Israel Law Review **47**(2) 2014, pp 181–189. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2014.
doi:10.1017/S0021223714000041

International Humanitarian Law and the Israeli Supreme Court

Aharon Barak[*]

In contrast with most other municipal courts in the world, the Israeli Supreme Court routinely decides cases based on international humanitarian law (IHL). Since the Six Day War in 1967, both the state and the Supreme Court have agreed that the Court has jurisdiction to decide humanitarian issues that come before it from territory held under belligerent occupation. The Court has indeed done so in issues ranging from land seizures to targeted killings, ruling on the basis of the relevant IHL. The Court has been criticised for its judgments, both from the right wing of the political spectrum, who see it as interfering with military matters, and from the left, who see it as granting legitimacy to occupation. In this article, I briefly describe the development, both historical and legal, of IHL in the Israeli Supreme Court, the criticism of the way the law is applied by the Court, and finally the importance of the fundamental concepts of human dignity and proportionality to IHL decisions.

Keywords: Israel Supreme Court, international humanitarian law, human dignity, proportionality, belligerent occupation

1. Introduction

There are very few municipal courts that deal with international humanitarian law (IHL).[1] Although belligerent occupation was not a rare phenomenon in the twentieth and the beginning of the twenty-first centuries, the courts of the various states involved in belligerent occupation have not – and certainly not on a routine basis – dealt with the humanitarian aspects of belligerent occupation.

The situation is different regarding the Supreme Court of the State of Israel. Dealing with belligerent occupation and IHL was, prior to the Oslo Accords of the early 1990s, a routine matter for our Supreme Court. Although this routine changed following the Accords, IHL still finds its way onto the docket of the Supreme Court from time to time. As for me personally, I have decided many hundreds, if not thousands, of cases brought to the court by inhabitants of the Sinai, of Gaza (in the past) and the West Bank (currently).[2] Like my colleagues at the Supreme Court, I became something of an expert on IHL. It would not be inaccurate to say that I have adjudicated more IHL cases than all of the municipal and international judges together. IHL has become part of our internal law. It has become part of me. Here are a few examples:

[*] President (ret) of the Israeli Supreme Court; Professor of Law, Interdisciplinary Center (IDC), Herzliya. This article is based on a lecture hosted by the International Committee of the Red Cross and the Minerva Center for Human Rights at the Hebrew University of Jerusalem, 3 July 2013; aharonbarak@gmail.com.

[1] Jochen A Frowein and Eric Stein, 'International Law in Municipal Courts' (1997) 91 *ASIL Proceedings* 290; Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Policy* 501.

[2] Aharon Barak, 'Human Rights in Israel' (2006) 39 *Israel Law Review* 12, 23–31; Aharon Barak, 'Human Rights in Times of Terror – A Judicial Point of View' (2008) 28 *Legal Studies* 493, 499–505.

- the ruling that prohibits torture;[3]
- many judgments regarding the legality of the separation barrier;[4]
- the judgment on the 'early warning procedure';[5]
- the legality of targeted killings;[6]
- many judgments regarding administrative detention and assigned residence territory under belligerent occupation;[7]
- the legality of seizing land for various needs, which include building settlements and paving roads;[8]
- the army's duty towards the civilian population in cases of armed conflict, such as ensuring the provision of food and medicine, and the handling of the dead and wounded;[9] and
- the legality of the conduct of military trials in the area held in belligerent occupation and the conditions in which prisoners and detainees are held.[10]

2. THE BASIS FOR APPLICATION OF IHL FROM THE STANDPOINT OF ISRAELI LAW

On these and many other issues, the petitions could have been rejected on the basis of the legal approach according to which the Court lacks jurisdiction, as they dealt with activity beyond the boundaries of the state. The petitions could have been rejected also on the basis of the argument

[3] HCJ 5100/94 *Public Committee Against Torture in Israel v Government of Israel* 53(4) PD 817 (1999) (*Interrogations*).

[4] HCJ 2056/04 *Beit Sourik Village Council v Israel and Israeli Defence Force Commander in the West Bank* 58(5) PD 807 (2004), ILDC 16 (*Separation Fence*); see also HCJ 7957/04 *Marabe v Prime Minister of Israel and Others* 60(2) PD 477 (2005), ILDC 157; HCJ 4825/04 *Alian v Prime Minister of Israel* (not reported, 16 March 2006); HCJ 11205/05 *Azaria Village Council v Government of Israel* (not reported, 23 May 2006); HCJ 396/05 *Alrazikat v Government of Israel* (not reported, 6 July 2006); HCJ 9961/03 *Center for Defence of the Individual Founded by Dr Lotte Salzberger v Government of Israel* (not reported, 5 April 2011); HCJ 10202/06 *Municipality of Dahariya v Commander of IDF Forces in the West Bank* (not reported, 12 November 2012).

[5] HCJ 3799/02 *Adalah – Legal Center for Arab Minority Rights in Israel and Others v General Officer Commanding Central Command, Israeli Defence Force and Others* 60(3) PD 67 (2005), ILDC 155 (*Early Warning*).

[6] HCJ 769/02 *Public Committee Against Torture in Israel v Government of Israel* 57(6) PD 285 (2005), ILDC 597 (*Targeted Killings*).

[7] HCJ 7015/02 *Ajuri and Others v Israeli Defence Force Commander in West Bank and Others* 56(6) PD 352 (2002), ILDC 14; see also HCJ 5793/92 *Association for Civil Rights in Israel v Minister of Defence* 47(1) PD 267 (1993); HCJ 5591/02 *Yassin v Commander of Kziot* 57(1) PD 403 (2002); HCJ 5784/03 *Salame v Commander of IDF Forces in Judea and Samaria* 57(6) PD 721 (2003); HCJ 2028/05 *Amara v Minister of Interior* (not reported, 10 July 2006).

[8] For example, HCJ 1748/06 *Mayor of Ad-Dhahiriya v IDF Commander in West Bank* (not reported, 14 December 2006), http://elyon1.court.gov.il/files_eng/06/480/017/a20/06017480.a20.pdf; HCJ 2150/07 *Abu Safiyeh v Minister of Defence* (not reported, 29 December 2009), http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf.

[9] For example, HCJ 3114/02 *Barake v Minister of Defence of Israel and Others* 56(3) PD 11 (2002), ILDC 369; HCJ 4764/04 *Physicians for Human Rights and Others v Israeli Defence Force Commander in the Gaza Strip* 58(5) PD 385 (2004), ILDC 17 (*Wartime Relief*); HCJ 201/09 *Physicians for Human Rights v Prime Minister of Israel* (2009), ILDC 1213.

[10] HCJ 3278/02 *Center for Defence of the Individual Founded by Dr Lotta Salzberger v Commander of IDF Forces in the West Bank* 57(1) PD 375 (2002); *Yassin* (n 7); HCJ 3239/02 *Marab v Commander of IDF Forces in Judea and Samaria* 57(2) PD 349 (2003), ILDC 15.

that the activity is political or military in nature, and is thus non-justiciable. That is certainly the case if the petition is to be heard while the military activity is ongoing. It is to the credit of the State of Israel that its representatives, arguing on its behalf in the Supreme Court, have rarely made such arguments. They were guided by a general directive issued by the Attorney General – and future Justice and President of the Supreme Court – Meir Shamgar.[11] According to this directive, the state does not claim that the Supreme Court does not have jurisdiction on issues that come before it from territory held under belligerent occupation. They were also directed by the government's position, according to which it complies with the rules of IHL and is willing to litigate IHL issues before the Supreme Court.

This consent of the state is, of course, neither a necessary nor a sufficient condition. The Court must itself be persuaded that it has jurisdiction, and that it is adjudicating according to law which it is required to apply. During the first period, shortly after the Six Day War, the answer to these questions seemed complex to the Supreme Court. However, the picture has gradually become clear and is today very simple. With regard to the problem of jurisdiction, according to the provisions of Basic Law: The Judiciary, the Supreme Court, sitting as the High Court of Justice, has jurisdiction to hear:[12]

> [m]atters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court.

Further, it is provided in this Basic Law that the Supreme Court has jurisdiction:[13]

> [t]o order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting.

This jurisdiction is directed towards the powers of the state and its officials, in respect of their acts both within and outside the borders of the state. No problem of jurisdiction arises, therefore, regarding a petition directed against the acts of the military commander outside Israel.

Regarding the application of the law, customary international law is part of Israeli common law.[14] To the extent that IHL is of customary character, it is part of our internal law. The Supreme

[11] Meir Shamgar, 'Legal Concepts and Problems of the Israeli Military Government – The Initial Stage' in Meir Shamgar (ed), *Military Government in the Territories Administered by Israel 1967–1980: The Legal Aspects* (Harry Sacher Institute for Legislative Research and Comparative Law, Hebrew University 1982) Vol 1, 43 fn 56 ('According to the instructions and guidelines of the present writer when serving as Military Advocate General and later as Attorney General of Israel, the State never raised the plea of a lack of *locus standi*'); also ibid 42–43 ('Israel decided … to subject the acts of its military government to judicial review by the Supreme Court of Israel sitting as the High Court of Justice'); David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY Press 2002) 22.

[12] Basic Law: The Judiciary, 1984 (Israel), s 15(c).

[13] ibid s 15(d)(2).

[14] CrimA 5/51 *Steinberg v Attorney General* 5 PD 1061, 1066 (1951); CrimA 174/54 *Stampfer v Attorney General* 10 PD 5, 17 (1956); HCJ 606/78 *Iyub v Minister of Defence* 33(2) PD 113, 120 (1979); HCJ 698/80 *Kawasme v*

Court examined, in each and every case, the question of whether a certain issue entrenched in an international convention or treaty – whether it is one to which Israel is party (such as the fourth Geneva Convention (1949)) or one to which Israel is not party (such as the Protocols to the Geneva Conventions) – also constitutes customary law. Thus, for example, the discussion of targeted killing examined Article 51(3) of Additional Protocol I to the Geneva Conventions,[15] to which the State of Israel is not party, but rather is viewed by us as reflecting customary international law. In deciding whether a norm in a convention or treaty – which in and of itself is not part of our internal law – reflects customary international law, we found much assistance in publications of the International Committee of the Red Cross. Pictet's book on humanitarian law[16] has been routinely quoted by us, and the Red Cross publication on Customary IHL[17] has been most helpful to us.

IHL, as part of customary international law, is not of constitutional status. A regular statute of our parliament (the Knesset) could change it, provided that the change is made clearly and unequivocally. However, the Israeli legislature has made no attempt to change this legal structure. Israel has no internal legislation to alter IHL matters that are part of our customary international law. I hope that will continue to be the case in the future.

3. CRITIQUE OF THE CURRENT SITUATION

The current legal position has been, and still is, severely criticised. The Israeli right wing criticised it on the grounds that it restricted the options for action by the army in the area held under belligerent occupation by Israel. 'Let the IDF Win' was the slogan, and the argument was that, by its judgments, the Supreme Court was preventing that victory.[18] The Israeli left criticised the position as it believed that the Supreme Court granted legitimacy to occupation.[19] Yet the Supreme Court has continued throughout the years, and continues today, down the path of the law, and the law does not recognise the statement that when the cannons roar, the muses are silent. It rejects the statement credited to Cicero that in battle the laws are silent.[20] Indeed, the approach is that when the cannons roar, the law is not silent.[21] That is when it is most important for its voice to be heard.

Minister of Defence 35(1) PD 617, 627 (1980); HCJ 785/87 *Affu v Commander of IDF Forces in the West Bank* 42(2) PD 4, 76 (1988).

[15] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I).

[16] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949 relative to the Protection of Civilian Persons in time of War* (International Committee of the Red Cross 1956).

[17] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, *Vol I* (International Committee of the Red Cross and Cambridge University Press 2005).

[18] Barak (2006) (n 2) 26–30.

[19] Kretzmer (n 11) 190.

[20] Cicero, *Pro Milone* (NH Watts tr, 5th edn, Harvard University Press 1972) 16 ('Silent enim leges inter arma').

[21] HCJ 168/91 *Morcos v Minister of Defence* 45(1) PD 467, 470–71 (1991) ('[E]ven when the cannons speak, the military commander must uphold the law'); cf William Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (Knopf Doubleday 1998) 224 (arguing that Cicero's statement reflects reality).

https://doi.org/10.1017/S0021223714000041 Published online by Cambridge University Press

The 'north star' is IHL to the extent that it is part of customary international law. That law indeed restricts the options for action by the army. The army of a democratic state cannot act in the same way as the terrorists. I discussed that in my judgment prohibiting torture:[22]

> This is the destiny of a democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

It is important to note that army and security personnel do not share the criticism of the right wing. They wish to act within the framework of the law, and they value every judgment of the Supreme Court that clarifies the law that applies to them. I remember very well that about a year after the judgment regarding the army's duty to conduct the combat in Rafah according to the humanitarian rules,[23] I met with the chief of staff at that time; he was pleased with the judgment and said that the lesson had been learned, and when the army prepares for military activity it takes into account the requirements regarding the needs of the civilian population. Similarly, following the judgment prohibiting torture,[24] the head of Shabak at the time told me, when we ran into each other, that the lesson of the judgment had been learned well and that 'when one uses one's head instead of one's hand, the results are better'. When I retired from the Supreme Court, I received a gift from the Shabak: a copy of a telegram that was sent about an hour after our judgment prohibiting torture, which was directed to all interrogators, ordering them to 'Stop'. I could not have received a more wonderful gift.

The Israeli left is incorrect in its criticism of the Court's very willingness to hear petitions from the territories. I am convinced that the humanitarian position of the residents of the territories – both Arab and Jewish – would be much worse if the Court had pulled back its hand and refrained from hearing petitions from the territories. The Court in its judgments does not grant legitimacy to the occupation, just as IHL does not grant legitimacy to the occupation. The Court decides which law applies. The political results of that determination are not the business of the Court.

In its case law the Court applies IHL. It thus applies and reflects the character of the State of Israel as a rule of law state in which security and human rights go hand in hand. There is no democracy without security; there is no democracy without human rights. Democracy is based upon a delicate balance between collective security and individual liberty. This balance is reflected in IHL, and in the case law of the Supreme Court employing IHL as part of customary international law. Further, not only the values of Israel as a democratic state, but also the values of a Jewish state are expressed.[25] The values of Israel as a Jewish state are not values of 'price tag', but are

[22] *Interrogations* (n 3) 605.
[23] *Wartime Relief* (n 9).
[24] *Targeted Killings* (n 6).
[25] Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2014 forthcoming).

https://doi.org/10.1017/S0021223714000041 Published online by Cambridge University Press

rather values of 'doing what is good and honest' and 'love your neighbour as yourself'. It is upon those values that IHL is also based.

4. THE MEANS EMPLOYED BY THE SUPREME COURT

In order to safeguard the values of Israel as a Jewish and democratic state, the Supreme Court has employed a number of means.[26] First, we do not accept the argument that petitions on humanitarian issues are non-justiciable;[27] a claim that a human right – whether a right according to human rights law or a right according to IHL – has been violated, is always a justiciable claim. Second, any person who claims that a human right has been violated – even if it is not his own right – has standing before the Supreme Court.[28] We act in this way in petitions that deal entirely with our internal law. We act so also in petitions regarding IHL. Third, we do not accept the argument that on the question of the proportional balance between security and human rights the Court should defer to the army.[29] In a case dealing with the separation barrier, I wrote:[30]

> The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportional. That is our expertise.

Fourth, it was decided by the Court that when a claim is made that a violation of IHL has occurred, that claim must be examined. In this regard, I wrote in the *Targeted Killings* case:[31]

> … [A]fter carrying out an attack on a civilian who is suspected of taking a direct part at that time in hostilities, a thorough investigation should be made (retrospectively) to ascertain that the identity of the target was correct and to verify the circumstances of the attack on him. This investigation should be an independent one ... In appropriate cases there will be grounds for considering the payment of compensation for harming an innocent civilian.

This idea was further developed by the Turkel Commission of Inquiry.[32]

---

[26] Barak (2006) (n 2) 23–25.
[27] Aharon Barak, 'The Role of a Supreme Court in a Democracy and the Fight against Terrorism' (2003) 58 *University of Miami Law Review* 125, 130; Barak (2008) (n 2).
[28] Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 190; Ze'ev Segal, *Standing Before the Supreme Court Sitting as a High Court of Justice* (2nd edn, Papirus 1993) (in Hebrew). Regarding justiciablity, see also *Iyub* (n 14) 124; HCJ 910/86 *Ressler v Minister of Defence* 42(2) PD 441(1988).
[29] See HCJ 1005/89 *Aga v Commander of IDF Forces in Gaza* 44(1) PD 536 (1990); *Wartime Relief* (n 9).
[30] *Separation Fence* (n 4) 304.
[31] *Targeted Killings* (n 6) 504.
[32] 'Second Report of the Public Commission to Examine the Maritime Incident of 31 May 2010: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed

https://doi.org/10.1017/S0021223714000041 Published online by Cambridge University Press

5. CRITICISM OF THE CASE LAW

The criticism of the Supreme Court's case law regarding IHL is not only political. There is also, of course, legal criticism. It is useful only to the extent that it claims that within the framework of IHL it was possible to reach a different decision. There are those who believe that the Court is too activist. There are those who believe that the Court is not active enough. This criticism applies to all case law of the Supreme Court on general public law issues, primarily constitutional law. It is not limited to IHL cases. To those general complaints of over-activism, I say: Israel is a state without a rigid constitution, and with a partial and weak bill of rights; Israel is a state that has suffered continuous, non-stop security tensions since the day of its establishment; it is a state that gathers in immigrants from states where democracy is not practised – Israel, being such a state, requires a Supreme Court with the extent of activism that it has today. To those who argue that the activism is insufficient, I say: A judge cannot do everything he wants to do. He must act within the framework of the separation of powers. The rule of law is first and foremost the rule of law binding the judge. Self-restraint is critical for every judge. It is certainly critical for a judge acting in the State of Israel, which has not succeeding in granting itself a new constitution, to which peace has not yet come, and whose democratic roots are not sufficiently deep.

Similar criticism, of over-activism or of too much self-restraint, is also heard regarding the Supreme Court's case law regarding IHL. In addition to my response to the general claim – which, of course, applies equally here – I would like to add that my activity as a judge on IHL issues was within the framework of customary international law. I was required to reflect customary international law. I had the duty to give effect to the customs of the international community. Judicial creative power is narrower than the creative power granted to a judge within the framework of general Israeli common law.

I must admit that when I began serving as Attorney General (in 1975) I knew little about international law in general, or of IHL in particular. In my studies at the faculty of law – which I completed in 1958 – we did not deal with IHL. Even when I was appointed to the Supreme Court, and when I began to deliver judgments on these issues, I had to learn new material which I did not know. I am sure that this is reflected in my judgments, both in their content and in their form. It appears that in taking my first steps, I treated cases that came before me as special cases of administrative law. I would begin the judgment with the powers of the military commander himself, and examine the extent to which his considerations were relevant. After having gained knowledge in the subject – and in parallel with developments that were taking place in Israel in general administrative law and the constitutional revolution which the Israeli legal system underwent – I began to treat the cases that came before me as special cases of constitutional law, in which the customary rules of IHL are the constitution and the acts of the military commander are 'sub-constitutional' acts. I would begin the judgment with the right, and examine to what extent the limitation upon it was in line with IHL.

Conflict according to International Law', 6 February 2013, http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf (English translation).

https://doi.org/10.1017/S0021223714000041 Published online by Cambridge University Press

In the framework of general Israeli public law, I dealt extensively in my judgments with two important concepts: human dignity[33] and proportionality.[34] I also attempted to introduce the concepts of human dignity[35] and proportionality[36] into my IHL case law. As for human dignity, it is my opinion that IHL as a whole is intended to protect and realise human dignity, and that human dignity lies at its foundations.[37] The historic rise of IHL is in the development of the increasing recognition of the need to safeguard the dignity of every individual – both soldier and civilian. At the foundations of IHL stands the humanity of the individual. At the foundations of that humanity stands human dignity. In my eyes, human dignity is an expression of the humanity of the individual – every individual. Human dignity, according to my approach, is not just about preventing torture, or preventing humiliation or degrading treatment – terms that appear in Common Article 3 of the Geneva Conventions. Human dignity is much more than that; it is the humanity of the individual, and his ability to weave his life story.

Similarly, the principle of proportionality is a general principle of public law.[38] It should also be a general principle of IHL. In the *Targeted Killings*[39] case I wrote that the requirement of necessity – that is, that a person's right should not be affected if the military objective can be reached by less harmful means – applies also in the framework of Article 51(3) of Additional Protocol I.[40] In my opinion, not only this aspect of proportionality should apply under IHL, but rather all aspects of proportionality. Thus, a proper balancing between military necessity and the deleterious effect of the limitation upon the human right is needed. I have held so in a number of judgments that dealt with the separation barrier. It was decided in all of those judgments that it is not enough that the purpose of the separation barrier is to fulfil a military necessity, and this purpose only; it is not enough that there is a rational connection between the

[33] For example, HCJ 6427/02 *Movement for Quality of Government in Israel v The Knesset* 61(1) PD 619 (2006); HCJ 7052/03 *Adalah – Legal Center for Arab Minority Rights in Israel v Minister of Interior* 61(2) PD 202 (2006), ILDC 393 (*Family Reunification*); HCJ 366/03 *Commitment to Peace and Social Justice Society v Minister of Finance* 60(3) PD 464 (2005); see also Barak (n 25).

[34] For example, CA 6821/93 *United Mizrachi Bank v Migdal* 49(4) PD 221 (1995); *Movement for Quality of Government in Israel v The Knesset* (n 33); *Family Reunification* (n 33); HCJ 1661/05 *Regional Council of Hof Gaza v The Knesset* 59(5) PD 673 (2005); see also Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012).

[35] For example, *Interrogations* (n 3); *Wartime Relief* (n 9); *Early Warning* (n 5); *Targeted Killings* (n 6).

[36] For example, *Separation Fence* (n 4); *Targeted Killings* (n 6); HCJ 8276/05 *Adalah – Legal Center for Arab Minority Rights in Israel v Minister of Defence* 62(1) PD 1 (2006), ILDC 593.

[37] For example, 'Declaration on Minimum Humanitarian Standards', UN Doc E/CN.4/1995/116 (1995) (Declaration of Turku). See also Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Minimum Humanitarian Standards, UN Doc E/CN.4/1998/87 (1988), para 99: ('For too long, these two branches of law have operated in distinct spheres, even though both take as their starting point concern for human dignity'); 'UN-ICRC: Guidelines for UN Forces', ICRC Resource Centre, 15 May 1996, http://www.icrc.org/eng/resources/documents/misc/57jmx3.htm ('[The guidelines'] main purpose, as that of international humanitarian law as a whole, is to preserve human dignity').

[38] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 65; Rosalyn Higgins, *Problems and Process – International Law and How We Use It* (Oxford University Press 1995) 219; Jost Delbrück, 'Proportionality' in Rudolph Bernhardt (ed), *Encyclopaedia of Public International Law* (North-Holland 1997) 1140.

[39] *Targeted Killings* (n 6).

[40] ibid 503, 519.

location of the barrier and the military purpose; it is not enough that the barrier is necessary, in the sense that there are no less intrusive means. What is also required is a proportional relationship (namely, balancing) between the benefit to be gained by the military purpose and the harmful effect on the rights of the inhabitants. In one case – which deals with the rights of Israeli citizens, but which also applies to IHL – I wrote:[41]

> Examination of the test of proportionality (in the narrow sense) returns us to first principles that are the foundation of our constitutional democracy and the human rights that are enjoyed by Israelis. These principles are that the end do not justify the means; that security is not above all else; that the proper purpose of increasing security does not justify serious harm to the lives of many thousands of Israeli citizens. Our democracy is characterised by the fact that it imposes limits on the ability to limit human rights; that it is based on the recognition that surrounding the individual there is a wall protecting his rights, which cannot be breached even by the majority. This is how the court acted in many different cases. Thus, for example … determining the route of the separation fence in the place decided by the military commander in Beit Sourik Village Council would have increased security. But we held that the additional security was not commensurate with the serious harm to the lives of the Palestinians. Removing the family members of suicide bombers from their place of residence and moving them to other places ('assigned residence') would increase security in the territories, but it is inconsistent with the character of Israel as a 'democratic freedom-seeking and liberty-seeking state'.

For 28 years I served as a Justice of the Supreme Court. During all those years I dealt with IHL; I viewed that as one of my most important roles. I knew very well that when I sit at trial, I too stand trial. I hope that in that trial – the trial of history – I will be found innocent.

[41] *Family Reunification* (n 33) 539–40.

https://doi.org/10.1017/S0021223714000041 Published online by Cambridge University Press