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Mara'abe v. Prime Minister of Israel

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by way of constitutional interpretation in the *Atkins*³² and *Roper*³³ cases involving application of the death penalty.³⁴ To the extent that the Court has seen the improvement in U.S. conformity to human rights standards as a probable by-product of its decisions in these cases, its judgment has been vindicated. The UN Human Rights Committee, in its recent report on U.S. country practices under the International Covenant on Civil and Political Rights, highlighted five positive developments—four of them being Supreme Court decisions.³⁵

Even in its cautiousness, *Hamdan* nonetheless may represent no more than a gambit by a narrow majority of the Court. Whether it marks a watershed in judicial participation in the security state will be answered only by subsequent rounds of interbranch interaction. As Congress has moved to reverse much of the decision's practical import, thereby largely acceding to the Bush administration's original vision of the tribunal regime, the Court will now likely face the raised-stakes choice of resisting or backing down from the combined power of the political branches—a context in which middle-ground solutions will not present themselves so readily.

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Humanitarian law—law of belligerent occupation—proportionality of security measures taken in occupied territory—self-defense against terrorism—effect of ICJ decisions in domestic courts

MARA'ABE V. PRIME MINISTER OF ISRAEL. Case No. HCJ 7957/04. At <<http://elyon1.court.gov.il/eng/home/index.html>> (English translation).

Supreme Court of Israel, sitting as the High Court of Justice, September 15, 2005.

In *Mara'abe v. Prime Minister of Israel*,¹ the Israeli Supreme Court held that the routing of a portion of Israel's "security fence" in the northern West Bank violated international humanitarian law. The Supreme Court, sitting as the High Court of Justice, ordered the Israeli government to consider alternative paths for the barrier. The *Mara'abe* decision expanded on the Court's earlier ruling in *Beit Sourik Village Council v. Israel*,² in which the Court ordered the

³² *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing disapproval of the "world community" on the way to invalidating execution of the mentally retarded).

³³ *Roper v. Simmons*, 543 U.S. 551, 576–78 (2005) (citing foreign and international sources in finding unconstitutional the execution of juvenile offenders).

³⁴ In all three cases—*Hamdan*, *Atkins*, and *Roper*—the Court had before it amicus briefs filed by former diplomats to the effect that the challenged governmental conduct itself undermined an effective foreign policy, and that judicial invalidation of the practices at issue would reduce frictions with other nations. See Brief of Amici Curiae Madeleine K. Albright and 21 Former Senior U.S. Diplomats, *Hamdan v. Rumsfeld* (No. 05-184); Brief of Former U.S. Diplomats Morton Abramowitz et al., *Roper v. Simmons* (No. 03-633); Brief of Amici Curiae Morton Abramowitz et al., *McCarver v. North Carolina* (No. 00-827), cert. dismissed as improvidently granted, 533 U.S. 975 (resubmitted in *Atkins*); see also *Lawrence v. Texas*, 539 U.S. 558, 573–76 (2003) (citing foreign and international sources in striking down criminal sodomy statute).

³⁵ Concluding Observations of the Human Rights Committee: United States, paras. 5–9, UN Doc. CCPR/C/USA/CO/3 (2006) (citing Supreme Court decisions in *Hamdan*, *Lawrence*, *Atkins*, and *Roper* as "positive aspects" in implementing ICCPR).

¹ HCJ 7957/04 (High Ct. Justice Sept. 15, 2005), at <<http://elyon1.court.gov.il/eng/home/index.html>>.

² HCJ 2056/04 (High Ct. Justice June 20, 2004), 43 ILM 1099 (2004). For more on *Beit Sourik Village Council*, see, e.g., Geoffrey R. Watson, *The "Wall" Decisions in Legal and Political Context*, 99 AJIL 6, 19–26 (2005).

rerouting of another segment of the obstacle. *Mara'abe* also revealed some of the Israeli Court's views on *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*³—the 2004 advisory opinion of the International Court of Justice (ICJ) holding that construction of the barrier anywhere in occupied territory violates international law.

On August 31, 2004, Zaharan Yunis Muhammad Mara'abe and five other Palestinians petitioned the High Court of Justice to order the Israeli government to dismantle a segment of the barrier in the northern West Bank. The segment in question begins by looping around the northern, western, and southern edges of the West Bank town of Qalqiliya, which borders the "Green Line," the 1949 armistice line separating the West Bank from Israel proper. From the southern edge of Qalqiliya, the obstacle juts east to surround the Israeli settlement of Alfei Menashe, which is about four kilometers east of the Green Line. This "Alfei Menashe enclave" also surrounds five Palestinian villages, separating them from Qalqiliya and the rest of the West Bank. After encircling Alfei Menashe, the barrier meanders back west to the Green Line, creating a corridor connecting Alfei Menashe to Israel proper. The result is a spatula-shaped protuberance extending into the West Bank (paras. 8–9).⁴

The petitioners, residents of two of the five enclosed villages, argued that the barrier was unlawful and should be torn down. First, citing the ICJ advisory opinion, they contended that Israel had no authority to construct a "security fence" anywhere in occupied territory. Second, they argued that the barrier violated the standards of international humanitarian law set forth in *Beit Sourik Village Council*—in particular, the requirement of proportionality between security measures and the harm resulting to the civilian population. The petitioners asserted that the wall separated them from their agricultural land, from essential medical and school services, from friends and relatives in neighboring towns, and in some cases from their mosques. The petitioners acknowledged that Israel had set up several gates and passageways allowing residents to come and go, but they noted that only non-Israelis were required to hold permits to pass through those checkpoints (paras. 76–83).

In response, Israel argued that notwithstanding the ICJ's advisory opinion, international law did not preclude the erection of a security barrier in occupied territory. The barrier, Israel contended, was "temporary" and not intended to establish a permanent border between Israel and a Palestinian state. As to the proportionality requirements of *Beit Sourik Village Council*, Israel asserted that the crossing points permitted access to neighboring areas, that Israel intended to implement a more uniform policy on identification cards, that Israel had arranged for medical personnel to visit the villages on a regular basis, that many village residents worked inside the enclave (particularly in Alfei Menashe) anyway, and that Israel was funding transportation for village children to schools outside the enclave (paras. 84–91).

President Aharon Barak, writing for a unanimous, nine-justice High Court, turned first to the petitioners' argument that international law forbids Israel to construct a security barrier anywhere in the occupied territories. The Court began its analysis by identifying the applicable

³ (Int'l Ct. Justice, July 9, 2004), 43 ILM 1009 (2004). For more on the advisory opinion, see, for example, the recent *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AJIL 1 (2005).

⁴ A map of the Alfei Menashe enclave appears at the end of the Court's opinion ("Qalqiliya" is spelled "Kalkiliya" on the map). For Israel's latest official maps of the barrier as a whole, see <<http://www.securityfence.mod.gov.il/Pages/ENG/route.htm>>.

law. As it has in the past, the Court concluded that the Hague Regulations⁵ applied to the occupied territories. And as it did in *Beit Sourik Village Council*, the Court assumed without deciding that the Fourth Geneva Convention⁶ was also applicable. In particular, given the Israeli government's position that the Convention's humanitarian provisions apply in the territories, Barak concluded that "we are not of the opinion that we must take a stand on that issue in the petition before us." He noted, moreover, that the ICJ had already determined that application of the Convention is not "conditional upon the willingness of the State of Israel to uphold its provisions" (para. 14).

The Court held that neither the Fourth Geneva Convention nor the Hague Regulations prohibit the construction of a security barrier in occupied territory. President Barak pointed to Article 53 of the Fourth Geneva Convention, which forbids "destruction" of private property "except where such destruction is rendered absolutely necessary by military operations." Barak added: "It is worth noting that construction of the separation fence is unrelated to expropriation or confiscation of land," which is prohibited by Article 46 of the Hague Regulations.⁷ Construction of the barrier, he added, "is done by way of taking possession," is "temporary" and "accompanied by payment of compensation," and is therefore permissible pursuant to Articles 43 and 52 of the Hague Regulations (para. 16).⁸

The Court found additional authority for construction of the wall in Article 23(g) of the Hague Regulations, which provides that it is "especially forbidden" to "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." President Barak noted that the ICJ's *Wall* advisory opinion found Article 23(g) inapplicable because it appears in section II of the Regulations, entitled "Hostilities."⁹ While he referred to the ICJ's position as a "principled stance," Barak nonetheless wrote: "This approach of the International Court of Justice cannot detract from this Court's approach regarding the military commander's authority to take possession of land for constructing the fence." Barak argued that "the scope of application of regulation 23(g) can be widened, by way of analogy, to cover belligerent occupation as well." He added that since the situation in the occupied territories often transforms itself into "combat," it was appropriate that Article 23(g) apply. In any event, he concluded, the other sources of authority in the Hague Regulations and Fourth Geneva Convention suffice (para. 17).

The Court also rejected the petitioners' argument that the illegality of the settlements precluded Israel's construction of a wall to protect settlers. President Barak took no position on the legality of the settlements themselves. Instead, his view was that Israel has the right and duty to protect Israeli settlements in occupied territory, even if the settlers are there illegally. He based this conclusion in part on Article 43 of the Hague Regulations, which empowered Israel

⁵ Hague Regulations, annexed to the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

⁶ Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

⁷ Article 46 of the Hague Regulations provides: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

⁸ Article 43 of the Hague Regulations provides: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Article 52 provides, in part: "Requisitions in kind and service shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation . . . Contributions in kind shall as far as possible be paid for in cash . . ."

⁹ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, para. 124.

to preserve “public order and safety” (as quoted in para. 19). He also pointed to the Israel-PLO Interim Agreement of 1995, which called for permanent status talks on settlements and provided in the meantime that Israel shall “carry the responsibility . . . for overall security of Israel and Settlements, for the purpose of safeguarding their internal security and public order”¹⁰ (quoted in para. 20). He found a similar obligation to protect settlers in Israel’s Basic Laws on human rights (para. 21).

Next, President Barak questioned the ICJ’s holding that Article 51 of the UN Charter has “no relevance” to the legality of the barrier. The ICJ held that Israel could not invoke Article 51, because “Israel does not claim that the attacks against it are imputable to a foreign State” and because the terrorist threat “originates within, and not outside,” the occupied territories.¹¹ Reacting to these holdings, Barak wrote:

We find this approach of the International Court of Justice hard to come to terms with. It is not called for by the language of §51 of the Charter of the United Nations It is doubtful whether it fits the needs of democracy in its struggle against terrorism. From the point of view of a state’s right of self defense, what difference does it make if a terrorist attack against it comes from another country or from territory external to it which is under belligerent occupation? (Para. 23)

Nonetheless, Barak found “no need to thoroughly examine this issue” because he found authority for construction of the barrier in the Hague Regulations and other sources of law. He concluded: “We shall, therefore, leave the examination of self defense for a future opportunity” (*id.*).

The Court then turned to the narrower argument presented by the petitioners—namely, that this segment of the wall imposed disproportionate hardships on the civilian population. After canvassing humanitarian law, the Court reiterated its holding in *Beit Sourik Village Council* that Israel must balance its own security against the harm to Palestinians and that Israel must, in particular, adhere to a standard of “proportionality.” As in *Beit Sourik Village Council*, proportionality had three elements: (1) a rational fit between means and ends, (2) a demonstration that Israel has chosen the “least harmful means” to achieve its security objective, and (3) a showing that damage caused to the individual “must be of appropriate proportion to the benefit stemming from it” (para. 30).

President Barak’s review of *Beit Sourik Village Council* prompted him to contrast that decision with the ICJ’s *Wall* advisory opinion. After presenting a lengthy recap of the ICJ decision (paras. 37–55), Barak commented on its legal effect:

As the ICJ itself noted in its opinion (paragraph 31), it does not bind the states. It is not *res judicata*. However, the opinion of the International Court of Justice is an interpretation of international law, performed by the highest judicial body in international law. The ICJ’s interpretation of international law should be given its full appropriate weight. (Para. 56, citations omitted).

Barak next noted that the ICJ and the Israeli Supreme Court had looked to much the same body of law—humanitarian law, in particular—and yet reached quite different results (paras.

¹⁰ See Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-PLO, Arts. 12(1), 17(1)(a), 31(5), 36 ILM 551 (1997).

¹¹ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, para. 139.

57–58). Echoing Judge Buergenthal's *Wall* dissent, Barak criticized the factual basis for the ICJ's judgment, especially its lack of attention to the security side of the equation. He noted that the secretary-general's report, upon which the ICJ relied heavily, contained only one line on "security-military necessity." The reports of two UN special rapporteurs provided "no data on this issue at all." Israel did present data on terrorism and the barrier's effect on it, "but these did not find their way into the opinion itself." And the opinion "contains no real mention of the security-military aspect" (para. 63). Instead, the ICJ reached conclusions founded on a "minimal factual basis" (para. 64). Barak also stressed that his Court had embarked on a detailed factual inquiry into both sides of the issue. "In contrast" to the ICJ proceedings, he said, "the parties to the proceedings in the *Beit Sourik Case* stood before the Court. An adversarial process took place. The burden of establishing the factual basis before the court was cast upon the parties. The parties' factual figures were examined and made to confront each other . . ." (para. 69). Barak concluded that the difference between the two opinions was attributable to the facts before them. He reiterated that the Supreme Court of Israel would "give the full appropriate weight" to the advisory opinion, but he again stressed that it was not *res judicata* and that, in particular, it

does not obligate the Supreme Court of Israel to rule that each and every segment of the fence violates international law. The Israeli Court shall continue to examine each of the segments of the fence, as they are brought for its decision . . . ; it shall ask itself, regarding each and every segment, whether it represents a proportional balance between the security-military need and the rights of the local population. (Para. 74)

Finally, President Barak applied his three-part "proportionality" test to the Alfei Menashe enclave. He had no trouble finding that the enclave satisfied the first prong of the test. In Barak's view, there was a "rational" connection between Israel's security objectives and the construction of the barrier around the enclave (paras. 110–11). But Barak was not persuaded that this segment of the barrier comported with the test's second prong, the requirement that Israel choose the "least injurious means." While he rejected petitioners' suggestion that the least injurious means would entail routing the barrier along the Green Line, since this would make Alfei Menashe "vulnerable to terrorist attacks" from the West Bank (para. 112), he likewise rejected Israel's argument that it was necessary to include all five Palestinian villages inside the enclave. "The enclave," he wrote, "creates a chokehold around the villages. It seriously damages the entire fabric of life." He asked why most or all of the villages could not be removed from the enclave, and observed that the current route seemed "strange." He noted that there were plans to expand Alfei Menashe, but he said Israel's advocate agreed that this "consideration . . . should [not] be taken into account" (para. 113). Barak concluded, therefore, that Israel "must examine the possibility of removing the villages of the enclave—some or all of them—from the 'Israeli' side of the fence." He found no need to reach the third prong, the requirement of "proportionality" between security measures and damage to civilians, until Israel had completed its reassessment of the route (paras. 114–15).¹²

In a concurring opinion, Vice President Mishael Cheshin said that he found the ICJ opinion "so objectionable" that he had to "add a few words of [his] own" (para. 1). He lamented the

¹² President Barak also rejected three procedural objections advanced by Israel. The Court held that the claim was not barred by laches (that is, delay); that the petitioners had standing; and that they had satisfied the requirement that they make a prior "direct plea" to the government for redress of their grievance (paras. 95–97).

advisory opinion's "ramshackle" factual basis and its "almost complete ignoring of the horrible terrorism" that has "plagued Israel" (para. 4). In reading that opinion, Cheshin "could not discover those distinguishing marks which turn a document into a legal opinion or a judgment of a court" (para. 3). He concluded: "I am sorry, but the decision of the ICJ cannot light my path. Its light is too dim for me to guide myself by it to law, truth, and justice in the way a judge does, as I learned from those who preceded me and from my father's household" (para. 4).

* * * *

The *Mara'abe* Court's central holding—that the Alfei Menashe enclave needs to be rerouted—seems eminently sensible. The Israeli government offered no compelling reason for including five Palestinian villages in the enclave. Israel's own representative conceded that future expansion of the Alfei Menashe settlement was not a valid justification for the present path of the barrier. It's worth noting, though, that just such a justification has resurfaced in a more recent case—one involving the barrier around the West Bank settlement of Tzufin. In June 2006, the Court reversed its earlier denial of a petition for rerouting the barrier there because of a "very grave development": Israel had not fully disclosed that its routing of the wall was partly intended to accommodate a future industrial area around Tzufin.¹³

It might well be asked, however, why the Supreme Court (qua High Court of Justice) holds that Israel can erect a barrier around the current boundaries of a settlement but cannot route a barrier to take into account the planned expansion of a settlement. Doubtless the Court would answer that the barrier can be justified only on present security needs, and not hypothetical, future ones. But the Court's rationale—that the state has the right and duty protect settlers, even if they are present illegally—seems to imply that once settlements are expanded, the barrier can be expanded to match. By that logic, could not Israel settle the entire West Bank and then wall it off on security grounds?

President Barak's answer is that the barrier, like the occupation itself, is "temporary." Presumably, the Court's view is that the entire length of the barrier will eventually be inside Israel, perhaps demarcating an Israeli-Palestinian boundary pursuant to a permanent status agreement. Such an agreement would be unobjectionable from the standpoint of international law; nothing in international law forbids states to erect walls inside their borders. But is such an agreement a realistic possibility? It is true that Israel has been willing to tear down settlements to make peace in the past, and the security barrier itself has already been rerouted numerous times. Nevertheless, the prospect that settlements will expand—and then be ringed by expanding security fences—hardly makes a negotiated peace seem more likely, especially in the current environment, in which neither party is actively pursuing a negotiated settlement.

Mara'abe will probably be remembered most for the Israeli Court's extended discussion—fully one-third of the 66-page judgment—of the ICJ's *Wall* advisory opinion. As to the merits, the Israeli Court's reaction to the *Wall* opinion was hardly surprising. President Barak noted, quite accurately, that the ICJ opinion was often conclusory, as even some of its defenders concede.¹⁴ Likewise, Barak echoed scholarly criticism of the ICJ's puzzling comments on the law of self-defense, as well as Judge Buerghenthal's criticism of the Court's thin factual basis for its ruling.

¹³ See Dan Izenberg, *High Court Raps State for Concealing Info in Fence Petition; Orders Barrier Rerouted, Excludes 1,000 Dunams*, JERUSALEM POST, June 16, 2006, at 6.

¹⁴ See, e.g., Iain Scobbie, *Words My Mother Never Taught Me—"In Defense of the International Court,"* 99 AJIL 76, 80 (2005) (approving the outcome, but observing that at times "the reasoning is rather abrupt, almost to the point of taciturnity").

More surprising was the tone of the *Mara'abe* opinion. President Barak's critique of the ICJ was businesslike, tinged with puzzlement, but remarkably free of venom. How, he asked, could two courts have reached such divergent views? His answer was straightforward: "the difference stems from the factual basis that was laid before the ICJ" (para. 73). This rather scientific explanation is commendable for its generosity, but it seems almost pre-realist.¹⁵ In contrast, Vice-President Cheshin's critique has a personal, sorrowful tone. It comes close to accusing the ICJ of not judging at all.

International lawyers should be particularly interested in President Barak's description of the *Wall* opinion's precedential effect. A case could be made that he was *too* solicitous of that opinion. He said that the Israeli Court "shall give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion" (para. 74). This standard is at least as deferential as that which some courts apply to the ICJ's *contentious* cases. The U.S. Supreme Court, for example, has held that while ICJ decisions in contentious cases deserve "respectful consideration,"¹⁶ there is "little reason to think that [ICJ] interpretations were intended to be controlling on our courts."¹⁷

Finally, it should be obvious that *Mara'abe* will not be the last "separation fence" case of interest. Although the Israeli Supreme Court has already disposed of several dozen petitions by steering the parties toward a negotiated settlement, it has dozens more on its docket. One might quarrel with the Court's jurisprudence on settlements, but it is hard to argue with the thorough, fact-based approach that the Court brings to these "wall" cases. In the meantime, one can only hope that President Barak is right that the presence of a security barrier in occupied territory, as well as the occupation itself, is temporary.

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Torture—jus cogens—state immunity in civil proceedings—state immunity and immunity of its officials

JONES V. MINISTRY OF INTERIOR OF THE KINGDOM OF SAUDI ARABIA. Case No. [2006] UKHL 26.

At <<http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm>>.

House of Lords, June 14, 2006.

The House of Lords handed down judgment in *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*¹ on June 14, 2006. The case concerns an action in damages brought by Jones and three other applicants, all UK citizens, falsely accused of involvement in bombings in Riyadh in 2001 and 2002. The four allege that they were repeatedly tortured while in prison in Saudi Arabia and that they suffered severe psychological and physical harm as a result. Seeking aggravated and exemplary damages from Saudi Arabia's Ministry of the Interior and the

¹⁵ Cf. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (expressing skepticism that legal issues "can be worked out like mathematics from some general axioms of conduct" or that disagreement simply means some judges "were not doing their sums right").

¹⁶ *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam).

¹⁷ *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2684 (2006).

¹ Case No. [2006] UKHL 26 (H.L. June 14, 2006), at <<http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm>>.