human rights treaties it has ratified (as well as customary international law). Most relevantly, Israel is a state party to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Israeli Government argues that only international humanitarian law and not international human rights law, applies in the Occupied Territories. However, it is well established at the United Nations and regional levels that human rights treaties apply concurrently with international humanitarian law. While international humanitarian law occasionally provides a more specialized rule that may influence the interpretation of a

¹ The court referred in particular to the 1907 Hague Regulations and the 1949 Fourth Geneva Convention relative to the protection of civilian persons in time of war.

human rights provision, both sets of laws apply in their own right: they are complementary and not mutually exclusive. Furthermore, human rights treaties apply in all places where a state exercises “effective control” – even outside a state’s formal territory – as is the case in the territories affected by the Separation Barrier.² Both the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights, supervising the implementation of the two Covenants, have specifically confirmed Israel’s obligation under these treaties in the Occupied Territories.

The Separation Barrier violates a range of rights guaranteed under the ICCPR and the ICESCR, including the right to freedom of movement and residence, protection from arbitrary interference into family life and privacy, rights to work, education, health, adequate standard of living and the right to non-discrimination. However, the court did assess the impact of the Barrier by using a test of proportionality that is very similar to the one used in applying human rights guarantees.

5) The question of the settlements

The Supreme Court did not explicitly address whether the Separation Barrier can legitimately encompass Israeli settlements in the Occupied Territories. However, it did recognize that only genuine security considerations could justify construction of the Barrier. They affirmed that if the route was chosen for “political” reasons, the Barrier would be illegal. Based on this reasoning, if the Barrier was intended to perpetuate the settlements or to ensure the quality of life of the inhabitants, these would be illegitimate and extraneous considerations.

Israel is entitled to take measures to protect all those under its jurisdiction, both Israelis and Palestinians. However, any security response must be assessed in light of the fact that the settlements are illegal under international humanitarian law and Israel is obliged to end the settlements and not to perpetuate their existence. Protecting the security of the settlement inhabitants cannot be carried out as a long-term measure and if it is to the sole detriment of the original population. This indeed is the impact of the Barrier. It restricts the rights and freedoms of Palestinians within their own territory, while seeking to ensure that settlers on illegal settlements *are* able to enjoy these same rights and freedoms. Whether or not the Barrier is a permanent structure, it is clearly of an open-ended duration and would appear to help perpetuate the settlements.

6) The Barrier as an arbitrary and discriminatory legal regime

The Supreme Court recognized some of the restrictions faced by Palestinians who have to pass through gates, some of which are open only sporadically. The Court rightly noted: “The licensing regime which the military commander wishes to establish cannot prevent or substantially decrease the extent of the severe injury to local farmers”.

² The UN Human Rights Committee has in its most recent General Comment put the applicability of human rights treaties in such situations beyond doubt, see CCPR/C/74/CRP.4/Rev. 6, para. 11.

The ICJ would underscore that the Separation Barrier is not only a physical structure. It is also characterized by a extensive and restrictive legal regime that regulates its operation. This legal regime severely affects property rights, the use of and access to land. The separation from land, workplace and home leads to severe consequences, in particular on the enjoyment of economic, social and cultural rights in the Occupied Territories. A particularly critical aspect is that it establishes a system of personal and permanent permits for Palestinians regulating their residence within their own territory and subjecting access through the Barrier to a burdensome and bureaucratic regime. Reports confirm that personal permits in particular are frequently denied on unclear or arbitrary grounds without effective remedies against the decisions.

This legal regime is inherently discriminatory. The movement and residence restrictions apply only to Palestinians because of their national origins and not to Israelis, Israeli settlers or other people who fall under Israel's law of return.

International humanitarian law may exceptionally allow for reasonable and proportionate distinctions based on nationality. While the specific context of occupation may enable a state to distinguish between an Occupying force and the local population, it does not justify blanket differences in movement restrictions between Israeli and Palestinian residents of the Occupied Territory or between Israelis eligible under the law of return and the local Palestinian population.

7) Respect for the rule of law requires effective remedies

The Supreme Court recognized that principles of procedural and substantive fairness must be respected when land is seized for the Barrier. International human rights law also provides important due process requirements that need to be fulfilled in the construction of the Barrier.

Unfortunately, the court accepted without further reasoning that the administrative procedures for seizure of land and remedies available are adequate. Reports, however, point to the inadequate and ineffective remedies against land seizures. Even if the procedure is applied as described in the court judgment, those affected have only one week to complain to the Military Advisor following a land survey and another week to appeal to the High Court following the dismissal of the complaint. This time period would not satisfy the requirements for an effective remedy, nor do they adequately guarantee effective access to the court as required by Article 14 ICCPR. The inability to effectively challenge the already disproportionate measures, exacerbates the arbitrary impact of the Separation Barrier.

8) Respect for private property

The Court considered that the Barrier impairs property rights, and that this contributes to the disproportionate impact of the Barrier. However, it held that the seizure of land for the construction of property, be it private or public, would be justified under Articles 23 (g) and 52 of the Hague Regulations and under Article 53 of the Fourth Geneva

Conventions. Article 23 (g) of the Hague Regulations, however, is not applicable, since it regulates the confiscation of property only in the context of armed fighting and does not apply to an occupation. Moreover, the Government would have to show that the requisitions of private property are “absolutely necessary as a result of war”. Article 46 of the Hague Regulation contains an absolute prohibition on the confiscation of private property in the context of belligerent occupation. The fact that the Barrier is of open-ended duration may turn the seizure of private property into a de facto confiscation of property. Even in the absence of a formal act of expropriation, the taking of property for the construction of the Barrier dispossesses the property owner of any meaningful way to exercise his/her right to property. The Courts use of Article 52 of the Hague Regulation is questionable since large-scale private land seizure, i.e. of real property, would need to be understood as “requisition in kinds and services” and these requisitions would need to be necessary to serve the legitimate “needs of the army of occupation”.

9) The legitimacy under human rights law of a Separation Barrier on occupied territory

The Supreme Court assumes that a Barrier on the Occupied Territories could be legitimate and legal if it served genuine security considerations and did not lead to a disproportionate interference with the lives of the Palestinian population.

In light of the cumulative impact of the Barrier on a range of rights of the protected population, and its discriminatory effect, it is difficult to conceive in practice that a Barrier that slices through Palestinian neighborhoods could be shown to be proportionate and legitimate. This is especially the case where the Barrier encompasses settlements. Prima facie, a Barrier that passes through occupied land would not be justifiable. There would be a heavy burden on the state to show that any such route on occupied land satisfies the demands of international law.