

Israel: The security barrier—between international law, constitutional law, and domestic judicial review

Daphne Barak-Erez*

Security fence or security wall—the Beit Sourik decision and proportionality test—International Court of Justice’s Advisory Opinion—the Maràabe decision—differences between the ICJ and Israeli Supreme Court—fate of the settlements—foundational constitutional issues

1. Introduction: Barrier, fence, or wall

A major issue regarding the territories Israel has occupied since 1967—and one subject to extensive debate—is the construction of the security barrier that aims to separate Israel proper from the West Bank. The Israeli justification for building this barrier, which lies chiefly in the occupied territories, was the growing number of terrorist attacks originating in those territories, usually involving suicide bombers entering Israeli civilian areas. Such attacks are difficult if not impossible to prevent, once the bombers have set forth on their mission, given the proximity of Palestinian areas to Israeli civilian centers and the likelihood that the terrorists will blow themselves up if approached by security forces.

The construction of the barrier is based on a series of decisions accepted by the Israeli Government since 2001, after the peace process between Israel and the Palestinians launched in the 1990s collapsed, when it became apparent that other methods used by Israel throughout the years, such as deportation, house demolition, administrative detentions, did not reduce the incidence of terrorist attacks. Some methods had proved impractical or insufficiently effective; others had been resisted (both within the country and abroad) as illegally infringing human rights and international humanitarian law. The official Israeli view is that the construction of the security barrier is a “passive” antiterrorist measure.

The initiative to construct the barrier was the subject of intense criticism in the international arena. The legal criticism focused mostly on Israel’s choice to build large sections of the barrier within the occupied territories. First, it was argued that Israel was de facto annexing Palestinian

*Professor, faculty of law, Tel-Aviv University. I thank Aeyal Gross, Yuval Shany, and Yaffa Zilbershats for their comments and Batya Stein for her editing. Email: barakerz@post.tau.ac.il

territory, and, in this sense, the barrier was described as motivated by political rather than security considerations. Second, critics pointed out that the route chosen for the barrier protects not only Israel's territory but also Israeli settlements in the occupied territories, long regarded by the international community as infringing the Fourth Geneva Convention.¹ These critiques bolstered the argument regarding Israel's motives—that it was engaging in de facto annexation of territory. Third, grave infringements of humanitarian law and of the human rights of Palestinians residing in areas adjacent to the barrier were also targeted, including land expropriations and the significant limitation of access to vital services. These infringements pertained mainly to Palestinians caught on the “Israeli” side of the barrier and in need of services supplied from the West Bank, but sometimes also to residents of the “Palestinian” side who are now detached from their fields, which remain on the other side.

The criticism is reflected in the various terms used to refer to the barrier. The official term of the Israeli authorities is “security fence,” reflecting their position that the barrier is a temporary measure not intended to delimit the country's borders, and that its impact on everyday life in the territories is not significant. Fences, after all, are part of daily life everywhere. This was also the term used in the litigation before the Israeli Supreme Court in the two cases reviewed in this note—the *Beit Sourik* decision² and the *Maràabe* decision.³ Critics, however, more often refer to it as the “wall,” a term that connotes permanence as well as the impediments it imposes on the lives of Palestinians. This was also the term used by the United Nations General Assembly in deciding to refer the matter to the International Court of Justice for an advisory opinion and, accordingly, in the Court's subsequent opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Territories*.⁴ In fact, the barrier is mostly a chain-link fence that includes walls in some sections.⁵

¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 68, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

² HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel* [2005] IsrSC 58(5) 807, translated in 38 ISR. L. REV. 83 (2005) and 43 INT'L LEGAL MATERIALS 1099 (2005) (hereinafter *Beit Sourik*). English translation is also available at <http://elyon1.court.gov.il>.

³ HCJ 7957/04 *Maràabe v. The Prime Minister of Israel* (unpublished at time of writing) (hereinafter *Maràabe*); English translation is available at <http://elyon1.court.gov.il>.

⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 43 INT'L LEGAL MATERIALS 1999 (2004) (July 9) (hereinafter *Advisory Opinion*).

⁵ For most of its length, the barrier is a strip approximately the width of a four-lane highway with a chain-link fence in the middle supporting an intrusion detection system. About 3 percent of it is a concrete wall, designed to block shootings at Israeli targets.

This note analyzes the decisions of the Israeli Supreme Court regarding the legality of the barrier, decisions that lie at the crossroad of Israeli constitutional law and international law.⁶ The note addresses, as well, both substantive legal principles and institutional constraints.⁷ In a broader perspective, these decisions are also interesting test cases for other topics that are attracting growing interest—the application of international law in domestic courts,⁸ and the mutual influences of judges in different jurisdictions.⁹

2. The *Beit Sourik* decision

The Israeli Supreme Court's *Beit Sourik* decision dealt with a petition against orders to seize plots in eight villages for the purpose of erecting the security barrier. The petitioners were the village councils and the landowners affected, who argued that the seizure orders were illegal. The Court examined the issue within the framework of the law of belligerent occupation, applying the Hague Regulations, the Fourth Geneva Convention

⁶The actions of Israel in the occupied territories have been subject to judicial review by the Israeli Supreme Court since the beginning of Israeli rule, following a decision of the Israeli government not to oppose petitions regarding the territories. Therefore, throughout the years, the Israeli Supreme Court has had the opportunity to review many decisions of the Israeli occupying forces in both civil and military contexts. On the jurisprudence of the Israeli Supreme Court regarding the territories, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* (State Univ. N.Y. Press 2002).

⁷Two symposia have been devoted to the Advisory Opinion. See *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AM. J. INT'L L. 1 (2005); Special Double Issue: *Domestic and International Judicial Review of the Construction of the Separation Barrier*, 38 ISR. L. REV. 6 (2005). For articles that looked at the Advisory Opinion and the *Beit Sourik* decision together see Geoffrey R. Watson, *The "Wall" Decision in Legal and Political Context*, 99 AM. J. INT'L L. 6 (2005); David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88 (2005); David Kretzmer, Introduction: *Domestic and International Judicial Review of the Construction of the Separation Barrier*, 38 ISR. L. REV. 6 (2005); Yuval Shany, *Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 ISR. L. REV. 230 (2005); Yuval Shany, *Head Against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Y.B. INT'L HUMANITARIAN L. (forthcoming 2006). For a detailed discussion of the two Israeli decisions—*Beit Sourik* and *Maràabe*—together with the Advisory Opinion, see Aeyal M. Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 LEIDEN J. INT'L L. (forthcoming).

⁸See Daphne Barak-Erez *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue* 2 INT'L J. CONST. L. (I-CON) 611 (2004).

⁹Anne Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication* 107 YALE L.J. 273 (1997). See also ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton Univ. Press 2005).

applied *de facto*,¹⁰ and Israeli administrative law. The decision dealt with the principles applying to the issue of the barrier but confined itself to the legality of constructing the barrier in the area relevant to the petitioners.

The Supreme Court addressed the argument that the military orders are illegal because building the barrier within the occupied territories alters the borders of the West Bank by *de facto* annexing areas to Israel, and because it violates many rights of the local residents—specifically the right to property, the right to work, freedom of movement, and access to education and religious services.

The Court considered two questions: whether the military commander was authorized to build the security barrier in the occupied territories and, if so, whether the location of the barrier was legal.

Addressing the first question, the Court accepted the petitioners' argument that the military commander could not order the construction of the barrier if his reasons were political, that is, aimed at annexation. The Court found, however, that the aim of the barrier was, indeed, to protect Israel's civilian population. Having determined this, the Court proceeded to discuss the second question, dealing with the placement of the barrier *per se*. In this regard, the Court strove to strike a balance between the military commander's authority to maintain security in the area and to protect the security of the country and its citizens, on the one hand, and the rights, needs, and interests of the local population, on the other. To do so, it applied a proportionality test, understood to be a significant principle of international law (and, specifically, of the law of belligerent occupation) as well as Israeli administrative law.

The analysis in the case professes to follow the standard reasoning of constitutional and administrative law adjudication in Israeli law. Whereas in a typical domestic case, the Court balances the general public interest *vis-à-vis* the constitutional rights of individuals according to Israeli law, in this case the Court balanced the public interest in security against the rights of the local residents according to international humanitarian law. The Court held that these rights were infringed—pointing at the amount of land taken for the purpose of erecting the barrier, the scope of uprooting of olive trees along the barrier's route, and the separation of villagers from their cultivated land. The Court found that these damages to local residents were disproportionate and, therefore, held that the military commander was

¹⁰ Israel's consistent official position has been that the Fourth Geneva Convention does not apply to the occupied territories because the convention applies only to territories that the occupier removes from the control of their legal sovereign. Israel is unwilling to grant implicit recognition to Egypt's and Jordan's sovereignty in Gaza and the West Bank, respectively (maintaining these nations had occupied the territories unlawfully when the British Mandate of Palestine ended). In addition, Israel has rejected the view that the convention reflects customary international law. However, Israel has declared that it will voluntarily comply with the convention's humanitarian provisions and, therefore, the Israeli Supreme Court also applies them.

under a duty to consider alternative routes. The Court reached this conclusion on the basis of a segment-by-segment analysis of the barrier, and also of an evaluation of its overall effect on the residents of the area.¹¹

3. The Advisory Opinion

While the *Beit Sourik* and other petitions against the separation barrier were still pending in Israel, the International Court of Justice (ICJ) was asked to give an advisory opinion on the legality of constructing the barrier. It rendered its opinion in the matter just ten days after the *Beit Sourik* decision. A short analysis of the Advisory Opinion is necessary at this point, because it sheds light on the possibility of different decisions on the same matter, and because the Israeli Supreme Court took the Advisory Opinion into consideration, as exemplified by the *Maràabe* case.

In contrast to the Israeli Court, the ICJ dealt with the barrier as a whole. It found that the construction of the barrier in the occupied territories was illegal, and that Israel was under an obligation to cease the construction of the barrier, to dismantle the structure already built, to repeal or render ineffective all legislative and regulatory acts relating thereto, and to make reparations for all damages caused by the construction.

The Advisory Opinion decided differently on the questions already considered by the Israeli Supreme Court. First, it implied that the barrier was built in order to achieve political rather than military purposes (by pointing at the correlation between its route and the location of Israeli settlements in the occupied territories).¹² Second, without conducting a detailed review of each section of the barrier it held that the barrier as a whole infringed humanitarian law and human rights law.

Regarding the barrier's political implications, the ICJ emphasized that its siting had been planned so as to enclose within Israel the great majority of Israeli settlements in the occupied territories. It held that these settlements were illegal pursuant to article 49(6) of the Fourth Geneva Convention, which prohibits the transfer of population by an occupying power into the territory it occupies, and that the route of the barrier might prejudice further negotiations between Israel and Palestine regarding the territories.

With regard to rights violations, the International Court held that the barrier infringes several rights, including freedom of movement, and the

¹¹ As a result of the *Beit Sourik* ruling, the Israeli government changed plans for the security barrier in the area, but the new plan has been contested in a new petition arguing that it has not solved the problems posed to Palestinian residents. See HCJ 426/05 Bido Village Council v. The Government of Israel (pending).

¹² Specifically, according to the International Court of Justice, "the Court, from the material available to it, is not convinced that the specific course Israel chose for the wall was necessary to attain its security objectives." Advisory Opinion, *supra* note 4, at para. 137.

right to work, to health, to education, and to an adequate standard of living, as well as provisions concerning the protection of property.

The ICJ further rejected possible defenses of the barrier based on military exigencies, because military exigencies cannot justify exceptions to some of the relevant provisions of the Hague Regulations and the Fourth Geneva Convention and, additionally, because it was not convinced that the construction of the barrier in the specific locations chosen was the only means to safeguard the Israeli interests at stake. The Court also rejected the applicability of the self-defense argument and concluded that Israel could not rely on article 51 of the United Nations Charter, because it was not threatened by another state and because the attack was coming from a territory under its control.

4. The *Maràabe* decision

More than a year after the *Beit Sourik* decision and the Advisory Opinion were issued, the Israeli Supreme Court ruled on the *Maràabe* petition, an important case regarding another section of the security barrier. *Maràabe* dealt with five villages in the so-called Alpehi Menasheh enclave, where the barrier surrounds the Israeli settlement of Alpehi Menasheh on all sides, leaving a road connecting it to Israel. Several Palestinian villages were included within the barrier and were thus cut off from the rest of the West Bank. The Palestinian inhabitants of the area could enter the West Bank through several gates that open at various times, but the enclave was connected to Israel without a checkpoint. The petitioners pointed to the harmful effects of the barrier, noting, for instance, that doctors could only pass through the gates during opening hours.

The Israeli Supreme Court allowed the petition, but based this on a reiteration of the principles of its *Beit Sourik* decision. The Court emphasized that it accepted the main holdings of the Advisory Opinion regarding the pertinent legal framework. It accepted the definition of the West Bank as an area under belligerent occupation, and it had recourse to the same norms of international law, including the Fourth Geneva Convention, although without ruling on its de jure application. Nevertheless, it rejected the ICJ's conclusions regarding both the alleged political purpose of the barrier and the sweeping denial of any justification for taking steps that infringed on the rights of Palestinian residents in the area. The Israeli Court explained this rejection as based on distinctions between the facts it considered and those before the International Court.

The Israeli Court concurred with the ICJ that a political barrier, aimed at annexing territories to Israel, would have been illegal, but it found that the construction of the barrier was motivated by security considerations.

Having so decided, the Court's next question was whether it was proper for the route followed by the barrier to take into consideration the protection

of Israelis residing in the territories. In this matter, the Court held that Israelis living in the occupied territories were not “protected persons” for the purposes of article 4 of the Fourth Geneva Convention; however, the military commander of the area was still authorized to protect their lives. First, the Court held that the power of the military commander, according to article 43 of the Hague Regulations, to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country” covers any person present in the territory held under belligerent occupation.¹³ Second, the Court held that the State of Israel has a duty—grounded in Israel’s Basic Law: Human Dignity and Liberty—to defend the lives, safety, and well-being of Israeli citizens, even outside Israel proper.

Based on this framework, the Israeli Supreme Court accepted the petition but, again, limited its ruling to specific choices governing the location of some sections of the barrier. Those choices failed the proportionality test because no effort had been invested in finding alternatives that could have ensured security with less injury to the local residents, as required. Accordingly, the Court ordered a reconsideration of the current siting, the dismantling of the existing barrier, and the building of a new one.

5. Comparisons, narratives, and possibilities

The decisions of the Israeli Supreme Court in the matter of the security barrier reflect the broad impact of international law on domestic adjudication. The foundation for the case law in this area is the international law of occupation. At the same time, the Court’s decisions show that international law varies according to the forum applying it.¹⁴ The Israeli Supreme Court has expressed an overriding sense of obligation to decide the petitions according to the applicable norms of international law. In its *Maràabe* decision it emphasized that it was instructed by the norms of international law as defined by the International Court of Justice, and explained its different conclusion on the basis of differences in the facts before each court, especially regarding the background security situation.

However, the differences between the Israeli precedents and the Advisory Opinion do not derive only from the differences in factual foundations. First, the two courts were inspired in their decisions by different historical narratives regarding the barrier’s background. The Israeli Supreme Court

¹³ For a criticism of this argument with regard to the proper interpretation of article 43 of The Hague Regulations, see Gross, *supra* note 7.

¹⁴ This observation brings to mind the classic debate on the legitimate scope of judicial discretion. See, e.g., Ronald Dworkin, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81 (Duckworth 1977). For a detailed institutional comparison between the two courts (focusing on the *Beit Sourik* decision), see Shany, *Capacities and Inadequacies*, *supra* note 7, at 240–242.

included in its judgments detailed accounts of the terrorist attacks on civilians within Israel, none of which were reflected in the Advisory Opinion of the ICJ. The differences are not only differences of fact, especially if one considers that judges are able, at least to some extent, to take judicial notice of facts and historical processes beyond the scope of the immediate controversy.¹⁵

Second, the Israeli Supreme Court dealt with specific petitions regarding particular sections of the security barrier, whereas the ICJ addressed the question of the barrier's construction as a whole, without dealing with the specifics of security needs with regard to each section. In this sense, thus, the two institutions were not dealing with the same question.

Which of the two approaches is better? The answer is not clear-cut. On the one hand, because a decision on specific facts is always more accurate than a general one, the Israeli Supreme Court's decisions may be regarded as more nuanced and better founded. On the other hand, issuing separate decisions on each section puts the Israeli Court at a disadvantage in the sense that it tends to obscure the larger reality constituted by the barrier.¹⁶ This is especially true concerning the barrier's impact on the future of Israeli settlements in the occupied territories, such as how many will be included in the area protected by the barrier.

A further major difference between the two courts' jurisprudence derives from the ways they addressed the question of the settlements' legality. The ICJ, basing itself on the provisions of the Fourth Geneva Convention, held that the settlements are illegal and their protection, therefore, is also illegal, whereas the Israeli Supreme Court has consistently refrained from addressing the question of the settlements' legality.¹⁷ In *Maràabe*, the Israeli Court explained that a decision on the matter of the settlements was not needed because the military commander must defend their residents in all circumstances, either because of his duties according to international law or because of the Israeli government's duties toward its citizens as defined in Basic Law: Human Dignity and Liberty.

Paradoxically, the two courts have something in common—namely, a narrow view of the motivations behind the construction of the barrier. The ICJ held that the barrier was a political move and, therefore, refused to acknowledge its security purposes. By contrast, the Israeli Supreme Court firmly held that the barrier was not politically motivated, and that its sole concern was security. The two courts were not open to the possibility that, in fact, both motivations were inseparably linked in the considerations

¹⁵ See Daphne Barak-Erez, *Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court*, 16 CANADIAN J. LAW & SOC'Y. 93 (2001).

¹⁶ In this context, Gross uses the metaphors of seeing the "big picture" or the whole "forest" (as opposed to seeing only the trees). See Gross, *supra* note 7.

¹⁷ See part 6 *infra*.

inspiring the barrier's construction. The conclusions of both courts on these matters seem unsatisfactory. The Advisory Opinion's denial of security-based motivations seems detached from reality, given the widely publicized incidence of terrorist attacks in Israeli civilian areas committed by Palestinians from the territories. At the same time, it is hard to be convinced by the decisions of the Israeli Supreme Court that the siting of the barrier was not also politically motivated, since its own decisions highlighted the unreasonable choices concerning the course followed by the construction, and invalidated them as failing the test of proportionality.

6. The pending question of the Israeli settlements

The real controversy hovering over all the litigation on the security barrier concerns the fate of the Israeli settlements in the occupied territories. Since 1967, Israel has allowed and even encouraged its citizens to live in the new settlements established in the territories, motivated by religious and national sentiments attached to the history of the Jewish nation in the land of Israel. This policy has also been justified in terms of security interests, taking into consideration the dangerous geographic circumstances of Israel before 1967 (where Israeli areas on the Mediterranean coast were potentially threatened by Jordanian control of the West Bank ridge). The international community, for its part, has viewed this policy as patently illegal, based on the provisions of the Fourth Geneva Convention that prohibit moving populations to or from territories under occupation.

For obvious reasons, a decision on the legality of the settlements would have put the Israeli Supreme Court in an extremely difficult situation. Acknowledging the legality of the settlements does not seem to satisfy the relevant provisions of international law. At the same time, denying their legality would invite confrontation with the Israeli government as well as with significant segments of the Israeli polity. In practice, the Court managed this very delicate matter by systematically avoiding any decision on the legality, as such, of the settlements policy. Although the Court exercised its jurisdiction in numerous petitions originating in the occupied territories, including military operations and security measures, the one matter it never addressed was the settlements' legality. The Court dismissed petitions attacking the settlements policy for being "general," that is, running counter to the judicial legacy of deciding petitions on specific matters, and even as nonjusticiable.¹⁸ Indeed, the Court has decided questions of legality regarding several settlements, but only when the issue concerned specific issues of location, as in its famous decision to overrule the establishment of a settlement on land taken from private Palestinian

¹⁸ See HJC 4481/91 Bargil v. Government of Israel [1992] IsrSC 47(4) 210.

landowners.¹⁹ At the same time, the Court has systematically stated that a general ruling on the settlements' legality was not needed for the purposes of deciding any of the particular petitions it did consider.²⁰ Occasionally, the Court has also noted that the fate of the settlements will be decided in future peace agreements between Israel and its neighbors.²¹

Petitions attacking the location of the security barrier had threatened to challenge this long-lasting judicial policy. The security barrier constructed on the territories was planned so as to protect Israeli settlements as well. Prima facie, then, the question of the settlements' legality was potentially relevant, especially in *Maràabe*. The Court, however, remained firm in its decision not to address the issue, insisting that the military commander is responsible for all the people in the territories, and that the settlers who are Israeli citizens are entitled to such protection. This argumentation is understandable, bearing in mind the Court's institutional constraints, but not entirely persuasive in terms of pure legal analysis. Unquestionably, residents in the settlements deserve protection but, legally speaking, the measures taken for protecting them should be influenced, perhaps, by the question of the settlements' legality. Various measures could be adopted to protect the settlers' lives. Some are based on the assumption that the settlements, as such, must be maintained, whereas others are based on the assumption that the residents deserve protection but not necessarily the settlements. Protecting the lives of Israelis in the territories could also be achieved by recourse to other protective measures, such as building fences encircling their settlements or even by offering them the option of leaving their homes. Such an offer should obviously be part of a larger plan regarding the area.²² One instance of an alternative solution was provided by the Israeli government in the disengagement plan it implemented in the Gaza Strip.

This analysis does not necessarily imply that a disengagement plan for some parts of the West Bank settlements is a better solution. It only points out that the Court's position, stating that the settlements' legality is not an issue, is not accurate; it must be understood in the context of the Court's institutional constraints.

This criticism is also relevant to the decision of the ICJ. Even if the settlements are illegal from the standpoint of international law, their residents must now be protected, and if the barrier is, indeed, only a temporary measure, the settlements' illegality is not the only consideration

¹⁹ See HJC 390/79 Dweikat v. Government of Israel [1980] IsrSC 34(1) 1.

²⁰ *Id.* at 29.

²¹ See HJC 610/78 Oyev v. Minister of Defense [1979] IsrSC 33(2) 113, 131, 134.

²² According to the Oslo Accords, the status of the settlements was to be resolved through bilateral negotiation. See Declaration of Principles on Interim Self-Government Arrangements, Israel-P.L.O., Sept. 13 1993, Art. V(3), 32 INT'L LEGAL MATERIALS 1525 (1993).

to be addressed. This criticism of the Advisory Opinion is contingent on whether the barrier is, in fact, a temporary measure rather than a de facto attempt to annex the territories.

7. Equality issues and constitutional law

Concerning the constitutional rights of Israelis in the settlements, *Maràabe* raises a foundational issue of constitutional law regarding Israel's territorial boundaries. According to the Israeli Supreme Court, the Basic Laws grant rights to Israeli citizens beyond Israel proper. This reasoning has also been used in another important precedent of the Court, dealing with the constitutionality of the disengagement initiative that ended Israeli settlement in another occupied territory, the Gaza Strip. In that matter, the Court faced petitions from settlers who attacked the constitutionality of this initiative.²³ In its *Gaza Beach* decision, the Court relied on the assumption that the constitutional rights granted by the Basic Laws apply also to citizens located in territories held by Israel under belligerent occupation, and used it as a basis for reviewing the compensation schemes afforded to the settlers. Although this holding is understandable on its own, it raises broader questions regarding the scope of the Basic Laws.²⁴

The scope of the protection afforded by constitutional regimes is, indeed, a serious question. It was at the heart of the debate on the United States' Guantánamo Bay detentions, an issue certainly beyond the scope of this note. At the same time, one of the possible distinctions suggested by the Israeli Supreme Court deserves attention. According to the Court, Israeli constitutional law protects Israelis in the territories but does not necessarily protect others in the same territories (since its application to non-Israelis was left open).²⁵ Such a distinction, if applied, would be extremely problematic. On the one hand, it may be justified, given that residents of the territories are "protected persons" according to the Fourth Geneva Convention, whereas

²³ H CJ 1661/05 *Gaza Beach Regional Authority v. Israeli Knesset* [2006] IsrSC 59(2) 481 (hereinafter *Gaza Beach*).

²⁴ In *Gaza Beach*, the Court stressed it had left open other related questions, such as the application of the Basic Laws to Israeli citizens who are not only outside Israel but also outside territories held by Israel, as well as their application to non-Israelis in territories held by Israel.

²⁵ Within Israel proper, the Basic Laws usually apply universally, and not only to citizens. Basic Law: Freedom of Occupation, which deals with the right to work and choose a profession of one's desire, is limited to citizens and residents, and does not apply to tourists and visitors (Section 3 of this Basic Law states: Every Israel national or resident has the right to engage in any occupation, profession or trade). Basic Law: Human Dignity and Liberty grants the rights it protects to all persons except the right to enter Israel from abroad, which is limited to Israeli nationals (This distinction is found in Section 6 of this Basic Law. Subsection (a) states: "All persons are free to leave Israel," whereas subsection (b) states: "Every Israel national has the right of entry into Israel from abroad"). The English translation is available at: <http://www.knesset.gov.il>.

citizens of the occupying power are not. On the other hand, this is a thorny distinction on several levels. First, it constitutionalizes existing legal discriminations between Israeli settlers and Palestinian residents in the area. So far, Israelis living in the territories have been subjected to a distinct legal regime applied only to the area of the settlements or to Israeli citizens. If the Basic Laws were to apply only to them, this discrimination would be constitutionalized. Second, the protection afforded to the Palestinian residents of the territories by the Fourth Geneva Convention does not balance the application of the Basic Laws to Israeli citizens residing in the area. The Fourth Geneva Convention defines the contours of the rights it protects in a manner that takes into consideration the special security constraints in occupied areas under military rule, and the scope of these rights is therefore narrower than that of constitutional rights in ordinary circumstances. Third, the Israeli Supreme Court has never directly stated that the Fourth Geneva Convention applies in the territories *de jure*, based on the long-standing policy of Israeli governments to apply its humanitarian provisions *de facto*. At the symbolic level, the Court was now willing to apply Israeli Basic Laws to Israeli citizens in the territories also *de jure*, but it has not recognized the *de jure* application of the Fourth Geneva Convention to Palestinians residing in the territories. Fourth, in pointing to a possible distinction between Israeli citizens residing in the territories and Israeli citizens residing elsewhere outside of Israel, the Court has implicitly recognized Israel's special attachment to the occupied territories. The Court made not merely a general statement regarding the extraterritorial application of the Basic Laws but a specific decision regarding Israelis in the territories.

8. Conclusions

It is not easy to draw firm conclusions regarding the case law pertaining to the security barrier since this is still an ongoing matter. Many petitions regarding other sections of the barrier and related matters are pending before the Israeli Supreme Court. The decisions of the Court in the matter of the security barrier should be understood in a domestic context, against the background of a public outcry demanding solutions, even if by harsh means, to the problem of terrorism. The Court's decisions deterred the Israeli government from proceeding with the construction of the barrier with only minimal concern for the Palestinians. However, these rulings addressed but two petitions out of the many brought with respect to various sections of the barrier.²⁶ Their actual impact remains to be seen. They could serve merely as

²⁶ In fact, the Israeli Supreme Court had already dismissed some other petitions based on the principles laid down in the precedents of *Beit Sourik* and *Maràabe*. See HCJ 5683/04 Beit Sira Village Council v. Government of Israel (to be published September 1, 2006); HCJ 6336/04 Mousa v. The Prime Minister (to be published October 1, 2006); HCJ 4825/04 Alian v. The Prime Minister (to be published, March 16, 2006).

“landmark cases” without genuinely affecting the lives of the Palestinians residing in the territories.²⁷ Furthermore, the decisions have also been unclear on the scope of Israeli constitutional law as well as the scope of the Basic Laws’ application inside and outside the territories, raising concerns about discrimination in the application of the Israeli constitutional regime.

From a more general perspective, the decisions point, once again, to the growing importance of international law in domestic adjudication. They also show that the interpretation of international law varies among different courts and tribunals, as is evident when comparing the Israeli precedents in *Beit Sourik* and *Maràabe* with the Advisory Opinion of the International Court of Justice. This comparison does not necessarily weigh against the domestic court. In these instances, the latter was in a better position than the international court to review the details of the controversy and, therefore, gave more nuanced decisions. At the same time, however, it was heavily constrained by the perceptions of the Israeli public on such questions as the settlements’ legality. The ICJ, for its part, was probably affected by perceptions prevalent in the international political arena and lacked exposure to relevant facts.

The security barrier decisions provide an opportunity to evaluate the potential for a dialogue between domestic courts and international tribunals. Interestingly, the dialogue appears so far to be one-sided, in that the Israeli Court’s decisions relied heavily on international law and, in the *Maràabe* case, even referred specifically to the Advisory Opinion. This dynamic may have resulted from the proximity between the *Beit Sourik* decision and the *Advisory Opinion* issued only ten days later, but may also point to the greater likelihood of national courts relying on international decisions as their terms of reference rather than vice versa.²⁸ At any rate, it is important to note that the Israeli Supreme Court felt obliged to refer to the opinion of the ICJ, but did not regard it binding.

Another important point concerns the impact of international judicial proceedings on the institutional legitimacy of national courts. It seems that the perceived threat of international adjudication has the potential to bolster the institutional legitimacy of the national court in handling highly sensitive political questions. That is to say, the Israeli Supreme Court had been criticized for involving itself in delicate security issues when it delivered its *Beit Sourik* decision. However, its decisions on the security barrier are now relatively welcome by the Israeli public and have emerged as a preferable alternative to the harsher criticism of the international tribunal.

²⁷ For a criticism of this type of “landmark case,” see Ronen Shamir, ‘Landmark Cases’ and the Reproduction of Legitimacy: The Case of Israel’s High Court of Justice, 24 L. & Soc. REV. 781 (1990).

²⁸ The Advisory Opinion mentions briefly one decision of the Israeli Supreme Court when it discusses the issue of the applicability of the Fourth Geneva Convention in the occupied territories. See Advisory Opinion, *supra* note 4, at para. 100.