The Fight Against The Separation Wall: The Legal Front in Israel

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The purpose of this paper is to outline the legal challenges to the construction of the separation wall presented in the Israeli justice system by Palestinian and Israeli Non-Governmental Organizations and by Palestinian and Israeli citizens. This paper will also examine the influence the International Court of Justice's recent decision is likely to have over the legal battles currently employed in the Israeli Courts in wall-related cases.

1. First wave of wall-related legal challenges

In June 2002 the Israeli government adopted for the first time a proposal to erect a system of walls, fences and trenches along the northern part of the green line (these walls and fences are called by the Israeli administration "the security barrier"). Immediately after issuing the decision, which dealt with what was termed as "phase A" of the separation wall project, the legal framework for its implementation was construed.

The civil administration of the Occupied Palestinian Lands (a military led body) began issuing decrees for seizure of lands needed for the project, but at that stage neither Palestinian nor Israeli human rights organizations could yet assess the magnitude of the wall and fence's ramifications on the daily life of Palestinians. Though drafts of work plans began circulating, both Israeli and Palestinian activists thought, at that time, of the barrier as a mainly property rights issue.

Accordingly, the first legal challenges to the seizure orders were made in the context of the land planning and construction law, a field of law which among other things lays out the conditions enabling the authorities to violate property

rights. Those first challenges were in fact legal appeals filed to the civil administration's appeals committee. In several cases the decision of the appeals committee was judicially reviewed at the Israeli High Court of Justice by way of an administrative petition.

This first wave of wall petitions did not raise the question of the administration's power to seize land for the purpose of erecting the wall. The petitioner assumed that the law gives the military commander the power to change and seize land for security purposes and that the wall's aim is indeed based on security considerations.

To the best of my knowledge, no appeal to the civil administration's appeals committee was successful and no petition to the High Court of Justice resulted in annulling any of the seizure orders.

2. **Second wave challenges and the *Beit-Surik* decision.**

It was only by mid-end of 2003, when the construction of phase A of the wall was completed, that Israeli Human Rights NGO's began to appreciate the far reaching, long-term threats the wall project poses to all aspects of Palestinian lives. The first B'tselem report issued on April 2003 predicted that the wall will cause massive damage to the livelihood of farmers and will dramatically impair the health and education infrastructure of Palestinian villages and towns.

By the end of 2003, a new wave of petitions to the Israeli High Court of justice challenged the legality of the wall construction. This time the petitioners did not limit themselves to land law and property right argumentations, but attacked the legality of the wall from the international humanitarian law perspective, claiming that the military commander has no authority, under Occupation Law, to engage in such a project and seize lands from protected persons to that end. Those petitions also supplied rich data regarding the wall's grave influence on such areas as employment, healthcare, education, freedom of movement, family and community life etc.

Among the second wave petitions three types of challenges to the legality of the wall may be identified. The first comprised of petitions of a general nature which

contained arguments against the project as a whole. Those petitions were filed by Israeli human rights NGO's most notably by *HaMoked: the Center for the Defence of the Individual* ("HaMoked") and the *Association for Civil Liberties in Israel* (ACRI). The second type consisted of 'specific segment petitions'. Those were petitions filed usually by Palestinian residents of villages affected by the wall together with Israeli NGO's and they dealt with the legality of a specific section of the wall which was about to be built. The third type of the second wave petitions dealt with the operation of the gates scattered along the wall and which were supposed to provide access for the villagers to their lands beyond the wall.

HaMoked's petition to the High Court of Justice

The main and only all-encompassing petition challenging the legality of the wall was the one filed by HaMoked. HaMoked's petition argued that the construction of the wall in all its segments which deviate from the green line was and is illegal for four main reasons:

A. The military commander lacks the authority to engage in such an enterprise **in the route chosen**, as the route does not adhere to the green line but rather encircles Jewish (illegal) settlements, and thus presents no legitimate security necessity.

B. The construction of the wall demands a far reaching violation of inherent rights of protected persons, rights enshrined both in IHL and in HRL. This immense infringement of human rights, the petition contended, is in itself illegal and might also amount to prohibited collective punishment.

C. The construction of the wall is a *de-facto* annexation of the areas encompassed by deviating segments (the areas of the Occupied Palestinian Lands who are left west of the wall).

D. Another reason to suspend the decision to erect the wall, mentioned in HaMoked's petition, was the legal regime chosen for the operation of the "seam zone" – the areas west of the wall, caught between the wall and the green line. The petition contends that this regime is defined from the outset as one that discriminates between Jews and Palestinians, and creates, as a matter

of fact, a reality of **apartheid**, unprecedented in Israeli law and forbidden by international law.

In other words, the petition argued that a colossal construction project such as that of the separation wall, with far reaching ramifications on the occupied civilian population, on the economy of the occupied territories and all aspects of civilian life conducted therein, to the extent that one might say that they are permanent – violates the principles of international law and is categorically prohibited by the laws of belligerent occupation, insofar as its route runs inside the occupied territory and materially modifies the fabric of civilian life in the occupied territory, isolating in fact considerable portions of the occupied population, creating hermetic enclaves and constituting a de-facto annexation of parts of the occupied land.

A few weeks after filing HaMoked's petition, the GA referred its request for an advisory opinion to the International Court of Justice. A hearing in the HaMoked petition was held a few days before the hearing at Hague, but no decision was rendered.

3. ***Beit-Surik*** **decision.**

With HaMoked petition still pending and no decision yet made by the ICJ, the Israeli High Court of Justice gave its decision in one of the "specific segment" petitions: HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel.

The Israeli Court (by the opinion of its chief Justice, Aharon Barak) has, for the first time, found a section of an **intended** wall to be illegal. Of the forty kilometers of planned walls and fences in the Beit Surik village region, the Court has annulled thirty.

The decision dealt with two questions: (1) does IHL empower the military commander to construct walls and fences (hereinafter: "the authority question"), and (2) what should be a legal criteria for choosing a particular route. The Court's answer to the first question was affirmative. The court declared that the military commander had the authority to implement the Israeli government's decision to

construct the separation barrier, if such barrier was motivated by military necessity:

> "*27. We accept that the military commander cannot order the construction of the separation fence if his reasons are political. The separation fence 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…*
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> *28. We examined petitioners' arguments, and have come to the conclusion, based upon the facts before us, that the fence is motivated by security concerns. As we have seen in the government decisions concerning the construction of the fence, the government has emphasized, numerous times, that "the fence, like the additional obstacles, is a security measure. Its construction does not express a political border, or any other border." (decision of June 23, 2002). "The obstacle that will be erected pursuant to this decision, like other segments of the obstacle in the "Seamline Area," is a security measure for the prevention of terror attacks and does not mark a national border or any other border." (decision of October 1, 2003)…*
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> *32… The infringement of property rights is insufficient, in and of itself, to take away the authority to build it.* ***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"*

(Emphasis added)

The court's decision on the issue of authority is thus twofold: A. The barrier is necessitated by security needs B. International humanitarian law authorizes such construction if this construction is motivated by military necessity.

In addressing the issue of criteria that should be applied by the military commander and the government while choosing the route, the Court balanced the

rights of Palestinians with the security needs, as the later were presented by the security establishment. In balancing those two the Court relied heavily on the principle of proportionality:

> *"49…The question is: is the injury caused to local inhabitants by the separation fence proportionate, or is it is possible to satisfy the central security considerations while establishing a fence route whose injury to the local inhabitants is lesser and, as such, proportionate?"*

The court has ruled that the route of the barrier in the Beit-Surik region does not meet the demands of proportionality:

> *"60. Our answer is that the relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander,* ***is not proportionate****. The route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. This approach is based on the fact that the route which the military commander established for the security fence – which separates the local inhabitants from their agricultural lands – injures the local inhabitants in a severe and acute way, while violating their rights under humanitarian international law. Here are the facts: more than 13,000 farmers (falahin) 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 separation fence. No attempt was made to seek out and provide them with substitute land, despite our oft repeated proposals on that matter."*
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> (Emphasis added)

The Beit-Surik case, though dismissing the lack of authority argument, limited considerably the degree of freedom of military and governmental administrations in choosing the barrier's route. As a consequence, many segments of the barrier are now under examination of the Court according to the principles laid down in the Beit-Surik decision (about 20 cases are pending at present).

4. **The ICJ's ruling.**

On the 9th of July 2004 the International Court of Justice has published its advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Case.

The ICJ's decision clashes directly with the Beit-Surik judgment on the question of authority. The ICJ has accepted the argument that the construction of the wall along the route which invades the territories occupied by Israel, amounts to a *de-facto* annexation. The court also made it clear that the will to include many Jewish (illegal) settlements on the west side of the barrier cannot be considered as a legitimate military necessity argument. The Court also ruled that the construction of the wall violates inherent rights of the civilian population and as such breaches international law (both IHL and HRL).

It is important to note that the ICJ advisory opinion has far reaching consequences that go well beyond the separation wall. The ICJ's decision comprises of many 'incidental' rulings on legal issues which were never adjudicated in international tribunals. Among them we should list the following:

a. **The pronouncement that the territories are governed by the laws of belligerent occupation.**

b. **The pronouncement that the 4th Geneva Convention applies to the Israeli occupation.**

c. **The rulling that the Jewish settlements in the occupied territories are illegal.**

d. **The determination that article 51 of the UN Charter (self-defence of States) is irrelevant to the current conflict.**

These are very important conclusions and as they are declared by the supreme international legal institution, they carry a high potential of a change in (at least) the sphere of international relations.

5. **Post ICJ ruling jurisprudence.**

It is difficult to asses at this stage how deep will be the change in the Israeli perception of the legality of the wall as a result of the ICJ's advisory opinion. Though Israeli officials have dismissed the ICJ's ruling as insignificant and irrelevant, and even made an attempt to portray the International Court as politically motivated, the legal establishment in Israel is much more careful.

A few days after the ICJ opinion was made public, HaMoked filed a request to reconsider the Beit-Surik judgment and to review the question of authority. HaMoked appended the ICJ opinion to its request. This request is still pending. In at least two "specific segment" petitions, a new line of argument based on the ICJ opinion, was introduced as well.

As a direct result of the ICJ ruling and the legal steps taken in consequence in Israel, the following events took place:

a. The Israeli Attorney General's office has submitted a harsh report to Prime Minister Sharon, explaining the dangers Israel would be faced if it chooses to completely ignore the ICJ opinion.

b. The Israeli Attorney General has also recommended changing Israeli law by incorporating the Geneva Convention as applying to the Occupied Territories. The AG believed that in taking this step, Israel would show its willingness to accept, at least in part, the demands of the international community.

c. On the 19th of August the High Court of Justice directed the Israeli ministry of justice to submit within 30 days a written brief presenting the state's formal position with regard to the implications of the ICJ decision on the question of authority.

It seems that the Israeli High Court finds itself bound to reconsider the Beit-Surik findings on the authority question, as it collides so dramatically with the ICJ

opinion. During a hearing on the 19th of August, Chief Justice Barak made it clear that “sooner or later we will have to deal with the ICJ decision, and now is a good time”.