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A Disproportionate Ruling for All the Right Reasons: *Belt Sourik Village Council v. The Government of Israel*

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**A DISPROPORTIONATE RULING FOR ALL
THE RIGHT REASONS:
*BEIT SOURIK VILLAGE COUNCIL V.
THE GOVERNMENT OF ISRAEL***

I. INTRODUCTION

On March 9, 2002, a Palestinian suicide bomber walked into Jerusalem's popular Moment Café as though he was an ordinary customer looking to order coffee or a snack.¹ When he reached the center of the café, he detonated himself, killing eleven people.² Three weeks later, during the Jewish holiday of Passover,³ twenty-five-year-old Abd al-Basit Awdah, a Hamas⁴ activist, blew himself up in Netanya's Park Hotel during a *seder*⁵ attended by 250 grandparents, mothers, fathers, and children.⁶ Twenty-nine people lost their lives and 140 others were injured in the explosion.⁷ Since September 2000, there have been over eight hun-

1. Lisa Katz, *Most Deadly Terrorist Attacks in Israel*, http://judaism.about.com/library/1_terrorism/bl_worstattacks.htm. See also Etgar Lefkovits & David Rudge, *11 Killed in Jerusalem Suicide Attack: Two Terrorists Open Fire at Netanya Hotel Killing 3, Wounding More than 50*, JERUSALEM POST, Mar. 10, 2002, at 1A, available at LEXIS, News Library Jpost File.

2. *Id.*

3. Passover is a spring festival celebrated by Jews lasting seven days in Israel and eight days in the Diaspora (lands outside of Israel). The holiday commemorates the Exodus from Egypt. 13 ENCYCLOPEDIA JUDAICA *Passover* 163 (1972).

4. Hamas was formed in late 1987 as an outgrowth of the Palestinian branch of the Muslim Brotherhood. Hamas has used various tactics, including political and violent, to reach their goal of establishing an Islamic Palestinian state in place of Israel. "Hamas activists, especially those in the Izz el-Din al-Qassam Brigades, have conducted many attacks—including large-scale suicide bombings—against Israeli civilian and military targets, suspected Palestinian collaborators, and Fatah rivals." U.S. Dep't of State, *Background Information on Foreign Terrorist Organizations, Released by the Office of the Coordinator for Counterterrorism* (Oct. 8, 1999), <http://www.state.gov/s/ct/rls/rpt/fto/2801.htm#hamas>.

5. Taking place on the first two nights of the eight day holiday of Passover, the *seders* are the most important events in the Passover celebration. They are a time for families to come together and recount the story of the Jews' exodus from Egypt and their journey to Israel. *The Passover Seder*, <http://www.holidays.net/passover/seder.html>.

6. Human Rights Watch, *Suicide Bombing Attacks on Civilians*, <http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002-03.htm>. See also David Rudge, *20 Die in Netanya Pessah Massacre*, JERUSALEM POST, Mar. 29, 2002, at 1A, available at LEXIS, News Library Jpost File.

7. Katz, *supra* note 1.

dred such attacks in Israel, making terrorism in Israel both horrifying and commonplace.⁸

As of March 2006, more than 3,800 Israelis and Palestinians have died and over 21,000⁹ have been injured during the second *Intifada*¹⁰—a potent reminder that the peace process that once seemed so promising has crumbled.¹¹ From an Israeli perspective, no place is secure from the

8. See HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] P.D. 46(2) ¶ 1, available at <http://62.90.71.124/eng/verdict/framesetSrch.html>.

9. See Middle East Policy Council, Conflict Statistics, <http://mepc.org/resources/mrates.asp> (last visited Apr. 5, 2006) (stating that 999 Israelis and 3844 Palestinians have lost their lives); see also Maj. Gen. Uzi Dayan, *Special Policy Forum Report—In Defense of the Fence*, Washington Institute for Near East Policy, Peacewatch, No. 437 (Dec. 19, 2003), available at <http://www.washingtoninstitute.org/watch/Peacewatch/peacewatch2003/437.htm>.

10. *Intifada* literally means uprising. The first *Intifada* spanned six years beginning in December 1987 and continuing until September 1993 (the signing of the Oslo Accord). This period was marked by continuous Palestinian uprisings, including rioting, rock throwing, and illegal road blocks in an effort to contest Israel's presence in Gaza and the West Bank. See generally CAPTAIN (RES.) UZI AMIT-KOHN ET AL., ISRAEL, THE "INTIFADA" AND THE RULE OF LAW 27–28 (1993). The second *Intifada*, like the first, also began with rock throwing. While some argue that it was caused by Ariel Sharon's controversial visit to the Temple Mount—a holy site shared by both Jews and Muslims where Abraham was to sacrifice Isaac and Mohammad is thought to have ascended to heaven—others believe that Yassir Arafat, the Palestinian Prime Minister, planned to call for an uprising regardless of Sharon's actions. Since September 2000 until the present, this latest *Intifada* has exploded into a full blown guerilla war of suicide bombers and military incursions. Ziv Hellman, *The Beginnings of the Second Intifada: In September 2000, a New Wave of Violence Erupted*, http://www.myjewishlearning.com/history_community/Israel/Overview_IsraeliPalestinian_Relations/Intifada_I/Intifada2.htm.

11. See David Makovsky, *How to Build a Fence*, 83 FOREIGN AFFAIRS 50, 50 (2004). Chief Justice Aharon Barak provides a brief history of the Israeli Palestinian peace process in *Beit Sourik Village Council v. The Government of Israel*. He states:

Since 1967, Israel has been holding the areas of Judea and Samaria in belligerent occupation. In 1993 Israel began a political process with the PLO, and signed a number of agreements transferring control over parts of the area to the Palestinian Authority. Israel and the PLO continued political negotiations in an attempt to solve the remaining problems. The negotiations, whose final stages took place at Camp David in Maryland, USA, failed in July 2000 . . . 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 [Judea and Samaria] and in Israel. From September 2000 until the beginning 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.

Beit Sourik, HCJ 2056/04 ¶ 2.

threat of attack: “in public transportation, in shopping centers and markets, in coffee houses and in restaurants,” Israeli citizens struggle with the perpetual fear of terrorism.¹² Homemade bombs filled with nails and shrapnel, snipers overlooking highways and small communities, and Qassam rockets¹³ fill the thoughts of parents daily as they send their children to school or kiss one another goodbye on their way to work.¹⁴

In the past, Israel responded to terrorist threats in several ways, most notably through military incursions into the Occupied Territories.¹⁵ In 2002 alone, the Israeli Defense Force¹⁶ carried out two large-scale military operations between March and June, operation “Defensive Wall”¹⁷

12. *Beit Sourik*, HCJ 2056/04 ¶ 2; see also Emanuel Gross, *The Struggle of a Democracy Against Terrorism—Protection of Human Rights: The Right to Privacy Versus the National Interest—The Proper Balance*, 37 CORNELL INT’L L.J. 27, 28 (2004) (“Since its establishment, the State of Israel has been subject to incessant terrorist attacks. Streets, buses, and places of mass entertainment transformed in the blink of an eye into fields of death is not the scene of a nightmare but a daily reality. The cost of terrorism is unbearable. The lives of thousands of innocent civilians have been brutally cut short, and the existence of tens of thousands of injured men and women has been changed unrecognizably; the Israeli experience is suffused with bereavement, pain, frustration and anger. 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.”).

13. “The Qassam-1 and Qassam-2 are rockets that were developed by the Islamic terrorist group Hamas in the Gaza Strip with the aid of the Palestinian Authority (PA)” Mara Karlin, *Palestinian Qassam Rockets Pose New Threat to Israel*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Terrorism/Qassam.html>.

14. See Michael Nakoryakov, *Terrorism Will End One Day—It Just Has to Run Out of Excuses*, SALT LAKE TRIBUNE, Jan. 12, 2003, at AA5.

15. *Beit Sourik*, HCJ 2056/04 ¶ 2. This Note refers to the Israel-occupied regions by the names that are most commonly used in the international debate: “West Bank,” “Gaza Strip,” or “the Occupied Territories.” The biblical terms “Judea” and “Samaria”—as the West Bank is officially called in Israel—are used as they appear in quoted texts or in formal titles. This Note uses the terms “occupied territories,” “military government,” “occupying power,” and “occupant” as they are normally used in international law. Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT’L L. 1, 1 n.1 (1994). Although somewhat geographically ambiguous, the West Bank constitutes the “area west of the Jordan River taken over by Israel in the 1967 Six Day War.” AMIT-KOHN ET AL., *supra* note 10, at 24.

16. The Israeli Defense Force (IDF) is one of the most elite forces in the world. In Israel, enrollment in the IDF is mandatory for both men and women. The IDF is highly regarded in Israel and commands great respect. See 9 ENCYCLOPEDIA JUDAICA 690 (1972).

17. Justice Barak described Operation Defensive Wall as follows:

Within the framework of Operation Defensive wall, the army carried out a wide-ranging operation of detention. The IDF entered Palestinian cities and villages and detained many suspects. At the height of the activity about 6000 people were detained During the first stage of these detentions, the detainees

and operation "Determined Path."¹⁸ Despite the commitment of significant resources and effort, the terrorist attacks, although reduced, have not ceased.

In April 2002, the Ministers' Committee for National Security, a Committee under the Minister of Defense,¹⁹ reached a decision to build a security fence²⁰ between Israel and the West Bank for the stated purpose

were brought to temporary facilities, which were set up at brigade headquarters. Here the detainees were initially screened, a process whose duration extended between a few hours and two days. At this point, a substantial number of the detainees were released. During the second stage, those who remained were transferred to a central detention facility in the area, located at Ofer Camp, for further investigation.

HJC 3278/02 Center for Defense of the Individual v. IDF Commander [2002] ¶ 2 (unpublished).

18. Operation Determined Path has been described as follows:

As part of this operation, which was initiated at the end of March 2002, the IDF forces entered various areas of Judea and Samaria. Their intention was to detain wanted persons as well as members of several terrorist organizations Among those detained were persons who were not associated with terrorism; some of these persons were released after a short period of time.

HJC 3239/02 Marab v. IDF Commander in the West Bank [2002] ¶ 1 (unpublished); *see also Beit Sourik*, HJC 2056/04 ¶ 2.

19. The Ministers' Committee for National Security works directly with the Prime Minister to discuss and establish national security policy. *See* Israel Ministry of Foreign Affairs, *Ministers' Committees*, <http://www.mfa.gov.il/mfa>. The Minister of Defense "heads and operates the defense system. The minister is aided by assistants, advisors, and a staff directly subordinate to him. These units are responsible for coordination of operations in Judea-Samaria and the Gaza District, the emergency economic system, internal auditing of the defense system, Youth and Nahal, soldiers' ombudsman, rural settlement affairs, and infrastructure." Ministry of Foreign Affairs, *Ministry of Defense*, http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1999/8/Ministry+of+Defense.htm [hereinafter MFA]. The Ministry of Defense is responsible for overseeing the construction of the security fence. *Id.*

20. This Note will refer to the fence predominantly as the "security fence" or as the "fence." However, the fence is not always referred to as a "security fence." In *Beit Sourik*, the Court refers to the fence as a "separation barrier," a "separation fence," and as a "wall." *Beit Sourik*, HJC 2056/04 ¶¶ 6, 7, 43. When referred to in a derogatory manner, the fence is called an "apartheid fence" and as an "annexation barrier." International Solidarity Movement, Archive for the 'Beit Sira' Category, <http://www.palsolidarity.org/main/category/beit-sira/> (last visited Apr. 5, 2006). As Nir Keida surmises:

All these terms refer to a physical barrier, normally 50–60 meters wide, which when completed should span approximately 720 km. The barrier comprises of a 3 meter high electronic warning fence, barbed wire, a ditch on the Eastern side, a patrol road, and a fine-sand path to detect intrusions. In only 3% of its path

of “improv[ing] and strengthen[ing] operational capability in the framework of fighting terror, and to prevent the penetration of terrorists from the area of Judea and Samaria into Israel.”²¹ This pronouncement came under severe scrutiny and opposition from the international community.²²

will the Separation Barrier comprise of a physical wall, mostly where there is risk of sniper rifle against Israeli highways.

Nir Keida, *An Examination of the Authority of the Military Commander to Requisition Privately Owned Land for the Construction of the Separation Barrier*, 38 ISR. L. REV. 247, 248 n.2 (2005).

21. *Beit Sourik*, HCJ 2056/04 ¶ 2.

22. See generally Anti-Defamation League, *Arab Media Review: Anti-Semitism and Other Trends February–March 2004—Focus: Israel’s Security Fence* (depicting Arab reaction to the fence and cartoons that have appeared in newspapers around the world damning Israel’s decision to build the fence), http://www.adl.org/Anti_semitism/arab/as_arabmedia_05_04/asam_fence_05_04.asp (May 11, 2004). On July 11, 2004, the International Court of Justice in The Hague ruled that the security fence was built illegally and must be dismantled. The “ICJ is the principal judicial organ of the UN, and its decision . . . constitutes a non-binding advisory opinion rendered at the request of the UN General Assembly.” Yuval Shany, *Examination of Issues of Substantive Law: Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 ISR. L. REV. 230, 231 (2005). Israel, along with several other countries including the United States, ignored the Court’s ruling and felt that the Court did not have jurisdiction in this matter. Many in the academic community rejected the ICJ’s opinion as well. Alan Dershowitz, a professor of law at Harvard, wrote:

The International Court of Justice is much like a Mississippi court in the 1930s. The all-white Mississippi court, which excluded blacks from serving on it, could do justice in disputes between whites, but it was incapable of doing justice in cases between a white and a black. It would always favor white litigants. So, too, the International Court. It is perfectly capable of resolving disputes between Sweden and Norway, but it is incapable of doing justice where Israel is involved, because Israel is the excluded black when it comes to that court—indeed when it comes to most United Nations organs.

Alan Dershowitz, *Israel Follows its Own Law, Not Bigoted Hague Decision*, JERUSALEM POST, July 11, 2004, at 2, available at LEXIS, News Library Jpost File. While Israel was not bound by the ICJ opinion, there exist both similarities between the ICJ’s advisory opinion and the HCJ’s holding in *Beit Sourik*, as well as many differences. In his introduction to the *Israel Law Review*’s double issue pertaining strictly to issues involving the security fence, David Kretzmer asserted that the most important similarities between the two opinions are that:

[B]oth courts found that construction of the barrier on the route under review was incompatible with international law (albeit that the Supreme Court decision refers only to one specific segment of the barrier). However, the differences between the two opinions are more striking than their similarities. Thus, for example, the Supreme Court ignored the legal status of the Israeli settlements on the West Bank, and even regarded protecting the residents of these settlements

Like so many of Israel's other policies concerning the Occupied Territories, the building of the fence has had a polarizing effect.²³ On the one hand, many Israelis, scholars, and military officials postulate that Israel should do whatever it takes to secure its borders and to ensure the safety of its citizens, while on the other hand, there are those, primarily human rights activists and scholars, who believe that *any* action Israel takes in conjunction with the Palestinians constitutes a human rights violation.²⁴

as a legitimate security interest of the military commander. The ICJ discussed the legal status of the settlements, stated that they had been established in violation of Article 49(6) of the Fourth Geneva Convention and opined that their illegality under international law meant that the barrier surrounding them was unlawfully constructed. The Supreme Court conducted a detailed analysis of the concrete facts relating to the segment of the barrier under review. The ICJ opinion is based on a series of generalities and a partial, it would seem, inaccurate description of the facts. Lack of any rigorous examination of the facts or of specific segments of the barrier is conspicuous by its absence in the Advisory Opinion. The Supreme Court rejected the argument that the barrier could not be built on the eastern side of the Green Line, if security considerations favored such a route. Implicit in the Advisory Opinion is the assumption that any barrier to protect people in Israel from terrorist attacks arising from the West Bank should be built on the Israeli side of the Green Line.

David Kretzmer, *Introduction*, 38 ISR. L. REV. 6, 10–11 (2005). A copy of the ICJ's opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, is available at www.icj-cij.org.

23. See Tovah Lazaroff & Dan Izenberg, *PM Accepts Ruling*, JERUSALEM POST, July 2, 2004, at 2, available at LEXIS, News Library Jpost File. See also Jonathan Grebinar, *Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law*, 31 FORDHAM URB. L.J. 261 (2003) ("As democracies, the United States and Israel are subject to a great deal of criticism with respect to legislation used to combat terrorism. Responding to terrorism, a question often arises regarding the measures that a democratic state may legally apply in order to effectively protect its citizens and yet continue to honor human rights."); but see Caroline B. Glick, *Without Prejudice*, JERUSALEM POST, Jan. 23, 2004, at 1, available at LEXIS, News Library Jpost File.

24. Arguments against Israel's treatment of human rights focus primarily on its military. Emanuel Gross, *Democracy's Struggle Against Terrorism: The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and Declaration of an Area as a Closed Military Area*, 30 GA. J. INT'L & COMP. L. 165, 201 (2002) ("Opponents of Israeli actions involving the demolition of houses, point out the danger involved in granting discretionary powers to the military commander, who will tend to see a 'military necessity' in situations where no such necessity exists."); see generally International Solidarity Movement, Archive for the 'Beit Sira' Category, <http://www.palsolidarity.org/main/category/beit-sira/> (last visited Apr. 5, 2006) (referring to the security fence as the "annexation barrier" and the "Israeli Apartheid Wall"); see also Simon, *supra* note 15, at 26 n.128 ("The Military Government's policies are frequently criticized as violating Palestinian human rights by the Jewish and Arab political parties on the left of the political spectrum, as well as by various

These differing views were magnified in early February 2004 when Israeli bulldozers and construction workers entered the areas surrounding the impoverished village of Beit Sourik to begin building the security fence.²⁵ For the people of Beit Sourik, the security fence represented the casting of a shadow over their rights.²⁶ In an interview, Village Council Chairman Muhammad Khaled Kandil stated that the construction of the fence was a sign that

[The Israeli] Army [was going to] cut us off from our livelihood and surround the village with a wall. We'll be denied access to 6,500 dunams²⁷ of our land. This is a quiet village that has never been under curfew, yet soon we will be in a prison. We'll be left to die.²⁸

non-governmental organizations including *B'Tselem*, Amnesty International, Middle East Watch, the ICRC, UNRWA, and the Lawyers' Committee for Human Rights.”)

25. Daniel Ben-Tal, *It Takes a Village*, JERUSALEM POST, June 11, 2004, at 11, *available at* LEXIS, News Library Jpost File. While Beit Sourik is the primary village discussed in this case, “the petition, as originally worded, attacked the orders of seizure regarding lands in the villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A’anan, Beit Likia, Beit Ajaza and Beit Daku.” *Beit Sourik*, HCJ 2056/04 ¶ 9. In describing where these villages are geographically located, the Court stated that “[t]hese lands are adjacent to the towns of Mevo Choron, Har Adar, Mevasseret Zion, and the Jerusalem neighborhoods of Ramot and Giv’at Zeev, which are located west and northwest of Jerusalem.” *Id.* The Court further described the petitioners as “the landowners and the village councils affected by the orders of seizure. They argue that the orders of seizure are illegal. As such, they should be voided or the location of the separation fence should be changed. The injury to petitioners, they argue, is severe and unbearable.” *Id.*

26. *See id.* *See also* Ruth Wedgwood, *Whitepapers on The International Court of Justice and the Israeli “Fence,”* General Assembly Referral on “Legal Consequence of the Construction Of a Wall in the Occupied Palestinian Territory” (Feb. 23, 2004), *available at* http://www.defenddemocracy.org/publications/publications_show.htm?doc_id=212024.

27. One dunam equals one thousand square meters which equals 0.25 acre.

28. Ben-Tal, *supra* note 25. The petitioners further argue that their injuries are both

severe and unbearable. Over 42,000 dunams of their lands are affected. The obstacle itself passes over 4,850 dunams, and will separate between petitioners and more than 37,000 dunams, 26,500 of which are agricultural lands that have been cultivated for many generations. Access to these agricultural lands will become difficult and even impossible Use of local water wells will not be possible. As such, access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted. The fence will separate villages from tens of thousands of additional trees. The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. The separation fence will harm the villages’ ability to develop and expand.

Beit Sourik, HCJ 2056/04 ¶ 9. Muhammad Khaled Kandil’s reference to a curfew is surely meant to imply that his village has never been associated with suicide bombers or

To rectify what they felt was a stripping of their rights as humans, the villagers and councilmen of Beit Sourik sought the Israeli Supreme Court's assistance in stopping what they felt was an illegal construction of a fence.²⁹

On a larger scale, Palestinians argue that the "wall" restricts their freedom of movement, disrupts their everyday lives, and causes them to lose land and their livelihood.³⁰ It is further argued that the placement of the fence, and even the fence itself, are clear indications that Israel is setting permanent borders³¹ and thus illegally annexing the land.³² These are legitimate and real concerns, magnified by the growing belief that the peace process between Israel and the Palestinians is indefinitely stalled.³³

On June 30, 2004, in *Beit Sourik Village Council v. The Government of Israel*, the Supreme Court of Israel, sitting as the High Court of Justice,³⁴

troublemakers since curfews are often imposed in such areas during times of heightened security. Ben-Tal, *supra* note 25.

29. *See id.* *See also Beit Sourik*, HCJ 2056/04 ¶ 2.

30. Wedgwood, *supra* note 26.

31. The argument made by the Palestinians centers on the belief that because the security fence does not pass along Israel's border, but instead through areas of the West Bank, Israel is trying to annex areas of Israel in violation of international law. *See Beit Sourik*, HCJ 2056/04 ¶ 10; *but see* Makovsky, *supra* note 11, at 51 ("A properly constructed fence could achieve multiple objectives: reduce violence by limiting the infiltration of suicide bombers into Israel, short-circuit the deadlock on achieving a two-state solution, advance the debate in Israel about the future of most settlements, and perhaps even provide an incentive for Palestinians to return to the negotiating table. Even without negotiation, the fence would function as a provisional border and could be modified in the future if Palestinians make real progress in halting terrorism against Israel and agree to restart talks.").

32. Wedgwood, *supra* note 26.

33. *See generally* Yorman Dinstein, *Whither the Peace Process?*, 70 TEMP. L. REV. 237 (1996); *see also* Makovsky, *supra* note 11; Gross, *supra* note 24.

34. Depending on the type of case before the Court, the Supreme Court also functions as the High Court of Justice. This dual role

is unique to the Israeli system because as the High Court of Justice, the Supreme Court acts as a court of first and last instance. The High Court of Justice exercises judicial review over the other branches of government, and has powers "in matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal." As the High Court of Justice, the Supreme Court hears over a thousand petitions each year. Often these cases are high-profile ones challenging acts of top government officials. Through its jurisdiction as a High Court of Justice, the Supreme Court upholds the rule of law and strengthens human rights.

Israel Ministry of Foreign Affairs, *The Judiciary: The Court System*, <http://www.mfa.gov.il/MFA/Government/Branches%20of%20Government/Judicial/The%20Judiciary-%20The%20Court%20System> (last visited Apr. 6, 2006) [hereinafter MFA, *The Judici-*

delivered a landmark judgment that attempted to quell international animosity and solve the political divide that plagued the State of Israel in its decision to erect a security fence. The ruling was made with the intention of striking the proper balance between the security needs of Israel and the human rights of Palestinians.³⁵ The Court ruled that the overarching motivation for building the fence was for security and not political purposes, and as a result, that the State of Israel was permitted to build the fence. However, the Court additionally held that the fence's route, as chosen by the Ministry of Defense, did not properly balance the security needs of Israel against the fence's adverse affect on the Palestinians' quality of life.³⁶ Consequently, the Court ruled that certain portions of the fence were illegal. In coming to this conclusion, the Court used the proportionality test,³⁷ which deals with the "balance between the realization of the declared purpose and the extent to which fundamental rights are infringed," as well as with the "logical and empirical connections between the declared purpose and the means chosen."³⁸ This particular

ary]. From this point forward, this Note will refer to the "Supreme Court" and the "High Court of Justice" interchangeably despite their separate functions as is commonly done in legal articles.

35. Dan Izenberg, *High Court to Hear Fence Petitions*, JERUSALEM POST, Aug. 17, 2004, at 2, available at LEXIS, News Library Jpost File.

36. See *Beit Sourik*, H CJ 2056/04 ¶ 67.

37. Courts have generally adopted two definitions of proportionality, and even then several Justices continue to disagree on its proper meaning. One definition commonly used is that proportionality is a form of review to determine if the administrative authority in question "chose the method of obtaining its goal that causes the minimal injury to individuals." Marcia Gelpe, *Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space*, 13 EMORY INT'L L. REV. 493, 525 (1999). This test focuses on the "means chosen by the authority, and not to its goals." *Id.* A comparison has been made to "American law for determining the validity of statutory classifications that interfere with fundamental rights. Under American law, such a classification is valid only if it is narrowly tailored to achieve a very important state interest." *Id.* at 526. Justices also define proportionality as:

Determination of whether the means chosen will reach the goal, whether they will do so with the least possible injury to individuals, and whether there is an appropriate relationship between the utility of the administrative action and the injury it causes This test allows the Court to perform not only a cost-benefit analysis of the administrative action . . . but also . . . ask whether any incremental action designed to achieve a greater good justifies the incremental injury it causes.

Id. at 525–26.

38. Moshe Cohen-Eliya, *The Formal and the Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 ISR. L. REV. 262, 263 (2005).

judgment has continuing implications as Supreme Court President Aharaon Barak³⁹ plans to use this petition “as a model for establishing guidelines for handling all the petitions which challenge sections of the security fence in different parts of the country.”⁴⁰ As a result of the Supreme Court’s judgment, Israel was compelled to reconsider the path of various segments of the fence all over the country.⁴¹

Part II of this Note briefly explains the role of the Israeli Supreme Court and reviews the legal structure of the territories. In addition, it examines the High Court’s authority to review administrative actions and how military activities fit within that authority. Finally, it surveys the role military orders play in the territories. Part III analyzes the proportionality test used by the Court in its attempt to balance the goals of the military against the rights of the petitioners. Part IV provides background concerning the construction of the security fence and the purported reasons for its erection. Part V of this Note is separated into two parts. First it examines the Court’s recent treatment of military orders, specifically the order to build the fence. Second, this section argues that the Court failed to provide the government and the military the proper deference necessary when reviewing the unique decision to build a fence. This Note concludes that while the Court’s ruling helped to ease international concern regarding the negative effects the fence will pose to Palestinians, it ultimately detracted from the democratic process of the State of Israel

39. Aharaon Barak is the sitting President of the Supreme Court of Israel and the author of the opinion in *Beit Sourik*.

40. Izenberg, *supra* note 35, at 2 (stating that the Court focused heavily on the principle that the barrier “should not encroach on Palestinian homes or cut farmers off from their land.” In all, this particular ruling directly canceled thirty kilometers of a forty kilometer section of the barrier between Maccabim and Givat Ze’ev, on Jerusalem’s northwest outskirts). In fact, the High Court relied heavily on its decision in *Beit Sourik* when determining whether a portion of the security fence, which “[p]ursuant the military commander’s orders . . . was built, surrounding [Alfei Menashe, an Israeli town in the Samaria area] . . . from all sides, and leaving a passage containing a road connecting the town to Israel,” was proportional to the military’s stated purpose of security needs in *Mara’abe v. The Prime Minister of Israel*. HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel* [2005] IsrSC ¶ 1. Sticking closely to its ruling in *Beit Sourik*, the Court determined that Israeli government and military must, “within a reasonable period, reconsider the various alternatives for the separation fence route at Alfei Menashe, while examining security alternatives which injure the fabric of life of the residents of the villages of the enclave to a lesser extent.” *Mara’abe*, HCJ 7957/04 ¶ 116.

41. See *id.* See generally Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT’L & COMP. LAW 721 (2001).

by improperly applying a test in an effort to influence military policy meant to be decided by other branches of the government.⁴²

II. THE ISRAELI LEGAL STRUCTURE

Before examining the Court's handling of *Beit Sourik Village Council v. The Government of Israel*, it is essential to clarify the legal system in the Occupied Territories.⁴³ This section will first explain the role and structure of the Supreme Court of Israel within the Occupied Territories. Next, this section will discuss the prevailing law in the West Bank and Gaza as stipulated by international law and as applied by the State of Israel. Finally, this section will examine the development of the military commander's power to implement policies that affect the fundamental safety of Israeli citizens as well as the nature of the Court's ability to review these policies.

A. Supreme Court of Israel

Similar to other States' judicial systems, the Supreme Court of Israel is the highest judicial tribunal and the court of last resort in Israel.⁴⁴ The Court is composed of fourteen justices with each case being overseen by three or more.⁴⁵ The Israeli Supreme Court is consistently recognized as a just, honorable, and able institution.⁴⁶ The Court has played a large role in forming Israeli civil liberties and shaping the rights of individuals—

42. The purpose of this Note is not to belittle or undermine the competency of the Supreme Court of Israel—a Court whose Justices and holdings are held in the highest regard across the international legal community. Simon, *supra* note 15, at 22. Nor is this Note going to argue that the Court, and specifically Aharaon Barak, had anything but the best intentions in determining that the security fence was disproportionately damaging to the Palestinians. In addition, this Note will not dispute the need for judicial safeguards to military actions under certain circumstances. This Note will conclude that it is the government's role to make security decisions, and that the Court's aggressive attempt to ease international criticism of the fence by circumventing the policy of the State for its own undermines the very democratic values it so desperately tries to celebrate. Additionally, the author recognizes the strong argument to be made that without judicial review of military decisions the rights of Palestinians and even many Israelis would be threatened without any mechanism to protect them. However, the Note does not pose that the High Court should not hear cases involving military decisions, but rather that such decisions should be given true deference, and not a mere illusion to deference.

43. See generally Simon, *supra* note 15, at 18.

44. Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 28 BROOK. J. INT'L L. 871, 880 (2003).

45. MFA, *The Judiciary*, *supra* note 34.

46. See Simon, *supra* note 15, at 22.

both within Israel and the Occupied Territories.⁴⁷ In order to do so, however, the Court first needed to expand its ability to make such decisions.⁴⁸ The Court accomplished this judicial expansion⁴⁹ primarily while acting in its second role as the Land's High Court of Justice.⁵⁰ In this role, the Court rules over institutions and people conducting public functions prescribed by the law, as well as matters involving government decisions.⁵¹

It is primarily in the capacity as the High Court of Justice that it has "achieved prominence in the Israeli political system, and it is in this role that it exercises review over actions of the authorities in the Occupied

47. Israel's recognition of civil liberties has been described as follows:

Before 1992, Israel had no Basic Laws defining individual human rights. During this period, the Israeli Supreme Court identified numerous individual rights that it found worthy of special protection. The Court called these rights 'basic values' or 'principles of the constitutional structure of our country.' The Court found such norms in various sources: Israel's Declaration of Independence, the United Nations' Universal Declaration of Human Rights, the democratic nature of the State, the inherent nature of man, considerations of justice and decency, 'the legacy of all advanced and enlightened states,' and 'the democratic freedom-loving character of our State.' These rights so identified include the following: gender equality, equality on the basis of nationality, presumption of innocence, freedom of association, freedom of movement, freedom of expression, privacy, dignity of man, freedom of property, integrity of the body, judicial integrity, freedom to strike, freedom of demonstration, freedom of conscience, and freedom of occupation. The Israeli Supreme Court created, or recognized, these values and rights through a process that American jurists might call constitutional common law. The Court itself referred to such rights as those 'not recorded in texts.' Similarly, the Court, through case law, established the principles of separation of powers and checks and balances.

Gelpe, *supra* note 37, at 506–08.

48. Because Israel does not have a written constitution, the Supreme Court has paved the way for what is referred to as a "judicial bill of rights." Zaharah Markoe, *Expressing Oneself Without a Constitution: The Israeli Story*, 8 CARDOZO J. INT'L COMP. L. 319, 323 (2000); Gelpe, *supra* note 37, at 493.

49. By "judicial expansion," this Note refers to the apparent willingness of the Israeli Supreme Court to expand its ability to review and adjudicate on matters that in the past were considered by the Court to be outside of their expertise.

50. MFA, *The Judiciary*, *supra* note 34; see also DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 10 (2002) ("It is mainly in the [role as the High Court] that the Court has achieved prominence in the Israeli political system, and it is in this role that it exercises review over actions of the authorities in the Occupied Territories.").

51. The Israeli Supreme Court website (English version), *Judicial Authority*, <http://elyon1.court.gov.il/eng/system/index.htm>.

Territories.”⁵² The Court’s jurisdiction over public functions has provided the legal basis for its review in various spheres,⁵³ including all decisions and actions made by the military government in the Occupied Territories.⁵⁴ In fact, the Court has asserted original jurisdiction over “virtually every power exercised by the branches of government,⁵⁵ and is competent to order them to perform or refrain from performing any action.”⁵⁶ This includes the ability to grant occupants of the territories requests to be heard by the Court.⁵⁷ The Court’s willingness to allow Palestinians to bring actions against the military government is considered by some to be unprecedented in similar situations.⁵⁸

52. *See id.* Captain Uzi Amit-Kohn provides an interesting perspective on the power and influence of the High Court over military commanders. He states:

This judicial review by Israel’s highest Court has not only provided a form of redress for the grievances of Area inhabitants and a safeguard for their rights; it has also provided a powerful symbol and reminder to the officials of the military government and Civil Administration of the supremacy of law and legal institutions and of the omnipresence of the Rule of Law The importance of judicial review lies not only in those cases which actually reach the Courts (between 150 and 300 annually in recent years), but also in the fact that before acting the officials involved know that their acts may be subjected to judicial scrutiny.

AMIT-KOHN ET AL., *supra* note 10, at 17.

53. *See* KRETZMER, *supra* note 50, at 11. Kretzmer also states:

The jurisdiction of the Court, as a High Court of Justice, is at present defined in section 15 of the Basic Law: Judiciary Under section 15(c) of this law, the Court has the power to deal with matters in which it sees need to grant a remedy for the sake of justice and which are not within the jurisdiction of another court or tribunal According to section 15(d)(2) the Court has the power to grant orders to state authorities, local authorities, their officials and other bodies and persons fulfilling public functions under law, to do an act or to refrain from doing an act in lawfully performing their duties.

Id.

54. *See* Simon, *supra* note 15, at 20–21.

55. The Israeli government has three main branches: the executive, the legislative, and the judiciary. *See* MFA, *supra* note 19.

56. Simon, *supra* note 15, at 22.

57. *See* HJC 337/71 Christian Society for the Holy Places v. Minister of Defense [1971] 26(1) P.D. 574 [English summary: 2 ISR YHR (1972) 354].

58. Gross, *supra* note 24, at 208 (“There are no other precedents for a person in occupied territory having recourse to the Supreme Court of the Occupying State against that state’s military commander.”). *Id.* This “unprecedented phenomenon of allowing the civilian population access to the occupying power’s national courts and subjecting the military government’s conduct to domestic judicial review has added a unique element to this occupation.” *Id.*; Simon, *supra* note 15, at 23 n.116 (“Unlike the discretionary juris-

Most relevant to this study is the Court's handling of cases involving the military. Despite Israel's original plan to establish a constitution, one was never implemented.⁵⁹ However, in 1992, Israel adopted a number of Basic Laws of Human Dignity and Liberty, which act as a miniature constitution.⁶⁰ Using the Basic Laws as its premise, the Israeli High Court has the capacity to review the legality of government officials' actions, including military commanders.⁶¹ In recent years, actions taken by the military and by the *Knesset*⁶² have been declared in "violation of the Basic Law of Human Dignity and Liberty."⁶³ However, the Court does not generally have the ability to review the legislation passed by the *Knesset*. Consequently, "primary legislation is . . . the highest form of law."⁶⁴

In an early attempt to establish unwavering control in the territories, the government argued in *Hilu v. State of Israel* that military orders are equivalent to primary legislation and the Court should therefore not have judicial review over such actions.⁶⁵ This argument was rejected by the Court, which determined that "military orders are a form of delegated, rather than primary, legislation."⁶⁶ Ultimately, this led the Court to hold

diction held by the U.S. Supreme Court, the Israeli Supreme Court has mandatory jurisdiction; it adjudicates every case submitted to it."); see also EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 119 (1993) (Hebrew).

59. See Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 588 (1996).

60. Conversation with Professor Amos Shapira, Faculty of Law Tel-Aviv University and visiting Professor at Brooklyn Law School (Apr. 1, 2006).

61. See *infra* Part IV. Judicial review is anchored in the status of the military commander as a public official, and in the jurisdiction of the High Court of Justice to issue orders to bodies fulfilling public functions by law under § 15(3) of Basic Law: The Judiciary. *Mara'abe*, HJC 7957/04 ¶ 31.

62. The *Knesset* is Israel's legislature and is comprised of 120 members.

Members are elected every four years within the framework of parties that compete for the electorate's votes. Each party chooses its own *Knesset* candidates as it sees fit. The major function of the *Knesset* is to legislate laws and revise them as necessary. Additional duties include establishing a government, taking policy decisions, reviewing government activities, and electing the President of the State and the State Comptroller.

Israel Ministry of Foreign Affairs, *The Knesset*, <http://www.mfa.gov.il/MFA/Government/Branches+of+Government/Legislative/The%20Knesset>.

63. Quoted from a conversation with Professor Amos Shapira, *supra* note 60.

64. Farrell, *supra* note 44, at 882.

65. See generally HJC 302/72 *Hilu v. State of Israel* [1972] 27(2) P.D. 169, translated in 5 ISR. Y.B. HUM. RTS. 384 (1975).

66. Farrell, *supra* note 44, at 897, citing *Hilu*, HJC 302/72 169, translated in 5 ISR. Y.B. HUM. RTS. 384 (1975).

that as a part of the government administration, military commanders and their actions should be reviewed under Israeli administrative law.⁶⁷

Under the theory that the rules of administrative law, which apply to all Israeli government authorities, also apply to military commanders, the Court has actually gone beyond the level of review which is necessary under international law.⁶⁸ In *Al-Taliya v. Minister of Defense*, Justice Shamgar mentioned the duty and power accorded to military commanders under international law, but added: “The exercise of powers by the respondents will be examined according to the criteria which this court applies when it reviews the act or omission of any other arm of the executive branch, while taking into account, of course, the duties of the respondents that flow from the nature of their task[s].”⁶⁹ Justice Shamgar further explained that:

Extending grounds of judicial review beyond the rules of belligerent occupation has allowed the Court to argue that in protecting the rights of residents in the Territories it has gone much further than required by international law. Furthermore, because administrative law may be regarded as an internal constraint, whereas international law may be seen as an external constraint, the political implications of overturning an act of the military on the grounds of Israeli administrative law are less threatening than overruling the same act on grounds of international law. This may explain why, when alternative grounds exist for overruling an act, the Court has sometimes seemed to place greater emphasis on administrative law.⁷⁰

In keeping with its effort to protect individuals living within the Occupied Territories, the Court adopted the principle of proportionality as the standard with which it would review military decisions.⁷¹ By applying

67. See H CJ 393/82 *Jam'iyat Ascan v. IDF Commander in Judea and Samaria* [1982] P.D. 37(4) 785, 793, cited in *Beit Sourik*, H CJ 2056/04 ¶ 24; see also H CJ 69/81 *Abu Aita v. IDF Commander in Judea and Samaria* [1981] 37(2) P.D. 197, 230–31, translated in 13 *ISR. Y.B. HUM. RTS.* 348 (1983).

68. See KRETZMER, *supra* note 50, at 27.

69. KRETZMER, *supra* note 50, at 27, citing H CJ 619/78 *Al-Taliya v. Minister of Defense* [1978] 33(3) PD 505, 512.

70. See *id.* at 27, citing *Al-Taliya*, H CJ 619/78 505, 512.

71. See *Beit Sourik*, H CJ 2056/04 ¶ 36–40. In determining which standard to use in order to adjudicate the legality of the fence, the Court recognized that:

Proportionality is not only a general principle of international law. Proportionality is also a general principle of Israeli administrative law. At first a principle of our case law, then a constitutional principle, enshrined in article 8 of the Basic Law: Human Dignity and Freedom, it is today one of the basic values of the Israeli administrative law. The principle of proportionality applies to every act

the proportionality principal, it can be argued that the Court is merely placing the proper checks and balances on the government and military's authority in the Occupied Territories.⁷²

B. The Law of the Land in the Occupied Territories

In 1967, during the course of the Six Day War,⁷³ Israel captured the West Bank, Gaza, and the Golan Heights.⁷⁴ Since then, Israel has ruled these territories under a system of belligerent occupation.⁷⁵ In such a regime, the military is given power over all governmental functions including legislating, adjudicating, collecting taxes, policing, and other admin-

of the Israeli administrative authorities. It also applies to the use of the military commander's authority pursuant to the law of belligerent occupation.

Id. ¶ 38 (citations omitted). *See also* Gross, *supra* note 24, at 184 ("The requirement of proportionality has been applied in the case law of the Supreme Court in a number of senses. Thus, for example, the Court has instructed the military commander to conform the exercise of his power to the severity of the case and the gravity of the circumstances. Consideration must be given not only to the gravity of the acts of which the terrorist is suspected, but also to the degree of participation of the rest of the household in advancing these acts. Also taken into account is the degree of influence which the demolition of the home will have on the other inhabitants thereof.")

72. During a conversation, Professor Shapira stated that as a parliamentary system, Israel's governmental structure does not offer the same modality of the separation of powers as the United States' form of government. Consequently, it is essential that each branch of government perform the proper checks and balance of powers on each other.

73. The Six Day War was fought between Israel on one side and Egypt, Jordan, and Syria on the other. "The war was the most dramatic of all wars fought between Israel and the Arab nations, resulting in a depression in the Arab world lasting many years. The war left Israel with the largest territorial gains from any of the wars the country had been involved in: Sinai and Gaza Strip were captured from Egypt, East Jerusalem and West Bank from Jordan and Golan Heights from Syria." *Six Day War*, ENCYCLOPEDIA OF THE ORIENT, <http://i-cias.com/e.o/sixdaywr.htm>.

74. *See* David Kretzmer, *Constitutional Law*, in INTRODUCTION TO THE LAW OF ISRAEL 39, 56 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995).

75. *Id.* Belligerent occupation occurs when a State seizes control of its enemy's territory after a period of war. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899, at 122 (James B. Scott ed., 1920) (Address of Delegate Martens). The law of belligerent occupation

recognizes that military needs will be the major concern of every army of occupation. Nevertheless, because the occupying army has control over the occupied territory the occupying power has the duty to take over the first and most basic task of every government: maintaining law and order and facilitating everyday life.

KRETZMER, *supra* note 50, at 57.

istrative tasks that are provided for by law.⁷⁶ Despite following the law of belligerent occupation, the Israeli government has refrained from recognizing its rule over the Occupied Territories as such.⁷⁷ This policy allows the government greater latitude when implementing policies and enforcing security measures within the Territories.⁷⁸

Unlike the government, the Israeli Supreme Court recognizes Israel's rule over the West Bank and Gaza as a belligerent occupation.⁷⁹ In doing so, the Court has decided to enforce the Hague Convention, which is recognized as the accepted form of international law with regard to belligerent occupation.⁸⁰ Justice Barak, in a summary of the principles defining the power of the military government⁸¹ in the Occupied Territories, stated: "The military commander may not consider the national, economic or social interests of his own country, unless they have implications for his [country's] security interest or the interests of the local

76. See Kretzmer, *supra* note 74, at 58; see also *Beit Sourik*, HCJ 2056/04 ¶67, citing Meir Shamgar, *Observance of International Law in the Administered Territories*, in 1 ISR. Y.B. HUM. RTS. 276 (1971) (citing proclamations of the Military Commander). This principle was further expressed by the commanders of the IDF upon taking control of the Territories in "Section 3 of the Proclamation on Law and Administration [which] stated: Any power of government, legislation, appointment, or administration with respect to the Region or its inhabitants shall henceforth be vested in me alone and shall be exercised only by me or by a person appointed by me to that end or acting on my behalf." KRETZMER, *supra* note 50, at 27.

77. See KRETZMER, *supra* note 50, at 19, 33. The Israeli government is not opposed to the Geneva Convention and the Hague Convention. Rather, "it argues that since neither Jordan nor Egypt held good title to the West Bank and Gaza, the Occupied Territories were not under the sovereignty of a 'High Contracting Party' . . . the government argues that the legal status of the Occupied Territories precludes application of the law of belligerent occupation." Simon, *supra* note 15, at 20; see also Robert Klein, *The Security Fence from a Legal Perspective: Question 4—Is Israel an "Occupying Power"?*, JEWISH AGENCY FOR ISRAEL, <http://www.jafi.org.il/education/actual/conflict/fence/2-4.html> ("the present [4th Geneva] Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and states that the West Bank and Gaza "are not under sovereignty of a High Contracting Party").

78. See KRETZMER, *supra* note 50.

79. See HCJ 606/78, 610/78 *Ayyub v. Minister of Defense* [1978] 33(2) P.D. 113, 117, translated in 9 ISR. Y.B. HUM. RTS. 337 (1979); see also Simon, *supra* note 15, at 20.

80. See Simon, *supra* note 15, at 20.

81. The term "military government" is synonymous with the term "military commander" as the military commander has several government-like functions in the Occupied Territories. In addition, for the purposes of this Note, it reflects the connection between the military and the government of Israel with regard to the decision making of how to proceed with the security of Israel.

population.”⁸² Conversely, the Court does not adhere unconditionally to the Geneva Convention.⁸³ According to the predominant understanding of international law, in order for the Court to be bound by the Geneva Convention, the Convention would have to be adopted into law by the Israeli legislature, which has not yet happened.⁸⁴ Nonetheless, there are many instances in which the Court has referred to the Convention to support or reject the military government’s actions.⁸⁵

As a general matter of international law, the two principal influences on the law of belligerent occupation are the Fourth Geneva Convention of 1949⁸⁶ and the Regulations Annexed to the Fourth Hague Convention

82. See KRETZMER, *supra* note 50, at 68.

83. Kretzmer argues that in applying international law:

The Supreme Court has relied on the distinction between customary law and conventional law. Following the British tradition, customary international law is regarded as part of the common law of the land that will be enforced by the domestic courts unless the legislature has provided otherwise. On the other hand, conventional law will not be enforced by the domestic courts unless it has been incorporated in the domestic legal system through parliamentary legislation. In this regard, the Court has held that the Hague Regulations Concerning the Law and Customs of War on Land, 1907, are part of customary law, which the Geneva Convention Concerning the Protection of Civilian Persons in Time of War, 1949 (the Fourth Geneva Convention), is part of conventional law. Thus, the Court will enforce the provisions of the Hague Regulations, but not those of the Fourth Geneva Convention. Nevertheless, on more than one occasion, the Court has agreed to interpret provisions in the Geneva Convention, but only to hold that the authorities had not violated those provisions.

Kretzmer, *supra* note 74, at 57; see also Simon, *supra* note 15, at 20.

84. Simon, *supra* note 15, at 20 (stating that it does not appear as though the Convention will be adopted into Israeli law anytime in the near future).

85. See *id.* at 20 (citing numerous Israeli cases referring to the convention).

86. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Farrell, *supra* note 44, at 915 (“It is often noted that the Israeli Supreme Court has not ruled that the Fourth Geneva Convention is applicable to the West Bank and Gaza. It is less often mentioned that the Court has never ruled that the Convention is not applicable. The Court has essentially avoided the issue.”). With regard to the security fence, several articles of the Geneva Convention are relevant. See Fourth Geneva Convention, *supra*, art. 23 (providing the importance of the freedom of movement); art. 28 (referring to the relationship between populated areas and the need for military operations); art. 33 (laying out the difference and legality of collective punishment versus restrictive measures); art. 46 (regarding restrictive measures affecting property rights); art. 53 (determining that the destruction of property by an Occupying Power is only justified under military necessity); see also Klein, *supra* note 77. Yet, for the most part, the Court, in its decision regarding the fence, focuses on the internationally accepted principle of proportionality in determin-

of 1907.⁸⁷ At the core of these sets of laws is the desire to allow the occupying power the ability to safely and securely oversee its interests, while ensuring that it does not encroach upon the human rights of the occupied inhabitants.⁸⁸ This body of law “neither condones nor outlaws occupations;”⁸⁹ rather, it recognizes the reality of such occupations and tries to make them as equitable as possible.⁹⁰

Besides the law of belligerent occupation, there are three other primary legal systems in the Occupied Territories: (1) the local law that was in effect in the territories when Israel assumed control during the Six Day War;⁹¹ (2) all military orders given by military commanders post-occupation; and (3) the current law in the State of Israel, which is not always completely applicable to the Territories, but nonetheless has pertinent implications on the review of military decisions.⁹²

C. Military Orders⁹³

As discussed in Part II.B, *supra*, the rules of international law provide that the military commander of Israel overseeing the Occupied Territories has power to legislate in the West Bank.⁹⁴ This system of military control was established by proclamation shortly after Israel took control

ing whether the security fence fits within the balance of national security versus humanitarian rights. See *Beit Sourik*, HCJ 2056/04 ¶ 38.

87. Simon, *supra* note 15, at 19, quoting Regulations Annexed to the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295, T.I.A.S. No. 539.

88. *See id.*

89. *Id.*

90. *Id.*

91. Examples of local laws generally applicable in the Occupied Territories are the Defense (Emergency) Regulations which “were part of the local law prevailing there immediately prior to Israeli occupation. Following the international law principles that an occupying power should not change the law in the occupied territory, Israeli military authorities in the territories exercise power under the same regulations as in Israel, but these regulations are considered local rather than Israeli law.” Baruch Bracha, *Checks and Balances in a Protracted State of Emergency—The Case of Israel*, in 34 ISR. Y.B. HUM. RTS. 124, 45–46 n.25 (2003).

92. Kretzmer, *supra* note 74, at 56. The scope of this Note does not allow for in-depth analysis of each of these systems of law. Instead, this Note will reflect upon their impact when appropriate within the confines of the Court’s ability to alter government and military orders regarding the security of Israeli citizens.

93. For a full discussion of this topic, see SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 465 (1994).

94. See KRETZMER, *supra* note 50, at 27 (“Under the rules of international law, when an army occupies enemy territory all governmental power, including legislative power, is concentrated in the hands of the military commander.”).

of the West Bank and Gaza in 1967.⁹⁵ Military commanders have used this power freely in order to promulgate military orders ranging from administrative issues and security, to education and taxes.⁹⁶ However, as the Court in *Beit Sourik* articulated, the power of the military commander is not that of a sovereign.⁹⁷ As such, the military is not permitted to pursue every activity it deems preferable, regardless of whether primarily motivated by security considerations or other considerations.⁹⁸ The power of the commander is principally restrained only by the process of balancing the security interests of Israel against the needs of the Palestinians.⁹⁹

Of primary importance to this Note is whether or not military orders should be “regarded as parallel to primary legislation and thus immune

95. Farrell, *supra* note 44, at 879, citing Raja Shehadeh, *The Legislative States of Military Occupation*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 152 (Emma Playfair ed., 1992). Section 3 of the Proclamation of Law and Administration states: “Any power of government, legislation, appointment, or administration with respect to the Region or its inhabitants shall henceforth be vested in me alone and shall be exercised only by me or by a person appointed by me to that end or acting on my behalf.” KRETZMER, *supra* note 50, at 27.

96. See KRETZMER, *supra* note 50, at 10.

97. L. Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 L.Q. REV. 363, 364 (1917), quoted in Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 106 (1978).

98. Farrell, *supra* note 44, at 880.

99. *Beit Sourik*, H CJ 2056/04 ¶ 34, citing Yoram Dinstein, *Legislative Authority in the Administered Territories*, 2 LYUNEI MISHPAT 505, 509 (1972) (Hebrew) (“The law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other.”). The Supreme Court has discussed this balance in many cases. Providing a brief explanation of the power of the military commander within the confines of the Hague Convention, Justice Barak states:

The Hague Convention authorizes the military commander to act in two central areas: one—ensuring the legitimate security interest of the holder of the territory, and the other—providing for the needs of the local population in the territory held in belligerent occupation. . . . The first need is military and the second is civilian-humanitarian. The first focuses upon the security of the military forces holding the area, and the second focuses upon the responsibility for ensuring the well being of the residents. In the latter area the military commander is responsible not only for the maintenance of the order and security of the inhabitants, but also for the protection of their rights, especially their constitutional human rights. The concern for human rights stands at the center of the humanitarian considerations which the military commander must take into account.

Beit Sourik, H CJ 2056/04 ¶ 34, citing HJC 10356/02 Hess v. Commander of the IDF Forces in the West Bank [2002] P.D. 58(3) 443, 456 ¶ 8.

from review, or as parallel to subordinate or delegated legislation, [and] hence subject to review under the rules of administrative law.”¹⁰⁰ In matters of national security, it is almost a universal phenomenon that courts remain extremely careful about engaging in such matters.¹⁰¹ As former Justice of the Supreme Court Itzhak Zamir cautioned, issues of national security are often clouded in secrecy, or are of vital importance to policies concerning national interests, and it is therefore not always appropriate for the Court to intervene.¹⁰² He further wrote that the Court should “leave the responsibility in such matters to the competent authorities, political or professional, civil or military. Such an attitude may be especially understandable, and possibly justifiable in Israel, given the State’s constant exposure to security risks.”¹⁰³ Yet, over the years, the Court has both expanded its jurisdiction over administrative actions, as well as expanded the realm of administrative legislation to include military orders.¹⁰⁴ As a result, military orders are reviewed under both international law and Israeli administrative law.¹⁰⁵ The latter standard is ap-

100. KRETZMER, *supra* note 50, at 27–28.

101. Itzhak Zamir, *Administrative Law in Israel*, in PUBLIC LAW IN ISRAEL 37 (Itzhak Zamir & Allen Zysblat eds., 1996).

102. *See id.*

103. *Id.*

104. Gelpe, *supra* note 37, at 528; *see, e.g.*, HCJ 69/81 Abu Itta v. IDF Commander in Judea and Samaria [1981] P.D. 37(2) 197 [English summary: 13 ISR YHR (1983) 348]. Judicial review of administrative decisions in Israel developed as follows:

Judicial review of administrative actions was introduced in [the land that would eventually become the State of] Israel during the period of the British Mandate. It was copied from the law in England at the time, with one important difference. In England, petitions to review administrative decisions could be brought in a lower court, sitting under the title of the High Court of Justice. In the British Mandate, which ruled the area now comprising the State of Israel from World War I until 1948, this authority was placed in the hands of the Supreme Court alone. Lower courts had judges drawn from the local Arab and Jewish population. The British authorities did not entrust review of their actions to these local judges, but rather located review in the Israeli Supreme Court, where a majority of the justices were English. The system was maintained after the establishment of the State, perhaps because only the Supreme Court was viewed as strong enough to control the governmental authorities and to protect civil rights from encroachment.

Gelpe, *supra* note 37, at 523.

105. *See* Kretzmer, *supra* note 74, at 56. *See also* HCJ 393/82 Jam’iyat Ascan v. IDF Commander in Judea and Samaria [1982] P.D. 37(4) 785, 793, *quoted in Beit Sourik*, HCJ 2056/04 ¶ 24 (“Together with the provisions of international law, ‘the principles of the Israeli administrative law regarding the use of governing authority’ apply to the military commander.”).

plied to all branches of Israel's government, regardless of whether the actions being reviewed took place in the Territories or in the sovereign State of Israel.¹⁰⁶

III. PROPORTIONALITY

The principle of proportionality¹⁰⁷ is recognized as both a general standard of international law and a fundamental principle of Israeli administrative law.¹⁰⁸ At the core of the principle is the belief that the means applied to achieve a given end should not be unduly excessive.¹⁰⁹ In the framework of military action or armed conflict, the principle seeks to balance the need to achieve a particular military objective against the rights and needs of those affected by that particular action.¹¹⁰ In its earliest form, and as applied presently in most English jurisdictions, the proportionality test was a standard with which to judge reasonableness.¹¹¹ In

106. *Id.*

107. The term proportionality as a general notion derives from the word "proportion," which signifies "the due relation of one part to another" or "such relation of size etc., between things or parts of things as renders the whole harmonious." See *Proportionality*, 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1140 (1992), quoting THE SHORTER OXFORD ENGLISH DICTIONARY (3d ed. 1973) [hereinafter ENCYCLOPEDIA].

108. *Beit Sourik*, HCJ 2056/04 ¶ 38–39; see also ENCYCLOPEDIA, *supra* note 107, at 1140–41.

109. See Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465, 467 (2005) (stating that "one should not use a sledge hammer to crack a nut"); see also Gross, *supra* note 24, at 185 (commenting on the test of proportionality with regard to home demolitions, Gross states: "According to the test of proportionality, which is one of the cornerstones in the examination of the reasonableness of the decision of the military commander according to administrative law, where it is possible to achieve a deterrent effect by something less than demolishing the entire house this must be done. Likewise, where it is possible to achieve the deterrence by sealing the house this must suffice.").

110. Olivera Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?*, 23 LOY. L.A. INT'L & COMP. L. REV. 329, 363 (2001) (focusing exclusively on the principle of proportionality as it affects armed conflicts. In effect, the Article argues that "as methods of warfare reached higher levels of sophistication, concerns about the safety and protection of citizens emerged, and proportionality became a focal point of the laws of armed conflict. The notion that a belligerent's right to use force is limited had the effect of continuing the prohibition on the use of specific means of warfare. It further restricted the use of non-prohibited means of warfare to the extent that the means were deemed proportional to the achievement of a military objective.").

111. Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, in PUBLIC LAW IN ISRAEL 332 (Itzhak Zamir & Allen Zysblat eds., 1996). Relying on Israeli case law, Zamir defined "unreasonableness" as "an established ground of review which has been developed and defined through the case law. An administrative decision is un-

some jurisdictions, including Israel, the test is now recognized as its own distinct ground of judicial review.¹¹²

The principle of proportionality consists of three subtests which the Court applies to determine if the governmental objective and the means used to achieve that objective are proportional to each other.¹¹³ The first subtest calls for “the objective to be related to the means,” or put another way, that there is a rational connection between the two.¹¹⁴ The second subtest requires that the administrative body employ the least harmful means in order to achieve its objective.¹¹⁵ The third subtest demands that the “damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means.”¹¹⁶

As its own basis for review, the proportionality test expands the Court’s scope of review by providing it with the ability to review the administrative process as well as the end result.¹¹⁷ Consequently, the High Court is afforded an effective channel through which to control administrative discretion.¹¹⁸ By applying this standard to military decisions such as the security fence, the Israeli High Court has, in recent years, become much more willing to intervene and apply its own position on matters of security.¹¹⁹

Further expanding the influence of the Court in Israeli administrative law is the High Court’s apparent merging of the domestic and international rationales of the principle of proportionality.¹²⁰ Rather than recognize the distinct differences between the international and domestic spheres with regard to the development and application of proportional-

reasonable, according to case law, if it is capricious or arbitrary, manifestly unjust, made in bad faith, or oppressive.” *Id.* at 327.

112. *Id.* at 332.

113. *Beit Sourik*, HCJ 2056/04 ¶ 40.

114. *Id.* at ¶ 41.

115. *Id.* (stating that this is referred to as the “least injurious means” test).

116. *Id.* (“The test of proportionality ‘in the narrow sense’ is commonly applied with ‘absolute values,’ by directly comparing the advantage of the administrative act with the damage that results from it. However, it is also possible to apply the test of proportionality in the narrow sense in a ‘relative manner.’ According to this approach, the administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act—by employing alternate means, for example—ensures a substantial reduction in the injury caused by the administrative act.”).

117. *Id.*

118. *Id.*

119. Zamir, *supra* note 101, at 37.

120. *See infra* notes 121, 124.

ity, the Court appears to take the method of review from domestic law and the scope of its applicability from international law.¹²¹ As a principle of domestic law, “proportionality has the function of relating means and ends properly or of balancing conflicting but equally high ranking fundamental rights and freedoms. It primarily fulfils a guiding function for the law-applying authorities rather than in itself being a substantive, concrete legal norm.”¹²² Under international law, the range of issues for which the principle of proportionality can be applied is greater than in domestic law and includes issues such as reprisal and self-defense,¹²³ humanitarian law,¹²⁴ economic sanctions,¹²⁵ and human rights administration.¹²⁶

121. ENCYCLOPEDIA, *supra* note 107, at 1140 (stating that from an international standpoint, the principle of proportionality was first recognized as a customary international law dealing with reprisal and self-defense. Recently, the applicability of this principle has expanded beyond instances of self-defense and spread into areas involving humanitarian law, economic sanctions, and human rights administration). The principle is often compared to “other open constitutional principles, the concrete legal meaning of which must be ascertained in their application to individual cases.” *Id.* at 1141. This principle has found great acceptance in domestic law and is often mentioned synonymously with the principles of reasonableness and necessity. *Id.*

122. *Id.* at 1140–41.

123. While the scope of the right is smaller under domestic law, both domestic and international law allow States to defend themselves against violations of their rights perpetrated by other States or actors. *Id.*

124. The principle of proportionality has long been firmly established in humanitarian law as it is inherent in principles of necessity and humanity which form the basis of humanitarian law. The prohibition of unnecessary suffering (Article 23(c) of Hague Convention IV of 1907) was the first codification of the principle of proportionality which had, however, already been accepted in international customary law. Today it has found broad recognition in the new rules for victims of armed conflicts in Protocol I Additional to the Geneva Red Cross Convention of 1949. *Id.* at 1142.

125. Another area where the principle of proportionality is relevant for the determination of the legality or illegality of State actions is that of economic sanctions. If such measures are taken by way of reprisal, the applicability of the principle of proportionality is mandatory since only proportionate acts of reprisal are permissible. *Id.* at 1143.

126. *See generally id.* at 1140–44 (stating that the principle of proportionality has also been firmly established in the universal and regional administration of the law of human rights. As human rights and fundamental freedoms do not guarantee limitless freedom to the individual but are necessary subject to certain restrictions in the public interest, it is an accepted principle in domestic as well as international law that the scopes of the individual’s enjoyment of human rights and the limits to it have to be brought into due relations); *see also Beit Sourik*, H CJ 2056/04 ¶ 39 (“Both international law and the fundamental principles of Israeli administrative law recognize proportionality as a standard for balancing the authority of the military commander in the area with the needs of the local population.”).

IV. THE SECURITY FENCE

In order to comprehend the immensity of the decision to build the fence, as well as the fears of many Palestinians, it is necessary to understand where the fence will be located and what the fence actually entails. This first part of this section presents the basic geographical placement of the fence, while the second part briefly explains the composition of the fence.

A. Security Fence Policy

In July 2001, the Defense Cabinet, on the recommendation of the Fence Bureau, approved the Security Fence program. At the time, the Cabinet believed that the fence would consist of three separate obstacle sections totaling 80 kilometers (50 miles), one each in Um el Fahem, Tulkarem, and Jerusalem, for the purpose of preventing illegal entry into Israel.¹²⁷ However, over time, it became evident that in order to be effective, the obstacle would have to be continuous and more advanced.¹²⁸ These concerns were addressed when the responsibility of constructing the fence was placed in the hands of the Ministry of Defense in April 2002.¹²⁹ The Ministry of Defense determined that the construction of the security fence would take place in four phases and the final obstruction would be approximately 728 kilometers (452 miles) in length.¹³⁰

The first phase (Phase A), which was approved in August 2002, consisted of 137 kilometers (85 miles) of fence from Salim to Elqana and 20 kilometers (12.5 miles) in northern and southern parts of Jerusalem.¹³¹

127. Ministry of Defense, *Israel's Security Fence*, <http://www.seamzone.mod.gov.il/pages/eng/purpose.htm>.

128. *Id.*

129. *Id.*

130. Consulate General of Israel in San Francisco Department of Media and Public Affairs, *The Security Fence: Facts and Figures*, <http://www.israeemb.org/la/news/Fence/Fence%20Presentation%20New%20York.ppt> [hereinafter *Facts and Figures*]. The actual length and route of the fence is continually changing. Jewish Virtual Library, *Israel's Security Fence*, <http://www.jewishvirtuallibrary.org/jsourc/Peace/fence.html> ("As a result of the modifications, the length of the barrier is expected to be approximately 416 miles.").

131. *Id.* In *Mara'abe*, the Court states:

The separation fence discussed in the petition before us is part of phase A of fence construction. The separation fence discussed in *The Beit Sourik Case* is part of phase C of fence construction. The length of the entire fence, including all four phases, is approximately 763 km. According to information relayed to us, approximately 242 km of fence have already been erected, and are in operational use. 28 km of it are built as a wall (11%). Approximately 157 km are currently being built, 140 km of which are fence and approximately 17 km are

Due to topographical and security needs,¹³² 8 kilometers (5 miles) of the fence were formed by concrete walls.¹³³ This phase of the fence was completed in July 2003.¹³⁴ Phase B, which extends sixty kilometers (forty miles) from Salim to Tirat-Zvi and to Mt. Avner has also been completed.¹³⁵ The next phase of the fence is divided into three segments, C1, C2, and C3. All three parts were approved in 2003 and will incorporate Jerusalem.¹³⁶ The first section, C1, will consist of three segments comprising approximately 64 kilometers (40 miles) in the areas between Beit Sahur and the Olive Junction, Qalandyia and Anatot, as well as specified sections around Bir Nabala.¹³⁷ As with Phase A, certain sections of this fence will require concrete walls as a result of sniper fire in certain places.¹³⁸ Phases C2 and C3 include “the fence between Elkana and the Camp Ofer military base, a fence east of the Ben Gurion airport and north of planned highway 45, and a fence protecting Israeli communities in Samaria (including Ariel, Emanuel, Kedumim, Karnei Shomron).”¹³⁹ This section is currently under construction and when completed will be nearly 150 kilometers long.¹⁴⁰ In certain areas, depending on security needs, an actual wall, as opposed to a fence, will be built.¹⁴¹ Finally, as approved by the Ministry of Defense in October 2003, Phase D will consist of a 52 kilometer (32 mile) fence in Tunnels Batir, a 30 kilometer (19 mile) section in Batir Surif, and a 93 kilometer (58 mile) addition in Surif Carmel.¹⁴²

wall (12%). The building of 364 km of the separation fence has not yet been commenced, of which 361 km are fence, and 3 km are wall.

Mara'abe, HCJ 7957/04 ¶ 3.

132. *Facts and Figures*, *supra* note 130.

133. *Id.*; see also Ministry of Defense, *Israel's Security Fence*, *supra* note 127.

134. Ministry of Defense, *Israel's Security Fence*, *supra* note 127.

135. *Beit Sourik*, HCJ 2056/04 ¶ 5. This section of the fence was approved in December 2002. *Id.*

136. Jewish Virtual Library, *Israel's Security Fence*, *supra* note 130.

137. *Beit Sourik*, HCJ 2056/04 ¶ 6; see also *Facts and Figures*, *supra* note 130.

138. Ministry of Defense, *Israel's Security Fence*, *supra* note 127; see also Jewish Virtual Library, *Israel's Security Fence*, *supra* note 130.

139. *Mara'abe*, HCJ 7957/04 ¶ 3.

140. See *Facts and Figures*, *supra* note 130.

141. *Id.*

142. *Id.* The approximated lengths of the fence and areas provided are subject to change.

B. Composition of the Fence

The security fence “is a multi layered composite obstacle comprised of several elements.”¹⁴³ At its core stands a technologically advanced fence.¹⁴⁴ While this chain-link fence appears in many places similar to any other fence, it is equipped with underground and long-range sensors to help alert authorities of attempts to infiltrate the border.¹⁴⁵ On the external side of the fence is an anti-vehicle obstacle, generally in the form of a trench, which is intended to prevent vehicles from being able to smash into the fence.¹⁴⁶ Just beyond these obstacles, there is also an additional fence and barbed wire in order to slow the progress of intruders.¹⁴⁷ Closest to the fence on its internal side is a dirt road meant to preserve foot prints or other markings that will indicate a breach in security.¹⁴⁸ On both sides of the electric fence are patrol roads, which are used by the IDF and border patrol in their efforts to guard the area.¹⁴⁹ In addition to another fence on the interior side of the fence, landmines and unmanned armored vehicles are strategically placed along the barrier in order to deter individuals from trying to cross the fence in an unmarked area.¹⁵⁰

In most areas, the fence and its additional components are approximately 60 meters (180 feet) wide.¹⁵¹ This figure varies depending on certain restraints or necessities depending on the topography and environmental needs of certain areas.¹⁵² Likewise, some areas require higher fences and even concrete structures in order to prevent infiltration.¹⁵³

143. Ministry of Defense, *Israel's Security Fence*, *supra* note 127.

144. Jewish Virtual Library, *Israel's Security Fence*, *supra* note 130.

145. *Id.*; *see also* Ministry of Defense, *Israel's Security Fence*, *supra* note 127.

146. *Beit Sourik*, HCJ 2056/04 ¶ 7.

147. Ministry of Defense, *Israel's Security Fence*, *supra* note 127; *see also Beit Sourik*, HCJ 2056/04 ¶ 38.

148. *Beit Sourik*, HCJ 2056/04 ¶ 38.

149. *Id.*

150. *See* Jewish Virtual Library, *Israel's Security Fence*, *supra* note 130.

151. *Id.*; *see also Beit Sourik*, HCJ 2056/04 ¶ 38.

152. Ministry of Defense, *Israel's Security Fence*, *supra* note 127. *See also Beit Sourik*, HCJ 2056/04 ¶ 38.

153. *Beit Sourik*, HCJ 2056/04 ¶ 38.

V. DISPROPORTIONAL DEFERENCE

In Parts II, III, and IV *supra*, this Note addressed the Israeli legal system as relevant to the Occupied Territories, the principle of proportionality as used by the Court, and the position and construction of the security fence respectively. This part examines the deference with which the Court gives to the Israeli government and military regarding decisions of national security. This Note contends that the proportionality test as originally conceived and previously applied is an improper inroad through which the High Court of Justice enabled itself to review the Israeli government's and military's decision to erect the security fence. Additionally, this part focuses on the failure of the Court to recognize the unprecedented nature of the security fence and the overwhelming impact the fence has with regard to counterterrorism and the future of the region.¹⁵⁴ Finally, this section will argue that the proportionality test, while evolving in scope, was not intended to shatter the delicate balance between the need for judicial review of administrative actions and the necessary discretion afforded to military commanders when given the responsibility of protecting Israeli lives and developing counterterrorism measures.¹⁵⁵

A. The Court's Review of Military Orders

Since establishing the ability to review military orders, *supra* Part II.C, the Court has attempted to define the scope of its power.¹⁵⁶ Some scholars argue that the Court fails to fully address military actions by inconsistently applying the standards of review that it has set forth.¹⁵⁷ These scholars believe that the Court allows the military too much deference in shaping policy in the Territories, particularly with regard to determining the necessity of security actions.¹⁵⁸ Others, however, are adamant in their

154. The Court itself denied the political implications of the fence. *Beit Sourik*, HCJ 2056/04 ¶ 33. However, it is clear that the fence could lead to future talks between the Israeli government and Palestinian Authority, either as a result of lowered tension from diminished terrorist activity, or through the pressure undoubtedly caused by the social and economic implications of the fence. The scope of this Note does not go beyond the use of the proportionality test. While scholarly works have yet to appear in large numbers with regard to the fence, other issues involving the fence will only be addressed as necessary and only in connection to the test of proportionality.

155. *C.f.* Gross, *supra* note 24.

156. Zamir, *supra* note 101, at 37.

157. KRETZMER, *supra* note 50, at 29.

158. See Kretzmer, *supra* note 50, at 74; *but see* Gross, *supra* note 24, at 181.

belief that the Court lacks self-restraint.¹⁵⁹ Despite the disagreement between scholars, it is clear that the Court no longer defers to the *Knesset* or the military, but rather reviews security decisions as though they were any other administrative legislation.¹⁶⁰ As a result, security assessments have become a joint effort between the government, military, and judiciary.¹⁶¹ Such a situation is counterintuitive in a democratic system¹⁶² as it erodes the separation of powers.¹⁶³

159. Gelpe, *supra* note 37, at 493. Even others believe that the Court has found a proper balance between its own discretion and that of the military's. Detlev F. Vagts, *International Decision: Ajuri v. IDF Commander in West Bank. Case No. HCJ 7015/02 [2002] Isr. L. Rep. 1. Supreme Court of Israel, September 3, 2002*, 97 AM. J. INT'L. L. 173, 175 (2003) ("One admires the meticulous and courageous way in which the Israeli Supreme Court, acting as it did in the immediate vicinity of violence, approached the task of distinguishing between appropriate and inappropriate uses of the executive's security powers.").

160. See generally Bracha, *supra* note 91, at 39; see also Gelpe, *supra* note 37, at 493.

161. See generally Gross, *supra* note 24.

162. In the landmark decision for judicial review, *United Mizrahi Bank v. Migdal Cooperative Village*, Justice Barak validated judicial review as "an affirmation of democracy itself. [T]he judicial review of constitutionality is the very essence of democracy, for democracy does not only connote the rule of the majority. Democracy also means the rule of basic values and human rights as expressed in the constitution." Ralph Ruebner, *Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel—A Comparative Perspective*, 31 GA. J. INT'L & COMP. L. 493, 499–500 (2003), quoting CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* [1995] P.D. 49(iv) 221, translated in Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 ISR. L. REV. 259 (1999).

163. Cf. Gelpe, *supra* note 37, at 93; see also KRETZMER, *supra* note 50, at 191 ("In democratic countries, courts enjoy varying degrees of independence. This independence ensures that the judges' decisions are based on their conscience and are not dictated by other branches of government" and vice versa). But see J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 272 (4th ed. 1991) ("Courts are part of the machinery of the authority within the State and as such cannot avoid the making of political decisions."). It is further argued that the evolution of the judiciary requires that it becomes involved in the political aspects of the other branches of government:

In the traditional view, the function of the judiciary is to decide disputes in accordance with the law and with impartiality. The law is thought of as an established body of principles which prescribe rights and duties. Impartiality means not merely an absence of personal bias or prejudice in the judge but also the exclusion of 'irrelevant' considerations such as his political or religious views.

A more sophisticated version of this traditional view sees the judiciary as one of the principle organs of a democratic society without whom government could be carried on only with great difficulty. The essence of their function is the maintenance of law and order and the judges are seen as a mediating influence.

The Court's increasingly aggressive position when reviewing military actions is apparent, despite language by the Court which purports a more balanced approach.¹⁶⁴ Justice Barak has stated on several occasions:

The Supreme Court, sitting as the High Court of Justice, reviews the legality of the military commander's discretion In exercising judicial review, we do not turn ourselves into experts in security affairs. We do not substitute the security considerations of the military commander with our own security considerations. We take no position regarding the way security affairs are run. Our task is to guard the borders and to maintain the boundaries of the military commander's discretion Thus, we shall not be deterred from reviewing the decisions of the military commander . . . simply because of the important security considerations anchoring his decision. However, we shall not substitute the discretion of the commander with our own discretion. We shall check the legality of the discretion of the military commander and ensure that his decisions fall within the zone of reasonableness.¹⁶⁵

In the past, such a statement could be construed to indicate that the Court was prepared to show the military great deference in reviewing military orders.¹⁶⁶ In fact, past case law demonstrates that when reviewing military officials' decisions in the Territories, the Court, more often than not, sided with the military government.¹⁶⁷ For some, the Court's propensity to side with the military government legitimizes Israel's Occupation and provides the government with a degree of autonomy over matters involving the West Bank and Gaza.¹⁶⁸ This belief seems to have lost prominence recently given that Justice Barak has also ruled:

The judgments of the Supreme Court stated more than once that the security considerations of the army, both inside Israel as well as in Judea, Samaria and Gaza, are subject to judicial review, and that this judicial review is not limited to questions of jurisdiction or the presence of security considerations . . . it extends to the whole gamut of grounds for review, including questions of reasonableness of the security considerations.¹⁶⁹

J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 187–88 (2d ed. 1979).

164. For a comprehensive survey of the Court's increasing intervention in the actions of the security authorities, see Bracha, *supra* note 91, at 39.

165. *Beit Sourik*, HCJ 2056/04 ¶ 46.

166. Simon, *supra* note 15, at 24.

167. *Id.*

168. *Id.*

169. HCJ 910/86 *Ressler v. Minister of Defense* [1988] P.D. 42(2) 441, 486; *see* Simon, *supra* note 15, at 23 n.117.

One of the most common illustrations¹⁷⁰ of the Court's movement toward active management of military activity in the Occupied Territories is the review of military orders involving home demolitions.¹⁷¹ The stated military objectives for ordering home demolitions are to punish those who commit acts of terror against Israel and to deter those who are thinking about committing such acts.¹⁷² Similar to the reaction of many

170. There are many examples of military orders which the High Court has ruled on, however few are as widely discussed, both positively and negatively as home demolitions. While it would be impossible to go into each type of military action which has come under review by the Court, by using home demolitions, it is possible to grasp the difference between what this Note would consider a proper military action to be reviewed by the Court using the proportionality test, and the security fence, which this Note argues should be outside the Court's review. With this in mind, it is also important to note that in both instances, home demolitions and the building of the security fence, the Court should show extreme deference to the government and military commanders who take responsibility for the results of their actions.

171. Simon, *supra* note 15, at 7 ("The practice of home demolitions has been employed since . . . 1967."). Home demolitions are either carried out by blowing up the home with explosives or destroying the structure using a bulldozer. The authority to order home demolitions stems from Defense (Emergency) Regulations 1945, Palestine Gazette (No. 1442), Reg. 119, para. 2, at 1089 (Supp. II Sept. 27, 1945) [hereinafter Defense Emergency Regulations]. The regulation provides:

A military commander may by order direct the forfeiture to the Government of Palestine of any house, structure or land form in which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, detonated, exploded or otherwise discharged or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence, and when any house, structure or land is forfeited as aforesaid, the Military commander may destroy the house or the structure or anything in or on the house, the structure or the land.

Id.; see also Gross, *supra* note 24, at 181 (arguing that the "Regulation cannot be said to be inconsistent with the values of the State of Israel as a Jewish and democratic State since a democratic state must also equip its military commanders with efficient tools for fighting terrorism." The article articulates that it cannot be said that "fighting terrorism is an improper purpose."). *Id.*; see HJC 2722/92 Alamarin v. Commander [1992] P.D. 46(3) 693, 702 (Hebrew) (per Justice Cheshin), cited in Gross, *supra* note 24, at n.75.

172. Gross, *supra* note 24, at 181–82 ("It seems that the legislature intended to enable the military commander to respond in an effective and suitable manner to every act that impairs the security of the population or threatens public order. The military commander has broad power to order the confiscation of land and thereafter the demolition of the structure or structures of which the terrorist made use in the commission of the offense. Moreover, the military commander may make these orders even if the act of terror was

scholars with regard to the building of the security fence,¹⁷³ there are those who feel that home demolitions go far beyond their stated purpose and in fact result in collateral damage to innocent people, often times to terrorists' wives, children, parents, and siblings.¹⁷⁴ In order to remedy the conflict between the necessity of home demolitions and the fear of condoning collective punishment, the Court has sought to quell the two concerns by allowing those who feel bereaved by any military order to petition the High Court to contest the order's legality.¹⁷⁵

The impact of the Court's willingness to provide direct access to the High Court of Justice has been two-fold with regard to the military commanders' authority.¹⁷⁶ On the one hand, it has provided the Court with an effective method of supervising the military commanders' authority in an area which in the past was not always open to judicial intervention.¹⁷⁷ On the other hand, it has slowed down the response time of the military to certain threats and made the work of the military commanders more difficult.¹⁷⁸ Returning to the example of home demolitions, the Court's decision to allow for review has left the military unable to immediately destroy a terrorist's residence, as soldiers are now obligated to wait for the inhabitants of the home to exercise their rights before the Court.¹⁷⁹

However, because each home demolition is technically unrelated to the next, it seems reasonable for the Court to have review over this military action, especially since the success of one demolition is not dependent on the next. Herein lies the significant difference between home demolitions and the security fence: a ruling by the Court that a demolition is too extreme does not negatively affect the overall purpose of home demoli-

not committed from the relevant land. It is sufficient that the land served as the home of the terrorist.”).

173. See, e.g., Gross, *supra* note 24.

174. *Id.* at 182. For these scholars, home demolitions are more analogous to other forms of collective punishment, a prohibited form of justice under Israeli law. *Id.* (“The power given to the military commander under Regulation 119 is not the power of the collective punishment. Its exercise is not intended to punish the family members of the Petitioner. The power is administrative and its exercise is intended to deter and thereby preserve public order.”); see also Fourth Geneva Convention, *supra* note 86, art. 33(1) (“No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism [are] prohibited.”).

175. Gross, *supra* note 24, at 187.

176. *Id.* at 230.

177. *Id.*

178. *Id.*

179. *Id.*

tions, whereas allowing the Court to determine the proper route of a section of the fence can directly affect not only the quality of that particular region, but the effectiveness of the fence as a whole.

The construction of the security fence is unique from other instances in which the Court has applied the proportionality test because the fence represents a shift in Israel's policy towards terrorism. Instead of reacting to specific terrorist activity, the government is attempting to preemptively stop all terrorists from entering Israel from the Territories.¹⁸⁰ As a result, unlike situations dealt with in previous case law such as curfew orders, home demolitions, and the treatment of imprisoned terrorists, the security fence cannot be linked to several random acts of terrorism, but must be viewed in its entirety, as a policy decision designed to end all terrorism. Whereas the proportionality test can be properly applied to a home demolition to determine whether destroying a terrorist's home is proportional to the damage that he caused through his terrorist act, the Court does not have the means or the expertise to evaluate the government's overarching policy towards fighting terrorism as a whole.¹⁸¹

B. The Court Did Not Give the Military the Proper Deference Under Its Proportionality Test

When the Court applied the proportionality test to examine the military's decision to build the fence, the Court failed to properly weigh the authority of the military commander, and to show deference to his expertise. As the Court in *Beit Sourik* openly admitted, the Justices of the High Court "are not experts in military affairs."¹⁸² Consequently, at the outset of its analysis, the Court explained that when applying its proportionality test, it would not attempt to substitute its opinion for that of the military commander's, nor would it require that the opinion of the Court and the opinion of the commander correspond.¹⁸³ Instead, the Court stated that all it could do was "determine whether a reasonable military commander would have set out the route as this military commander did."¹⁸⁴ As a

180. *See generally id.*

181. *Cf. R. COTTERREL, THE SOCIOLOGY OF LAW* 235 (2d ed. 1992); *see also* KRETZMER, *supra* note 50, at 192 ("In some jurisdictions courts have avoided ruling in such situations, relying on doctrines of nonjusticiability or 'act of state' to justify their passivity.")

182. *Beit Sourik*, HCJ 2056/04 ¶ 46.

183. The Court in *Beit Sourik* stated: "We shall not examine whether the military commander's military opinion corresponds to ours—to the extent that we have an opinion regarding the military character of the route. So we act in all questions which are matters of professional expertise, and so we act in military affairs as well." *Id.*

184. *Id.*

result, the Court gave the impression that its final ruling as to the proportionality of the fence would be based heavily on the conclusions of the military commander. However, this was not the case, and while the Court purported to show deference to the military, in reality, it failed to do so.¹⁸⁵

The Court directly addressed the weight that should be given to the military commander when it determined that the opinion of the Council for Peace and Security¹⁸⁶ could not be adopted by the Court.¹⁸⁷ In fact, the Court stated that “at the foundation of this approach is our long-held view that we must grant special weight to the military opinion of the official who is responsible for security.”¹⁸⁸

185. *Id.* ¶¶ 45, 60, 62.

186. Members of the council moved to be joined as *amici curiae* and were granted recognition. The council of former military personnel submitted several affidavits claiming that the route of the security fence was unnecessary.

In an additional affidavit (from April 18, 2004), members of The Council for Peace and Security stated that the desire of the commander of the area to prevent direct flat-trajectory fire upon the separation fence causes damage from a security perspective. Due to this desire, the fence passes through areas that, though they have topographical control, are superfluous, unnecessarily injuring the local population and increasing friction with it, all without preventing fire upon the fence.

Petitioners, pointing to the affidavits of the Council for Peace and Security, argue that the route of the separation fence is disproportionate. It does not serve the security objectives of Israel, since establishing the route adjacent to the houses of the Palestinians will endanger the state and her soldiers who are patrolling along the fence, as well as increasing the general danger to Israel's security. In addition, such a route is not the least injurious means, since it is possible to move the route farther away from petitioners' villages and closer to Israel. It will be possible to overcome the concern about infiltration by reinforcing the fence and its accompanying obstacles.

Id. ¶ 18–19.

187. *Id.* ¶ 47 (“In this state of affairs, are we at liberty to adopt the opinion of the Council for Peace and Security? Our answer is negative.”).

188. *Id.* The Court continues to emphasize the importance of deferring to the opinion of the military commander. Vice-President M. Landau J. dealt with this point in a case where the Court stood before two expert opinions, that of the Major General serving as Coordinator of IDF Activity in the Territories and that of a reserve Major General. Thus wrote the Court:

In such a dispute regarding military-professional questions, in which the Court has no well founded knowledge of its own, the witness of respondents, who speaks for those actually responsible for the preservation of security in the administered territories and within the Green Line, shall benefit from the assumption that his professional reasons are sincere reasons. Very convincing evidence

The military's expertise is most pertinent in the third subtest of the proportionality principle since it examines whether the benefit derived from the fence is in proportion to the injury caused to the Palestinians as a result of its construction.¹⁸⁹ In order to determine if the route chosen by the military fulfilled the objective of gaining the greatest security advantage with the least harm to the inhabitants, the Court determined that it must weigh the opinions of the military against the claims of the inhabitants. The Court came to the conclusion that in many areas, the fence did not meet this standard, despite arguments by the military that the route was necessary to ensure the security of Israeli citizens.

In complete contrast to the Court's earlier dictum, it effectively ignored the military commander's reasoning behind the placement of the fence and instead turned to the Council for Peace and Security in several instances to find an alternative route.¹⁹⁰ The Court had previously stated that it could not adopt the opinion of the Council for Peace and Security;¹⁹¹ yet, when determining the route of the fence pursuant to Order no. Tav/107/03 and Order no. Tav/108/03,¹⁹² the Court held that the proposal provided by the Council could be considered.¹⁹³ Thus, while the Court stated one standard at the beginning of its opinion, during its examination it failed to abide by its rhetoric.

is necessary in order to negate this assumption. Justice Vitkon wrote similarly in *Duikat*, in which the Court stood before a contrast between the expert opinion of the serving Chief of the General Staff regarding the security of the area, and the expert opinion of a former Chief of the General Staff. The Court ruled, in that case, as follows: In security issues, where the petitioner relies on the opinion of an expert in security affairs, and the respondent relies on the opinion of a person who is both an expert and also responsible for the security of the state, it is natural that we will grant special weight to the opinion of the latter. Therefore, in our examination of the contrasting military considerations in this case, we give special weight to the fact that the commander of the area is responsible for security. Having employed this approach, we are of the opinion—the details of which we shall explain below—that petitioners have not carried their burden, and have not convinced us that we should prefer the professional expert opinion of members of the Council for Peace and Security over the security stance of the commander of the area. We are dealing with two military approaches. Each of them has military advantages and disadvantages. In this state of affairs, we must place the expert opinion of the military commander at the foundation of our decision.

Id. (citations omitted).

189. *Beit Sourik*, HCJ 2056/04 ¶ 59.

190. *Id.* ¶ 71.

191. *Id.* ¶ 47.

192. *Id.*

193. *Beit Sourik*, HCJ 2056/04 ¶ 71.

While the Court has attempted to develop the proportionality test and expand its application, neither past case law nor the scholarly works cited by the Court directly deal with a situation such as the security fence. In fact, of the material the Court cites to in the *Beit Sourik* opinion, the article most directly linked to the security fence states that the principle of proportionality “is often difficult to apply . . . especially in counterterrorist¹⁹⁴ operations.”¹⁹⁵ Thus, while the Court was correct in stating that “proportionality plays a central role in the law regarding armed conflict” and that “during such conflicts, there is frequently a need to balance military needs with humanitarian considerations,”¹⁹⁶ once the Court deemed security to be the motivation behind the fence, it should have provided the military commander greater deference in his determination as to the necessary route of the security fence.¹⁹⁷

Proponents of judicial intervention argue that it is necessary for the Court to have the ability to oversee all government and military decisions concerning national security because such decisions are most likely to run the risk of suppressing liberties.¹⁹⁸ The reality of the security fence is that it will cause hardships to the Palestinians—specifically with regard to the loss of land. As a result, it was proper for the Court to rule on the legality of the fence in general, to determine whether the military commander had the proper authority to order its construction. However, when the Court divided the security fence into various segments in order to apply the proportionality test, it disregarded the underlying rationale and justification for the fence as a whole.¹⁹⁹ The objective of the fence is to protect Israelis and to save lives.²⁰⁰ The Court could not justify trading

194. Counter-terrorism has been defined as “offensive military operations designed to prevent, deter and respond to terrorism.” Adam Roberts, *The Laws of War in the War on Terror*, in ISR. Y.B. HUM. RTS. 200 (Yoram Dinstein ed., 2002).

195. *Id.* at 200.

196. *Beit Sourik*, HCJ 2056/04 ¶ 37.

197. Cohen-Eliya, *supra* note 38, at 274 (“[I]t is common to grant the decision-maker margins of appreciation when he acts for the realization of the worthy purpose of national security.”).

198. SHIMON SHETREET, *JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY* 465 (1994).

199. *See* Makovsky, *supra* note 11, at 54–56 (stating that the two main purposes of the fence were security and to “spur the peace process” by forcing the Palestinians back to the negotiating table); *see also* *Beit Sourik*, HCJ 2056/04 ¶¶ 12, 15. In all, the Court examined eleven different orders by the military commander to construct different segments of the fence. Some of these segments only measured five kilometers in length. *See Beit Sourik*, HCJ 2056/04 ¶¶ 17, 49–50, 62, 65, 67, 71–72, 75, 77, 80–81, 86.

200. *Facts and Figures*, *supra* note 130 (“The Security Fence is a central component in Israel’s response to the horrific wave of terrorism emanating from the West Bank. The fence is a manifestation of Israel’s basic commitment to defend its citizens. Once com-

Israeli lives to safeguard the liberties of the Palestinians most affected by the fence. By separating the fence into segments, the Court was able to examine it in the same manner that it examined home demolitions and other military orders.

There is no doubt that the order to build the security fence was a drastic measure. However, without it, Israel would be forced to continue to fight terrorists using guerilla war tactics.²⁰¹ While the structure of the fence is temporary in theory, the objective behind the fence is permanent—lasting security and peace.²⁰² The fact that Israel has been in a constant state of emergency since its establishment in 1948²⁰³ is proof that the previous tools given to the military to secure its citizens were reactionary in nature—meant to punish those who committed terrorist acts and deter others from supporting terrorism—not to bring about a lasting peace.²⁰⁴ Although security appears to be the primary purpose of the fence, it is also possible that the government could be forcing its two-state solution to the current conflict or even trying to create a situation that forces the Palestinians into negotiating for peace. Regardless of the Justices' political views, they do not have the expertise or the authority to determine whether such policies are correct. As Justice Ben Porat argued in *Barzilai v. Government of Israel*:²⁰⁵

[I]t cannot be overlooked that those who discharge a clear security function find it especially difficult to act always within the law Naturally the smaller the deviation from the legal norm, the easier it would be to reach the optimal degree of harmony between the law and the protection of the State's security. But we, as judges who dwell among our people, should not harbour any illusions, as the events of the instant case well illustrate. There simply are cases in which those who are at the helm of the State, and bear responsibility for its survival and

pleted, the fence will substantially improve the ability of the Israeli Defense Force (IDF) to prevent the infiltration of terrorists and criminal elements into Israel.”) (emphasis removed); see Makovsky, *supra* note 11, at 55; see also *Beit Sourik*, H CJ 2056/04 ¶ 13.

201. See Gross, *supra* note 24, at 231.

202. Both the government of Israel and the Court recognize that the structure of the fence is temporary. However, if peace cannot be reached between the two sides, the fence will most likely remain in place. Already, the amount of terrorist attacks in areas where construction is complete are down significantly. See Makovsky, *supra* note 11, at 55.

203. Bracha, *supra* note 91.

204. *Id.* at 123.

205. H CJ 428/86 *Barzilai v. Government of Israel*, 40(3) P.D. 505, 579–80, *quoted in* Bracha, *supra* note 91.

security, regard certain deviations from the law for the sake of protecting the security of the State, as an avoidable necessity.²⁰⁶

In the case of the security fence, the objectives of stopping terrorism²⁰⁷ and shifting Israeli policy toward the idea of separation qualify this case as an instance where the necessity of building the fence as the government sees fit is essential to its overarching goals, and the Court should provide the government and military the deference that is necessary for it to achieve those goals.²⁰⁸

206. *Id.* at 125 n.10 (illustrating that the comments made by Justice Ben Porat were not shared by the majority of Justices in this particular case. Justice Shamgar, in response to Justice Ben Porat stated, "One cannot conceive of a sound administration without maintenance of the rule of law, for it is a bulwark against anarchy and ensures the State order. This order is essential for the preservation of political and social frameworks and the safeguarding of human rights, none of which can flourish in an atmosphere of lawlessness.").

207. *See* Dayan, *supra* note 9. In a speech regarding the security fence's ability to stop terrorism, Dayan stated:

There is ample evidence demonstrating the effectiveness of, and precedence for, the construction of a security fence. Whenever Israel has needed to provide a defensive measure against terrorists for the security of its citizens, it has constructed a fence (e.g., along its borders with Jordan, Syria, and Lebanon). Indeed, the fence in Gaza has been 100 percent effective in preventing terrorist infiltration. Similarly, Stage A of the West Bank fence has already been successful, forcing terrorist groups to scramble to move their headquarters to areas where there is no fence and greatly decreasing the number of criminal incidents along its route. Eventually, this fence will also eliminate the problem of illegal Palestinian immigration, which has already resulted in 150,000 illegal residents in Israel.

Id.

208. *Cf. id.* *See also* Bracha, *supra* note 91. It should be noted that in most instances, providing free reign to the military could lead to drastic and unnecessary results. Consequently, this Note does not argue that the Court should never review military decisions, nor that the Court cannot use the proportionality test to weigh the security benefit provided by a military order versus the negative effect that order poses to the Palestinians; rather, this Note asserts that the proper amount of deference must be provided to the Court, specifically in the case of the security fence. It is true that

[i]n a democratic society that loves freedom and security, there is no escape from balancing liberty and dignity, and security. Human rights cannot become a shovel for negating the security of the public and the state. There must be a balance, albeit a difficult and sensitive one, between the individual's dignity and freedom and the state security and public security.

Gross, *supra* note 24, at 231.

VI. CONCLUSION

Over the course of the past six years, the ongoing cycle of Palestinian terrorist attacks and Israeli military excursions into the Occupied Territories has become commonplace. During this period, known as the *Second Intifada*, Israel implemented forced curfews, border closings, additional security at checkpoints, and military operations in an attempt to thwart terrorism. Yet, none of these efforts subdued the threat of attack that Israeli citizens struggle with every day.²⁰⁹ Instead of escalating the severity of military missions or increasing the frequency of curfews and home demolitions, the government and military determined that the time was right to change the way Israel approached terrorism and proposed the idea of building a security fence that would act as a buffer between Israelis and Palestinians.

The decision to erect the fence came under immediate scrutiny from both Palestinians and much of the international community. Many of the concerns and questions surrounding the fence were answered in *Beit Sourik*, the Israeli High Court's landmark decision in which it ruled that while the State of Israel was permitted to build the fence, the fence's route, as chosen by the Ministry of Defense, disproportionately favored the security needs of Israel over the fence's adverse effects on the Palestinians' quality of life.²¹⁰ The Court stated that it would take into consideration the military's belief that the designated route was necessary for the security of Israel; however, its decision does not reflect deference to the military, but rather, it indicates that the Court used its own judgment when concluding that the fence's route was improperly determined by the military.²¹¹

209. *Beit Sourik*, HCJ 2056/04 ¶ 2.

210. *See id.* ¶ 67.

211. In the epilogue of his decision, Chief Justice Barak explains:

Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security.

This Note's assessment that the High Court must provide the military with greater deference with regard to its decision surrounding the fence is even more pertinent as the Court's holding in *Beit Sourik* was reinforced in its decision in *Mara'abe v. The Prime Minister of Israel*. In *Mara'abe*, the Court required the Israeli government and military to reconsider its placement of the security fence near Alfei Menashe, in order to minimize the negative effects of the fence on the Palestinians.²¹² By applying the proportionality test in such a way that it lessens the value of the military's opinions and goals, the Court is, in effect, substituting its own security beliefs for those of the individuals entrusted with the duty to protect Israeli citizens. While allowing the military too much deference can lead to undesirable results, the uniqueness of the fence as a temporary and defensive measure to prevent future terrorist activity in Israel should qualify it as an instance in which the Court should have provided the military with the utmost deference.

From a security standpoint, the determination of the fence's route must be based on the best possible course to ensure the safety of Israeli citizens. While the rights and needs of the Palestinians should be taken into consideration by the military and government when determining the route for the fence, finding a "less restrictive alternative"²¹³ in this particular instance is not an appropriate determination for the Court to make.²¹⁴ Once the Court established that the military took into account the adverse effects the security fence would have on Palestinians, the Court should have respected the commander's discretion.²¹⁵ Thus, the Court's use of the proportionality test to review the decision to construct the security fence was improper because it did not take into account the

Id. ¶ 59.

212. *Mara'abe*, HCJ 7957/04 ¶ 116.

213. See Bracha, *supra* note 91; see also *Beit Sourik*, HCJ 2056/04 ¶ 69.

214. See Gross, *supra* note 24, at 221–22.

215. *Beit Sourik*, HCJ 2056/04 ¶¶ 44–46. During the process of determining the route of the fence, the government stated that "every effort shall be made to minimize, to the extent possible, the disturbance to the daily lives of the Palestinians due to the construction of the obstacle." *Id.*

expertise of the military when dealing with specific aspects of the fence that directly pertain to the security of Israeli lives both present and future.

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