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Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask

Emanuel Gross†

Introduction

In June 2002, after two years during which the Israeli-Palestinian conflict reached new heights of violence, and after carrying out various military operations that did not provide a sufficient answer to the immediate need to stop the murderous terrorist acts, the Israeli government adopted a military recommendation to erect a security fence that was supposed to prevent terrorist infiltration from the Palestinian territories into Israel. The chosen route of the fence involved various limitations on the rights of the local Palestinian inhabitants. Inter alia, private land was seized from its owners, peasants were separated from their agricultural lands and needed special permits in order to go from their homes to their fields, and access roads to urban centers were blocked off, hence preventing access to medical and other essential services.

A petition against the legality of the chosen route was filed to the Israeli Supreme Court sitting as the High Court of Justice.[1] On June 30, 2004, the court unanimously held that while the decision to erect a separation barrier, along any possible route, cannot be motivated by a political desire to create a de facto annexation of territories to the state of Israel, the Israeli government was motivated only by valid security concerns. Nevertheless, the court determined that some parts of the route of the fence were illegal because they injured humanitarian rights of the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit of the fence.

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1. Beit Surik Village Council et al. v. Government of Israel et al., HCJ 2056/04 (June 30, 2004), 43 I.L.M. 1099 (2004) [hereinafter Beit Surik judgment].

Nine days after the Supreme Court's ruling, the International Court of Justice (ICJ) rendered an advisory opinion on the matter, on the request of the General Assembly of the United Nations.[2] In contrast to the fundamental conclusion of the Supreme Court, the ICJ found by a majority of fourteen judges to one, that the fence should not be regarded as a temporary security measure whose sole purpose was to enable Israel to effectively combat terrorist attacks, but rather as a political attempt to draw new permanent borders of Israel by creating facts on the ground that would be tantamount to de facto annexation. Thus, the ICJ determined that the construction of the fence was contrary to international law, and therefore Israel was under an obligation to cease its construction and dismantle it forthwith.

A year has passed since both decisions were rendered, and it seems that the questions presented before the two tribunals have remained as urgent as before: How can a democratic nation defend its citizens from external violent threats? What is the proper normative balance between security needs and humanitarian considerations? Which international norms apply to armed conflicts between a sovereign state and terrorist organizations?

The two tribunals, who prima facie guided themselves by similar legal norms, reached different conclusions in each of these questions. In my opinion, the difference originated from inadequate implementation of the legal norms by the ICJ, which was caused by a combination of insufficient evidentiary bases and improper balance between the competing values. In this essay, I shall address these defects at length.

I. Some Preliminary Comments on Terminology

The law, like human beings, does not operate in a vacuum. In democratic regimes, it is formulated by the legislative branch and interpreted by the judicial authority. While the legislature sets the general legal norm that is designed to regulate a type of situations, the judicial authority implements it on the specific circumstances before it. For this reason, legal judgments and opinions inherently reflect a variety of political theories and, to a greater or lesser extent, the ideology of the individuals who wrote them. It is therefore important to be aware of two significant terminological differences between the Supreme Court's judgment and the ICJ opinion: First, while the Supreme Court referred to the separation barrier as a "separation fence," a "security fence," or a "Seamline" obstacle between Israel and the areas of Judea and Samaria (the area), the ICJ adopted the terminology employed by the General Assembly, and used the term "wall."

Although the ICJ was right in recognizing the fact that the structure in question is a complex construction and therefore cannot be understood in

2. Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (July 9), 43 I.L.M. 1009 [hereinafter ICJ Advisory Opinion], *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last visited Mar. 1, 2005).

a limited physical sense,[3] I believe that it must have known that the use of this particular loaded term, which was chosen by the General Assembly for its obvious political meaning[4], would most likely cause people—even if they are unfamiliar with the issue—to feel a sense of aversion and antipathy towards a structure of this kind because of the immediate negative connotations of the expression.

The second terminological difference between the Supreme Court's judgment and the ICJ opinion concerns the manner in which each tribunal chose to describe the violent events that led to Israel's decision to erect the separation barrier.

It is an unfortunate but indisputable fact that for the past few decades, Israel has been subject to incessant terrorist attacks, perpetrated by extreme religious and nationalist Palestinian groups. Thus far, these brutal attacks have resulted in the death of thousands of innocent civilians. Tens of thousands of men and women have been injured. Coping with the constant fear of imminent terrorist attacks imprints its own indelible mark on every aspect of daily life—political, cultural, social and economic. Indeed, this is the unique destructive character of the terrorist act—its ability to undermine the everyday life to a degree that bears no relation to the direct damage caused by the specific terrorist act.[5]

This difficult reality was well reflected throughout the Supreme Court's judgment. Inter alia, the court stated:

> A short time after the failure of the Camp David talks, the Israeli-Palestinian conflict reached new heights of violence. In September 2000, the Palestinian side began a campaign of terror against Israel and Israelis. Terror attacks take place both in the area and in Israel. They are directed against citizens and soldiers, men and women, elderly and infants, regular citizens and public figures. Terror attacks are carried out everywhere: in public transportation, in shopping centers and markets, in coffee houses and in restaurants. Terror organizations use gunfire attacks, suicide attacks, mortar fire, Katyusha rocket fire, and car bombs. From September 2000 until the beginning

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3. *See* ICJ Advisory Opinion, 2004 I.C.J. 131, paras. 67, 82, *reprinted in* 43 I.L.M. For a detailed description of the structure's components see the Beit Surik judgment, 43 I.L.M., para. 7:

> In its center stands a "smart" fence. The purpose of the fence is to alert the forces deployed along its length of any attempt at infiltration. On the fence's external side lies an anti-vehicle obstacle, composed of a trench or another means, intended to prevent vehicles from breaking through the fence by slamming up against it. There is an additional delaying fence. Near the fence a service road is paved. On the internal side of the electronic fence, there are a number of roads: a dirt road (for the purpose of discovering the tracks of those who pass the fence), a patrol road, and a road for armored vehicles, as well as an additional fence. The average width of the obstacle, in its optimal form, is 50-70 meters.

4. *See also* David Kretzmer, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88 n.3 (2005).

5. For a comprehensive analysis of the nature and characteristics of the terrorist act see EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM: THE LEGAL AND MORAL ASPECTS ch. 1 (Virginia University Press, forthcoming).

> of April 2004, more than 780 attacks were carried out within Israel. During the same period, more than 8200 attacks were carried out in the area. The armed conflict claimed (as of April 2004) the lives of 900 Israeli citizens and residents. More than 6000 were injured, some with serious wounds that have left them severely handicapped. The armed conflict has left many dead and wounded on the Palestinian side as well. Bereavement and pain wash over us.[6]

In contrast, the ICJ majority opinion makes almost no mention of the Palestinian terrorism. The court's most profound description of the situation simply states: "The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population."[7] The narrative chosen mentions neither the *nature* of the acts (acts of terror) nor the *identity* of the perpetrators (Palestinian terrorist organizations).[8]

Here too, the ICJ's attempt to avoid addressing the unbearable consequences of the Palestinian terrorism on one hand, and its comprehensive analysis of the limitations the fence imposes on the Palestinian population on the other hand,[9] necessarily create a sense of alienation and intolerance towards Israel's justifications for the construction of the fence.

II. The Security Fence as a Legitimate Measure of Nonforcible Self-Defense Against Terrorism Attacks

There is no dispute that a sovereign state is entitled to build separation barriers on its international borders in order to prevent infiltration into its territory. The state's ability to control its borders and prevent the unchecked passage of people into its territory is considered to be one of the primary symbols of sovereignty. Therefore, were the route of the separation fence to pass along Israel's side of the "Green Line" (i.e., the 1949 armistice line between Israel and Jordan after the War of Independence), there would not be any doubts regarding Israel's right to build the barrier. However, the fact that only some parts of the fence are situated inside Israel, while others pass through the areas of Judea and Samaria, rises the question whether the military commander in Judea and Samaria is legally authorized to construct a separation fence in the areas under his control.

The ICJ—in contrast to the Supreme Court—reached the conclusion that this was not a question whose answer is to be found in the law of self-defense, but rather a question that related to the realization of political sovereignty on an occupied territory held by a state. It rejected Israel's contention that the fence was a temporary measure aimed at preventing infiltration of Palestinian terrorists into Israel and determined that the fence might prejudge the future permanent border between Israel and the Palestinians and was hence tantamount to de facto annexation of occupied

6. Beit Surik judgment, 43 I.L.M., para. 1.

7. ICJ Advisory Opinion, 2004 I.C.J. 131, para. 141, *reprinted in* 43 I.L.M.

8. The dissenting opinion of Judge Thomas Buergenthal explicitly emphasizes these two elements. *See* ICJ Advisory Opinion, 2004 I.C.J. 131, *reprinted in* 43 I.L.M. at 1078 (Declaration of Judge Buergenthal).

9. *See infra* Part III.

territories in the West Bank.[10] In other words, the ICJ assumed that Israel's decision to build some parts of the fence on the occupied territories was meant to provide a political solution to its security need to determine the border separating it from the West Bank according to the 1949 armistice line. The court then observed that as an occupying power, Israel was prohibited from acting in any way that might alter the status of the territories under its control, and thus the construction of the barrier in the occupied territories of the West Bank was contrary to international law.

This conclusion reflects, in my view, the most basic mistake of the ICJ in this matter. True, Israel holds the West Bank—apart from certain areas that were handed over to the Palestinians pursuant to the Israeli-Palestinian Interim Agreement of September 1995—in belligerent occupation. The area is subject to military administration headed by the military commander, who is responsible for ensuring the public order, the safety of his soldiers, and the orderly life of the local population.

There is also no dispute that the military commander of territory held in belligerent occupation is not permitted to perform any action, including the construction of a barrier, in the area under his control for reasons other than military. Israel—by its definition as an occupier—is only the temporary holder of the area. Thus, under no circumstances, should the military commander take the national interests of his country into account. He may only consider the security needs of his country against the humanitarian needs of the local population.

Therefore, if Israel's considerations in choosing the route of the fence had been motivated by a political desire to establish its permanent national border in the West Bank, the court would have indeed been right in its conclusion. However, I am of the opinion that the factual basis presented to the court supported the opposite conclusion.[11] First, the premise that guided the ICJ in reaching its conclusion was that a security-based barrier had to follow the "Green Line," otherwise it should necessarily be considered as a political-based barrier. This premise ought to be rejected, as the Supreme Court eloquently explained:

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10. ICJ Advisory Opinion, 2004 I.C.J. 131, paras. 121-22, *reprinted in* 43 I.L.M.

11. It should be mentioned that the Israeli government decided not to take part in the proceedings before the ICJ. Therefore, it limited its written statement only to issues of jurisdiction and did not send representatives to state its case in the public hearings held before the court.

Israel's decision not to participate in the said proceedings was a product of deep resentment towards the U.N. institutions, which has evolved over the years, on the ground that the U.N. is biased against the state of Israel.

In my opinion, the decision not to appear before the Court was wrong. It is indeed possible that even had Israel participated in the proceedings, the court would not have reached different conclusions. However, there is also a strong possibility that had the Israeli perspective been presented, the Court's reasoning would have been more favorable to Israel.

Nevertheless, the ICJ is a judicial body, and as such, it should have declined to render the advisory opinion, or at least qualified its findings, due to the fact that Israel's absence had left the court with no sufficient factual base. *See also* ICJ Advisory Opinion, 2004 I.C.J. 131, *reprinted in* 43 I.L.M. at 1078 (Declaration of Judge Buergenthal).

> The opposite is the case: it is the security perspective—and not the political one—which must examine the route on its security merits alone, without regard for the location of the 'Green Line.'[12]

Second, the fact that the fence is not a conventional buffer zone but rather a complex construction with an array of security facilities[13] also indicates its nonpolitical nature, since national borders are usually designed to include fewer security devices.

Furthermore, although, as explained in the previous part, the ICJ majority opinion employed terminology that intentionally blurred the nature of the violent acts committed against Israeli civilians and the identity of the perpetrators, both elements were in the knowledge of the court. This was the background for the repeated statements made by Israeli officials that the fence was a temporary measure aimed at physically blocking the possibility of infiltration from the West Bank into Israel and had no political significance of any kind. As mentioned above, the ability of a nation to prevent the uncontrolled passage of people into its territory is a prominent aspect of sovereignty; however, it is not a political aspect but a security one. Thus, the central question—which the ICJ failed to recognize—was whether Israel had the right to defend itself against terrorist attacks perpetrated by Palestinian terrorist organizations, and if it had, whether it could realize the right to self-defense by building a security barrier.

The answer to this question lies in the principle of self-defense and its applicability to the unique situation of a violent dispute between a sovereign state and nonstate private terrorist organizations.

Both treaty and customary international law recognize the state's right to use the appropriate measures, including force, in order to thwart the dangers posed to its existence and to the security of its citizens.[14] Self-defense in customary international law is based on the "Caroline Doctrine," which established the state's right to use force in order to defend itself against real and imminent threats that require immediate response in circumstances where all peaceful means of resolving the dispute have been exhausted and the response is essential and proportional to the threat. Self-defense in international treaty law is entrenched in Article 51 of the UN Charter, which does not create a new right to self-defense, but refers to the preexisting customary right.[15]

Nonetheless, the right entrenched in the Charter is not identical to the

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12. Beit Surik judgment, 43 I.L.M. at para. 30.

13. *See supra* note 3 and accompanying text.

14. For an extensive analysis of the right to self-defense in treaty and customary international law see Antonio Cassese, INTERNATIONAL LAW 305 (2001).

15. Article 51 of the UN Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . . ." U.N. CHARTER art. 51.

customary law right.[16] This can be seen inter alia from the fact that customary law permits self-defense in every case of *aggression*, whereas treaty law permits self-defense only in cases of *armed attack*.[17] Thus, terrorist attacks by nonstate groups can qualify as acts of aggression, but there is a difficulty in classifying them as an armed attack. Terrorist attacks are not an armed attack in the classic sense because the attacks are not directed against government and military targets but at civilian targets; the attacks are not prolonged but are intermittent; and there are no defined battle zones, although every civilian site is a legitimate target in the eyes of the terrorists.

For this reason, the ICJ found that because the Palestinian terrorist organizations are operating out of the West Bank, which is not an independent state but an occupied territory held by Israel in belligerent occupation, Article 51 of the Charter had no relevance in this case.[18] The Court's opinion seems to suggest that Article 51 of the Charter only recognizes the existence of the right to self-defense in the case of an armed attack by one state against another state. When an attack is committed by a nonstate organization, and all the more so when this organization is operating out of a territory held by the attacked state in belligerent occupation, the right to self-defense does not apply.

In my view, the Court's opinion gives an inadequate interpretation to the laws of belligerent occupation. The terrorist act contains some of the principle characteristics of the traditional armed conflict: In most cases the attacks are not spontaneous but are meticulously planned, sometimes after intelligence has been gathered, since they have great impact and can cause serious physical harm and property damage. In addition, the group possesses an organized armed force, and a hierarchical structure with a political branch that directs the activities of the operational branch. Under these circumstances, in my view, it may legitimately be argued that terrorist attacks amount to armed attacks and vest the attacked state with the right to defend itself.[19]

This is true whether the threat originates within or outside the occu-

16. Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v. United States of America, 1986 I.C.J. 14, 94.

17. EMANUEL GROSS, *supra* note 5, at ch. 2.

18. ICJ Advisory Opinion, 2004 I.C.J. 131, paras. 138-39, *reprinted in* 43 I.L.M. It should be noted that in her separate opinion, Judge Rosalyn Higgins expressed reservations about the Court's findings in this matter. *See* 2004 I.C.J. 131, paras. 33-34, *reprinted in* 43 I.L.M. at 1058 (Higgins, J., separate opinion).

19. Following the terrorist attacks of September 11, 2001 on the World Trade Center in New York, the Pentagon in Washington and in Pennsylvania, the Security Council decided to reconfirm the right to self-defense recognized in the Charter. This impliedly confirms the thesis that terrorist attacks may be regarded as armed attacks that vest the right to self-defense. *See* S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001) (regarding threats to international peace and security caused by terrorist acts).

pied territory.[20] As explained, the international laws of belligerent occupation, which determine the obligations and rights of the occupying power, are based on the premise that belligerent occupation is inherently temporary. Therefore, even though the occupier exercises effective control of the territory, it cannot become the sovereign power over it by reason of its belligerent occupation. Yet, for as long as the belligerent occupation continues, the occupier has a right to defend itself and its civilian citizens against terrorist attacks that emanate from the occupied territory.

A second relevant difference between the customary right to self-defense and the treaty right to self-defense concerns the possibility of engaging in preemptive activities directed at preventing anticipated attacks. Customary law, which recognizes the right of the state to defend itself in every case of aggression, provides that the right to self-defense embraces the right to adopt defensive tactics in the face of an anticipated act of aggression.[21]

The question whether the right to anticipatory self-defense also exists under treaty law has not yet been determined. On one hand, there are those who argue that the language of Article 51 ("*the inherent right* of individual or collective self-defense *if an armed attack occurs*") is unambiguous—that it is clear that a state is prohibited from employing armed force as an anticipatory measure and that it must wait for an actual armed attack.[22] Opposing them are those who contend that the language of the Charter is not so unequivocal, since it does not purport to create a new right to self-defense but refers to the inherent rights of states to defend themselves, and as mentioned, the customary law pointed at by the Charter recognizes the right of states to anticipatory self-defense. A further argument is that in light of the fact that military capabilities have changed in recent years, Article 51 of the Charter should be interpreted to comply with the new world reality. Thus, for example, it would clearly be absurd to assert that international law requires a state to absorb a severe nuclear attack before it is permitted to defend itself.

In my opinion, in view of the modern means of warfare available to nonstate terrorist organizations, Article 51 must be interpreted in the light of its contents and purpose, so as also to enable self-defense in the face of future terrorist attacks.[23]

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20. For a similar opinion see Ruth Wedgwood, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT'L L. 52, 58-59 (2005).

21. YORAM DINSTEIN, THE LAWS OF WAR 68-70 (1983) (Heb.).

22. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 166 (3d ed. 2001).

23. It would seem that this is also the understanding of the UN General Assembly, as in a resolution concerning the definition of acts of aggression, it decided that the first use of force in breach of the Charter would comprise prima facie evidence of aggression, but that the Security Council is entitled to decide that in the light of the circumstances surrounding the commission of the act, it should not be perceived to be an act of aggression. In effect, this amounts to indirect recognition of the legality of the use of force as anticipatory self-defense. *See* G.A. Res. 3314 U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974) (defining aggression).

In any event, I believe that this controversy is of purely theoretical importance, as the moment the malicious thoughts of the terrorist begin to be put into practice by real steps preparatory to the commission of the attack—such as planning or enlisting persons to perpetrate it—it may be said that the terrorists have in fact begun to commit the attack, and therefore the state is indisputably vested with the right to defend itself against it.

At this point we should also consider the nature of the separation barrier. Because self-defense usually involves the use of force, the barrier is not a conventional act of preemptive self-defense, in the sense that it is a nonforcible measure. While the Supreme Court made no distinction between forcible and nonforcible acts of self-defense,[24] the ICJ did not examine this aspect in light of its preliminary conclusion that the construction of the barrier was based on political considerations and hence contrary to international law. Only Judge Higgins, who criticized the court's analysis of the applicability of the law of self-defense to the Israeli-Palestinian conflict, noted that she remained "unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood."[25]

In my opinion, as the right to self-defense enables the state to use forcible measures, a fortiori it enables it also to use nonforcible measures.[26] Indeed, from a legal point of view there is no difference between the state's right to defend itself by active means, such as military air-strikes or administrative detentions, and its right to defend itself by passive means, such as the imposition of curfews and blockades or the construction of a barrier. However, each type of measures has different ramifications: While forcible measures endanger the lives or well-being of the terrorists and sometimes of the innocent local inhabitants of the territory held in belligerent occupation, nonforcible measures primarily disturb the orderly life of the local population. In this case, the chosen path of the separation barrier not only injured the humanitarian rights of the local population, but it also required the seizure of land privately owned by local inhabitants.

An act of self-defense is justified only if it is necessary and proportionate.[27] In other words, it must create a proper balance between the military needs of the army and the humanitarian needs of the people who are affected by it. Thus, the laws of belligerent occupation authorize the mili-

24. The Supreme Court relied on the premise that both forcible and nonforcible measures may qualify as acts of self-defense. Thus, after concluding that the considerations for building the fence were military-based rather than political-based, the Court immediately turned to examine the legality of the route chosen for construction of the separation fence. *See* Beit Surik judgment, 43 I.L.M., para. 33.

25. *See* 2004 I.C.J. 131, paras. 33-34, *reprinted in* 43 I.L.M. at 1058 (Higgins, J., separate opinion).

26. See the statement of Israel's permanent representative to the United Nations: "International law and Security Council resolutions, including resolutions 1368 (2001) and 1373 (2001), have clearly recognized the right of States to use force in self-defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end." G.A. Res. A/ES-10/PV.21, 21st Emergency Special Sess., Agenda Item 5 (2003).

27. *Nicaragua v. United States of America*, 1986 I.C.J. at 103.

tary commander to expropriate private land in areas under his control, if an absolute military necessity exists.[28] This normative framework was summed up by the Supreme Court as follows:

> It is permitted, by the international law applicable to an area under belligerent occupation, to take possession of an individual's land in order to erect the separation fence upon it, on the condition that this is necessitated by military needs. To the extent that construction of the fence is a military necessity, it is permitted, therefore, by international law. Indeed, the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers. The building of the obstacle, to the extent it is done out of military necessity, is within the authority of the military commander. Of course, the route of the separation fence must take the needs of the local population into account. That issue, however, concerns the route of the fence and not the authority to erect it.[29]

I shall therefore now turn to examine the question whether the chosen route of the barrier created an adequate balance between the legitimate security necessities of Israel and the humanitarian needs of the local inhabitants.

III. National Security versus Humanitarian Considerations

Even when a democratic state is legally entitled to defend itself against terrorist organizations, it does not have unlimited freedom of choice in relation to the nature of the measures it may use in order to protect its citizens. Consequently, even though a security-based barrier is, in itself, a legitimate measure of self-defense, it cannot be constructed along any desirable route. The *jus in bello*, i.e., the laws that regulate the manner in which a war may lawfully be conducted and that are primarily found in the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949, and the Additional Protocols to the Geneva Conventions of 1977, restrict the state from making free use of all the effective means at its disposal.[30]

The restrictions imposed upon the state are intended to guarantee that the military commander will use his authority to ensure public order in the areas under his control after properly balancing the security needs of his country against the humanitarian needs and human rights of the local population.

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28. Regulations 23 & 46, Annexed to the Hague Convention Respecting the Laws and Customs of War on Land (Hague IV) (Oct. 18, 1907); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) art. 53, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516.

29. Beit Surik judgment, 43 I.L.M., para. 32.

30. In this connection the question arises whether the implementation of the right to self-defense is subject to the restrictions of international law regarding the manner of conducting hostilities or whether when the right to self-defense is implemented against terrorist organizations, the provisions of the *jus in bello* do not apply. This issue is beyond the scope of this essay since the ICJ and the Supreme Court reached their conclusions after examining the relevant provisions of the *jus in bello*. For a comprehensive discussion concerning this complex issue see EMANUEL GROSS, *supra* note 5, at ch. 2.

Thus, for example, Article 27 of the Fourth Geneva Convention, which establishes the basic provision of international humanitarian law in wartime, states:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and 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 and against insults and public curiosity. . . .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.[31]

Article 23 of the Second and Fourth Hague Conventions of 1907 prohibits the destruction of enemy property unless such destruction be imperatively demanded by the necessities of war.[32]

Article 54(2) and (3) of the First Additional Protocol to the Geneva Conventions further prohibits attacking, destroying, or rendering useless objects indispensable to the survival of the civilian population which are not clearly used for the military purposes of the adverse party.[33] Article 57(1) demands that: "[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."[34]

Indeed, it is especially in times of violent disputes—when the cannons roar—that the state's duty to provide security to its citizens is in the most severe clash with its obligation, as a belligerent occupier, to protect the rights and well-being of the local inhabitants. Thus, for example, the Supreme Court ruled that the military commander must ensure the ongoing functioning of medical services as well as other welfare services that are essential to the existence of the local population even during times of an actual combat.[35] The separation fence imposes substantial restrictions on the Palestinian population. Inter alia, expropriation of private lands violates the right to property. In addition, the fence severely impedes the freedom of movement by blocking off access roads to urban facilities such as health services, educational establishments, and holy places. The route chosen separates peasants from their agricultural lands, thus substantially restricting their freedom of occupation. Access to the lands depends upon the possibility of crossing the gates separating between the two areas. However, this is no easy task because the gates, which are few in number,

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31. Geneva IV, *supra* note 28, at art. 27; 4 THE GENEVA CONVENTIONS OF 12 AUGUST, 1949: COMMENTARY 199 (Jean S. Pictet ed., 1958).

32. Regulation 23, Annexed to the Hague Convention Respecting the Laws and Customs of War on Land (Hague II) (July 29, 1899); Regulation 23, Annexed to the Hague Convention Respecting the Laws and Customs of War on Land (Hague IV) (Oct. 18, 1907).

33. Art. 54 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (June 8, 1977), 1125 U.N.T.S. 3.

34. *Id.* at art. 57.

35. *See, e.g.*, HCJ 3451/02 Almandi v. The Minister of Defense, 56(3) P.D. 30; Physicians for Human Rights v. The Commander of I.D.F. Forces in Gaza Strip, HCJ 4764/04 58(5) P.D. 385. (Heb.).

are not always open and security checks cause long lines resulting in many hours of waiting.

The proper manner to resolve this clash of interests is by conducting a just balance between the conflicting values. The military commander can impose limitations on the freedom of the local inhabitants, provided that these restrictions are proportionate.[36] A proportionate balance between national security and the rights of the local inhabitants is determined by a threefold test:[37] (A) *The compatibility test*: The infringing measure must lead rationally to the achievement of the purpose of the infringement. Here, we need to determine whether the injurious measure, i.e., the chosen route of the separation fence, can rationally lead to the achievement of the security goal of the construction of the fence. (B) *The least harm test*: Among all the measures suitable for achieving the purpose, the selected measure must be the one that causes the least harm to the right. Here, we need to examine whether, among the various routes that would achieve the objective of the separation fence, the chosen one is the least injurious. (C) *The proportionality test*: There must be a reasonable relationship between the benefit accruing from realizing the purpose and the damage caused to the individual as a result of the violation of his constitutional right. Here, the question is whether the chosen route injures the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit of the fence.

There is no doubt that the central consideration in determining the proper balance is the national security consideration. The basic rights and freedoms of the people who live in an area held in belligerent occupation when violent threats against the state originate within that territory, are more limited than those to which they are entitled when public order is maintained. Human rights and humanitarian needs—however important—must retreat before compelling security interests in times of warfare. At the same time, a democratic nation may not ignore the needs of the local inhabitants—either according to the humanitarian law or other international conventions.[38] Security interests, however pressing, are no justification for abandoning the state's responsibility for ensuring the well-being of the local population.

Ergo it follows that every balance that is made between security and freedom will necessarily impose certain limitations both on security and on freedom. We approach the task of drawing the proper normative balance between the two conflicting values, knowing in advance that its outcome will not make it easier for us to contend with our enemies.

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36. THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 220 (Dieter Fleck ed., 1995).

37. 3 AHARON BARAK, INTERPRETATION IN LAW 536 (1994) (Heb.).

38. The ICJ was of the opinion that not only humanitarian law, but also several other human rights conventions, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, are applicable to a territory held in belligerent occupation. This determination is not free of doubts; however, even if these conventions apply to an occupied territory during an armed conflict, they too ought to be properly balanced against security needs.

The President of the Supreme Court, Justice Aharon Barak, eloquently described this tragic dilemma:

> This is the fate of a democracy—it does not see all means as acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Even so, a democracy has the upper hand. Preserving the rule of law and and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strenghten its spirit and strength and allow it to overcome its difficulties.[39]

The Supreme Court understood the meaning of this delicate balance. It held that the route chosen for the construction of the barrier could achieve its stated objectives. Nevertheless, the Court observed that significant parts of the barrier were disproportionate because they injured the fabric of life of the local inhabitants to the extent that there was no proper proportion between this injury and the security benefit of the barrier. The Court therefore ruled that the military commander would have to provide alternative routes in these areas, which would attain the security objectives of the separation fence in a way that would cause less injury to the local inhabitants.[40]

The Court realized that a proper balance between security and human rights must take both interests into account. Therefore, it determined that the chosen route was disproportionate in places where it was possible to satisfy the central security considerations while establishing an alternative route whose injury to the local inhabitants was substantially decreased. It is true that such an alternative route will not provide an ideal solution to Israel's security needs, but the compromise—so the Court ruled—is the price of democracy, which must adhere to its fundamental commitment to preserve human rights especially during times of crisis.

The ICJ, in contrast, implemented the constitutional balancing formula between national security and humanitarian rights improperly. It concluded that in the inevitable clash between these two interests, the humanitarian aspect bears the greater weight. Thus, in light of the grave

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39. Public Committee against Torture in Israel v. Government of Israel, HCJ 5100/94, 53(4) P.D. 817, 845. (Heb.).

40. Beit Surik judgment, 43 I.L.M., paras. 49-81. In light of this ruling, it is important to consider Israel's recent response to a petition that has been filed against the legality of one of the segments of the fence, which was built prior to the Beit Surik judgment. Israel admitted that the segment in question was chosen not only because of military necessities but also because of urban considertions of a nearby settlement. Nevertheless, Israel argued that while there is no doubt that such a consideration was invalid in light of the court's judgment, the barrier should stay in its current position due to the tremendous costs of dismantling and readjusting it.

In my opinion, this argument must be rejected. Humanitarian needs may only be infringed because of compelling security interests. Financial considerations cannot justify, under any circumstances, the perpetuation of the initial injustice caused to the local population. Therefore, I believe that Israel will have to—either by choice or as a result of a court order—change this segment of the fence in order to reach a more proportionate solution. *See* Yuval Yoaz, *The State in Court: Not Only Security Considerations Affect the Route of the Fence*, HA'ARETZ, July 4, 2005, at A4.

injury caused to the local population by the construction of the fence, the Court found that the chosen route, in general, could not be justified by the requirements of national security.[41] This sweeping conclusion was not only factually unfounded (the ICJ, in contrast to the Supreme Court, did not examine the proportionality of each segment of the route, but rather of the barrier in general), but it was also based on the misguided premise that in order for the barrier to be proportionate, humanitarian needs should be given greater weight than security considerations.

Conclusion

Protection of the basic rights and freedoms of the individual in times of crisis poses a serious and complex challenge to every democratic regime. As I explained, a democratic state that holds a territory in belligerent occupation is entitled to protect the lives of its citizens. At the same time, the state is also obligated to protect the local inhabitants against arbitrary and disproportional violations of their rights carried out under the pretext of security needs. Finding the proper balance between these two clashing interests is not an easy task, since limitations must necessarily be imposed both on security and on freedom.

I am of the opinion that the Supreme Court reached the proper normative conclusions in these matters. It recognized the separation fence as a legitimate measure of self-defense against terrorism attacks and conducted a just balance between national security and humanitarian considerations. The ICJ, in contrast, relied on an insufficient factual base and conducted an improper balance between the competing values, hence erring on both matters.

I shall conclude with the words of the President of the Supreme Court, Justice Aharon Barak, which seem most reflective of the spirit of this essay:

> There is no avoiding—in a democracy aspiring to freedom and security—a balance between freedom and dignity on the one hand, and security on the other. Human rights must not become a tool for denying security to the public and the state. A balance is required—a sensitive and difficult balance—between the freedom and dignity of the individual, and national security and public security.[42]

41. ICJ Advisory Opinion, 2004 I.C.J. 131, paras. 123-37, *reprinted in* 43 I.L.M.

42. Anonymous v. Minister of Defense, F.Cr.A. 7048/97, 54(1) P.D. 721, 741. (Heb.).