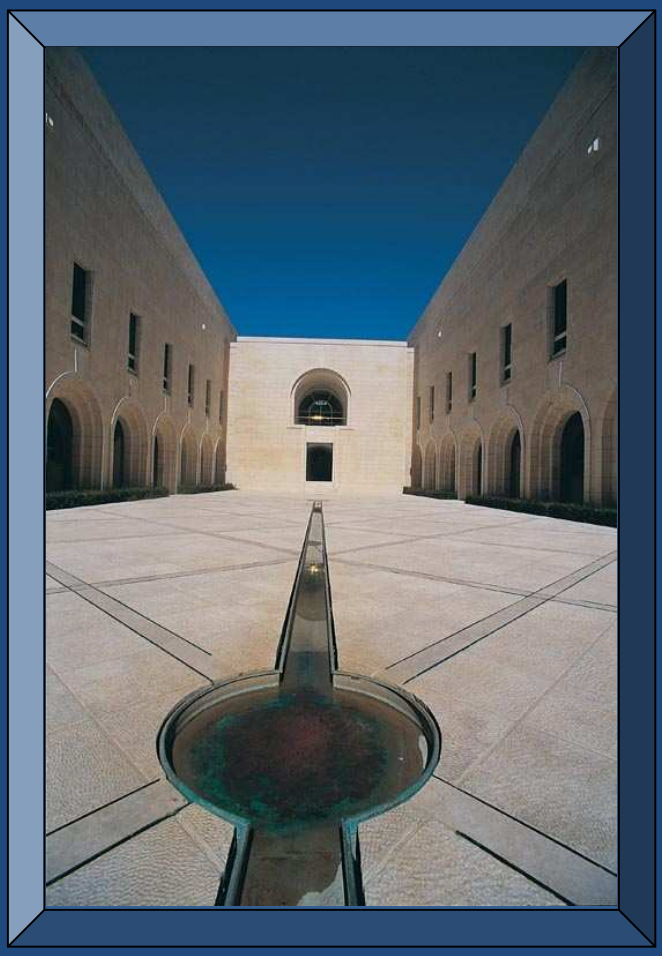

# Judgments of the Israel Supreme Court: Fighting Terrorism within the Law

# JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW

Volume 3

2006-2009

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## Editor's Introduction

This is the third volume of 'Judgments of the Israel Supreme Court: Fighting Terrorism within the Law.'

Like the two previous volumes, this volume also contains translations of several decisions given by the Supreme Court on various matters relating to the fight of the State of Israel against terrorism. The cases are brought before the Supreme Court by individuals and human rights organizations. The Supreme Court scrutinizes the conduct of the State of Israel, according to the norms laid down in international law and Israeli internal law, to ensure that the fight against terrorism is conducted within the law, not in contravention thereof.

The cases are presented in this volume in chronological order, according to the date on which the decisions were given. Each case is preceded by a brief synopsis of the issues involved.

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Some words of explanation are required so that the reader may understand the references cited in the cases.

Since the proceedings of the Israeli courts are conducted in Hebrew and their decisions are given in Hebrew, English translations of these decisions are limited. Between 1954 and 1996, ten volumes containing translations of Supreme Court decisions were published under the title *Selected Judgments of the Supreme Court of Israel* (IsrSJ). More recently, decisions of the Supreme Court of the State of Israel have been published in an ongoing series entitled *Israel Law Reports* (IsrLR).

Since the vast majority of Israeli cases are not translated, citations in this volume are always given to the Hebrew decisions (IsrSC) and, where they exist, also to the English translations (IsrSJ or IsrLR). Full citations are given at the beginning of each decision; when a case is cited in the text of the decision, the reader is referred to the full citation at the beginning of the decision by means of the number in square brackets.

This volume follows the new system of citing the Hebrew decisions that was adopted in the *Israel Law Reports* series. It differs from the system used in *Supreme Court Judgments* and in the earlier volumes of 'Fighting Terrorism within the Law.' The new system was adopted to make the system of citations easier for the English-speaking reader.

Under the system used formerly, Supreme Court decisions in Hebrew were cited as P.D., which stands for *Piskei Din shel Bet HaMishpat HaElyon LeYisrael* (Judgments of the Supreme Court of Israel). The decisions of the District Courts were cited as P.M. which stands for *Pesakim Mehoziim* (Judgments of the District Courts). The decisions of the Labour Courts were cited as P.A., which stands for *Piskei Din Avoda* (Judgments of the Labour Courts). This system of citation, while understood by the Hebrew speaker, was not very helpful to the English speaker.

Consequently, the new system, which is used in this volume, cites decisions of the Supreme Court of Israel as IsrSC (Israel Supreme Court); decisions of the District Courts are cited as IsrDC (Israel District Courts); decisions of the Labour Courts are cited as IsrLC (Israel Labour Courts). All of these citations are of court decisions in Hebrew.

Citations of translations in the *Israel Law Reports* series are given as IsrLR; citations of the earlier series of *Selected Judgments of the Supreme Court of Israel* are given as IsrSJ. Citations of decisions in this volume are given as IsrSR (Israel Security Reports).

A full list of the various citations and abbreviations used in this volume can be found in the Table of Abbreviations.

Since most decisions of the Supreme Court are not translated, it is the policy in this volume to cite all cases according to the page numbers of the Hebrew version. Where reference is made to a decision for which an English translation is available, the page number of the English text cited follows the page number of the Hebrew text, and is enclosed in curly brackets {}. The appearance of curly brackets thus serves to provide an immediate indication to the reader that an English translation of the cited decision exists. Another indication of the existence of English translations can be found in the list of cases at the beginning of each judgment, where citations of English translations appear in bold type.

## Table of Abbreviations

| | |
|---|---|
| A | Appeal |
| AA | Arrest Appeal |
| AAA | Administrative Affairs Appeal |
| AC | Adoption Case (in trial court) |
| ADA | Administrative Detention Appeal |
| AP | Administrative Petition |
| BAA | Bar Association Appeal |
| BC | Bankruptcy Case |
| BS | Beer-Sheba |
| CA | Civil Appeal |
| CApp | Civil Application |
| CrimApp | Criminal Application |
| CrimC | Criminal Case (in trial court) |
| CC | Civil Case (in trial court) |
| CE | Common Era (civil date) |
| Cent. | Central |
| CFH | Civil Further Hearing |
| CM | Court Martial |
| CMA | Court Martial Appeal |
| CrimA | Criminal Appeal |
| CrimC | Criminal Case (in trial court) |
| CrimApp | Criminal Application |
| CrimFH | Criminal Further Hearing |
| CSA | Civil Service Appeal |
| DC | Disciplinary Case |
| EA | Elections Appeal |
| EC | Estates Case (in trial court) |
| EDA | Election Decision Approval |
| EnfC | Enforcement Case |
| FA | Family Appeal |
| FC | Family Case |
| FH | Further Hearing |
| GSS | General Security Service |
| HCJ | High Court of Justice |
| HCJApp | High Court of Justice Application |

| | |
|---|---|
| HCJFH | High Court of Justice Further Hearing |
| Hf | Haifa |
| IDF | Israel Defence Forces |
| IsrCM | Israel Court Martial Judgments (Official publication of the Israeli Appeals Court Martial decisions in Hebrew) |
| IsrDC | Israel District Court Judgments (Official publication of the Israeli District Court decisions in Hebrew) |
| IsrLC | Israel Labour Court Judgments (Official publication of the Israeli Labour Court decisions in Hebrew) |
| IsrLR | Israel Law Reports (English translations of selected Supreme Court decisions) |
| IsrSC | Israel Supreme Court Judgments (Official publication of the Israeli Supreme Court decisions in Hebrew) |
| IsrSJ | Selected Judgments of the Supreme Court of Israel (ten volumes of English translations of Supreme Court judgments, published between 1954 and 1996) |
| IsrSR | Israel Security Reports (translations of judgments of the Supreme Court relating to security issues, published by the Ministry of Foreign Affairs) |
| Jer | Jerusalem |
| LA | Application for Leave to Appeal |
| LAA | Application for Leave to Appeal (Administrative) |
| LabA | Labour Appeal |
| LabC | Labour Case (in trial court) |
| LCA | Application for Leave to Appeal (Civil) |
| LCrimA | Application for Leave to Appeal (Criminal) |
| LFA | Application for Leave to Appeal (Family) |
| LHCJA | Application for Leave to Appeal (High Court of Justice) |
| MA | Miscellaneous Appeal |
| MApp | Miscellaneous Application |
| MP | Miscellaneous Petition |
| MK | Member of Knesset |
| Mot | Motion |
| Naz | Nazareth |
| Net | Netanya |
| NLC | National Labour Court |
| OM | Originating Motion (in trial court) |
| PPA | Prisoner's Petition Appeal |
| PS | Personal Status Case |
| PT | Petah Tikva |

| | |
|---|---|
| Ram | Ramla |
| Res. | Reserve Forces of IDF |
| Ret. | Retired |
| RT | Retrial |
| SFC | Serious Felony Case (in trial court) |
| ST | Special Tribunal |
| TA | Tel-Aviv |
| TakDC | Takdin District Court judgments (unofficial reports of District Court judgments in Hebrew) |
| TakLC | Takdin Regional Labour Court judgments (unofficial reports of Regional Labour Court judgments in Hebrew) |
| TakNLC | Takdin National Labour Court judgments (unofficial reports of National Labour Court judgments in Hebrew) |
| TakSC | Takdin Supreme Court judgments (unofficial reports of Supreme Court judgments in Hebrew) |

**Morar v. IDF Commander In Judaea and Samaria**

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## Synopsis

This case was brought before the Supreme Court by representatives of five Palestinian villages in the West Bank against the military commander of the Israel Defence Forces, who is responsible under international and Israeli law for maintaining security in the territory, upholding law and order and ensuring the welfare of the inhabitants.

The representatives of the Palestinian villages raised two issues.

First, they complained that the military commander was restricting their access to their agricultural land, which is their main source of income. This caused them particular hardship during the olive harvesting season.

Second, they complained that they suffered from harassment by inhabitants of Israeli settlements. Considerable numbers of olive trees were being destroyed, and the military commander was failing in his duty to maintain law and order by not taking effective steps to counter these attacks or to apprehend the culprits.

In reply to the first issue, the military commander pointed out that his obligation under international and Israeli law to maintain law and order was difficult in view of the close proximity of the Palestinian villages to Israeli settlements. He said that the olive harvesting season was a problematic time, because Palestinian terrorists exploited the proximity of Palestinian agricultural land to Israeli settlements in order to mount attacks on those settlements. In order to maintain law and order, the military commander was required to restrict access to various areas, in order to prevent violence by either Palestinians or Israelis.

In reply to the second issue, the military commander gave the court explanations of the steps that were being taken to protect Palestinian

property and to apprehend the perpetrators of the unlawful acts against them.

On the first issue, the Supreme Court found the military commander's position that closures of land were necessary to protect Israelis and Palestinians to be problematic. The court pointed out that the military commander's position was to adopt the same measure of restricting the access of Palestinians to their land *both* in order to counter the threat of Palestinian attacks on Israelis *and* in order to counter the threat of Israeli attacks on Palestinians.

In so far as the threat of Palestinian attacks on Israelis was concerned, the court held that this could justify restricting the access of Palestinians to their land that was very close to Israeli settlements, provided that these restrictions were kept to the absolute minimum, and arrangements were made to allow reasonable access to the land for agricultural purposes.

In so far as the threat of Israeli attacks on Palestinians was concerned, the court held that restricting the access of Palestinians to their land in order to protect the Palestinians was a disproportionate measure and therefore unlawful.

In view of the continuing ineffectiveness of the military commander's measures to protect the Palestinians against harassment on the part of Israeli inhabitants of the territory, the court saw a need to lay down guidelines for the military commander. The court emphasized the importance of upholding the law in the territories.

**Rashed Morar, Head of Yanun Village Council**
**and others**
**v.**
**1. IDF Commander in Judaea and Samaria**
**2. Samaria and Judaea District Commander, Israel Police**

The Supreme Court sitting as the High Court of Justice
[26 June 2006]
*Before Justices D. Beinisch, E. Rivlin, S. Joubran*

Petition to the Supreme Court sitting as the High Court of Justice.

**Facts:** The petitioners, who represent five Arab villages in the territory of Judaea and Samaria, claimed that the respondents unlawfully deny Palestinian farmers in those villages access to their agricultural land. The petitioners also claimed that the respondents do not act to prevent attacks and harassment perpetrated by Israeli inhabitants of the territory of Judaea and Samaria against Palestinian farmers and do not enforce the law against the Israeli inhabitants. In reply, the respondents explained that the agricultural land was closed only when it was necessary to protect the Palestinian farmers from harassment by Israeli inhabitants. The respondents also notified the court of the actions taken by them to enforce the law against Israeli inhabitants in Judaea and Samaria.

**Held:** The measure of denying Palestinian farmers access to their land for their own protection is disproportionate. The proper way of protecting Palestinian farmers from harassment is for the respondents to provide proper security arrangements and to impose restrictions on those persons who carry out the unlawful acts.
Law enforcement in Judaea and Samaria is insufficient and unacceptable, since the measures adopted have not provided a solution to the problems of harassment. The respondents were ordered to improve law enforcement procedures to deal with the problem properly.

Petition granted.

**Legislation cited:**
Basic Law: Human Dignity and Liberty, 5752-1992, ss. 2, 3, 4.
Security Measures (Judaea and Samaria) (no. 378) Order, 5730-1970, s. 90.

**Israeli Supreme Court cases cited:**

[1] HCJ 302/72 *Hilo v. Government of Israel* [1973] IsrSC 27(2) 169.

[2] HCJ 6339/05 *Matar v. IDF Commander in Gaza Strip* [2005] IsrSC 59(2) 846.

[3] HCJ 10356/02 *Hass v. IDF Commander in West Bank* [2004] IsrSC 58(3) 443; **[2004] IsrLR 53**.

[4] HCJ 2612/94 *Shaar v. IDF Commander in Judaea and Samaria* [1994] IsrSC 48(3) 675.

[5] HCJ 7957/04 *Marabeh v. Prime Minister* **[2005] (2) IsrLR 106**.

[6] HCJ 3680/05 *Tana Town Committee v. Prime Minister* (not yet reported).

[7] HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* **[2005] (2) IsrLR 206**.

[8] HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [1996] IsrSC 50(1) 353.

[9] HCJ 2753/03 *Kirsch v. IDF Chief of Staff* [2003] IsrSC 57(6) 359.

[10] HCJ 1890/03 *Bethlehem Municipality v. State of Israel* [2005] IsrSC 59(4) 736; **[2005] (1) IsrLR 98**.

[11] HCJ 2481/93 *Dayan v. Wilk* [1994] IsrSC 48(2) 456; **[1992-4] IsrLR 324**.

[12] HCJ 7862/04 *Abu Dahar v. IDF Commander in Judaea and Samaria* [2005] IsrSC 59(5) 368; **[2005] (1) IsrLR 136**.

[13] HCJ 292/83 *Temple Mount Faithful v. Jerusalem District Police Commissioner* [1984] IsrSC 38(2) 449.

[14] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* **[2006] (1) IsrLR 443.**

[15] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.

[16] HCJ 2725/93 *Salomon v. Jerusalem District Commissioner of Police* [1995] IsrSC 49(5) 366.

[17] HCJ 531/77 *Baruch v. Traffic Comptroller, Tel-Aviv and Central Districts* [1978] IsrSC 32(2) 160.

[18] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**.

[19] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.

[20] HCJ 61/80 *Haetzni v. State of Israel (Minister of Defence)* [1980] IsrSC 34(3) 595.

[21] HCJ 551/99 *Shekem Ltd v. Director of Customs and VAT* [2000] IsrSC 54(1) 112.

[22] HCJ 153/83 *Levy v. Southern District Commissioner of Police* [1984] IsrSC 38(2) 393; **IsrSJ 7 109**.

[23] HCJ 2431/95 *Salomon v. Police* [1997] IsrSC 51(5) 781.
[24] HCJ 3641/03 *Temple Mount Faithful v. HaNegbi* (unreported).
[25] HCJ 166/71 *Halon v. Head of Osfiah Local Council* [1971] IsrSC 25(2) 591.

For the petitioners — L. Yehuda.
For the respondents — E. Ettinger.

JUDGMENT

**Justice D. Beinisch**

The petition before us concerns the right of access of the residents of five Arab villages in the territory of Judaea and Samaria (hereafter: the territory) to their agricultural land. The original petition was filed on behalf of the residents of three villages (Yanun, Aynabus, Burin) and later the residents of two additional villages (A-Tuani and Al-Jania). According to what is alleged in the petition, the respondents — the IDF Commander in Judaea and Samaria ('the IDF Commander') and the Commander of the Samaria and Judaea District in the Israel Police ('the Police Commander') are unlawfully preventing Palestinian farmers, who are residents of the petitioning villages, from going to their agricultural land and cultivating it. They claim that the respondents are depriving them of their main source of livelihood on which the residents of the petitioning villages rely and that this causes the residents serious harm. It is also alleged in the petition that the respondents are not acting in order to prevent attacks and harassment perpetrated by Israeli inhabitants of the territory of Judaea and Samaria against Palestinian farmers and that they do not enforce the law against the Israeli inhabitants.

*The course of the proceedings in the petition and the arguments of the parties*

1. Since the petition was filed at the end of 2004, it has undergone many developments. We shall discuss below, in brief, the main events in the course of the petition.

On 24 October 2004 the petition was filed for an order *nisi* ordering the respondents to show cause as to why they should not allow the residents of the petitioner villages, and the residents of the territory of

Judaea and Samaria in general, to have access to their land throughout the year, and particularly during the olive harvest and the ploughing season. The court was also requested to order the respondents to show cause as to why they should not take the appropriate action in order to ensure the security of the Palestinian farmers when they cultivate their land.

The petition that was filed was of a general nature but it also contained an application for concrete and urgent relief, since at the time when the petition was filed the olive harvest had begun. After an urgent hearing of the petition was held on 1 November 2004, arrangements were made between the parties in order to resolve the existing problems and to allow the harvest to take place in as many areas as possible. These arrangements were successful and from the statements that were filed by both parties it appears that a solution to the petitioners' problems was found and that the specific difficulties that were raised in the petition were mostly resolved.

2. On 9 December 2004 an application was filed by the petitioners for an order *nisi* to be made in the petition. In this application the petitioners said that although the urgent and specific problems that arose during the current harvest season had been resolved, the petition itself addressed a 'general *modus operandi*, which was practised by the security forces in extensive parts of the territory of the West Bank, as a result of which residents are denied access to their land.' It was alleged that because the IDF Commander was afraid of violent confrontations between Palestinian farmers going to work on their land and Israeli inhabitants, the IDF Commander is in the habit of ordering the closure of Palestinian agricultural areas, which are defined as 'areas of conflict.' This denies the Palestinians access to their land and deprives them of the ability to cultivate it. It was argued that denying them access to their land is done unlawfully, since it is not effected by means of an order of the IDF commander but by means of unofficial decisions. It was also argued that the justification given for closing the area is the need to protect the Palestinian farmers against acts of violence against them by Israeli inhabitants. In addition to this, it was argued in the petition that the respondents refuse to enforce the law against the Israeli inhabitants who act violently towards the Palestinian farmers and their property.

On 14 January 2005 the respondents filed their response to the application. In the response, it was emphasized that according to the

fundamental position of the Attorney-General, the rule is that the Palestinian inhabitants in the territory of Judaea and Samaria should be allowed free access to the agricultural land that they own and that the IDF Commander is responsible to protect this right of access from hostile elements that seek to deny the Palestinians access to their land or to harm them. The respondents stated that following meetings between the defence establishment and the Attorney-General, a comprehensive examination of the areas of conflict was made, and the purpose of this was to examine whether it was essential to continue to impose restrictions on access to agricultural areas and on what scale and for how long such restrictions are required. The respondents also said that where it transpires that areas of conflict make it necessary to continue to impose restrictions upon access, these will be declared closed areas and a closure order will be made with regard thereto in accordance with s. 90 of the Security Measures (Judaea and Samaria) (no. 378) Order, 5730-1970 (the 'Security Measures Order'). At the same time it was stated that nothing in the aforesaid would prevent the closure of an area by virtue of an unwritten decision when the defence establishment had concrete information of an immediate and unforeseen danger to the Palestinian residents or the Israeli settlers in a specific area, if the entry of Palestinian farmers into that area would be allowed. In conclusion it was argued that in view of the fact that the immediate needs of the petitioners had been satisfied and in view of what is stated above with regard to the issue of principle addressed by the petition, there was no basis for examining the petitioners' arguments within the scope of this proceeding and the petition should therefore be denied.

3. On 1 March 2005 a hearing was held in the presence of the parties, at the end of which it was decided to make an order *nisi* ordering the respondents to show cause as to why they should not allow the residents of the villages access to their agricultural land on all days of the year and why they should not adopt all the measures available to them in order to prevent the harassment of the residents of the petitioning villages and in order to ensure that they could work their land safely.

4. In their reply to the order, the respondents discussed the difficult security position in the area and reviewed some of the serious security incidents that recently took place in the areas adjacent to the petitioners' villages. The respondents said that in many places in Judaea and Samaria Israeli towns had been built close to Palestinian villages and that this proximity had been exploited in the past to carry out attacks against the

Israeli towns. The respondents also said that during the ploughing and harvesting seasons the fear of attacks increases, since at these times the Palestinian farmers wish to cultivate the agricultural land close to the Israeli towns and hostile terrorist elements exploit the agricultural activity in order to approach the Israeli towns and attack them. In view of this complex position, the respondents discussed the need to impose balanced and proportional restrictions on both the Israeli and the Palestinian inhabitants of Judaea and Samaria in order to minimize the loss of human life on both sides. The respondents again emphasized that the principle that guides their action is the duty to allow the Palestinian residents in Judaea and Samaria free access to their agricultural land and the duty to protect this right. The respondents gave details in their reply of the rules that they have formulated in order to implement this principle and the respondents mainly emphasized the change that has occurred in the security outlook in so far as dealing with the areas of conflict is concerned: whereas in the past the prevailing outlook was that all the areas of conflict — both those characterized by harassment of Palestinians by Israelis and those where the presence of Palestinians constituted a danger to Israelis — should be closed, now areas of conflict are closed only where this is absolutely essential in order to protect Israelis (para. 16(a) of the statement of reply). According to the reply, the Palestinians will no longer be protected against harassment by Israeli residents by means of a closure of areas to Palestinians but in other ways. The methods that will be adopted for the aforesaid purpose are an increase in security for the Palestinian farmers, operating a mechanism for coordinating access to the agricultural land and closing the areas of conflict to prevent the entry of Israelis into those areas at the relevant times. The respondents also said that the problematic areas of conflict, whose closure was required in order to protect the Israeli residents, would not be closed absolutely during the harvesting and ploughing seasons, but in a manner that would allow the Palestinian farmers access to them, by coordinating this and providing security. During the rest of the year, the Palestinians would only be required to advise the DCO of their entry into the areas of conflict. The respondents argued that the aforesaid principles have led to a significant reduction in the restrictions on the access of Palestinians to their land, both with regard to the size of the area that is closed and with regard to the amount of time during which the area is closed. Thus, with regard to the village of Yanun (which is represented by the first petitioner), it was decided to close a

piece of land with an area of only 280 dunams, instead of 936 dunams in 2004; with regard to the village of Aynabus (the second petitioner), no land would be closed at all (after in the original reply of the respondents it was said that an area of 218 dunams would be closed); with regard to the village of Burin (the third petitioner), two areas amounting to only approximately 80 dunams would be closed; with regard to the village of A-Tuani (the sixth petitioner), three areas amounting to approximately 115 dunams would be closed; and in the area of the village of Al-Jania (the seventh petitioner), several pieces of land with a total area of 733 dunams would be closed.

With regard to the second part of the petition, which concerns law enforcement against Israeli residents, the respondents discussed in their reply the efforts of the police to prevent acts of harassment at the points of conflict, both from the viewpoint of prevention before the event (which mainly concerns increased deployment in the areas of the conflict at the relevant times) and from the viewpoint of law enforcement after the event (by maximizing the investigation efforts and filing indictments).

5. The petitioners filed their response to the respondents' reply, in which they claimed that nothing stated therein changed the prevailing position, in which the Palestinian residents were refused free access to their land. The alleged reason for this is that they continue to suffer a *de jure* denial of access to their land — by virtue of closure orders, which the petitioners claim do not satisfy the tests of Israeli and international law — and a *de facto* denial of access, as a result of attacks and harassment on the part of Israeli inhabitants. The petitioners also complained of the continuing ineptitude of the police treatment of Israeli lawbreakers.

6. After receiving the respondents' reply and the petitioners' response to it, two additional hearings were held in the case, and at the end of these the respondents were asked to file supplementary pleadings, including replies to the petitioners' claims that there is no access to the agricultural land during the current harvesting season and that nothing is done with regard to the complaints of residents of the petitioning villages with regard to harassment against them. In the supplementary pleadings of 26 September 2005, the respondents discussed at length the deployment of the army and the police for the 2005 olive harvest. In reply to the questions of the court, the respondents said, *inter alia*, that in the course of the deployment a plan is being put into operation to

determine days on which security will be provided for the areas of conflict, which has been formulated in coordination with the Palestinians; that several control mechanisms have been formulated with the cooperation of the civil administration, the police and the Palestinian Authority, whose purpose is to provide a solution to the problems that arise during the harvest; that the forces operating in the area will be strengthened in order to guard the agricultural work; that the police forces have taken action to improve their ability to bring lawbreakers to justice; that orders have been issued to the IDF forces, emphasizing the fundamental principle that the farmers should be allowed to go to harvest the olives and that they should ensure that the harvest takes place in a reasonable manner; and that there was an intention to make closure orders for Israeli areas only, together with restriction orders for certain Israeli inhabitants who had been involved in the past in violent actions.

In addition to the aforesaid, the respondents said in their reply that following another reappraisal of all the relevant factors and circumstances in the area, they had revised their position with regard to the use of closure orders directed at the Palestinian residents. The respondents said that the reappraisal was carried out against the background of the tension anticipated during the withdrawal from the Gaza Strip and in view of the concern that the olive harvest was likely to be characterized by many attempts on the part of Israeli inhabitants to harm Palestinian residents. According to the revised position, in addition to the security need to make use of closure orders where this was required in order to protect the security of the Israeli inhabitants, there was also a security need to make use of closure orders *when the main purpose was to protect the Palestinian residents.* At the same time the respondents informed the court that, in view of the aforesaid parameters, it had been decided in the reappraisal of the issue not to make closure orders for the land of the villages of A-Tuani and Yanun. The respondents also said that in the land of the villages of Burin and Al-Jania only areas amounting to approximately 808 dunams would be closed. Against the background of all of the aforesaid, the respondents were of the opinion that there was a significant improvement in the access of the Palestinian farmers to their land.

In an additional statement of the respondents, it was argued that the question of law enforcement against the Israeli settlers was being treated seriously both by the defence establishment and by the

interdepartmental committee for law enforcement in the territories, which operates at the State Attorney's Office. In this context the respondents discussed, *inter alia*, the efforts that were made to increase the supervision of security officers in Israeli towns and to increase supervision of the allocation of weapons to Israelis in the area, and the steps taken by the police in order to deal with offences carried out by Israeli inhabitants. They also addressed the handling of specific complaints that were made with regard to the villages that are the subject of the petition.

7. The petitioners, for their part, filed on 30 November 2005 an additional supplementary statement, in which they said that during the olive harvest season of 2005 there had indeed been a certain change for the better from the viewpoint of the respondents' deployment. In this regard, they discussed how greater efforts had been made by the civil administration to coordinate with the Palestinians the dates of the olive harvest, and that more requests by Palestinians to receive protection were granted. At the same time, the petitioners said that the results on the ground were not always consistent: whereas in the villages of Yanun and Al-Jania most of the farmers did indeed succeed in obtaining access to their land in order to carry out the harvesting on certain days during the season, this was not the case in the other petitioning villages, in which there was no real change in the access to the land. In any case, the petitioners argued that in general the situation remained unchanged, since the Palestinian farmers cannot access their land in the areas of conflict freely on a daily basis, both because of violence on the part of the Israeli inhabitants and because of various restrictions that the army imposes. The petitioners emphasized that this *modus operandi*, whereby as a rule the Palestinians are denied access to their land, except on certain days when protection is provided by the forces in the area, is the complete opposite of the right to free access, since, in practice, preventing access is the rule whereas allowing access is the exception.

8. Shortly thereafter, on 2 January 2006, the petitioners filed an application to hold an urgent hearing of the petition. This was in response to several very serious incidents in which more than two hundred olive trees were cut down and destroyed on the land of the village of Burin. In the application it was stated that despite repeated requests to the respondents, no activity was being carried out by them at all to protect the petitioners' trees and that no measures were being taken to stop the destruction of the trees. It was also claimed in the

application that the ploughing season was about to begin and that the respondents were not taking the necessary steps in order to allow the residents of the petitioning villages safe access to their agricultural land and were not taking any action to prevent attacks and harassment by the Israeli inhabitants.

9. In consequence of what was stated in the application, the petition was set down for a hearing. Shortly before this hearing, a statement was filed by the respondents, in which it was claimed that the incidents in which the olive trees were ruined were being investigated intensively by the competent authorities, but at this stage evidence has not been found that would allow the filing of indictments in the matter. It was also stated that the phenomenon of violent harassment by Israeli residents against Palestinian farmers had recently been referred to the most senior level in government ministries and that a real effort was being made to find a solution to the problem. In addition, it was stated that the Chief of Staff had orders several steps to be taken in order to reduce the phenomenon of the harassment of Palestinian farmers, including increased enforcement at the places where law and order were being violated, adopting administrative measures against lawbreakers and reducing the number of weapons held by the Israeli inhabitants of Judaea and Samaria. It was also stated that the deputy prime minister at that time, Mr Ehud Olmert, ordered the establishment of an inter-ministerial steering committee that would monitor the law enforcement operations carried out as a part of the measures taken to prevent acts of violence perpetrated by Israeli inhabitants in Judaea and Samaria.

10. At the last hearing that was held before us on 19 January 2006, the parties reiterated their contentions. The petitions again argued against the ineffectual protection afforded by the respondents to the Palestinian farmers who wish to have access to and cultivate their agricultural lands and against the forbearing approach adopted, according to them, towards the lawbreakers. The petitioners indicated in their arguments several problematic areas, including improper instructions given to the forces operating in the area, a failure to make orders prohibiting the entry of Israelis into the Palestinian agricultural areas, and so forth. The respondents, for their part, discussed the steps that were being taken and the acts that were being carried out in order to ensure that the residents of the petitioning villages had access to their lands and that they were protected.

*Deliberations*

*General*

11. The petition before us has raised the matter of a very serious phenomenon of a violation of the basic rights of the Palestinian residents in the territories of Judaea and Samaria and of significant failures on the part of the respondents with regard to maintaining public order in the territories. As we have said, the claims raised by the petitioners are of two kinds: *one claim* relates to the military commander denying the Palestinian farmers access to their land. In this matter, it was claimed in the petition that the closure of the area deprives the Palestinian residents of their right to freedom of movement and their property rights in a manner that is unreasonable and disproportionate and that violates the obligations imposed on the military commander under international law and Israeli administrative law. It was also claimed that it was not proper to protect the Palestinian farmers in a way that denied them access to their land. In addition it was claimed that closing the areas to the Palestinians was done on a regular basis without a formal closure order being made under section 90 of the Security Measures Order and therefore the denial of access to the land was not based upon a lawful order. *The main additional claim* that was raised in the petition addressed the failure of the respondents to enforce the law in the territories of Judaea and Samaria. The essence of the claim was that the respondents do not take action against the Israeli inhabitants in the territories that harass the Palestinian farmers and harm them and their property. In addition to these general claims, the petition also includes specific claims that required immediate action in concrete cases where access was being denied, and these claims were dealt with immediately (see para. 1 above).

The proceedings in the petition before us were spread out over several hearings; the purpose of this was to allow the respondents to take action to solve the problems that were arising and to find a solution to the claims raised before us, under the supervision of the Attorney-General and subject to the judicial scrutiny of the court. We thought it right to give the respondents time to correct what required correction, since there is no doubt that the reality with which they are confronted is complex and difficult and that the tasks imposed on them are not simple. Regrettably, notwithstanding the time that has passed, it does not appear that there has been any real change in the position and it would seem

that no proper solution has been found to the serious claims of the Palestinian farmers concerning the violation of their right to cultivate their land and to obtain their livelihood with dignity, and to the injurious acts of lawbreaking directed against them. At the hearings that took place before us, a serious picture emerged of harm suffered by the Palestinian residents and contempt for the law, which is not being properly addressed by the authorities responsible for law enforcement. Therefore, although some of the claims that were raised in the petition were of a general nature, we have seen fit to address the claims raised by the petitioners on their merits.

*Denying access to land*

12. The territories of Judaea and Samaria are held by the State of Israel under belligerent occupation and there is no dispute that the military commander who is responsible for the territories on behalf of the state of Israel is competent to make an order to close the whole of the territories or any part thereof, and thereby to prevent anyone entering or leaving the closed area. This power of the military commander is derived from the rules of belligerent occupation under public international law; the military commander has the duty of ensuring the safety and security of the residents of the territories and he is responsible for public order in the territories (see art. 23(g) and art. 52 of the Regulations concerning the Laws and Customs of War on Land, which are annexed to the Fourth Hague Convention of 1907 (hereafter: 'the Hague Regulations'); art. 53 of the Convention relative to the Protection of Civilian Persons in Times of War, 1949 (hereafter: 'the Fourth Geneva Convention'); HCJ 302/72 *Hilo v. Government of Israel* [1], at pp. 178-179). This power of the military commander is also enshrined in security legislation in section 90 of the Security Measures Order (see, for example, *Hilo v. Government of Israel* [1], at pp. 174, 179; HCJ 6339/05 *Matar v. IDF Commander in Gaza Strip* [2], at pp. 851-852). In our case, the petitioners do not challenge the actual existence of the aforesaid power but the manner in which the military commander directs himself when exercising his power in the circumstances described above. Therefore the question before us is whether the military commander exercises his power lawfully with regard to the closure of agricultural areas to Palestinian residents who are the owners or who have possession of those areas.

In order to answer the question that arises in this case, we should examine the matter in two stages: in the first stage we should seek to ascertain the purpose for which the power to close areas is exercised by the military commander, and we should also examine the various criteria that the military commander should consider when he considers ordering a closure of areas in the territories. In the second stage we should examine the proper balance between these criteria and whether this balance is being upheld in the actions of the military commander in our case.

*The purpose of adopting the measure of closing areas*

13. According to the respondents' position, the purpose of adopting the measure of closing areas is to help the military commander carry out his duty of maintaining order and security in the area. Indeed, no one disputes that it is the duty of the military commander to ensure public order and the security of the inhabitants in the area under his command. Article 43 of the Hague Regulations sets out this duty and authorizes the military commander to take various measures in order to carry out the duty:

> '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.'

See also HCJ 10356/02 *Hass v. IDF Commander in West Bank* [3], at pp. 455-456 {64-65}. It should be emphasized that the duty and authority of the military commander to ensure security in the territory apply with regard to all the persons who are present in the territory that is subject to belligerent occupation. This was discussed by this court, which said:

> '… In so far as the needs of maintaining the security of the territory and the security of the public in the territory are concerned, the authority of the military commander applies to all the persons who are situated in the territory at any given time. This determination is implied by the well-known and clear duty of the military commander to maintain the security of the territory and by the fact that he is responsible for ensuring the safety of the public in his area' (*per* Justice Mazza in HCJ 2612/94 *Shaar v. IDF Commander in Judaea and Samaria* [4], at p. 679).

(See also HCJ 7957/04 *Marabeh v. Prime Minister* [5], at para. 18, and HCJ 3680/05 *Tana Town Committee v. Prime Minister* [6], at paras. 8-9).

As we have said, the respondents' argument is that the closure of the areas is done for the purpose of maintaining order and security in the territories. It should be noted that within the scope of this supreme purpose, it is possible to identify two separate aspects: one concerns the security of the Israelis in the territories and the other the security of the Palestinian residents. Thus in some cases the closure of the areas is intended to ensure the security of the Israeli inhabitants from the terror attacks that are directed against them, whereas in other cases the closure of the areas is intended to ensure the security of the Palestinian farmers from acts of violence that are directed against them. We shall return to these two separate aspects later, but we should already emphasize at this stage that in order to achieve the two aspects of the aforesaid purpose the military commander employs the *same measure*, and that is the closure of agricultural areas owned by the petitioners and denying the Palestinian farmers access to those areas.

*The relevant criteria when exercising the power to close areas*

14. As a rule, when choosing the measures that should be adopted in order to achieve the purpose of maintaining public order and security in the territories, the military commander is required to take into account only those considerations that are relevant for achieving the purpose for which he is responsible. In our case, when he is called upon to determine the manner of adopting the measure of closing areas, the military commander is required to consider several criteria.

*On the one hand*, there is the value of security and the preservation of the lives of the residents of the territories, both Israelis and Palestinians. It is well-known that the right to life and physical integrity is the most basic right that lies at the heart of the humanitarian laws that are intended to protect the local population in the territories held under the laws of belligerent occupation (see HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [7], at para. 23 of the opinion of President Barak). This right is also enshrined in Israeli constitutional law in ss. 2 and 4 of the Basic Law: Human Dignity and Liberty, and there is no doubt at all that this is a right that is on the highest normative echelon (see HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [8], at p. 368; HCJ 2753/03 *Kirsch v. IDF Chief of Staff* [9], at pp. 377-378). All the residents of the territories — both

Palestinians and Israelis — are therefore entitled to enjoy the right to life and physical integrity, and a fundamental and primary criterion that the military commander should consider when deciding to close areas is the criterion of the protection of the life and physical integrity of all the residents in the territories.

The petition before us concerns agricultural areas that are owned by Palestinian inhabitants and that are closed by the order of the military commander. Therefore, the right to security and the protection of physical integrity is opposed by considerations concerning the protection of the rights of the Palestinian inhabitants, and in view of the nature of the case before us, we are speaking mainly of the right to freedom of movement and property rights. In the judgment given in HCJ 1890/03 *Bethlehem Municipality v. State of Israel* [10], we said that the freedom of movement is one of the most basic human rights. We discussed how in our legal system the freedom of movement has been recognized both as an independent basic right and also as a right derived from the right to liberty, and how there are some authorities that hold that it is a right that is derived from human dignity (see para. 15 of the judgment and the references cited there). The freedom of movement is also recognized as a basic right in international law and this right is enshrined in a host of international conventions (*ibid*.). It is important to emphasize that in our case we are not speaking of the movement of Palestinian residents in nonspecific areas throughout Judaea and Samaria but of the access of the residents to land *that belongs to them*. In such circumstances, where the movement is taking place in a *private* domain, especially great weight should be afforded to the right to the freedom of movement and the restrictions imposed on it should be reduced to a minimum. It is clear that restrictions that are imposed on the freedom of movement in public areas should be examined differently from restrictions that are imposed on a person's freedom of movement within the area connected to his home and the former cannot be compared to the latter (see HCJ 2481/93 *Dayan v. Wilk* [11], at p. 475).

As we have said, an additional basic right that should be taken into account in our case is, of course, the property rights of the Palestinian farmers in their land. In our legal system, property rights are protected as a constitutional human right (s. 3 of the Basic Law: Human Dignity and Liberty). This right is of course also recognized in public international law (see HCJ 7862/04 *Abu Dahar v. IDF Commander in Judaea and Samaria* [12], at para. 8 and the references cited there).

Therefore, the residents in the territories held under belligerent occupation have a protected right to their property. In our case, there is no dispute that we are speaking of agricultural land and agricultural produce in which the petitioners have property rights. Therefore, when the petitioners are denied access to land that is their property and they are denied the possibility of cultivating the agricultural produce that belongs to them, their property rights and their ability to enjoy them are thereby seriously violated.

15. Thus we see that the considerations that the military commander should take into account in the circumstances before us include, on the one hand, considerations of protecting the security of the inhabitants of the territories and, on the other hand, considerations concerning the protection of the rights of the Palestinian inhabitants. The military commander is required to find the correct balance between these opposite poles. The duty of the military commander to balance these opposite poles has been discussed by this court many times, and the issue was summarized by President Barak in *Marabeh v. Prime Minister* [5] as follows:

> 'Thus we see that, in exercising his power under the laws of belligerent occupation, the military commander should "ensure public order and safety." Within this framework, he should take into account, on the one hand, considerations of the security of the state, the security of the army and the *personal safety of everyone who is in the territory*. On the other hand, he should consider the *human rights of the local Arab population*' (para. 28 of the judgment [5]; emphases supplied).

See also *Hass v. IDF Commander in West Bank* [3], at pp. 455-456 {64-65}.

16. There is no doubt that in cases where the realization of human rights creates a near certainty of the occurrence of serious and substantial harm to public safety, and when there is a high probability of harm to personal security, then the other human rights yield to the right to life and physical integrity (HCJ 292/83 *Temple Mount Faithful v. Jerusalem District Police Commissioner* [13], at p. 454; *Hass v. IDF Commander in West Bank* [3], at p. 465 {76}). Indeed, in principle, where there is a direct conflict, the right to life and physical integrity will usually prevail over the other human rights, including also the right to freedom

of movement and property rights. The court addressed this principle in HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [14], where it said:

> 'When there is a direct confrontation and there is a concrete risk to security and life, the public interest indeed overrides protected human rights, and the same is the case where there is a concrete *likelihood* of a risk to life' (para. 11 of my opinion [14]).

Notwithstanding, the balance between the various rights and values should be made in such a way that the scope of the violation of the rights is limited to what is essential. The existence of risks to public safety does not justify in every case an absolute denial of human rights and the correct balance should be struck between the duty to protect public order and the duty to protect the realization of human rights. The question before us is whether the manner in which the military commander is exercising his power to close areas for the purpose of achieving security for the Israeli residents on the one hand and the Palestinian residents on the other properly balances the conflicting considerations. We shall now turn to consider this question.

*The balance between the relevant considerations*

17. As we have said, in order to achieve the purpose of preserving security in the territories, the military commander adopts the measure of closing agricultural areas that are owned by Palestinians and in doing so he violates the right of the Palestinian residents to freedom of movement on their land and their right to have use of their property. We therefore discussed above the purpose for which the military commander was given the power to close the areas and the relevant criteria for exercising this power. Now we should consider whether the military commander properly balanced the various criteria and whether the measures adopted by the military commander satisfy the *principle of proportionality* that governs him in his actions.

18. The centrality of the principle of proportionality in the actions of the military commander has been discussed by this court many times (see, for example, HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [15], at pp. 836-841 {293-298}). The manner in which the military commander exercises his power to close agricultural areas in the territories inherently results in a violation of the rights of the Palestinian residents and therefore this violation should satisfy the principle of

proportionality. According to the proportionality tests, the military commander has the burden of showing that there is a rational connection between the measure adopted and the purpose (the first subtest of proportionality); he is required to show that, of the various appropriate measures that may be chosen, the measure adopted causes the least possible harm to the individual (the second test); and he is also required to show that adopting the aforesaid measure is proportionate to the benefit that arises from employing it (the third subtest).

19. According to the aforesaid tests, is the harm caused to the petitioners as a result of the closure of the agricultural land by the military commander proportionate? The proportionality of the measure is examined in relation to the purpose that the military commander is trying to achieve with it. 'The principle of proportionality focuses… on the relationship between the purpose that it wants to realize and the measures adopted to realize it' (*Beit Sourik Village Council v. Government of Israel* [15], at p. 839 {296}). In our case, the respondents claim that the closure of the areas is done for one purpose, which has two aspects: in certain circumstances it is for the protection of the Israeli inhabitants and in other circumstances it is for the protection of the Palestinian farmers. There are cases where the purpose is a mixed one, and the closure is intended to protect the lives of all the inhabitants, both Israeli and Palestinian, and in these circumstances the discretion of the military commander will be examined in accordance with the main purpose for which the power was exercised. Accordingly, we should examine the manner in which the military commander exercises the power of closure with regard to all of the aforesaid circumstances. First we shall examine the proportionality of the use of the power to close areas with regard to the purpose of protecting the security of the Israeli inhabitants and afterwards we shall examine the proportionality of the use of this measure with regard to the purpose of protecting the security of the Palestinian farmers.

*Protecting the security of Israeli inhabitants*

20. In so far as the protection of the security of the Israeli residents is concerned, the respondents argued that in order to achieve this purpose, in a period when brutal and persistent terrorist activity is taking place, the closure of areas near Israeli towns so that Palestinians cannot enter them is needed in order to prevent the infiltration of terrorists into those towns and the perpetration of acts of terror against the persons living

there. The respondents explained that the access of the Palestinian farmers to agricultural land adjoining the Israeli towns is exploited by the terrorist organizations to carry out attacks against the Israeli towns, and that the presence of the Palestinian farmers on the land adjoining the Israeli towns serves the terrorists as a cloak and helps them to infiltrate those areas. The proximity of the agricultural land to Israeli towns is exploited particularly in order to carry out attempts to infiltrate the Israeli towns, for the purpose of carrying out attacks in them, and also for the purpose of long-range shooting attacks. Because of this, the respondents explained that there is a need to create a kind of barrier area, into which entry is controlled, and thus it will be possible to protect the Israeli inhabitants in an effective manner.

After considering the respondents' explanations and the figures presented to us with regard to the terror activity in the areas under discussion in the petition, we have reached the conclusion that the measure of closing areas adjoining Israeli towns does indeed have a rational connection with the purpose of achieving security for the inhabitants of those towns. As we have said, the protection of the security of the Israeli inhabitants in the territories is the responsibility of the military commander, even though these inhabitants do not fall within the scope of the category of 'protected persons' (see *Marabeh v. Prime Minister* [5], at para. 18). The proximity of the Palestinian agricultural land to the Israeli towns, which is exploited by hostile terrorist forces, presents a significant risk to the security of the Israeli residents, and contending with this risk is not simple. The closure of the areas from which terrorist cells are likely to operate, so that the access to them is controlled, is therefore a rational solution to the security problem that arises.

With regard to the second test of proportionality — the least harmful measure test — according to the professional assessments submitted to us, no other measure that would be less harmful and that would achieve the purpose of protecting the security of the Israeli residents was raised before us. The military commander is of the opinion that the unsupervised access of Palestinians to areas that are very close to Israeli towns is likely to create a serious threat to the security of the Israeli inhabitants and there is no way to neutralize this threat other than by closing certain areas to Palestinians for fixed and limited periods. The military commander emphasized how the closure of the areas to the Palestinians will be done only in areas where it is absolutely essential and

that there is no intention to close areas of land beyond the absolute minimum required in order to provide effective protection for the Israeli inhabitants. The military commander also said that the period of time when the areas would be closed to the Palestinian residents would be as short as possible and that the periods when access was denied would be limited. The military commander emphasized that he recognizes the importance of the right of the Palestinian farmers to have access to their land and to cultivate it and that making closure orders from time to time would be done while taking these rights into account and violating them to the smallest degree. The military commander also emphasized the intention to employ additional measures in order to ensure the protection of the rights of the Palestinians and that by virtue of the combination of the various measures it would be possible to reduce to a minimum the use of closure orders. From the aforesaid we have been persuaded that the military commander took into account, in this regard, the absence of any other less harmful measure that can be used in order to achieve the desired purpose. The other measures discussed by the respondents are insufficient in themselves for achieving the purpose and therefore there is no alternative to using also the measure of closing areas that adjoin Israeli towns for a limited period, in order to provide security.

With regard to the third test of the principle of proportionality — the proportionate or commensurate measure test — the benefit accruing to the Israeli inhabitants from the closure of the areas, from a security perspective, and the protection of the value of preserving life without doubt exceeds the damage caused by employing this measure, provided that it is done in a prudent manner. It should be remembered that, according to the undertaking of the military commander, the closure of the area will not cause irreversible damage to the Palestinian farmers, since by prior arrangement they will be allowed to have access to all of the agricultural land and to carry out the necessary work.

Consequently our conclusion is that subject to the undertakings given by the respondents, exercising the power to deny the Palestinians access to the areas that are *very close* to Israeli towns, in so far as this derives from the need to protect the Israeli towns, is proportionate. Indeed, the use of the measure of closing the areas inherently involves a violation of basic rights of the Palestinian residents, but taking care to use this measure proportionately will reduce the aforesaid violation to the absolute minimum.

21. It should be re-emphasized that the actual *implementation* of the military commander's power to close areas should be done proportionately and after a specific and concrete examination of the conditions and character of the risks that are unique to the relevant area (cf. HCJ 11395/05 *Mayor of Sebastia v. State of Israel* (not yet reported)). In this regard it should be noted that, before filing the petition, the respondents defined a range of 500 metres from the boundaries of an Israeli town as the necessary security limits for the closed area, but following the hearings that took place in the petition this range was reduced and in practice areas were closed within a range of between only 50 and 300 metres from Israeli towns, as needed and according to the topography of the terrain, the nature of the risk and the degree of harm to the Palestinian residents in the area. Determining the security limits in the specific case is of course within the jurisdiction of the military commander, but care should be taken so that these ranges do not exceed the absolute minimum required for effective protection of the Israeli inhabitants in the area under discussion, and the nature and extent of the harm to the Palestinians should be examined in each case. In addition, whenever areas are closed it should be remembered that it is necessary to give the Palestinian residents an opportunity to complete all the agricultural work required on their land 'to the last olive.' It should also be noted that closing the areas should be done by means of written orders that are issued by the military commander, and in the absence of closure orders the Palestinian residents should not be denied access to their land. Nothing in the aforesaid prejudices the commander's power in the field to give oral instructions for a closure of any area on a specific basis for a short and limited period when unexpected circumstances present themselves and give rise to a concern of an immediate danger to security that cannot be dealt with by any other measures. But we should take care to ensure that the power to order the closure of a specific piece of land without a lawful order, as a response to unexpected incidents, should be limited solely to the time and place where it is immediately required. In principle, the closure of areas should be done by means of an order of which notice is given to whoever is harmed by it, and the residents whose lands are closed to them should be given an opportunity to challenge its validity. Within the limitations set out above and subject thereto, it can be determined that closing areas close to Israeli towns is proportionate.

*Protecting the security of Palestinian farmers*

22. As we said above, the purpose of maintaining order and security in the territories has two aspects, and for each of these we should examine the proportionality of the use of the measure of closing areas. We discussed above the proportionality of the military commander's use of the power to close areas to achieve the first aspect — the protection of the security of the Israeli inhabitants. Now we should consider whether the military commander has exercised his power proportionately also with regard to the second aspect of the purpose — providing protection for the security of the Palestinian farmers.

23. According to the respondents' explanations, there is no alternative to closing off the agricultural areas to their Palestinian owners, since the Palestinian farmers often suffer from harassment by the Israeli inhabitants when they enter their land. The respondents said that every year the olive harvest is a focal point for conflicts between Israeli settlers and Palestinian farmers and that in a large number of cases these conflicts result in serious harm to the lives and property of the Palestinian farmers. Because of the aforesaid, the military commander adopts the measure of closing areas to the Palestinian farmers in order to realize the purpose of protecting them against attacks directed at them.

24. The question of denying a person access to certain land, when he has a right of access to it, for the purpose of protecting his security and for the purpose of preserving public order is not new in Israel and it has been considered in our case law several times (see, for example, *Temple Mount Faithful v. Jerusalem District Police Commissioner* [13]; HCJ 2725/93 *Salomon v. Jerusalem District Commissioner of Police* [16]; HCJ 531/77 *Baruch v. Traffic Comptroller, Tel-Aviv and Central Districts* [17]; HCJ 5016/96 *Horev v. Minister of Transport* [18]). In these judgments and others, the court considered the question of the conflict between the public interest of order and security and the duty of protecting basic human rights such as freedom of worship, freedom of movement and freedom of expression.

In our case, as we have said, assuming that the violation of the Palestinians' right of access to their land is done for the proper purpose of protecting their lives, we should consider whether the closure of the agricultural areas to the Palestinians in order to protect *them* is a proportionate violation of their rights. After studying the written

pleadings and hearing the arguments of the parties, we have reached the conclusion that in the prevailing circumstances the exercising of the military commander's power to close land to Palestinians for the purpose of protecting *them* is disproportionate. Of course, no one disputes that closing the area and preventing the access of Palestinians to their land does achieve a separation between them and the Israeli inhabitants and thereby protects the Palestinian farmers. But the use of the power of closure for the purpose of protecting the Palestinian inhabitants violates the right of the Palestinian inhabitants to freedom of movement and their property rights to a disproportionate degree and it does not satisfy the subtests of the principle of proportionality. We shall explain our position below.

25. Exercising the power to close areas that are owned by Palestinians for the purpose of protecting them does not satisfy the first subtest of proportionality, since there is no rational connection between the means and the end. The rational connection test is not merely a technical causal connection test between means and end. Even when use of a certain measure is likely to lead to realization of the desired purpose, this does not mean that there is a rational connection between the means and the end and that the means is *suited* to achieving the end. The emphasis in the rational connection test is whether the connection is *rational*. The meaning of this is, *inter alia*, that an arbitrary, unfair or illogical measure should not be adopted (see HCJ 4769/95 *Menahem v. Minister of Transport* [19], at p. 279; A. Barak, *Legal Interpretation — Constitutional Interpretation*, at pp. 542, 621). In our case, the areas that are closed are *private* areas that are owned by Palestinians whose livelihood depends upon their access to them. On the other hand, the threat to the security of the Palestinians is the perpetration of acts of harassment by Israeli lawbreakers. In these circumstances, the closure of the areas to the Palestinian farmers in order to contend with the aforesaid threat is not rational, since it is an extremely unfair act that results in serious harm to basic rights while giving in to violence and criminal acts. Admittedly, closing the areas is likely to achieve the purpose of protecting the Palestinian farmers, but when the discretion of the military commander in closing the areas is influenced by the criminal acts of violent individuals, who violate the rights of the inhabitants to their property, the discretion is tainted (see *Baruch v. Traffic Comptroller, Tel-Aviv and Central Districts* [17], at p. 165; *Horev v. Minister of Transport* [18], at pp. 77 {235} and 118-120 {286-290}). A policy that denies Palestinian

inhabitants access to land that belongs to them in order to achieve the goal of protecting them from attacks directed at them is like a policy that orders a person not to enter his own home in order to protect him from a robber who is waiting for him there in order to attack him. In the circumstances of the case before us, it is not rational that this policy should be the sole solution to the situation in the area, since it violates the rights of the Palestinian farmers to freedom of movement and their property rights disproportionately.

The use of the measure of closing the area to Palestinians for the purpose of protecting the Palestinians themselves is inconsistent with the basic outlook of the military commander with regard to protecting the inhabitants against harassment. When the military commander seeks to protect the security of the *Israeli* inhabitants he takes the step of closing the area to Palestinians, whose entry into the area may be exploited by terrorists. With regard to this purpose we said that the measure chosen is proportionate since placing a restriction on the party from which the danger may arise achieves the purpose of protecting the Israeli inhabitants by means of a proportionate violation of the protected rights of the Palestinian farmers. By contrast, when the purpose sought is to protect the security of the *Palestinian farmers* from acts of violence directed against them, it is right that the appropriate measure should be directed against the party causing the danger, i.e., against those persons who carry out the attacks on the Palestinian farmers. The problem is that when he seeks to protect the Palestinian farmers, the military commander has *once again* chosen to act against them, even when they are the victim of the attacks. It is clear therefore that the use of the measure of closing the area to the Palestinian farmers when the purpose is to protect the Palestinians themselves is not an appropriate use of the aforesaid measure, and it is contrary to our sense of justice. This situation is not proper and therefore the use of the measure of closing areas as the standard and only measure for protecting Palestinian inhabitants who are attacked on their land is a use that is disproportionate and inconsistent with the duties imposed on the military commander.

26. It should be noted that now we have found that the measure adopted is not at all appropriate or suited to the purpose for which it was intended (the first test of proportionality), we are not required to examine whether the measure is consistent with the other tests of proportionality. Nonetheless we should point out that in the

circumstances of the case it is also clear that the measure adopted is not the least harmful measure, nor is it proportionate to the benefit that arises from it (the two remaining tests of proportionality). In this regard, it should be stated that the respondents themselves discussed in their responses other measures that could be adopted in order to realize the purpose of protecting the Palestinian inhabitants when they wish to cultivate their land. *Inter alia*, the respondents mentioned their intention to increase the security given to the Palestinian inhabitants when carrying out the agricultural work by means of increasing the forces in the area, and also their intention to issue restriction orders against certain Israeli inhabitants who were involved in the past in acts of violence and who, in the military commander's opinion, present a danger. The use of these measures and other additional measures that were mentioned by the respondents is likely to achieve the purpose of protecting the Palestinian inhabitants who wish to cultivate their land without disproportionately violating the right of the Palestinian farmers to freedom of movement on their land and their property rights.

27. Naturally, it is not possible to rule out entirely the use of the measure of closing an area to the party that is being attacked in order to protect him (see *Salomon v. Jerusalem District Commissioner of Police* [16]). The matter depends on the circumstances of the case, the human rights that are violated and the nature of the threat. This is for example the case when there is concrete information of a certain risk and according to assessments it is almost certain that it will be realized and it is capable of seriously endangering security and life. In our case, these conditions are not satisfied. In the case before us the violation of the rights is serious, whereas the threat is one which from the outset can and should be handled in other ways that violate rights to a lesser degree. In addition, the closure of the areas was done in our case in a sweeping manner for prolonged periods, on the basis of a general assessment, and not pursuant to a specific concrete assessment. Therefore, the relevant circumstances in our case are what make the use of the measure of closing the area to the Palestinian farmers in order to protect them disproportionate.

*Denying access — summary*

28. The inescapable conclusion is therefore that the manner in which the military commander exercised his discretion to deny Palestinians access to agricultural areas that belong to them, in order to realize the

purpose of protecting their security, is not consistent with the proportionate measure test that governs the respondents, and therefore it is unacceptable. As a rule, the military commander should carry out his duty to protect the security of the Palestinian inhabitants in another manner, and not by closing the agricultural areas, provided that his command responsibility is not prejudiced. The 'conflict areas,' which are closed to the Palestinians in order to protect the Palestinians themselves, should therefore remain open to the movement of Palestinians and the respondents should adopt all the measures that are required in order to ensure the security of the Palestinians farmers in those areas. The protection of the Palestinians should be afforded by providing proper security, giving clear instructions to the military forces and the police with regard to how they should act, and imposing restrictions that will be effective against those persons who harass the Palestinians and break the law. With regard to the closure of areas belonging to Palestinian inhabitants when the purpose that is being sought is the protection of the Israeli inhabitants against terrorist activity, in such a case the measure of closure may be proportionate, provided that the military commander exercises his power on the smallest scale possible and while observing the rules set out above.

*Law enforcement in the territories of Judaea and Samaria*

29. As we have said, the second head of the petition was directed against the respondents' failures to enforce the law in the territories against the Israeli inhabitants. The petitioners claim that the respondents are not doing enough in order to prevent the Israeli inhabitants from harassing the Palestinian farmers who are cultivating their land and that they are not taking action to prevent harm to the Palestinians and their property. We shall now turn to examine these contentions.

30. As we said in para. 13 above, article 43 of the Hague Regulations sets out the duty and power of the military commander to maintain order and security in the territory under his control. There is no doubt that one of the main duties for which the military commander is responsible within this framework is the duty to ensure that the law is upheld in the territories (see HCJ 61/80 *Haetzni v. State of Israel (Minister of Defence)* [20], at p. 595; *Abu Dahar v. IDF Commander in Judaea and Samaria* [12], at para. 7).

A discussion of the general subject of law enforcement in Judaea and Samaria and the many problems that this entails falls outside the scope

of the petition before us. This is without doubt a serious problem with which the State of Israel has been contending for many years. A detailed review and recommendations on this issue can be found in the report of the Commission of Inquiry into the Hebron Massacre (1994), at pp. 157-200, 243-245 and 250-251 (hereafter: 'the Shamgar Commission report'). It should be noted that the Shamgar Commission report extensively considered the problem of law enforcement against the Israeli settlers in the territories and several specific contentions were raised with regard to the harassment of Palestinians by Israeli inhabitants by means of physical attacks, the destruction of property and uprooting orchards. The Shamgar Commission report also gives details of claims concerning the ineffective handling of law breaking and *inter alia* the report discusses the phenomena of not carrying out police investigations, delays in carrying out investigations, not filing indictments and so on (see pp. 192-193 of the Shamgar Commission report). The Shamgar Commission made its recommendations and these led, *inter alia*, to the creation of the Samaria and Judaea division of the police, which operates in the territories under the control of the military commander and deals with all the issues that concern policing in those territories.

But notwithstanding the repeated discussion, both in the report and on other additional occasions, of the problems relating to law enforcement in the territories, and notwithstanding the steps taken in this field in the past, the petition reveals the ineffectiveness of the respondents in enforcing the law against those persons who break it and cause physical injury to the Palestinian farmers and damage to their property. The physical security of the Palestinian farmers is in real danger when they go to cultivate their land, because of serious acts of violence on the part of Israeli settlers. The property of the Palestinian farmers also suffers from lawlessness when, after a day's work, under the cover of night lawbreakers return to the agricultural land in order to uproot trees and damage agricultural implements.

No one disputes that the petitioners are deprived of their basic rights to security and property because of these lawbreakers. Moreover, no one disputes that it is the duty of the respondents to prevent this infraction of security and public order. This duty is enshrined in the rules of international humanitarian law; see, for example, art. 27 of the Fourth Geneva Convention that states with regard to 'protected persons' that:

> 'Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights,

> their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, *and shall be protected especially against all acts of violence or threats thereof* and against insults and public curiosity' (emphasis supplied).

Maintaining an effective law enforcement system in the territories of Judaea and Samaria is naturally mandated also by the duties imposed on the respondents under Israeli law.

31. It is important to emphasize that the lawbreaking acts that are perpetrated against the Palestinian farmers are carried out by a small and extreme group of Israelis who by their acts stain the reputation of all the Israeli settlers in Judaea and Samaria. The acts of the extremists harm not only the security, safety and property of the local inhabitants but also sully the image that the Israeli settlers wish to nurture, an image of law-abiding citizens, and they also taint the image and reputation of the whole of the State of Israel as a state that respects the supremacy of law and justice. The respondents ought therefore to act with greater force against the lawbreakers so that this phenomenon is eradicated.

32. In their most recent statements, the respondents described the measures that were being adopted in order to re-establish order. To this end, we were presented with affidavits of the senior commanders in the area both from the police and from the army. In one of the hearings that took place, the Samaria District Commander was present and he described the treatment of the phenomenon of harassment of Palestinian famers, and we made a note of his undertaking to act in so far as possible to protect the Palestinian farmers when they go to cultivate their land. In addition, as we said in para. 9 above, it would appear that the matter is being considered at the highest level, as it ought to be. Nonetheless, despite the declarations that were made by the respondents in their responses, it would appear that no solution has yet been found to the problem of the repeated harassment of Palestinians when they go to their land in order to cultivate it and to the problem of the damage to the farmers' property, and especially the uprooting of the trees. Notwithstanding the steps that have been adopted in order to ensure the security of the Palestinian farmers, and a certain improvement that has taken place, the position is far from satisfactory. As we described in para. 8 above, recently — while the petition was pending — we witnessed a significant increase in the violent acts against the farmers and their crops. Because of this deterioration, on 2 January 2006 the petitioners

filed the application mentioned in para. 8, in which an urgent hearing of the petition was sought. At the hearing that was held, the respondents once again described the measures that have been taken, but it would appear that the facts on the ground speak for themselves and that too little has been done in order to protect the rights of the petitioners. This situation is intolerable and unacceptable and the respondents should take action in order to put matters to rights immediately.

33. In view of the aforesaid, we pondered at length the order that this court should issue with regard to enforcement of the law in the territories. 'Law enforcement is a fundamental element of the rule of law… it is one of the main functions of any government. The competent authorities may not shirk this duty' (HCJ 551/99 *Shekem Ltd v. Director of Customs and VAT* [21], at p. 125). It need not be said that there is no need for this court to issue an order that directs the respondents to enforce the law and carry out their duties (*ibid*.). This is especially the case where the respondents themselves confirm their commitment to protect the rights of the petitioners and promise to act in so far as possible in order to carry out their duties. There is therefore no doubt that the respondents should act with all the means at their disposal in order to protect the security of the Palestinian farmers who come to work on their land and they should act in order to protect the property rights of the petitioners so that they are not violated unlawfully. Even though the court does not have the power to determine the size of the forces that will be allotted for these tasks and what operations will be carried out, we do have the power to say that the protection of the security and property of the local inhabitants is one of the *most fundamental* duties imposed on the military commander in the territories. We are aware that the declaration of intentions made by counsel for the respondents in this matter is not mere words. We are persuaded that the establishment of the inter-ministerial committee and the experience in dealing with law enforcement in the territories are steps that were chosen in good faith and in recognition of the duty of imposed on the army and the police operating in the territories. But plans and intentions are one thing and results another, and the results do not indicate success in the field of enforcement.

Therefore, notwithstanding the difficulty in giving judicial directions in this matter, we have seen fit to address in general the principles that should guide the respondents in dealing with this matter. *First*, action should be taken to ensure the security of the Palestinian farmers when

they go to work on the land and, if necessary, to protect them when the agricultural work is being carried out. *Second*, clear and unequivocal instructions should be given to the forces operating in the field as to how to act in order not to prevent those inhabitants who are entitled thereto from having access to their land, unless there is a lawful ground for doing so. *Third*, forces should be deployed in order to protect the property of the Palestinian inhabitants. *Fourth*, complaints that are made by the Palestinian inhabitants should be investigated on their merits and the investigation should be completed as soon as possible. Investigations should be made immediately when information is received with regard to acts of harassment, and patrols should be deployed by the army and the police in order to discover such acts. It should be noted that in the current situation it is very doubtful whether the police units that were established for this purpose in the territories have been given all the resources required in order to carry out the enforcement. The enforcement mechanisms — investigations and indictments — should be improved. The respondents should act on their own initiative in order to discover the lawbreakers and bring them to justice and they should consider which measures should be adopted in order to prevent recurrences of the blatant acts of lawbreaking.

34. Subject to the aforesaid guidelines and the right of the petitioners to apply once again to this court with concrete problems at any time, if these guidelines are not upheld, we are of the opinion that the second part of the petition has been addressed. We can merely reiterate the remarks that were written in the summary of the Shamgar Committee Report in the chapter dealing with law enforcement, which is no less relevant today and has not yet been properly implemented:

> 'We accept the premise that in the absence of effective law enforcement there is also no effective government. In an atmosphere in which everyone does what seems right in their own eyes, without being subject to any real risk that he will be brought to justice if he oversteps what is permitted, the propriety of the actions of the authorities responsible for effective control of the territories is impaired. The Supreme Court said years ago that the rule of law cannot be created *ex nihilo* and is not merely a matter of theory. It should be expressed in a concrete and daily manner in the existence of binding normative arrangements and in enforcing these in

practice with respect to everyone…' (p. 243 of the Shamgar Committee Report).

*Summary*

33. The result is that we declare that except in cases of a concrete need, which arises from reliable information or real warnings in the field, the military commander should, as a rule, refrain from closing areas in a manner that prevents the Palestinian inhabitants from having access to their land for their own protection, since the use of this measure in these circumstances is disproportionate. Adopting the measure of closing areas, which should be restricted to the absolute minimum, may be proportionate only when it is done in order to protect the Israeli inhabitants, subject to the restrictions and the conditions that we discussed in paras. 20-21 above.

With regard to the deficiencies in the field of law enforcement in the territories, the handling of these complaints is within the jurisdiction of the respondents and the whole issue is being considered by the most senior decision makers in the State of Israel. It is to be presumed that they will have the wisdom to deal with the complaints that the petitioners have raised and that they will do so with the speed and efficiency required by the nature, character and importance of law enforcement.

**Justice E. Rivlin**

I agree with the opinion of my colleague Justice D. Beinisch and its reasoning in every respect.

The response to the violation of the right of Palestinian inhabitants not to be harassed when cultivating their land does not lie in placing restrictions upon the Palestinians themselves. An aggressor should not have the right to 'veto' the right of his victim. Therefore I agree with my colleague's declaration that, as a rule, the military commander should refrain from closing areas in a manner that denies the Palestinian residents the possibility of access to their agricultural land for their own protection. I also agree with her remarks with regard to the deficiencies in law enforcement.

**Justice S. Joubran**

1. I agree with the opinion of my colleague Justice D. Beinisch and all of the reasoning that appears in her opinion.

2. I think that there is no need to speak at length on the harm that is likely to be suffered by the Palestinian inhabitants if they are denied access to the agricultural land that they own. Here it should be emphasized that in most cases these are inhabitants whose land serves as the main if not the only source of livelihood for them and their families. It is clear that during periods of intensive agricultural work, such as during the olive harvest season, the damage that may be caused to the livelihood of these inhabitants is far greater. Therefore, the court has the duty to ensure that the violation of these rights of the Palestinian inhabitants is proportionate and not excessive (cf. and see *Marabeh v. Prime Minister* [5]).

3. My colleagues rightly reached the conclusion that in general there is no basis for allowing a violation of the rights of the Palestinian inhabitants to cultivate their land merely because of the desire to protect their lives from persons who wish to harass them. This conclusion is consistent with the principle that this court has stated time and again in a whole host of judgments that 'a person should not be deprived of his liberty because of the violent opposition to the exercising of that liberty' (HCJ 153/83 *Levy v. Southern District Commissioner of Police* [22], at p. 404 {120}; see also HCJ 2431/95 *Salomon v. Police* [23]; *Horev v. Minister of Transport* [18]; HCJ 3641/03 *Temple Mount Faithful v. HaNegbi* [24]). Even though most of the aforesaid cases mainly concerned the protection of the rights of freedom of worship, freedom of movement and freedom of speech, no one denies that what was said there applies to our case too, *mutatis mutandis*, especially in view of the importance attributed to the protection of property rights in our legal system.

4. Imposing severe restrictions on the Palestinian inhabitants by closing agricultural areas, even as a result of a concern that they may be harmed by the criminal acts of violent persons, amounts *de facto* to placing the keys to exercising the right of freedom of movement and property rights in the hands of those lawbreaking persons, who wish to prevent the Palestinian inhabitants from cultivating their land. Moreover, imposing such restrictions on the Palestinian inhabitants is tantamount to rewarding violence, and it sends the wrong message of surrender and capitulation to those lawbreakers, even at a cost of a violation of the fundamental principles on which our system of government is based. In this context I think it appropriate to cite the remarks of President Barak in *Horev v. Minister of Transport* [18]:

> 'A government authority whose path is influenced by violence on the street will ultimately lose its way' (*ibid*. [18], at p. 80 {235}).

5. I agree with the view that maintaining public order and the security of the Palestinian inhabitants should be done by means of adopting appropriate measures against those lawbreakers and not by imposing additional restrictions on the victims of the violence. Similar remarks have been uttered by this court elsewhere, when it said:

> 'Keeping the peace does not mean capitulating to those who threaten to breach it, but the opposite: giving shelter and protection to their victims' (HCJ 166/71 *Halon v. Head of Osfiah Local Council* [25], at p. 594).

Indeed, one of the duties of the military commander, who is responsible for upholding the law and keeping the peace in the territories, is to adopt reasonable measures in order to prevent those persons from stopping the Palestinian farmers from cultivating their land, while realizing their right to freedom of movement and their property rights. The military commander has many different ways of protecting the security of the Palestinian residents, including by increasing the security presence or closing areas of conflict to prevent the entry of Israelis. Denying the Palestinian inhabitants access to their land should be the last resort, not the first.

6. In this context I accept the determination that there may be exceptional cases in which the great probability of danger to human life, as well as the scope of the anticipated harm, may justify closing a certain area for fixed period on the basis of definite and specific intelligence. But in order that these exceptional cases do not become the rule, we cannot agree to preventative measures of a sweeping closure of large areas for lengthy periods of time.

Petition granted.
30 Sivan 5766.
26 June 2006.

## Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence

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### Synopsis

This case concerns the question of the liability of the State of Israel for injuries and damage caused by the Israel Defence Forces in conflict zones.

The Torts (State Liability) Law, which was enacted in 1952, gives the state a general exemption from liability for damage caused as a result of the combatant activity of the Israel Defence Forces (IDF). Following the outbreak of the First Intifadeh in 1987, the courts were called upon to consider the question of what constituted 'combatant activity' for the purpose of the State of Israel's liability for damage caused by the IDF. In 2002 the Supreme Court held in the case of *Bani Ouda v. State of Israel* that not all activity of the IDF should be considered 'combatant activity,' and that all of the circumstances of each specific case should be considered in order to determine whether it could be classified as 'combatant activity.'

Following the decision of the Supreme Court in *Bani Ouda v. State of Israel*, which the Knesset thought gave too narrow a definition of the term 'combatant activity,' the Knesset passed an amendment to the Tort (State's Liability) Law in July 2002, which introduced a definition of the term 'combatant activity' and imposed various procedural restrictions on claims against the State of Israel for damage caused by the IDF.

In 2005, the Knesset passed a further amendment to the Torts (State Liability) Law. This amendment gave the Minister of Defence a power to declare any area in the territories to be a 'conflict zone.' The significance of a such a declaration was that it increased the scope of the State of Israel's exemption from liability to include *all* activity of the IDF in a 'conflict zone,' not merely 'combatant' activity.' The Minister of Defence exercised this power extensively and declared large parts of the territories 'conflict zones.'

The Adalah Legal Centre for Arab Minority Rights in Israel challenged the constitutionality of the 2005 amendment in the Supreme Court. Following the principles laid down by the Supreme Court in a whole host of cases since the enactment of the Basic Law: Human Dignity and Liberty in 1992, the Supreme Court held that the 2005 amendment violated the property (compensation) rights of those persons who were injured by the IDF. In order for this violation of constitutional rights to be constitutional, the 2005 amendment needed to satisfy the tests laid down in the limitations clause of the Basic Law (section 8 of the Basic Law: Human Dignity and Liberty).

The Supreme Court held that the 2005 amendment satisfied the proper purpose test. The ordinary law of torts was not designed to contend with tortious acts that occur in the course of the combatant activities of the security forces outside Israel in an armed conflict. Therefore an arrangement whose purpose is to adapt the law of torts to the special circumstances that prevail during combatant activity is an arrangement that is intended for a proper purpose.

The court went on to hold that the 2005 amendment did not satisfy the proportionality test, because the 2005 amendment did not adopt the least harmful measure that was capable of achieving the proper purpose of the law while causing the smallest harm to the property (compensation) rights of the Palestinian victims. The proper approach is to consider each claim on a case by case basis, in order to determine whether the damage is the result of combatant activities or not.

The Supreme Court therefore declared the 2005 amendment void on the grounds of unconstitutionality.

HCJ 8276/05

**Adalah Legal Centre for Arab Minority Rights in Israel**
**and others**
**v.**
**1. Minister of Defence**
**2. State of Israel**

HCJ 8338/05

**Estate of the late Shadan Abed Elkadar Abu Hajla**
**and others**
**v.**
**1. Minister of Defence**
**2. Minister of Justice**
**3. Attorney-General**

HCJ 11426/05

**Estate of the late Iman Alhamatz**
**and others**
**v.**
**1. Minister of Defence**
**2. State of Israel**

The Supreme Court sitting as the High Court of Justice
[12 December 2006]
*Before President Emeritus A. Barak, President D. Beinisch*
*and Justices A. Procaccia, E.E. Levy, A. Grunis, M. Naor, S. Joubran,*
*E. Hayut, D. Cheshin*

Petition to the Supreme Court sitting as the High Court of Justice.

**Facts:** In 2005, an amendment was made to the law of torts with regard to the liability of the State of Israel arising from the activities of its security forces in the territories of Judaea, Samaria and the Gaza Strip. Section 5C of the Torts (State Liability) Law, 5712-1952, which was introduced by the amendment, increased the scope of the state's exemption from liability, which was previously

limited to combatant activities, to any activity (subject to some exceptions) taking place in a 'conflict zone,' and the Minister of Defence was authorized to determine which areas would constitute 'conflict zones.' He exercised this power on a large-scale basis.
The petitioners attacked the constitutionality of this amendment.

**Held:** Section 5C of the Torts (State Liability) Law, which was introduced by the 2005 amendment, is unconstitutional. It releases the state from liability for tortious acts that are in no way related to 'combatant activities,' no matter how broadly the term is defined. The proper approach is to consider each claim on a case by case basis, in order to determine whether the damage is the result of combatant activities or not.

Petition granted.

**Legislation cited:**
Basic Law: Human Dignity and Liberty, s. 3.
Torts Ordinance [New Version], ss. 38, 41.
Torts (State Liability) Law, 5712-1952, ss. 1, 2, 5, 5A, 5A(2), 5A(3), 5A(4), 5C(b), 5C(b)(1), 5C(b)(3), 9A.
Torts (State Liability) Law (Amendment no. 4), 5762-2002.
Torts (State Liability) Law (Amendment no. 7), 5765-2005.

**Israeli Supreme Court cases cited:**
[1] CA 5964/92 *Bani Ouda v. State of Israel* [2002] IsrSC 56(4) 1.
[2] CA 623/83 *Levy v. State of Israel* [1986] IsrSC 40(1) 477.
[3] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.
[4] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.
[5] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.
[6] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.
[7] HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; **[1998-9] IsrLR 635**.
[8] HCJ 1030/99 *Oron v. Knesset Speaker* [2002] IsrSC 56(3) 640.
[9] HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* (not yet reported).
[10] HCJ 4593/05 *United Mizrahi Bank Ltd v. Prime Minister* (not yet reported).

[11] HCJ 4128/02 *Man, Nature and Law — Israel Environmental Protection Society v. Prime Minister of Israel* [2004] IsrSC 58(3) 503.
[12] HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* **[2005] (2) IsrLR 335**.
[13] HCJ 2334/02 *Stanger v. Knesset Speaker* [2004] IsrSC 58(1) 786.
[14] HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* **[2005] (1) IsrLR 340**.
[15] HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [1998] IsrSC 52(2) 433.
[16] HCJ 1435/03 *A v. Haifa Civil Servants Disciplinary Tribunal* [2004] IsrSC 58(1) 529.
[17] HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in Israel v. Prime Minister* [2003] IsrSC 57(3) 31.
[18] HCJ 3434/96 *Hoffnung v. Knesset Speaker* [1996] IsrSC 50(3) 57.
[19] CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [2005] IsrSC 59(1) 345.
[20] CA 6521/98 *Bawatna v. State of Israel* (unreported).
[21] CA 6790/99 *Abu Samra v. State of Israel* [2002] IsrSC 56(6) 185.
[22] CA 1354/97 *Akasha v. State of Israel* [2005] IsrSC 59(3) 193.
[23] CFH 1332/02 *Raanana Local Planning and Building Committee v. Horowitz* (not yet reported).
[24] HCJ 2390/96 *Karasik v. State of Israel* [2001] IsrSC 55(2) 625.
[25] CA 2781/93 *Daaka v. Carmel Hospital* [1999] IsrSC 53(4) 526; **[1998-9] IsrLR 409**.
[26] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* **[2006] (1) IsrLR 443**.
[27] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.
[28] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**.
[29] LCA 3145/99 *Bank Leumi of Israel Ltd v. Hazan* [2003] IsrSC 57(5) 385.
[30] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
[31] AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [2004] IsrSC 58(3) 782.
[32] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.
[33] CFH 9524/04 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* (unreported).
[34] CrimA 4424/98 *Silgado v. State of Israel* [2002] IsrSC 56(5) 529.

**American cases cited:**

[35] *Koohi v. United States*, 976 F. 2d 1328 (1992).

[36] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

**English cases cited:**

[37] *Mulcahy v. Ministry of Defence* [1996] 2 All ER 758.

[38] *Bici v. Ministry of Defence* [2004] EWHC 786.

For the petitioners in HCJ 8276/05 — H. Jabareen, O. Kohn, D. Yakir, Y. Wolfson.

For the petitioners in HCJ 8338/05 — H. Abuhussein, R. Masarwa.

For the petitioners in HCJ 11426/05 — O. Saadi, A. Yassin, L. Tsemel, G. Hliehel.

For the respondents — A. Licht, S. Nitzan.

## JUDGMENT

**President Emeritus A. Barak**

The Torts (State Liability) Law (Amendment no. 7), 5765-2005, provides that the state shall not be liable in torts for damage that occurred in a conflict zone as a result of an act carried out by the security forces. There are several provisos to this rule. Is the law constitutional? This is the question that needs to be decided in the petitions before us.

*A. Factual and normative background*

1. The first Intifadeh began at the end of 1987. It was characterized by demonstrations, tyre-burning, the throwing of stones and Molotov cocktails at the security forces and Israeli citizens in Judaea, Samaria and the Gaza Strip, stabbings and the use of firearms and other weapons (see CA 5964/92 *Bani Ouda v. State of Israel* [1], at p. 4). The security forces operated in the territories in order to maintain order and security there. In the course of these operations, they used weapons and ammunition. This resulted on more than one occasion in injuries to persons and damage to property that was suffered by inhabitants of the territories, whether they were involved in the disturbances and hostile acts or not. In consequence, actions for damages were filed in the courts in Israel

against the state by inhabitants of the territories who claimed that the state was liable under the law of torts for damage that they suffered as a result of what they alleged were negligent or deliberate actions of the security forces. From figures submitted by the respondents it can be seen that thousands of claims of this kind were filed in the various courts in Israel.

2. These actions were tried in the courts in Israel in accordance with the Israeli law of torts. Under Israeli law, the state's liability in torts is governed by the Torts (State Liability) Law, 5712-1952 (hereafter — the Torts Law). The fundamental principle enshrined in s. 2 of the law is that 'For the purpose of liability in torts, the state is like any incorporated body.' There are several provisos to this principle. The relevant proviso for our purposes concerns 'combatant activity,' which states (in s. 5):

> 'The state is not liable in torts for an act that was caused as a result of combatant activity of the Israel Defence Forces.'

The Intifadeh claims gave rise to the question of how the term 'combatant activity' should be interpreted. Judgments that were given in these claims by the District Courts varied, on this question, between a 'broad outlook' and a 'narrow outlook' (see A. Yaakov, 'Immunity under Fire: State Immunity for Damage caused as a result of "Combatant Activity",' 33(1) *Hebrew Univ. L. Rev. (Mishpatim)* 107 (2003), at pp. 158-172). The two approaches held that the activity of the security forces to maintain order and security in the territories during the First Intifadeh might be protected by this immunity. The broad approach tended to regard most of the operational activity of the security forces, which was intended to maintain order and security, as combatant activity. The narrow approach distinguished policing activities from combatant activities and sought to examine the circumstances of each activity in order to determine whether it was a combatant activity or not.

3. This question of interpretation came before the Supreme Court at the beginning of the 1990s in *Bani Ouda v. State of Israel* [1]. During the hearing in that appeal, the respondents said that they intended to regulate the question of the state's liability for damage caused in the Intifadeh by means of Knesset legislation. This led to the publication of the government-sponsored draft Treatment of Defence Forces Claims in Judaea, Samaria and Gaza Strip Law, 5757-1997 (*Draft Laws* 2645, at p. 497). The draft law sought to give the term 'combatant activity' a broad interpretation. It was proposed that 'any operational activity of the Israel

Defence Forces whose purpose was to combat or prevent terrorism, and any other action of protecting security and preventing a hostile act or an uprising that was carried out in circumstances of risk to life or body…' should be regarded as combatant activity. But the legislative process was unsuccessful, and the draft law did not become statute. In these circumstances, the Supreme Court was required to make a decision in *Bani Ouda v. State of Israel* [1].

4. The question that arose in *Bani Ouda v. State of Israel* [1] was whether shooting by the IDF in the direction of wanted persons who were in flight, without there being any danger to the lives of the soldiers, fell within the scope of combatant activity. For the purpose of the definition of combatant activity, it was held that:

> 'The activity is a combatant one if it is an act of combat or a military-operational act of the army. The act does not need to be carried out against the army of a state. Acts against terrorist organizations may also be combatant activities' (*ibid*. [1], at p. 7).

Notwithstanding, it was held that not all activity of the security forces should be considered combatant activity:

> '"Only genuine combatant activities within the narrow and simple meaning of this term… in which the special character of combat with its risks, and especially its ramifications and consequences, finds expression, are those that are intended by the wording of s. 5" (*per* Justice Shamgar in CA 623/83 *Levy v. State of Israel* [2], at p. 479)… The army carries out various "activities" in the territories of Judaea, Samaria and the Gaza Strip, which create risks of various kinds. Not all of its activities are "combatant" ones. Thus, for example, if the injured party is harmed by an assault of a soldier because of his refusal to comply with an order to erase slogans that are written on a wall, the act of assault should not be regarded as a "combatant activity," since the risk that this act created is an ordinary risk of an act of law enforcement. This is not the case if an army patrol in a village or town finds itself in a situation of danger to life or serious physical risk because of shooting or the throwing of stones or Molotov cocktails, and in order to extricate itself it fires and injures someone. The act of shooting is a "combatant activity," since the risk in this

> activity is a special risk. Between these two extreme cases there may be intermediate positions' (*ibid.* [1], at p. 8).
>
> It was therefore held that:
>
> 'When answering the question whether an activity is a "combatant" one, all the circumstances of the incident should be examined. The following should be considered: the purpose of the act, the place where it occurred, the duration of the activity, the identity of the military force that is operating, the threat that preceded it and is anticipated from it, the strength of the military force that is operating and the duration of the incident' (*ibid*. [1], at p. 9).

5. Meanwhile the second Intifadeh broke out in September 2000. A fierce barrage of terrorism befell Israel and the Israelis in the territories. Thousands of terror attacks, which were mainly directed at civilians, were committed inside Israel and in the territories. More than a thousand Israelis lost their lives in the years 2000-2005. Approximately two hundred of these were in Judaea and Samaria. More than seven thousand Israeli citizens were injured. Approximately eight hundred of these were in Judaea and Samaria. Many of the injured became seriously disabled (see HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [3], at para. 1 of my opinion). The terrorist organizations and terror operatives employed many different methods in their war against Israel. Frequently they operated from among the civilian population inside the territories. The security forces required special deployments and special operations in order to contend with the terrorism and its perpetrators. Sometimes they were compelled to fight in densely populated areas. Between 2000 and 2005 thousands of Palestinians living in the territories were injured as a result of the activity of the security forces. Some of these took part in the hostilities; others did not. As a result of these injuries, once again many claims were filed against the state for damage that was sustained, according to the plaintiffs, as a result of negligent or deliberate activity of the security forces.

6. Against the background of these events, and in view of the interpretation given to the expression 'combatant activity' by the Supreme Court in *Bani Ouda v. State of Israel* [1], which in the opinion of the Knesset was too narrow, there was a further attempt to regulate in statute the question of the state's liability for damage caused during the Intifadeh. The government-sponsored draft law that was formulated in

1997 was once again tabled in the Knesset. This time the legislative attempt was successful, and the Knesset adopted (on 24 July 2002) the Torts (State Liability) Law (Amendment no. 4), 5762-2002 (hereafter — 'amendment 4'). This amendment added to s. 1 of the Torts Law a definition of the expression 'combatant activity,' which said the following:

> '"Combatant activity" — including any act of combating terror, hostilities or an uprising, as well as an act for the prevention of terrorism, hostilities or an uprising that was carried out in circumstances of risk to life or body.'

In addition, amendment 4 added s. 5A to the Torts Law, which provides special arrangements for claims that would be filed after its enactment for damage that was caused as a result of the activity of the security forces in the territories. *Inter alia*, s. 5A provides that notice should be given of damage within 60 days as a condition for filing a claim (s. 5A(2)); the limitations period for these claims is reduced to two years instead of seven (s. 5A(3)); and the rule concerning the transfer of the burden of proof in negligence with regard to dangerous items that is provided in s. 38 of the Torts Ordinance [New Version] and the rule of *res ipsa loquitur* provided in s. 41 of the Ordinance shall not apply (s. 5A(4)). The law allows the court to depart from these rules for special reasons that should be recorded. Obviously these restrictions apply in cases of claimants who have shown that their damage does *not* derive from 'combatant activity,' according to the new definition in the law, since otherwise the state would have immunity under s. 5 of the law.

*B. Amendment no. 7*

7. The legislature was not satisfied with this. On 27 July 2005, the Knesset amended the Torts Law once again in a manner that restricted even further the state's liability for tortious acts that occurred in the territories. It passed the Torts (State Liability) Law (Amendment no. 7), 5765-2005 (hereafter — 'amendment 7'). This amendment is the focus of the petitions before us. The essence of the amendment was the addition of ss. 5B and 5C of the Torts Law, which state:

'Claims of an enemy or an operative or member of a terrorist organization

5B. (a) Notwithstanding what is stated in any law, the state is not liable in torts for damage that is caused to anyone stipulated in paragraphs (1), (2) or (3), except for damage that is caused in the types of claims or to the types of claimants as stated in the first schedule —

(1) A national of an enemy state, unless he is lawfully present in Israel;

(2) An operative or a member of a terrorist organization;

(3) Anyone who is injured when he is acting on behalf of or for a national of an enemy state or a member or an operative of a terrorist organization.

(b) In this section —

'enemy' and 'terrorist organization' — as defined in section 91 of the Penal Law, 5737-1977;

'the state' — including an authority, body or person acting on its behalf.

Claims in a conflict zone

5C. (a) Notwithstanding what is stated in any law, the state is not liable in torts for damage that is caused in a conflict zone as a result of an act done by the security forces, except for damage that is caused in the types of claims or to the types of claimants as stated in the second schedule —

(b) (1) The Minister of Defence shall appoint a committee that shall be competent to approve, beyond the letter of the law, in special circumstances, a payment to an applicant to whom subsection (a)

applies and to determine the amount thereof…

…

(c) The Minister of Defence may declare an area to be a conflict zone; if the minister makes such a declaration, he shall determine in the declaration the borders of the conflict zone and the period for which the declaration shall apply; notice of the declaration shall be published in *Reshumot*.'

The first schedule provides that state immunity under s. 5B shall not apply to damage that is suffered by someone who is held in custody by the State of Israel. The second schedule provides that state immunity under s. 5C shall not apply to damage that is caused by a criminal offence, damage that is suffered by someone who is held in custody by the State of Israel, damage that is suffered as a result of an act of the civil administration that was done without reference to the conflict and damage that is suffered as a result of a road accident in which a vehicle of the security forces is involved when it is not being used for security operations.

8. Section 3(b) of amendment 7 authorizes the Minister of Defence to declare areas conflict zones retroactively for the period from the beginning of the conflict (29 September 2000) until six months from the date of publication of amendment 7. The significance of this declaration is that tortious claims that were filed in the years 2000-2005 cannot be tried if the Minister of Defence has declared that they concern events that occurred in a conflict zone. The Minister of Defence made use of his power under this section and on 9 February 2006 and 12 February 2006 he declared (in *Yalkut Pirsumim* 5942 and 5943 respectively) various areas to be conflict zones for periods that preceded the enactment of the amendment. The territory of Judaea and Samaria was divided into 88 districts and an additional 22 crossing points. Some of these districts were declared conflict zones during a part of the period under discussion. Thus, for example, the Hebron district was declared a conflict zone during 100% of the period from September 2000 until the end of that year; during approximately 90% of the years 2002 and 2003, and during approximately 80% of the time in the years 2001, 2004 and 2005.

The Greater Tulkarm district was declared a conflict zone during approximately 88% of the time in the years 2002 and 2003, and during approximately 82% of the time in 2004. The Greater Ramallah district was declared a conflict area during approximately 75% of the time in the years 2001-2003. District 64, which includes villages to the north of Jerusalem, was declared a conflict area during approximately half of the time since the Second Intifadeh broke out until the date of publishing the declaration. The territory of the Gaza Strip was divided into four districts and seven crossing-points. The southern district of the Gaza Strip was declared a conflict zone throughout the period. The central district of the Gaza Strip was declared a conflict zone during approximately 86% of the time. The northern district of the Gaza Strip was declared a conflict zone during approximately 95% of the time. Since 12 September 2005, when the IDF forces withdrew from the Gaza Strip, the whole of the Gaza Strip has been declared a conflict zone.

9. The Minister of Defence exercised his power under s. 5C(b)(3) of the Torts Law and on 13 June 2006 enacted regulations that govern the activity of the committee for paying compensation beyond the letter of the law, which was established under s. 5C(b) of the law. In the regulations, it was held that the committee is competent to make payments to family members of anyone who was killed in a conflict zone, and to anyone who was seriously injured, on the conditions prescribed in the regulations. *Inter alia*, the committee should consider the seriousness of the injury and its circumstances, the family status of the injured person and to what extent making the payment will contribute towards the rehabilitation of the injured person. The committee is also authorized to make payments, for personal injury and property damage that are not insignificant, to anyone who is injured as a result of a criminal act, even if no one has been convicted of that act.

*C. The contentions of the parties*

10. The petitioners in HCJ 8276/05 are human rights organizations. The petitioners in HCJ 8338/05 are the estate and surviving relatives of the late Shadan Abed Elkadar Abu Hajla. According to them, on 11 October 2002 in the evening the deceased was sitting with her husband and their son on the balcony of their house at Rafidia in Shechem. Two IDF jeeps stopped on the road that passes by the house. Several shots were fired from the vehicle in the direction of the windows of the house. As a result of the shooting, the deceased was killed instantly and her

husband and son were wounded. In December 2004, the Chief Military Advocate gave instructions to begin an army investigation to establish the circumstances of the deceased's death. Before the investigation was completed, the petitioners filed a claim in torts against the state in the Nazareth Magistrates Court. After the enactment of amendment 7, and before the claim was tried, the state filed an application to dismiss the claim *in limine*. In its application the state said that the Minister of Defence had declared the Shechem district a conflict zone during the whole period from June 2002 until the end of March 2003. For this reason the court was requested to dismiss the claim *in limine*. In HCJ 11426/05 the petitioners include two separate groups. Each group filed a claim in torts against the state with regard to deaths or serious injuries that were caused, according to them, as a result of negligent and even deliberate activity of the security forces in the territories. All of the events took place between 2001 and 2004. After the enactment of amendment 7, these claims cannot be heard, if the districts in which the events took place are declared conflict zones.

11. The petitioners' position is that amendment 7, and especially ss. 5B and 5C, are unconstitutional and therefore should be set aside. According to them, the Basic Laws apply to the violations of rights that arise from amendment 7, for four reasons. *First*, the Basic Laws apply to the violations of rights that arise from the amendment, because the amendment denies rights in Israel itself and in its courts; *second*, because the amendment applies, according to its wording, both to Israelis and to Palestinians; *third*, the Basic Laws apply in the territories because these laws apply to all the organs of government, and therefore every soldier carries in his knapsack not only the principles of administrative law but also the Basic Laws; *fourth*, because the Basic Laws give rights to Palestinians who are inhabitants of the territories, by virtue of their being protected persons who are present in an area that is subject to Israel's belligerent occupation.

12. The petitioners argue that several constitutional rights have been violated. *First*, amendment 7 violates the constitutional right to life and physical integrity, in that it denies someone who has lost his life or suffered personal injury as a result of a deliberate or negligent act any relief for this injury. *Second*, the amendment violates property rights, in that it denies someone whose property has been damaged as a result of a deliberate or negligent act any relief. *Third*, the amendment violates the constitutional right to apply to the courts. *Fourth*, the amendment

violates the constitutional right to equality, since it is intended to apply mainly to claims of Palestinians. Especially serious, according to the petitioners, is the fact that all of these violations include a retroactive violation of the rights of those persons who were harmed by negligent acts of the security forces and who filed a claim in the years preceding the enactment of the amendment. According to them, the violations are particularly grave when we consider the application of the law *de facto*. In this regard, the petitioners say that the Minister of Defence has declared extensive areas of the West Bank and the Gaza Strip conflict zones for long periods of time. Thereby he has denied the right of many persons to obtain relief for their damage. The petitioners discuss how Israel holds the territories under belligerent occupation. It maintains strict urban control in most of the towns and villages of the West Bank. This control of the towns and villages, streets and crossings, involves close daily contact between soldiers and civilians. This contact is really a form of police work. Notwithstanding, it sometimes involves harm to civilians, whether negligent or deliberate. The result of amendment 7 is that the law exempts the security forces from liability for all the consequences of their acts in the territories that have been declared conflict zones. It justifies, *inter alia*, shooting injuries and physical injuries in the course of regular checks at roadblocks, property damage in the course of searches, and looting in the course of patrols and arrests. In all of these cases, the injured parties cannot obtain any relief. This results in contempt for the lives of the Palestinians who live in the territories, and contempt for their rights to physical integrity and their property rights.

13. The petitioners' position is that the violations of the constitutional rights do not satisfy the conditions of the limitations clause. *First*, legislation that violates rights retroactively cannot be said to satisfy the condition that the violation should be made in 'statute.' *Second*, amendment 7 was not intended for a proper purpose, nor does it befit the values of the State of Israel. The purpose of the legislation is to prevent Palestinians who live in the territories from applying to the courts in Israel. This is a purpose that is improper. It undermines the status of the judiciary. It also violates the rule of law. Another purpose underlying the law is to exempt the state from the financial cost involved in paying compensation. Considerations of economic cost and administrative efficiency do not constitute a proper purpose for a violation of human rights. An additional purpose that underlies the law is

to provide a solution to the special difficulties of evidence that confront the state when it seeks to defend itself against tort claims that are related to combat incidents. The petitioners' position is that the state has not made clear what is special about these difficulties, especially in view of the fact that the burden of proof in claims of this kind rests in any case with the plaintiffs, and therefore the objective difficulties of proof fall mainly on the shoulders of the plaintiffs. *Third*, even if we say that the purpose is a proper one, the measures adopted in amendment 7 are disproportionate. The state and its agents have already been granted immunity from claims concerning damage that is caused during combatant activity under the provisions of s. 5 of the Torts Law. The definition of 'combatant activity' was even expanded in amendment 4. That amendment also introduced additional substantial and procedural advantages for the state in tort claims. All of these are sufficient in order to achieve the proper purpose, which is to protect the state from tort claims that arise from combatant activity.

14. The petitioners further argue that amendment 7 also violates the rules of humanitarian law that apply in territories that are under belligerent occupation, as well as the provisions of international human rights law. The petitioners say that Israel's control of the territories is a belligerent occupation. The military commander is responsible not only for security interests but also for the safety, security and rights of the protected inhabitants in the territories. *Inter alia*, the military commander has the duty to compensate protected inhabitants who are harmed as a result of the negligent actions of the security forces. The amendment denies this obligation of the military commander and therefore it is contrary to the provisions of humanitarian law and the provisions of international human rights law.

*D. The respondents' arguments*

15. The respondents discuss at length the security background to the enactment of amendment 7. Their position is that the second Intifadeh is a 'war in the common meaning of the word' (para. 1 of the respondents' reply of 6 July 2006) that is being waged in the streets of Israel as well as in the territories of Judaea, Samaria and the Gaza Strip. The scope of the security activity whose purpose is to contend with the threats of terrorism in the second Intifadeh is very great. The conflict has a special character, because the terrorist organizations operate frequently from within residential areas. This requires activity of the security forces inside

those residential areas. This activity is intended to target terrorists, but unfortunately inhabitants who are not involved in terrorist activity are also sometimes harmed. These inhabitants file thousands of tort claims against the state for personal injury and damage to property that they allegedly suffer as a result of the activity of the security forces. But the law of torts was not designed to deal with a situation of this kind. *Inter alia*, this is because the risks in times of war are greater in scope and of more diverse kinds than in times of peace and because of the difficulties of obtaining evidence in cases concerning war damage. Moreover, it is intolerable that the State of Israel should be liable to compensate not only its citizens who are injured by the armed conflict, but also the inhabitants of the Palestinian Authority. The principle that should be followed is that each party to the armed conflict should be liable for its own damage. The Palestinian Authority has mechanisms that are designed to compensate persons who are injured by the armed conflict for their damage. In addition, the Palestinians receive aid from international organizations. For these reasons, there is no basis for applying the law of torts to damage resulting from the armed conflict between the State of Israel and the Palestinians who inhabit the territories. The law of torts should be adapted to the new reality that has been created. Amendment 7 was intended to achieve this goal. The provisions of s. 5B enshrine in the law the principle that is accepted in international law, in English common law and also in Israeli common law, according to which a state is not liable for damage sustained by an enemy alien.

16. The respondents' position is that it is doubtful whether amendment 7 violates constitutional rights, since it is doubtful whether the Basic Laws give constitutional rights to inhabitants of the territories. Notwithstanding, in view of their position that, even if there is a violation of constitutional rights, it satisfies the conditions of the limitations clause, the respondents focused their arguments on the conditions of the limitations clause. The respondents' position is that the purposes underlying the amendment are proper ones. The main purpose of the amendment is, as aforesaid, to adapt the law of torts to the special characteristics of the armed conflict with the Palestinians. The amendment was not intended to undermine the status of the judiciary, but to limit the scope of the state's liability in torts. Therefore the amendment does not conflict with the principle of the separation of powers. The law also does not contain any approval for or consent to

negligent or unlawful activity of the security forces. The absence of any liability in torts does not prevent scrutiny of the conduct of the security forces within the context of the criminal law and disciplinary proceedings. It cannot therefore be said that the amendment undermines the rule of law. In addition, the amendment seeks to avoid an undesirable and unjust result, whereby Israel is responsible both for damage to Palestinian inhabitants and for the burden of the considerable damage suffered by Israel and Israelis. The respondents discuss how this purpose, which does indeed involve an economic element, reflects a proper ethical purpose. Finally, in so far as enemy aliens and members of terrorist organizations are concerned, amendment 7 seeks to restrict their claims in order not to aid the enemy in its war against Israel.

17. The respondents' position is that the violations of rights in amendment 7 satisfy the requirements of proportionality. *First*, the arrangements in the amendment make it possible to overcome the ethical and practical difficulties of implementing the law of torts in the course of an armed conflict. The amendment also realizes the principle that each party in a war is liable for its damage. This satisfies the rational connection test between the purpose of the amendment and the arrangements provided in it. *Second*, the arrangements in the amendment satisfy the *second* test of proportionality (the least harmful measure test). The amendment does not provide an arrangement that amounts to a sweeping denial of the right to compensation. The application of the amendment is conditional upon a declaration that a certain district is a conflict zone. These declarations are limited in time and place and they are made only after a careful examination of the conditions in the area. Admittedly, because of the large scale of the war, large parts of the territories of Judaea, Samaria and the Gaza Strip have been declared conflict zones for lengthy periods. But this is not a sweeping and general declaration, merely a declaration that is based on a careful and precise analysis. Moreover, the broad principle ruling out liability in torts is accompanied in the second schedule by exceptions to the rule. These exceptions reduce the intensity of the violation. Furthermore, the Minister of Defence may add to the list of exceptions. Finally, the law provides a further 'exceptions mechanism' that allows compensation to be paid beyond the letter of the law. On the basis of all of these, the respondents' position is that amendment 7 reflects an arrangement that satisfies the requirements of proportionality. The respondents' position is that amendment 4 cannot be regarded as an

arrangement that violates rights to a lesser degree. There are several reasons for this. According to them, amendment 4 was prepared after the first Intifadeh, and it does not provide a solution to the unique nature of the current armed conflict. Moreover, amendment 4 does not reflect the ethical purpose that each party in an armed conflict should be liable for its losses. Finally, amendment 4 does not address the claims of enemy aliens and members of terrorist organizations. Therefore for this reason also it is insufficient. *Third*, the respondents' position is that amendment 7 satisfies the *third* condition of proportionality (the test of proportionality in the narrow sense). The benefit of the amendment is very great. It adapts the law of torts to the unique circumstances of the armed conflict. It enshrines ethical standards and solves practical problems in implementing the existing law. The amendment also prevents an abuse of Israeli law for the purpose of obtaining money that may be used to wage war against Israel. On the other hand, the harm caused by the amendment is not as serious as the petitioners claim. The respondents discuss how even according to the law that prevailed before the amendment was enacted, the state had immunity against a claim for combatant activity. Many claims arising from events that occurred in the territories since September 2000 may be dismissed on this ground alone. Moreover, some of the claims can be addressed within the framework of the exceptions to the rule or by the committee that is authorized to pay compensation beyond the letter of the law. Finally, it should be remembered that the plaintiffs have an alternative relief of receiving compensation from the Palestinian Authority. In view of all this, the respondents' position is that the amendment to the Torts Law satisfies the *third* requirement of proportionality.

18. The respondents' position is that the amendment does not violate the provisions of international humanitarian law or international human rights law, since both of these sets of laws restrict the right of claim of enemy aliens and recognize the immunity of the state against claims arising from combatant activities during an armed conflict. The respondents point out that exceptions to the state's liability for claims in torts that derive from combatant activities are recognized in the law of many countries such as the United States, England, Canada, Italy, Japan and Germany.

*E. The proceeding*

19. The petitions in HCJ 8276/05 and HCJ 8338/05 were filed at the beginning of September 2005. The petition in HCJ 11426/05 was filed in December 2005. The hearing of the petitions was deferred twice (in March 2006 and April 2006), with the consent of the parties, until regulations were enacted with regard to the committee for paying compensation beyond the letter of the law. The first hearing of the petitions took place on 13 July 2006 before a panel of three justices. At the end of this, an order *nisi* was made. On 17 July 2006 it was decided that the petitions would be heard before an expanded panel of nine justices. According to an agreed statement filed by the parties, an interim order was made on 30 July 2006, according to which the hearing of pending claims that the state contended were subject to amendment 7 was suspended. The hearing of the petitions on their merits took place before the expanded panel on 30 August 2006.

*F. The questions that arise*

20. The petitions challenge the constitutionality of amendment 7. A claim of this kind should focus on one of the Basic Laws. In our case, this is the Basic Law: Human Dignity and Liberty. Claims that amendment 7 violates human rights that are recognized in Israel under Israeli common law, international human rights law or international humanitarian law cannot — according to the constitutional structure of the State of Israel — lead to the unconstitutionality of a statute. The Supreme Court discussed this in HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [4], where it held:

> 'It is not sufficient to find that the Israeli settlers in the area being vacated enjoy human rights that are enshrined in Israeli common law. It is not sufficient to find that they enjoy human rights that are recognized by public international law. Such recognition — and on this we are adopting no position — while important, cannot give rise to a constitutional problem in Israel. The reason for this is that when the violation of a right that arises in common law or public international law conflicts with an express provision of a statute of the Knesset, the statute of the Knesset prevails, and no constitutional problem arises. Indeed, a constitutional problem arises in Israel only if the right of the Israeli settlers is enshrined in a constitutional super-

> legislative normative provision, i.e., in a Basic Law. Moreover, it is insufficient that the Disengagement Implementation Law violates a right enshrined in a Basic Law. A constitutional problem arises only if the Disengagement Implementation Law violates the right unlawfully. When these conditions are satisfied, we say that the law is unconstitutional and we consider the question of the relief for the violation of the Basic Law' (*Gaza Coast Local Council v. Knesset* [4], at p. 544).

This is the position in our case. We should examine whether amendment 7 unlawfully violates the Basic Law: Human Dignity and Liberty. This examination, according to our accepted practice, is done in three stages (see CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [5]; HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [6]; HCJ 6055/95 *Tzemah v. Minister of Defence* [7]; HCJ 1030/99 *Oron v. Knesset Speaker* [8]; *Gaza Coast Local Council v. Knesset* [4], at p. 544; HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [9]; HCJ 4593/05 *United Mizrahi Bank Ltd v. Prime Minister* [10]). The *first* stage examines whether the law — in our case, amendment 7 — violates a human right that is enshrined and protected in a Basic Law. If the answer is no, the constitutional scrutiny ends (see HCJ 4128/02 *Man, Nature and Law — Israel Environmental Protection Society v. Prime Minister of Israel* [11]; HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* [12]). If the answer is yes, the constitutional scrutiny passes to the *second* stage. In this stage, we consider the question whether the law containing the violation, in whole or in part, satisfies the requirements of the limitations clause. Indeed, our basic constitutional outlook is that not every violation of a constitutional human right is an unlawful violation. We recognize lawful violations of constitutional human rights. These are those violations that satisfy the conditions of the limitations clause (see HCJ 2334/02 *Stanger v. Knesset Speaker* [13]; HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [14]). If the violation of the constitutional human right is lawful, the constitutional scrutiny ends. If the violation does not satisfy one of the conditions of the limitations clause, the violations is unlawful. In such a case, we pass on to the *third* stage of the scrutiny, which concerns the consequences of the unconstitutionality. This is the relief stage. I discussed the importance of

this division of the constitutional scrutiny into three stages in *Movement for Quality Government in Israel v. Knesset* [9], where I said:

> 'This division into three stages is important. It is of assistance in the legal analysis. It is intended "to clarify the analysis and focus the thinking" (HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [15], at p. 440; …). It clarifies the basic distinction, which runs like a golden thread through human rights law, between the scope of the right and the degree of protection afforded to it and its *de facto* realization (see A. Barak, *A Judge in a Democracy* (2004), at p. 135; …). It serves as a basis for the distinction between the horizontal balance (in the first stage) and the vertical balance (in the second stage), between human rights *inter se* and between human rights and social values and interests (see HCJ 1435/03 *A v. Haifa Civil Servants Disciplinary Tribunal* [16], at p. 537); it is of assistance in outlining the distinction between the role of the court in the interpretation of the rights in the Basic Law (in the first stage) and its role in the constitutional scrutiny of the violation of these rights in legislation (in the second stage). It is of assistance in examining arrangements in the law, such as affirmative action, while examining the question whether this falls within the scope of the right to equality (the first stage), or whether is constitutes a violation of equality that satisfies the requirements of the limitations clause (the second stage) (see HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in Israel v. Prime Minister* [17], at p. 40; …). It clarifies disagreements on the question of the burden of proof' (*Movement for Quality Government in Israel v. Knesset* [9], at para. 21 of my opinion).

Let us now turn to the required constitutional scrutiny.

*G. First stage: the violation of the constitutional right*

*(1) Presentation of the problem*

21. The *first* stage of the constitutional scrutiny examines whether the statute of the Knesset — in our case, amendment 7 — violates a human right that is protected in the Basic Law: Human Dignity and Liberty. This stage is comprised in our case of two separate questions. The *first* of these is whether the Basic Law: Human Dignity and Liberty applies in

the petitioners' case, since the damage was caused to them outside Israel. This is a question that arises specifically with regard to amendment 7. If the answer to this question is yes, then the *second* question arises. This question arises in all the cases where a constitutional contention is raised. The question is whether a human right that is enshrined in a Basic Law has indeed been violated. As we have seen, it is insufficient that a law violates a human right. The constitutional question arises only if the human right is enshrined in a Basic Law. For our purposes, this is the Basic Law: Human Dignity and Liberty. It is also customary to consider at this stage whether the violation is not merely a trivial one (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [5], at p. 431; HCJ 3434/96 *Hoffnung v. Knesset Speaker* [18], at p. 57). Let us turn to the first of these two questions.

*(2) The first question: does the Basic Law apply?*

22. In general, Israeli legislation has territorial application. When a law is intended to apply to persons or acts outside Israel, this needs to be stated in statute (expressly or by implication). Indeed, there is a presumption that the laws of Israel apply to legal relationships in Israel, and they are not intended to regulate legal relationships outside Israel. This is the case with criminal legislation in Israel; it is also the case with legislation in other spheres. This presumption is rebuttable (see A. Barak, *Legal Interpretation: Statutory Interpretation* (vol. 2, 1993), at p. 578). This rule also applies to Israeli legislation in the territories. Judaea, Samaria and the Gaza Strip are not a part of the State of Israel; no declaration has been made that they are subject to the 'law and jurisdiction and administration of the state.' There is a presumption that Israeli legislation applies in Israel and not in the territories, unless it is stated in legislation (expressly or by implication) that it applies in the territories (*ibid*., at p. 579). A similar rule applies also to the Basic Laws. There is therefore a presumption that the various Basic Laws apply to acts done in Israel. As we have seen, this presumption may be rebutted (either expressly or by implication). Can it be said that this presumption is rebutted when the Basic Law concerns human rights? Should the need to enforce human rights against the state not lead to a conclusion that the Israeli organs of government are obliged 'to uphold the rights under this Basic Law' everywhere? Should it not be said that any Israel official carries in his knapsack the Basic Law: Human Dignity and Liberty? Should it not be said that wherever the official goes, the Basic Law goes with him? Should it not be said that this approach is particularly

appropriate when the act of the official is done in a place that is subject to Israel's belligerent occupation (see A. Barak, *Legal Interpretation: Constitutional Interpretation* (vol. 3, 1994), at p. 460)? These questions are good ones. We considered some of them in *Gaza Coast Local Council v. Knesset* [4] (at p. 560). We held in that case that the Basic Laws concerning human rights 'give rights to every Israeli settler in the area being vacated. This application is personal. It derives from the fact that the State of Israel controls the area being vacated' (*ibid*. [4]). We left unanswered the question whether the Basic Laws concerning human rights also give rights to persons in the territories who are not Israelis. Should we not say that with regard to 'protected inhabitants' international human rights law replaces Israeli internal law in this regard? There is no simple answer to these questions. Indeed, in its reply the State does not devote much attention to this question, since in its opinion amendment 7, even if it violates rights that are enshrined in the Basic Law: Human Dignity and Liberty, does so lawfully. It is also our opinion that there is no reason to consider the question of the territorial application of the Basic Law: Human Dignity and Liberty, since the rights that amendment 7 violates are rights in Israel, not rights outside Israel.

Let me explain.

23. Section 5B of amendment 7 applies, according to its wording, to tortious acts done in Israel. The question of the application of the Basic Law therefore does not arise at all in this context. By contrast, s. 5C of amendment 7 provides that 'the state is not liable in torts for damage that is caused in a conflict zone as a result of an act done by the security forces.' A 'conflict zone' is outside Israel. Does the question of the application of the Basic Law: Human Dignity and Liberty outside Israel arise with regard to this provision? My answer is no. The rights of the residents of the territories which are violated by amendment 7 are rights that are given to them in Israel. They are their rights under Israeli private international law, according to which, when the appropriate circumstances occur, it is possible to sue in Israel, under the Israeli law of torts, even for a tort that was committed outside Israel. Indeed, since the Six Day War, and especially since the first Intifadeh, the courts in Israel have heard claims in torts filed by Palestinian inhabitants of the territories who were injured in the territories by Israeli tortfeasors in general (see, for example, CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19]), and by the activities of the security

forces in the territories in particular (see, for example, *Bani Ouda v. State of Israel* [1]; CA 6521/98 *Bawatna v. State of Israel* [20]; CA 6790/99 *Abu Samra v. State of Israel* [21]; CA 1354/97 *Akasha v. State of Israel* [22]). This situation is consistent with the principles of the conflict of laws in torts that prevail in our legal system (for an extensive survey, see *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19]). Even the state made no claims against this application of the Israel law of torts. During the oral pleadings in the petitions before us, we asked the state's representatives whether they had any contention under Israeli private international law with regard to the application of Israeli tort law to the Intifadeh claims. The reply of the state's representatives was no. It follows that amendment 7 violates the rights given in Israel to inhabitants of the territories who are harmed by tortious acts of the security forces in the territories. This was the position before amendment 7. This position was changed by s. 5C of amendment 7. The rights in Israel under the law of torts were taken away from the inhabitants of the territories for tortious acts done by the security forces in a conflict zone. The effect of amendment 7 is therefore in Israel. It violates rights that the injured parties from the territories had in Israel. The denial of these rights is subject in principle to the Basic Law: Human Dignity and Liberty. This application is not extra-territorial. It is territorial. Of course, this still leaves us with the second question of whether amendment 7 violates one of the rights prescribed in the Basic Law: Human Dignity and Liberty. Let us now turn to consider this question.

*(3) The second question: has a right enshrined in the Basic Law: Human Dignity and Liberty been violated?*

24. Amendment 7 provides that the state is not liable in torts when the conditions set out therein are satisfied. Does this denial of liability for torts violate rights that are enshrined in the Basic Law: Human Dignity and Liberty? The answer is yes. There are two main reasons for this. *First*, the right in torts that is given to the injured party (or to his heirs or dependants) and that was denied by amendment 7 is a part of the injured party's constitutional right to property. Indeed, the word 'property' in s. 3 of the Basic Law: Human Dignity and Liberty — 'A person's property should not be harmed' — means a person's property rights. In *Gaza Coast Local Council v. Knesset* [4] it was held with regard to the word 'property' in the Basic Law: Human Dignity and Liberty:

> '"Property" in this provision includes every property right. The Basic Law protects against any harm to a person's property rights. It follows that the protection of property extends not only to "property" rights such as ownership, a lease and an easement, but also to "obligatory" rights that have a property value' (*ibid.* [4], at p. 583; see also *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [5], at pp. 431, 572).

In *United Mizrahi Bank Ltd v. Prime Minister* [10] I added:

> 'The question "what is property?" has arisen in several judgments. The answer to this is not at all simple. The difficulty arises from the complexity of the theoretical concept of "property" and the lack of a consensus as to the reasons underlying it… It would appear that everyone agrees that property in the Basic Law extends to all the various kinds of property rights according to their meaning in private law. Everyone also agrees that property in the Basic Law is not limited merely to property rights. Indeed, property in its constitutional sense is not the same as property in its private law sense… Therefore the constitutional concept of property also includes the right of possession and obligatory rights… In one case it was held that the word property in the Basic Law includes a pension… Against this background it has been held that property in its constitutional sense means a property right, whether it is a right *in rem* or a right *in personam*' (*ibid*. [10], at para. 9).

This approach to the constitutional concept of property is accepted in most countries where property is given a constitutional status (see Y. Weisman, 'Constitutional Protection of Property,' 42 *HaPraklit* (1995) 258; see also A.J. van der Walt, *Constitutional Property Clauses* (1999), at p. 22). This leads to the conclusion that the right of an injured party under the law of torts is a part of his property rights and therefore part of his 'property.' Moreover, the right of a person to compensation for a violation of his right against the state is also a part of his 'property.' Indeed, 'the right to compensation that is intended to restore the injured party to his original position… is a property right according to its meaning in the Basic Law' (E. Rivlin, *Road Accidents — Procedure and Calculation of Damages* (New Extended Edition, 2000), at p. 932). The

violation of the right to compensation is also a violation of property rights (see *Gaza Coast Local Council v. Knesset* [4], at p. 589; CFH 1332/02 *Raanana Local Planning and Building Committee v. Horowitz* [23]; HCJ 2390/96 *Karasik v. State of Israel* [24]; CA 2781/93 *Daaka v. Carmel Hospital* [25]).

25. *Second*, liability in torts protects several rights of the injured party, such as the right to life, liberty, dignity and privacy. The law of torts is one of the main tools whereby the legal system protects these rights; it reflects the balance that the law strikes between private rights *inter se* and between the right of the individual and the public interest. Denying or restricting liability in torts undermines the protection of these rights. Thereby these constitutional rights are violated. Indeed:

> 'The basic right of a person, who has been injured by a tortious act, to compensation is a constitutional right that derives from the protection afforded to his life, person and property… Any restriction of the right to compensation for a tortious act needs to satisfy the constitutional test of having a proper purpose and not being excessive' (I. Englard, *Compensation for Road Accident Victims* (third edition, 2005), at p. 9).

Other legal systems that afford constitutional protection to human rights are also familiar with the approach that the law of torts is subject to constitutional restrictions, and changes to it require constitutional scrutiny (I. Englard, *The Philosophy of Tort Law* (1993), at pp. 125-134).

*H. Second stage: Is the violation of the constitutional rights lawful?*

*(1) The limitations clause*

26. The second stage of the constitutional scrutiny considers the limitations clause in the Basic Law: Human Dignity and Liberty, which states:

> 'Violation of rights
>
> 8. The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive, or in accordance with a law as aforesaid by virtue of an express authorization therein.'

This provision plays a central role in our constitutional system. It has two aspects. *On the one hand* it protects the human rights that are set out in the Basic Law; *on the other hand* it determines the conditions for violating the basic right (see HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 54 of my opinion). The limitations clause is based on the outlook that in addition to human rights there are also human obligations; that the human being is a part of society; that the interests of society may justify a violation of human rights; that human rights are not absolute, but relative. The limitations clause reflects the approach that human rights may be restricted, but there are limits to such restrictions (see *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [14], at para. 11; *Movement for Quality Government in Israel v. Knesset* [9], at paras. 45 and 46 of my opinion). Indeed, human rights are not afforded the protection of the law to the fullest extent; the constitutional system does not allow the realization of human rights in their entirety.

27. The limitations clause is based on two main elements. The *first* element concerns the purpose of the legislation. The limitations clause provides that a statute that violates a constitutional human right should satisfy the requirement that it '… befits the values of the State of Israel, is intended for a proper purpose…'. The *second* element concerns the means used to achieve the purpose. The limitations clause provides that the means adopted by the statute to realize the purpose should violate the constitutional human rights 'to an extent that is not excessive.' There is a close relationship between these two elements. The means are intended to realize the purpose. Therefore we should examine whether the purpose is constitutional. When this has been determined, we should examine whether the means for realizing that purpose are constitutional.

28. The question of purpose is complex. In our case, it is sufficient if we determine that the purpose that should be considered is the main purpose of the statute (see HCJ 4769/95 *Menahem v. Minister of Transport* [27], at p. 264). This purpose should be a 'proper' one in the context of a violation of human rights (see *Gaza Coast Local Council v. Knesset* [4], at p. 548; *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 61 of my opinion). The characteristics of the proper purpose are that it 'is intended to realize social purposes that are consistent with the values of the state as a whole, and that display sensitivity to the place of human rights in the overall

social system' (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 62 of my opinion). From the viewpoint of the need to realize the purpose, the law is that this need varies according to the nature of the right and the degree of the violation thereof (see *Tzemah v. Minister of Defence* [7], at p. 273; *Menahem v. Minister of Transport* [27], at p. 258; HCJ 5016/96 *Horev v. Minister of Transport* [28], at p. 52 {206}). When a central right — such as life, liberty, human dignity, property, privacy — is violated, the purpose should realize a significant social goal or an urgent social need (*Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 62 of my opinion).

29. In addition to the proper purpose, there are the proportionate means. It is insufficient that the purpose of the statute is a proper one. The means that are adopted to realize it should be proper ones. The means are proper is they are proportionate. The principle of proportionality is based on the outlook that 'the end does not justify the means' (*per* Justice T. Or in *Oron v. Knesset Speaker* [8], at p. 465); see also *Movement for Quality Government in Israel v. Knesset* [9], at para. 47 of my opinion). In a host of cases, this court has consistently held that proportionality is determined by three subtests (see A. Barak, *A Judge in a Democracy* (2004), at p. 346). The use of the subtests is affected by the nature of the right being violated, the degree of the violation thereof and the importance of the values and interests that the violation is intended to realize. The *first* subtest is the rational connection test or the suitability test. The means that the statute adopts should be suited to realizing the purpose that the statute seeks to realize. The *second* subtest is the least harmful measure test or the necessity test. It demands that the statute that violates a constitutional right should not violate it to a greater degree than is necessary in order to achieve the proper purpose. 'The legislative measure can be compared to a ladder, which the legislator climbs in order to achieve the legislative purpose. The legislator must stop at the rung on which the legislative purpose is achieved and on which the violation of the human right is the least' (*Israel Investment Managers Association v. Minister of Finance* [6], at p. 385; LCA 3145/99 *Bank Leumi of Israel Ltd v. Hazan* [29], at p. 405; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [30], at p. 840 {297-298}). The *third* subtest is the proportionate result test or the test of proportionality in the narrow sense. The benefit arising from achieving the proper purpose should be commensurate with the harm

caused by the violation of the constitutional right (see *Beit Sourik Village Council v. Government of Israel* [30], at p. 850 {309-310}; *Marabeh v. Prime Minister of Israel* [3], at para. 116 of my opinion). This is an ethical test (see the opinion of Vice-President M. Cheshin in *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 107). It focuses on the outcome of the legislation, and the effect that it has on the constitutional human right. It is a balancing principle.

30. With regard to the three subtests of proportionality, we should point out the following: *first*, there is a major difference between the first and second subtests and the third subtest. The first two subtests — the rational connection and the least harmful measure — focus on the means of realizing the purpose. If it transpires, according to these, that there is a rational connection between realizing the purpose and the legislative measure that was chosen, and that there is no legislative measure that is less harmful, the violation of the human right — no matter how great — satisfies the subtests. The third subtest is of a different kind. It does not focus merely on the means used to achieve the purpose. It focuses on the violation of the human right that is caused as a result of realizing the proper purpose. It recognizes that not all means that have a rational connection and are the least harmful justify the realization of the purpose. This subtest seeks in essence to realize the constitutional outlook that the end does not justify the means. It is an expression of the concept that there is an ethical barrier that democracy cannot pass, even if the purpose that is being sought is a proper one. *Second*, the three subtests do not always lead to the same outcome. On more than one occasion there is a margin of possibilities that satisfy the proportionality tests to a greater or lesser degree. The fundamental approach is that any possibility that the legislature chooses is constitutional, if it falls within the margin of proportionality. This is the constitutional margin of appreciation given to the legislature within the limits of the margin of proportionality (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [5], at p. 438; *Menahem v. Minister of Transport* [27], at p. 280; AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [31], at p. 815; *Gaza Coast Local Council v. Knesset* [4], at pp. 550, 812; *Movement for Quality Government in Israel v. Knesset* [9], at para. 61 of my opinion; *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 77 of my opinion).

*(2) The constitutionality of section 5B of amendment 7*

31. The question of the constitutionality of s. 5B of amendment 7 arose before us in a marginal manner only. The parties focused their main arguments on the provisions of s. 5C. They did not discuss s. 5B at length. We were not presented with any cases in which the question of its application arose. All of this reflects upon the question of the constitutional of the section. In these circumstances, as long as these questions have not been properly addressed, the time has not come to decide the constitutionality of s. 5B. Much depends on the manner in which it is implemented and the interpretation that is given to the provisions of the section. Thus, for example, we have heard no argument on the question whether the correct interpretation of the section includes a causal relationship between the activity and the membership of the terrorist organization or what was done on its behalf and the damage suffered by the injured parties. Naturally the parties have the right to raise their arguments concerning the constitutionality of s. 5B in so far as it will arise in specific cases. The civil courts are competent, in specific tort cases, to examine arguments concerning the constitutionality of the section. In the circumstances of this case, we see no reason to decide the question of the constitutionality of s. 5B of amendment 7.

*(3) The constitutionality of s. 5C of amendment 7*

32. Section 5C of amendment 7 provides that the state is not liable in torts for damage that is caused in a conflict zone as a result of an act done by the security forces. This rule has several exceptions. The exclusion of liability does not depend on the identity of the injured party but on the fact that the damage occurred in a conflict zone. The purpose underlying this provision was addressed by the respondents before us:

> 'The main purpose of the amendment, which justifies a restriction of claims that are filed for damage caused in a conflict zone, is to adapt the law of torts to the special characteristics of the war with the Palestinians. Within this framework, the amendment also seeks to prevent an improper and unjust outcome that Israel should be liable for the damage of Palestinian inhabitants, in addition to being liable for the huge damage caused to the Israeli side' (para. 275 of the respondents' reply of 6 July 2006).

The respondents' position is that the law of torts was designed to regulate 'risk management for harmful acts in ordinary life within a given

society' (para. 26). It is not suited to dealing with damage caused in a time of war. There are several reasons for this:

> 'First, the risks in times of war are different from those in times of peace. We are speaking of risks to the soldiers and risks to the state if they fail in their operations… Second, in war the scale of the damage is greater, and sometimes it is caused during a short period… Third, in times of war many soldiers and citizens are harmed… Fourth, war is, as a rule, a confrontation between states, or between a state and organizations, who operate from within the territory of another state… Fifth, litigating a claim in torts is not completely practical with regard to damage that is caused in war, or it encounters many difficulties… Sixth, the law of torts naturally examines a given incident on the basis of a specific and particular set of facts… Therefore, for all of the aforesaid reasons, there is no basis for applying the law of torts to war damage' (para. 33 of the respondents' reply of 6 July 2006).

This background gives rise to the question whether the provisions of s. 5C of amendment 7 are constitutional. As we have seen, they violate the rights of a Palestinian who was injured in a conflict zone by a tortious act of the security forces. Before amendment 7 was enacted, the state was liable to Palestinians in conflict zones if the tortious act was caused by a non-combatant activity of the security forces. Now the law provides that the state is not liable in torts for damage caused in a conflict zone as a result of an act carried out by the security forces, irrespective of the question whether the tortious act was caused by a 'combatant activity' or a non-combatant activity. This restriction of the state's liability has violated the constitutional right of the Palestinian (or his heirs or estate) who was injured by a tortious act that was caused by a non-combatant activity. Does this violation of the constitutional right satisfy the provisions of the limitations clause?

33. Is the purpose underlying the provisions of s. 5C of amendment 7 a proper purpose? In my opinion, the answer to this question is yes. Indeed, the ordinary law of torts was not designed to contend with tortious acts that are caused during the combatant activities of the security forces outside Israel in an armed conflict. Excluding liability in torts in situations of 'combatant activity' is also accepted in other legal

systems (for a survey, see Yaakov, 'Immunity under Fire: State Immunity for Damage caused as a result of "Combatant Activity",' *supra*, at pp. 115-125). An arrangement whose purpose is to adapt the law of torts to the special circumstances that prevail during the combatant activity of the security forces is an arrangement that is intended for a proper purpose. I discussed this in *Bani Ouda v. State of Israel* [1]:

> 'Combatant activities that cause harm to the individual should not be tried according to the ordinary law of torts. The reason for this is that combatant activities create special risks which should be addressed outside the framework of ordinary tort liability… Combatant activities create, by their very nature, risks that the "ordinary" law of torts was not designed to address. The purposes underlying the ordinary law of torts do not apply when the damage derives from combatant activity that the state is waging against its enemies… It should be noted that the approach is not that "combatant activity" is beyond the reach of the law. The approach is that the problem of civil liability for combatant activities should be determined outside the scope of the classical law of torts' (*ibid*. [1], at p. 6).

34. Is s. 5C of amendment 7 proportionate? The *first* subtest, which concerns a rational connection between the proper purpose and the provisions of s. 5C, is satisfied. The exclusion of liability in torts provided by s. 5C of amendment 7 removes the damage caused by the security forces in a conflict zone from the scope of the ordinary law of torts. This realizes the proper purpose that amendment 7 sought to achieve.

35. Does s. 5C of amendment 7 satisfy the *second* subtest of proportionality? According to this test, the statute should adopt the measure that is least harmful. Does s. 5C satisfy this constitutional requirement? My answer is that it does not. In order to realize the purpose underlying s. 5C of amendment 7, it is sufficient to provide legal arrangements that the state is exempt from liability for combat activities. The ordinary law of torts is not suited to addressing liability for tortious acts in the course of combat. Arrangements of this kind were provided in s. 5 of the original Torts Law, which determined that the state is not liable in torts for an act done in the course of the combatant activity of the Israel Defence Forces. Amendment 4 extended the definition of 'combatant activity' beyond the scope that was given to it in decisions of

the courts. It was provided in amendment 4 that combatant activity includes 'any act of combating terror, hostilities or an uprising, as well as an act for the prevention of terrorism, hostilities or an uprising that was carried out in circumstances of risk to life or body.' It further provided that notice of the damage must be given within sixty days; it shortened the prescription period and it ruled out the application of laws that transfer the burden of proof to the state. This amendment is proportionate, and it does not give rise to any constitutional difficulty. It realized the purpose underlying amendment 7, which is the need 'to adapt the law of torts to the special characteristics of the war with the Palestinians' (para. 27 of the respondents' reply of 6 July 2006). Amendment 7 goes far beyond this. It excludes liability in torts for all damage that is caused in a conflict zone by the security forces, even as a result of acts that were not done in the course of the combatant activity of the security forces. This amplification of the state's exemption from liability is unconstitutional. It does not adopt the least harmful measure that achieves an exemption from liability for combatant activities. It releases the state from liability for tortious acts that are in no way related to combatant activities, no matter how broadly the term is defined. Nothing in the ordinary activities of law enforcement that are carried out by the security forces in a territory controlled by them justifies an exclusion from the ordinary law of torts. This is certainly the case when the tortious act is totally unrelated to security activity. Only combat activities justify, as the purpose of amendment 7 indicates, an exclusion of the arrangements in the ordinary law of torts. Excluding tortious acts in which the security forces are involved but which have no combatant aspect does not realize the proper purpose of adapting the law of torts to combat situations. It seeks to realize an improper purpose of exempting the state from all liability for torts in conflict zones. This is certainly the case in view of the retroactive nature of this provision.

36. Section 5C of amendment 7 rules out any liability in torts on the part of the state with regard to any claim in torts that was filed with regard to an incident that occurred in a 'conflict zone.' From the respondents' statement it appears that after the enactment of amendment 7, large areas of the territories of Judaea, Samaria and the Gaza Strip were declared conflict zones for lengthy periods. The territories were divided into several large districts. Sometimes one district encompasses whole cities or several villages and towns. According to the criteria that were determined in this regard, it was

sufficient for one terrorist incident to occur in one part of a certain district in order to declare the whole district a conflict zone for several days. In these circumstances, the exclusion of the state's liability under s. 5C causes a major violation of constitutional human rights. We should remember that the territories of Judaea and Samaria, and until August 2005 also the territory of the Gaza Strip, have been subject to a belligerent occupation for almost forty years. Thus the Israeli security forces are present in the territories on a constant basis and in large numbers. The inhabitants of the territories come into close contact with them on a regular and daily basis, on their way to and from work and school, at checkpoints and roadblocks inside the territories and at crossings into and out of Israel. The security forces have a fixed and permanent presence in the territories. They are deployed and operate in the territories both in combatant activities and in activities that have the character of law enforcement, both in areas where there is terrorist activity and in quiet areas, both in times of conflict and in times of relative calm. In these circumstances, a sweeping immunity of the kind given to the state by s. 5C of amendment 7 means that the state is given an exemption from liability in torts with regard to many kinds of operations that are not combatant activities even according to the broad definition of this term. This means that many injured persons, who were not involved in any hostilities whatsoever and who were injured by operations of the security forces that were not intended to contend with any hostile act, are left without any relief for the injury to their lives, persons and property. This sweeping violation of rights is not required in order to realize the purposes underlying s. 5C of amendment 7. Exempting the state from liability under s. 5C does not 'adapt the law of torts to the state of war.' It excludes from the scope of the law of torts many acts that are not combatant ones. It is inconsistent with Israel's duty that arises from its belligerent occupation in Judaea, Samaria and the Gaza Strip. This occupation imposes on the state special duties under international humanitarian law, which are inconsistent with a sweeping immunity from all liability in torts. We are not adopting any position — since the matter did not arise before us — with regard to changes that may arise from the Oslo accords (see *Gaza Coast Local Council v. Knesset* [4], at pp. 523-524; HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [32], at p. 364 {96}). Obviously we are making no determination with regard to the legal status of the Gaza Strip after the disengagement. Even if Israel's belligerent occupation there has ended, as the state

claims, there is no justification for a sweeping exemption from liability in torts.

37. Indeed, the proportionate approach is to examine each incident on a case by case basis. This examination should consider whether the case falls within the scope of 'combatant activity,' however this is defined. It is possible to extend this definition, but this case by case examination should not be replaced by a sweeping exemption from liability. I discussed this in *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26]:

> 'The need to adopt the least harmful measure often prevents the use of a blanket prohibition. The reason for this is that in many cases the use of a criterion of an individual examination achieves the proper purpose while using a measure whose violation of the human right is less. This principle is accepted in the case law of the Supreme Court… A blanket prohibition of a right, which is not based on an individual check, is a measure that raises a suspicion of being disproportionate. This is the case in our law. It is also the case in comparative law' (ibid. [26], at paras. 69-70 of my opinion).

This approach was accepted by additional justices in that case. The vice-president (Justice M. Cheshin) said that the question is whether it is possible to create 'a mechanism of an individual check for every resident of the territories who is a spouse or parent of an Israeli citizen, instead of imposing a blanket prohibition on all the residents of the territories who are of certain ages' (*ibid*. [26], at para. 105 of his opinion). Justice D. Beinisch said that 'Not carrying out an individual check and determining a blanket prohibition gives too wide a margin to the value of security without properly confronting it with the values and rights that conflict with it' (*ibid*. [26], at para. 11 of her opinion). Similarly, Justice E. Hayut said that:

> '… security needs, no matter how important, cannot justify blanket collective prohibitions that are deaf to the individual… there is certainly a basis for a presumption of dangerousness that the respondents wish to impose in this matter of family reunifications between Arab citizens of Israel and residents of the territories. Notwithstanding, in order that the fear of terror does not mislead us into

> overstepping our democratic limits, it is proper that this presumption should be rebuttable within the framework of an individual and specific check that should be allowed in every case…' (*ibid.* [26], at paras. 4-5 of her opinion).

Justice A. Procaccia emphasized in her opinion that:

> 'We should beware of the lurking danger that is inherent in a sweeping violation of the rights of persons who belong to a particular group by labelling them as a risk without discrimination… we should protect our security by means of individual scrutiny measures even if this imposes on us an additional burden…' (*ibid*. [26], at para. 21 of her opinion).

Justice M. Naor said that '… I do not dispute the importance of making an individual check, where this is possible… As a rule I accept that a violation of a basic right will be suspected of being disproportionate if it is made on a sweeping basis rather than on the basis of an individual check' (*ibid*. [26], at para. 20 of her opinion). Justice E. Rivlin also emphasized the importance of the individual check, but he thought in that case that such a check would not realize the purpose of the law. Justice E. Levy emphasized in his opinion that '… in the final analysis there will be no alternative to replacing the blanket prohibition in the law with an arrangement based on an individual check…' (*ibid*. [26], at para. 9 of his opinion). The case before us is different from *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26]. Notwithstanding, there are similarities between the two. In both cases very important human rights were violated. Amendment 7 denies the right to compensation, and thereby it is likely to result in the injured person or his family becoming destitute. In both cases, the state chose a sweeping denial ('the state is not liable in torts') to an individual check on a case by case basis to discover whether 'combatant activity' is involved. In *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26] it was argued that it was not possible to realize the purpose of the statute by means of an individual check. This argument cannot be made in the case before us. The individual check is capable of realizing the purpose of the statute.

38. The state addressed extensively in its written pleadings the arrangements that prevail in comparative law in this matter. A study of the state's claims shows that in the countries surveyed by the state in its pleadings, the arrangements prescribed with regard to the liability of the

state in torts are similar to the arrangement provided in amendment 4, whereas the sweeping arrangement provided in amendment 7 is unprecedented. Thus, for example, in American law, the Federal Tort Claims Act recognizes, alongside the general liability of the Federal government in torts, an exception that releases the state from liability in torts for combatant activities. But this exception is limited to acts of the security forces in a time of war (section 2680(j)). Admittedly this section has been interpreted broadly. It has been held that a 'state of war' prevails even in a period of significant hostilities between the United States army and other military forces, and that 'combatant activities' include both the actual combat operations and activities that are directly related to them (*Koohi v. United States* [35]). But even with its broad interpretation, this section provides arrangements that are similar in essence to the arrangement provided in amendment 4, and not the sweeping immunity provided in amendment 7. The same is true in English law, which recognizes the immunity of the state with regard to tort claims arising from combatant activities (combat immunity). In the words of Sir Iain Glidewell, '… during the course of hostilities, no duty of care is owed by a member of the armed forces to civilians or their property…' (*Mulcahy v. Ministry of Defence* [37]). Even this immunity from liability has been interpreted broadly, but without resorting to a sweeping exemption:

> '[Combat immunity] must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement. But the real distinction does exist between active operations against the enemy and other activities of the combatant services in time of war' (*Bici v. Ministry of Defence* [38]).

That case (in 2004) concerned a claim in torts of Albanians living in Kosovo who were injured by gunfire from British troops who were in Kosovo as part of the NATO force sent there. The court held that the soldiers were negligent in that they violated the rules of engagement, and in the circumstances of the case, it rejected the state's contention that it should enjoy combat immunity. Thus we see that the arrangement in English law is also similar in essence to the arrangement provided in amendment 4. State immunity from liability for combatant activities is the broadest in Canadian law. Section 8 of the Crown Liability and Proceedings Act provides that:

> '… nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.'

This clause excludes the liability of the state in tort claims that arise from actions of the Canadian army that are done in order to defend Canada, whether in time of peace or of war, and whether it is actually a combatant activity or training for it. But even this broad arrangement does not give the state a sweeping immunity, and the state needs to show that the activity of the security forces that caused the damage was done in the defence of Canada. By contrast, in Israel the state is released from any burden of proof, and it is sufficient for it to show that the damage was caused in a conflict zone.

39. Section 5C has several exceptions. The second schedule of amendment 7 provides that the state's immunity under s. 5C shall not apply to damage that is caused as a result of a criminal act, damage that is caused to someone who is held by the State of Israel in custody, damage that is caused as a result of an act of the civil administration that was not done within the framework of the conflict, and damage that is caused as a result of a road accident in which a vehicle of the security forces is involved but not in the course of operational activities. Do these exceptions to the general arrangement, which are stipulated in s. 5C, save it from being disproportionate? Are they capable of changing the conclusion with regard to the *second* subtest? My answer to this question is no. These provisos and exceptions cannot constitute a less harmful measure to human rights. On the contrary, if the immunity from liability that is provided in amendment 7 does not apply to these cases, why does it apply in other cases of torts that do not derive from 'combatant activities'? If the liability for a 'road accident' in which a military vehicle is involved does not fall within the scope of the state's immunity from liability, why in other accidents that are not road accidents is liability excluded in a sweeping manner without allowing an individual check? It is true that there are difficulties in producing evidence. But the way to overcome this is not to exclude liability, but to make individual checks and determine burdens of proof and shorter limitation periods.

40. Does s. 5C of amendment 7 satisfy the *third* subtest of proportionality, the test of proportionality in the narrow sense? Is the benefit to the public interest from excluding the state's liability for the damage caused in a conflict zone commensurate with the loss caused to individuals who are injured as a result of tortious acts of the security forces? It should be noted that the question of proportionality in the narrow sense does not arise in all those cases where it transpires in the trial that no tortious act was committed at all, whether because there is no (conceptual or concrete) duty or because there is no carelessness or because there is no causal link or for any other reason (with regard to other torts). Moreover, the question of proportionality (in the narrow sense) does not arise at all with regard to a tortious act that was done as a result of 'combatant activities' of the security forces. The state is not liable in torts for this tortious act under the law that was in force before amendment 7. It follows that the question that we should ask ourselves is the following: is the benefit to the public interest that is afforded by excluding the state's liability for a tort that was not caused by 'combatant activities' commensurate with the damage that is caused to someone who is injured as a result of this tort? We asked the respondents once again what public benefit is realized by amendment 7 that was not realized under the law of torts that preceded it, including amendment 4. We sought to ascertain in what *additional* circumstances does amendment 7 give the state immunity from liability, as compared with the legal position that preceded the amendment, and how do these realize the legislative purpose and the public interest. The following was the answer that we were given:

> 'First, amendment 4 is an amendment that was prepared against the background of the Intifadeh that broke out in 1987. The draft of amendment 4 was tabled before the armed conflict broke out in the year 2000, and it was not intended at all to provide a solution to the unique nature of the armed conflict with the Palestinians. Indeed, amendment 4 also does not provide a solution to the armed conflict *de facto*. This is reflected in the fact that amendment 4 is a limited amendment. It deals mainly with the technical-procedural aspect of claims that arise in the territories. This amendment looks at the damage from within the law of torts. By contrast, amendment 7 is a substantial amendment.

> The purpose of amendment 7 is different from the purpose of amendment 4. The amendment seeks to exclude war damage from the scope of the law of torts, and not to adapt the law of torts to war damage. The purpose of the amendment is mainly ethical. It is completely different from the purpose of amendment 4. Therefore amendment 4 on its own is insufficient.
>
> Second, amendment 4 does not address claims of enemy aliens and claims of members of a terrorist organization at all, and therefore for this reason also amendment 4 is insufficient.'

In my opinion, these reasons are unconvincing. *First*, it was not made clear how the date of preparing the legislation is relevant to the question of the public benefit that the legislation realizes and why amendment 4 does not also provide a legal solution to the conflict that broke out in the year 2000. *Second*, the assertion that amendment 4 is technical-procedural is unacceptable. Amendment 4 made a major change to the definition of the term 'combatant activity.' The definition greatly broadened the interpretation given to this term in case law, and thereby significantly restricted the liability of the security forces operating in the conflict with the Palestinians. *Third*, we received no explanation of the significance of the distinction between 'excluding war damage from the scope of the law of torts' and adapting 'the law of torts to war damage.' With regard to the second reason given by the state, this relates solely to s. 5B of amendment 7.

41. The respondents also discussed the general benefit of amendment 7:

> 'The amendment restores the balance in the law of torts, and adapts it to the new circumstances of war. It enshrines ethical principles and solves practical difficulties in implementing the existing law. It enshrines the principle that in times of conflict each side is liable for its own damage, and it prevents the outcome, which currently exists, in which Israel is compelled to bear a double burden of claims for war damage suffered both by its own citizens and also by the inhabitants of the Palestinian Authority.'

These remarks also do not answer the question as to how exempting the state from liability for committing tortious acts that do not fall within

the scope of 'combatant activities,' as defined in amendment 4, realizes a public benefit from an ethical viewpoint. *Prima facie*, the immunity from liability for 'combatant activities' in its broad sense is sufficient in order to adapt the law of torts to a situation of war and in order to release the state from the burden of liability for claims arising from war damage. It would appear that the main benefit does not lie in realizing these purposes, but in releasing the state from conducting legal proceedings in order to determine the question of whether there were 'combatant activities.' Indeed, giving the state a sweeping immunity makes it unnecessary to conduct many proceedings in which the state is required to prove that the damage for which it is being sued was caused by combatant activities. But this benefit to the public interest — a benefit that lies mainly in a savings of administrative resources — is disproportionate in comparison to the damage to the various individuals, which was caused by non-combatant activities. This damage often involves great suffering. Injured parties suffer major injuries; they become seriously disabled; their ability to earn a livelihood is significantly impaired. All of these — and of course the loss of life — are far greater than the limited benefit that arises from releasing the state from liability and from the need to defend its position in court, both when the damage is caused by combatant activities and when it is caused by non-combatant activities.

42. Amendment 7 established a committee that was authorized '… to approve, beyond the letter of the law, in special circumstances, a payment to an applicant to whom subsection (a) applies and to determine the amount thereof…' (s. 5C(b)(1)). It was also provided that 'The Minister of Defence, in consultation with the Minister of Justice and with the approval of the Constitution, Law and Justice Committee of the Knesset, shall determine the preconditions for submitting an application to the committee, the manner of submitting the application, the work procedures of the committee and the criteria for making payments beyond the letter of the law' (s. 5C(b)(3)). Do the existence of this committee and its payments of compensation make the arrangements in s. 5C of amendment 7 proportionate? My answer is no. Naturally, where the disproportionality is based on the absence of a 'beyond the letter of the law' arrangement, the provision of such an arrangement can remove the disproportionality. But where the disproportionality in an arrangement arises from a disproportionate violation of human rights — and certainly when the rights that are

violated are fundamental and important ones and the violation thereof is serious and painful — the violation does not become proportionate by means of a payment beyond the letter of the law. Someone who has been injured by a non-combatant activity of the security forces is entitled to compensation by law, and not to compensation beyond the letter of the law. We should give him justice, not charity. Of course, the state would act meritoriously if it considered making payments beyond the letter of the law to someone who is seriously injured as a result of 'combatant activities' of the security forces, in circumstances where the state thinks that a charitable payment is justified (cf. the remarks of Vice-President M. Cheshin in *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 126 of his opinion).

The result is that we deny the petitions in so far as the constitutionality of s. 5B of amendment 7 is concerned. We grant the petitions and make the order *nisi* absolute, in so far as the constitutionally of s. 5C of amendment 7 is concerned. This section is void.

**President D. Beinisch**

I agree with the opinion of President Emeritus A. Barak.

**Justice A. Procaccia**

I agree with the opinion of my colleague, President Emeritus A. Barak.

**Justice E.E. Levy**

I agree with the opinion of the honourable President Emeritus A. Barak.

**Justice M. Naor**

I agree with the opinion of my colleague, President Emeritus Barak.

**Justice S. Joubran**

I agree with the opinion of my colleague, President Emeritus A. Barak.

**Justice E. Hayut**

I agree with the opinion of my colleague, President Emeritus A. Barak.

**Justice D. Cheshin**

I agree with the opinion of my colleague, President Emeritus Barak.

**Justice A. Grunis**

1. I agree with the outcome in the opinion of my colleague, President Emeritus A. Barak. My agreement with the outcome derives mainly from the fact that the respondents did not address, and certainly did not address satisfactorily, two main questions: first, what — under the rules of private international law — is the substantive law that governs claims filed in Israel against the state and its agencies for acts outside Israel? Second, do the Basic Laws have extra-territorial application? It should be noted that the respondents raised certain arguments that my colleague, President Emeritus A. Barak, did not address, even though I am of the opinion that they should be mentioned with regard to these two questions. I am referring to various arrangements in English and American law, which I shall address below, that apply to factual situations that are relevant to our case and that may prevent the courts from giving relief.

2. One of the first questions that are relevant to an action filed in an Israeli court with regard to an incident that occurred outside the borders of Israel concerns the substantive law that should be applied. This question also arises in every case of a tort action that is brought before an Israeli court with regard to an incident that occurred in Judaea and Samaria. The cases under discussion can be of many different kinds. Thus it is possible that an Israeli citizen who works for an Israeli employer in an Israeli settlement in Samaria is injured in a work accident and files an action on account of this in the court in Israel. A small change in the facts presents a case in which the worker who is injured is a Palestinian. Another possibility, which brings us closer to the cases addressed in the petitions, concerns a claim filed by a Palestinian resident of Samaria on the grounds that he was injured by the gunfire of IDF soldiers. In each of these examples, the court is supposed to consider the question of which law will apply to the claim under the rules of private international law. My colleague, the president emeritus, says

that under the conflict of law rules that are practised in Israeli law, the Israeli law of torts applies to actions of the security forces in the territory of Judaea and Samaria. In my opinion, the answer to this question is not so clear. CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19] (an application for a further hearing was denied: CFH 9524/04 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [33]) comprehensively considered the position of Israeli private international law with regard to a tortious act that took place in the aforesaid territory. It was held that the rule is that the law of the place where the tort was committed (*lex loci delicti commissi*) applies. Therefore in principle Jordanian law should apply. The aforesaid rule is subject to a rare exception, according to which the court should apply the law of the country that has the closest connection with the tort (*Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19], at pp. 374-375, 377). *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19] concerned an action of a Palestinian woman that was filed in a court in Israel. The plaintiff was injured in a work accident, while working at a plant of an Israeli company that was situated in an Israeli town in Samaria. The Israeli aspects of the case — an Israeli employer, an Israeli plant that was situated in an Israeli town in the territories — led the court to say that 'the exception begs to be applied' (*ibid*. [19], at p. 378). Therefore in that case it was held that the Israeli law of torts would apply, rather than the Jordanian law. Indeed, as my colleague President Emeritus A. Barak says, claims of Palestinians against the state for alleged tortious acts of the security forces have been tried for years under Israeli law. It is to be wondered why in those cases the state did not raise the argument that the substantive law that should apply, under the conflict of law rules, is the law of the place where the tort was committed. This argument was also not raised in the petitions before us. It is possible that a determination that Jordanian law applies would make it unnecessary to consider the constitutional question. This would be the case if Jordanian law does not give rise to a cause of action in the situations that we are considering, as a result, for example, of an 'act of state' doctrine (paras. 6-7 below). If there was no right of action until amendment 7 of the Torts (State Liability) Law, 5712-1952 (hereafter — the Torts Law), under the law of the place where the tort was committed, it would not be possible to argue that the amendment denied an existing right and therefore no constitutional question would arise. Nonetheless, we should note that it would appear that the premise for changing the

Torts Law in amendment 4 and amendment 7 was that the law of torts that applies with regard to claims concerning the activities of IDF soldiers in the territories is the Israeli law.

3. The other main question that should be considered is the question of the application of the Basic Laws — in this case the Basic Law: Human Dignity and Liberty — to events that occur outside the borders of Israel. According to the approach of my colleague President Emeritus A. Barak, there is no need to consider the aforesaid question. According to his position, the rights of Palestinians who are inhabitants of the territories 'are rights that are granted to them in Israel' and amendment 7 of the Torts Law violates those rights. And why are these rights that are granted to them in Israel? It is because under Israeli private international law they may, in certain circumstances, sue in Israel under the Israeli law of torts for tortious acts that were committed outside Israel (para. 23 of the opinion). We have already seen (para. 2 *supra*) that the conflict of law rules in Israel provide that the law of the place where the tort was committed should apply. When we are dealing with the territory of Judaea and Samaria, the significance of this is that we should refer to Jordanian law. Indeed, the aforesaid rule is subject to an exception, as was indeed held in *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19]. For the purpose of considering this question I am prepared to assume that the conflict of law rules in Israel lead to the application of the Israeli law of torts with regard to an incident in which a Palestinian is injured as a result of shooting by IDF soldiers. According to the approach of my colleague the president emeritus, 'The rights in Israel under the law of torts were taken away from the inhabitants of the territories for tortious acts done by the security forces in a conflict zone. The effect of amendment 7 is therefore in Israel. It violates rights that the injured parties from the territories had in Israel' (para. 23 of his opinion). This leads my colleague to conclude that there is no need to consider the question of the application of the Basic Law outside the borders of Israel. I cannot agree with this.

Let us remember that we are dealing with events that took place outside the borders of Israel. Even if according to the conflict of law rules the Israeli law of torts applies to those events, this does not change the place where the tort was committed. Applying the Israeli law of torts does not create a fiction whereby the event occurred in Israel. The mere fact that the matter is tried before an Israeli court, under Israeli law, cannot lead to the conclusion that the rights are given to the injured

parties in Israel. If you say this, then you arrive at a far-reaching conclusion that the Basic Laws apply to every proceeding that takes place in an Israeli court where the conflict of law rules determine that Israeli law applies. No connection should be made between the rules of Israeli private international law and the scope of application of the Basic Laws. Therefore it would appear that we need first to decide the question of the extraterritorial application of the Basic Law: Human Dignity and Liberty. However, since the respondents stated that in their opinion no decision on this question is required, there is no reason to address it in the present case. It would appear that it will be necessary to address the issue in the future, if an argument is presented before the courts.

4. Ultimately we are determining that s. 5C of the Torts Law is unconstitutional. By contrast, we are not deciding the question of the constitutionality of s. 5B of the law. It can be assumed that this question will be brought before the courts again. In the opinion of my colleague President Emeritus A. Barak, section 5B of the Torts Law applies, 'according to its wording, to tortious acts done in Israel.' This leads to his conclusion that the question of the application of the Basic Law does not arise. I would point out that a careful reading of section 5B shows that it is indeed possible that it will also apply to tortious acts committed by the state and those acting on its behalf outside Israel. Therefore it is possible that in the future it will be necessary to consider the question of the application of the Basic Laws with regard to the aforesaid section as well.

5. In consequence of the finding that the Basic Law applies in this case, my colleague goes on to consider the question whether amendment 7 of the Torts Law violates a right that is included in the Basic Law. His conclusion is that such a violation does indeed exist with regard to the right to life, liberty, dignity, privacy and property. My colleague adds that 'Denying or restricting liability in torts undermines the protection of these rights' (para. 25). I am prepared to agree that in the present case a basic right has been violated. This is because of the broad application of s. 5C of the Torts Law. Notwithstanding, I cannot agree that any restriction or denial of liability in torts will constitute a violation of a constitutional right, just as I cannot accept that every new criminal norm or stricter penalty constitutes a violation of a constitutional right (CrimA 4424/98 *Silgado v. State of Israel* [34], at pp. 553-561 (*per* Justice T. Strasberg-Cohen); see also para. 2 of my opinion in HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26]).

6. The respondents mentioned in their arguments arrangements that exist in foreign law, even though they did not go so far as to claim that those arrangements constitute in themselves a response to the petitions. Thus the respondents raised an important doctrine that exists in English law, the act of state doctrine. According to this doctrine, certain acts of the state and its agents may not be tried in the English courts, if they were committed outside the borders of the state with regard to persons who are not British nationals. These also include acts of a violent nature that are committed by the state and its agents (see H.W.R. Wade & C.F. Forsyth, *Administrative Law* (ninth edition, 2004), at pp. 838-840; O. Hood Phillips & Jackson, *Constitutional & Administrative Law* (eighth edition, 2001), at pp. 320-326; Halsbury's Laws of England, vol. 18(2) (fourth edition, 2000), at pp. 452-455; see also CA 5964/92 *Bani Ouda v. State of Israel* [1], at p. 7, and A. Yaakov, 'Immunity under Fire: State Immunity for Damage Caused as a Result of "Combatant Activity",' 33(1) *Hebrew Univ. L. Rev. (Mishpatim)* 107 (2003), at pp. 124-125 and the references cited there). The scope of the doctrine's application is unclear. It also appears that there is now a trend to limit its application (Yaakov, 'Immunity under Fire,' *supra*, at p. 194). In American law there is a similar rule to that of an act of state, by virtue of a specific provision of statute. Section 2680(k) of the Federal Tort Claims Act provides that the government of the United States shall not be liable 'for any claim arising in a foreign country.' The American rule, like the English doctrine, is not limited to acts carried out by military forces nor is it limited to combatant activities. Thus the United States Supreme Court has held that it is not possible to file a claim in torts in an American court against the United States government and agents of the Drug Enforcement Administration with regard to their liability for the abduction of a Mexican citizen from Mexico to the United States (*Sosa v. Alvarez-Machain* [36]).

7. The act of state doctrine is part of English common law. Therefore it was *prima facie* incorporated into Israeli law. One might argue that even if it was incorporated, it was abolished by the enactment of the Torts Law. It is well known that this law was intended to replace the common law rule that the state has immunity in torts. It would appear, without making a firm determination, that the enactment of the law did not abolish the act of state doctrine, just as that doctrine was not abolished in England by the Crown Proceedings Act 1947. It should be remembered that the doctrine applies to acts that are carried out outside

the jurisdiction of the state. Indeed, s. 5A of the Torts Law expressly addresses the territories, i.e., Judaea, Samaria and the Gaza Strip, and therefore it seems that the aforesaid doctrine does not apply in the territories. We should point out, in passing, that the aforesaid s. 5A was adopted when Israel was in control of Gaza. It may be asked whether there is any need today for the aforesaid provision following the withdrawal from Gaza, if the act of state doctrine applies to that area. In any case, it is possible that the doctrine will apply in other places outside the state, as for example with regard to the combat activities that took place last summer in Lebanon or acts of Israel's secret services outside the state. It should also be noted that it is possible that a hint of the act of state doctrine may be found in the provisions of s. 9A of the Torts Law, which was adopted in amendment 7. The section provides that 'Nothing in the provisions of sections 5B and 5C shall derogate from any defence, immunity or exemption given to the State of Israel under any law.' We should add that the act of state doctrine may apply in addition to the statutory rule that exempts the state from liability in torts 'for an act that was done by a combatant activity of the Israel Defence Forces' (s. 5 of the Torts Law). Even if the act of state doctrine has no relevance to the matters that arose in the petitions, it is possible that it will be important in future cases.

8. Since the respondents did not address central questions, and since in practice they agreed, if only by implication, that the tort actions under discussion are subject to Israeli law and that there is no need to consider in this case the extraterritorial application of the Basic Law, I can only agree with the outcome proposed by my colleague President Emeritus A. Barak. It would appear that the time will come for deciding the aforesaid questions.

Petition granted.
21 Kislev 5767.
12 December 2006.

## Public Committee against Torture in Israel v. Government of Israel

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### Synopsis

Following the outbreak of the Second Intifadeh in the year 2000, in which more than one thousand Israelis were killed and many thousands more injured, the Israeli government has employed many measures in its fight against the Palestinian terrorist organizations. One of these measures is the policy of 'targeted killings,' in which the Israel Defence Forces target persons who plan, order or carry out terrorist attacks against the State of Israel. The policy seeks to prevent the perpetration of terrorist attacks before they are committed. Sometimes, however, innocent bystanders are killed or injured in these targeted killings.

The petitioners in this case are human rights organizations. They petitioned the court to declare targeted killings of terrorists unlawful *in all cases*. They claimed that targeted killings unlawfully violate the rights of both the targets and innocent bystanders. According to the petitioners, the terrorists should be treated as criminals and should be arrested and brought to trial within the framework of the criminal law. The petitioners further argued that targeted killings contravene the laws of war. These laws recognize only two categories of person — combatants and civilians. Combatants are legitimate targets for attack, but they enjoy a right of immunity from indictment and are entitled to a status of prisoners of war. Citizens are not a legitimate target for attacks. The petitioners claimed that there is no intermediate status of 'unlawful combatants.' The petitioners pointed out that the state refuses to give terrorists the rights of combatants under international law, such as the right to a status of a prisoner of war. Thus the state wishes to treat terrorists according to the worse of both worlds: as combatants, to justify killing them, and as civilians, to bring them to trial. The petitioners argued that terrorists should be regarded as civilians in all respects.

The petitioners accepted that a civilian who takes part in combat may lose some of the protections given to civilians in times of war, but only, in their

opinion, when he takes a direct part in the combat activities, and only for as long as this direct participation lasts. Therefore they argue that when a terrorist is not actively taking part in hostilities against the State of Israel, he may not be targeted.

The Supreme Court accepted the petitioners' position that international law recognizes only two classes of persons — 'combatants' and 'civilians.' It held that a third category of 'unlawful combatants' has not yet been recognized by international law. Since terrorists do not satisfy the definition of 'combatants' in international law (because, for example, they do not observe the laws and customs of war), they should be classified as civilians. Under article 51 of the First Additional Protocol to the 1977 Geneva Conventions, civilians may not be targeted by armed forces, but this is subject to a proviso in article 51(3) that civilians may not be attacked 'unless and for such time as they take a direct part in hostilities.' Therefore terrorists who take a direct part in hostilities may be targeted by armed forces, 'for such time' as they are taking a direct part in the hostilities.

With regard to the requirement that civilians may only be targeted 'for such time' as they take part in hostilities, the court held that a civilian who has taken a direct part in hostilities on a single occasion or sporadically should not be attacked. The court held that any targeting of a civilian needs to satisfy four conditions: (1) there is reliable information that the civilian is taking a direct part in hostilities; (2) a civilian should not be targeted if it is possible to arrest him. A country governed by the rule of law resorts to the use of trials rather than the use of force. Even if arrest is not always possible, it should always be considered; (3) after carrying out an attack on a civilian who is suspected of being directly involved in hostilities at the time, 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; (4) if the attack is not only on the civilian who is taking a direct part in the hostilities but also on innocent civilians who are in the vicinity, the harm to them is collateral damage. This harm should satisfy the test of proportionality.

The Supreme Court also discussed the case of persons who recruit terrorists to take a direct part in the hostilities and persons who send them

to carry out hostilities. The court held that it is not only the person who carries out the physical attack who takes a 'direct' part in hostilities. Persons who plan attacks or who order others to carry them out cannot be said to take merely an indirect part in the hostilities. Their participation is direct.

The Supreme Court therefore reached the conclusion that it could not hold, as the petitioners requested, that targeted killings are unlawful *in all cases*, just as it could not hold that they are lawful *in all cases*. Each case needs to be examined on its merits.

HCJ 769/02

**1. Public Committee against Torture in Israel**
**2. LAW — Palestinian Society for the Protection of Human Rights and the Environment**

**v.**

**1. Government of Israel**
**2. Prime Minister of Israel**
**3. Minister of Defence**
**4. Israel Defence Forces**
**5. Chief of General Staff**
**6. Shurat HaDin — Israel Law Centre and 24 others**

The Supreme Court sitting as the High Court of Justice
[14 December 2006]
*Before President Emeritus A. Barak, President D. Beinisch and Vice-President E. Rivlin*

Petition to the Supreme Court sitting as the High Court of Justice.

**Facts:** In the armed conflict between the State of Israel and the terrorist organizations operating in the territories of Judaea, Samaria and the Gaza Strip the government of the State of Israel decided to adopt a policy of 'targeted killings' against terrorists. The petitioners asked the court to declare that this policy was illegal under international law and to order the respondents to desist from using the policy.

**Held:** Customary international law distinguishes between 'combatants' and 'civilians.' There is insufficient information for saying that a third category of 'unlawful combatants' has been recognized at this time by customary international law. Since terrorists do not satisfy the requirements of the definition of 'combatants' in international law, because *inter alia* they do not observe the laws and customs of war, they must be classified as civilians. Under article 51 of the First Additional Protocol to the 1977 Geneva Conventions, civilians may not in principle be targeted by armed forces. However, art. 51(3) of the First Protocol states that 'Civilians shall enjoy the protection afforded by this

section, unless and for such time as they take a direct part in hostilities.' Therefore terrorists may be targeted by armed forces if 'they take a direct part in hostilities.' The targeting of terrorists by armed forces must satisfy the requirements of art. 51(3); the terrorists must 'take a direct part in hostilities' and the targeting of terrorists may be carried out 'for such time' as they do so. The principle of proportionality in carrying out these attacks should also be observed.

It cannot therefore be said that 'targeted killings' are prohibited by customary international law in every case, just as it cannot be said that they are permitted by customary international law in every case. Each case should be examined prospectively by the military authorities and retrospectively in an independent investigation, and the findings should be based on the merits of the specific case. These findings will be subject to the scrutiny of the court.

Petition denied.

**Legislation cited:**

Basic Law: Human Dignity and Liberty, s. 8.
Basic Law: the Army, s. 1.
Basic Law: the Government, s. 40(b).
Government and Justice Arrangements Ordinance, 5748-1948, s. 18.
Internment of Unlawful Combatants, 5762-2002, s. 2.
Penal Law, 5737-1977, s. 34M(1).

**Israeli Supreme Court cases cited:**

[1] HCJ 5872/01 *Barakeh v. Prime Minister* [2002] IsrSC 56(3) 1.
[2] HCJ 9255/00 *Al-Saka v. State of Israel* (unreported).
[3] HCJ 2461/01 *Canaan v. IDF Commander in Judaea and Samaria* (unreported).
[4] HCJ 9293/01 *Barakeh v. Minister of Defence* [2002] IsrSC 56(2) 509.
[5] HCJ 3114/02 *Barakeh v. Minister of Defence* [2002] IsrSC 56(3) 11; **[2002-3] IsrLR 39**.
[6] HCJ 3451/02 *Almadani v. Minister of Defence* [2002] IsrSC 56(3) 30; **[2002-3] IsrLR 47**.
[7] HCJ 8172/02 *Ibrahim v. IDF Commander in West Bank (unreported)*.
[8] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.
[9] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.
[10] HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [2004] IsrSC 58(5) 385; **[2004] IsrLR 200**.

[11] HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(4) 785.
[12] CrimA 174/54 *Stampeper v. Attorney-General* [1956] IsrSC 10 5.
[13] CrimA 336/61 *Eichman v. Attorney-General* [1963] IsrSC 17(3) 2033.
[14] LCA 7092/94 *Her Majesty the Queen in Right of Canada v. Edelson* [1997] IsrSC 51(1) 625; **[1997] IsrLR 403**.
[15] HCJ 785/87 *Afu v. IDF Commander in Gaza Strip* [1988] IsrSC 42(2) 4.
[16] HCJ 69/81 *Abu Ita v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(2) 197.
[17] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
[18] HCJ 698/80 *Kawasma v. Minister of Defence* [1981] IsrSC 35(1) 617.
[19] HCJ 3278/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [2003] IsrSC 57(1) 385; **[2002-3] IsrLR 123**.
[20] HCJ 10356/02 *Hass v. IDF Commander in West Bank* [2004] IsrSC 58(3) 443; **[2004] IsrLR 53**.
[21] HCJ 72/86 *Zaloom v. IDF Commander in Judaea and Samaria* [1987] IsrSC 41(1) 528.
[22] HCJ 5591/02 *Yassin v. Commander of Ketziot Military Camp* [2003] IsrSC 57(1) 403.
[23] HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(2) 349; **[2002-3] IsrLR 173**.
[24] HCJ 1890/03 *Bethlehem Municipality v. State of Israel* [2005] IsrSC 59(4) 736; **[2005] (1) IsrLR 98**.
[25] HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* **[2005] (2) IsrLR 206**.
[26] HCJ 2967/00 *Arad v. Knesset* [2000] IsrSC 54(2) 188.
[27] HCJ 9593/04 *Morar v. IDF Commander in Judaea and Samaria* **[2006] (2) IsrLR 56**.
[28] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.
[29] HCJ 2847/03 *Alauna v. IDF Commander in Judaea and Samaria* (unreported).
[30] HCJ 9252/00 *El-Saka v. State of Israel* (unreported).
[31] HCJ 4219/02 *Gussin v. IDF Commander in Gaza Strip* [2002] IsrSC 56(4) 608.
[32] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* **[2006] (1) IsrLR 443**.
[33] HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* **[2006] (2) IsrLR 352**.

[34] HCJ 910/86 *Ressler v. Minister of Defence* [1988] IsrSC 42(2) 441; **IsrSJ 10 1**.
[35] HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [1991] IsrSC 55(4) 800.
[36] HCJ 9056/00 *Kleiner v. Knesset Speaker* [2001] IsrSC 55(4) 703.
[37] HCJ 652/81 *Sarid v. Knesset Speaker* [1982] IsrSC 36(2) 197; **IsrSJ 8 52**.
[38] HCJ 73/85 *Kach Faction v. Knesset Speaker* [1985] IsrSC 39(3) 141.
[39] HCJ 742/84 *Kahane v. Knesset Speaker* [1985] IsrSC 39(4) 85.
[40] HCJ 606/78 *Awib v. Minister of Defence* [1979] IsrSC 33(2) 113.
[41] HCJ 390/79 *Dawikat v. Government of Israel* [1980] IsrSC 34(1) 1.
[42] HCJ 4481/91 *Bargil v. Government of Israel* [1993] IsrSC 47(4) 210; **[1992-4] IsrLR 158**.
[43] HCJ 2117/02 *Physicians for Human Rights v. IDF Commander in West Bank* [2002] IsrSC 53(3) 26.
[44] HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* (not yet reported).
[45] HCJ 253/88 *Sajadia v. Minister of Defence* [1988] IsrSC 42(3) 801.
[46] HCJ 306/81 *Flatto-Sharon v. Knesset Committee* [1981] IsrSC 35(4) 118.
[47] HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [1993] IsrSC 47(1) 749.
[48] HCJ 3648/97 *Stamka v. Minister of Interior* [1999] IsrSC 53(2) 728, at p. 805.
[49] HCJ 399/85 *Kahane v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255.
[50] HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [1990] IsrSC 44(1) 536.
[51] HCJ 258/79 *Amira v. Minister of Defence* [1980] IsrSC 34(1) 90.
[52] HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [1995] IsrSC 49(5) 1.
[53] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.
[54] HCJ 168/91 *Morcus v. Minister of Defence* [1991] IsrSC 45(1) 467.
[55] HCJ 320/80 *Kawasma v. Minister of Defence* [1981] IsrSC 35(3) 113.
[56] HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [1996] IsrSC 50(1) 353.
[57] HCJFH 2161/96 *Sharif v. Home Front Commander* [1996] IsrSC 50(4) 485.
[58] HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [1999] IsrSC 53(4) 817; **[1998-9] IsrLR 567**.
[59] HCJFH 10739 *Minister of Defence v. Adalah Legal Centre for Arab Minority Rights in Israel* (not yet reported).

**Israeli District Court cases cited:**
[60] SFC 1158/02 (TA) *State of Israel v. Barghouti* (not yet reported).

**Israeli Military Tribunal cases cited:**
[61] *Military Prosecutor v. Kassem*, 42 *International Law Reports* 470 (1971).

**American cases cited:**
[62] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
[63] *Ex Parte Quirin*, 317 U.S. 1 (1942).
[64] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

**Canadian cases cited:**
[65] Application under s. 83.28 of the *Criminal Code* (Re), [2004] 2 S.C.R. 248.

**English cases cited:**
[66] *Mohamed Ali v. Public Prosecutor* [1969] 1 A.C. 430 (PC).

**European Court of Human Rights cases cited:**
[67] *Banković v. Belgium*, 41 ILM 517 (2002).
[68] *Ergi v. Turkey*, 32 E.H.R.R. 388 (2001).
[69] *McCann v. United Kingdom*, 21 E.H.R.R. 97 (1995).
[70] *McKerr v. United Kingdom*, 34 E.H.R.R. 553 (2001).

**Inter-American Court of Human Rights cases cited:**
[71] *Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H. R. (series C, no. 4) (1988); 28 ILM 291 (1989).

**International Criminal Tribunal for Rwanda cases cited:**
[72] *Prosecutor v. Akayesu*, case no. ICTR-96-4-T (1998).

**International Criminal Tribunal for the former Yugoslavia cases cited:**
[73] *Prosecutor v. Tadić*, ICTY case no. IT-94-1.
[74] *Prosecutor v. Blaškić*, ICTY case IT-95-14-T (2000).
[75] *Prosecutor v. Strugar*, ICTY case IT-01-42 (2005)
[76] *Prosecutor v. Kupreškić*, ICTY case no. IT-95-16 (2000).

For the petitioners — A. Feldman, M. Sfard.
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JUDGMENT

**President Emeritus A. Barak**

The Government of Israel has adopted a policy of preventative attacks that cause the death of terrorists in Judaea, Samaria and the Gaza Strip. It brings about the death of those terrorists who plan, dispatch or carry out terror attacks in Israel and in the territories of Judaea, Samaria and the Gaza Strip, against both civilians and soldiers. Sometimes these attacks also harm innocent civilians. Does the state thereby act unlawfully? This is the question that is before us.

*(1) Factual background*

1. In September 2000 the second Intifadeh broke out. A fierce barrage of terrorism was directed against the State of Israel and against Israelis wherever they were. The barrage of terror does not distinguish between combatants and civilians, or between women, men and children. The terror attacks are taking place both in the territories of Judaea, Samaria and the Gaza Strip and in the State of Israel. They target civilian centres, shopping centres and marketplaces, cafés and restaurants. In the last five years thousands of acts of terrorism have been committed against Israel. In the course of these, more than one thousand Israelis have been killed. Thousands of Israeli civilians have been injured. Thousands of Palestinians have also been killed and injured during this period.

2. In its war against terrorism, the State of Israel has adopted various measures. As a part of the defence activity that is intended to deal with terrorist attacks, the state employs what it calls 'the targeted killing policy.' By means of this policy, the security forces operate in order to kill operatives in terrorist organizations who are involved in the planning, dispatching or commission of terror attacks against Israel. During the second Intifadeh, preventative attacks have been carried out throughout Judaea, Samaria and the Gaza Strip. According to figures provided by the petitioners, from the time when these operations began until the end of 2005 almost three hundred operatives in terrorist organizations were killed in these attacks. More than thirty targeted killing attempts failed.

Approximately one hundred and fifty civilians who were near the location of the targets of these killings were killed in these operations. Hundreds of others were injured. The targeted killings policy is the focus of this petition.

*(2) The petitioners' arguments*

3. The petitioners' position is that the targeted killings policy is clearly illegal, contrary to international law, Israeli law and basic principles of human morality. It violates the human rights both of the targets of the attacks and of innocent bystanders who happen to be in the area of the attack, as these rights are recognized in Israeli and international law.

4. The petitioners' position is that the legal framework that governs the armed conflict between Israel and the terrorist organizations is not the laws of war but the laws that concern the enforcement of law and order in an occupied territory. The petitioners' position in this regard underwent changes in the course of the petition, of which some were the result of changes that occurred in the respondents' position. Originally it was argued that the laws of war mainly concern international conflicts, whereas the armed struggle between Israel and the Palestinians does not fall into the category of an international conflict. Therefore it is not the laws of war that apply to this dispute but the laws of policing and law enforcement. In their closing statement (of 1 September 2004) the petitioners agreed with the position that in our case we are dealing with an international conflict, but even in this framework there is no place for military operations that are governed by the laws of war. This is because Israel's right to carry out military operations of self-defence under article 51 of the United Nations Charter of 1945 does not apply to the dispute under discussion. The right of self-defence is given to a state in response to an armed attack of another state. The territories are subject to a belligerent occupation of the State of Israel, and therefore article 51 does not apply at all to our case. Just as the state is unable to claim self-defence against its own population, so too it cannot claim self-defence against inhabitants who are subject to the occupation of its army. Against an occupied civilian population there is no right of self-defence but only a right to enforce the law in accordance with the laws of belligerent occupation. Therefore our case is subject to the laws of policing and law enforcement within the framework of the laws of occupation, and not the laws of war. In this framework, there is no place for killing suspects

without due process, and without arrest and trial. The targeted killings violate the basic right to life and this violation has no defence or justification. The prohibition of arbitrary killing that is not required for self-defence is enshrined in the customary norms of international law. A prohibition of this kind derives also from the duties of the occupying power in an occupied territory vis-à-vis the occupied population, which constitutes a protected population under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, and also according to the two additional protocols to the convention that were signed in 1977. All these laws reflect norms of customary international law and they bind Israel. According to the petitioners, the practice of states that fight terrorism indicates unequivocally an international custom according to which members of terrorist organizations are treated as criminals, and the criminal law, sometimes with the addition of special emergency powers, is what governs the methods of combating terrorism. The petitioner state as examples for this purpose the British struggle against the Irish terrorist organizations, the Spanish struggle against the Basque terrorist organizations, the German struggle against the terrorist organizations, the Italian struggle against the Red Brigades organization and the Turkish struggle against the Kurdish terrorist organizations.

5. In the alternative, the petitioners claim that the targeted killing policy violates the rules of international law even if we apply the laws of war to the armed conflict between Israel and the Palestinians. These laws recognize only two statuses of persons — combatants and civilians. Combatants are legitimate targets for attack, but they also enjoy the rights that are granted in international law to combatants, including immunity against indictment and the right to a status of prisoners of war. Citizens enjoy protections and rights that are granted in international law to civilians in times of war. *Inter alia*, they are not a legitimate target for attacks. The status of civilians and the protection afforded to them are enshrined in common article 3 of the Geneva Conventions. This is a basic principle of customary international law. The petitioners' position is that this classification of combatants and civilians is an exhaustive classification. There is no intermediate status and there is no third category of 'unlawful combatants.' Every person who is not a combatant and every person with regard to whom there is a doubt as to whether he is a combatant automatically has the status of a civilian and is entitled to the rights and protections given to civilians in times of war. Even a

civilian who collaborates in combat activities is not an 'unlawful combatant,' but only a criminal civilian, and therefore he retains his status as a civilian. The petitioners therefore reject the state's position that the terrorist organizations' operatives should be regarded as unlawful combatants. The petitioners discuss how the state itself refuses to give these operatives the rights and the defences given in international law to combatants, such as the right to a status of a prisoner of war. The result is that the state wishes to treat them according to the worse of both worlds: as combatants, to justify killing them, and as civilians, for the purpose of arresting them and bringing them to trial. This result is unacceptable. The operatives of the terrorist organizations, even if they take part in combat activities, are not thereby excluded from the application of the rules of international law. The petitioners' position is therefore that the operatives of the terrorist organizations should be regarded as having the status of civilians.

6. The petitioners state that a civilian who takes part in combat may lose some of the protections given to civilians in times of war. But this is only when he takes a direct part in the combat activities, and only as long as this direct participation lasts. These two conditions are provided in article 51(3) of the First Additional Protocol to the 1977 Geneva Conventions (hereafter — the First Protocol). This article, with all of its conditions, reflects, according to the petitioners, a customary rule of international law. These conditions were adopted in international case law, and they are mentioned in additional international documents, as well as in the army manuals of most Western countries. In order to preserve the clear distinction between combatants and civilians, these conditions are given a narrow and precise interpretation. According to this interpretation, a civilian will lose his immunity against attack only when he actually takes a direct part in hostilities, and only during the time when this direct participation is continuing. Thus, for example, from the moment that the civilian returns home, and even if he intends to take part once again in hostilities at a later date, he is not a legitimate target for attack, although he can be arrested and brought to trial for his participation in the combat activities. The petitioners insist that the targeted killing policy, as it is implemented in practice and as the respondents expressly state, goes beyond these narrow limits. It targets civilians even when they are not participating directly in combat or hostile acts. The targeted killings are carried out in circumstances that do not satisfy the immediate and essential conditions which alone justify an

attack on civilians. Therefore we are dealing with an illegal policy that constitutes a prohibited attack on civilian targets.

7. The petitioners attached an expert opinion from Prof. Cassese, an expert in international law, who was the first president of the International Criminal Tribunal for crimes committed in the former Yugoslavia. In his opinion Prof. Cassese discusses the fundamental distinction in international law between civilians and combatants, which is enshrined, *inter alia*, in the Regulations Concerning the Laws and Customs of War on Land, which are appended to the fourth Hague Convention of 1907. Someone who does not fall within the definition of combatant is automatically a civilian. There is no third category of 'unlawful combatants.' Therefore persons who participate in various hostile acts without satisfying the definition of combatants have the status of civilians and are entitled to the protections granted to them by the laws of war. A civilian who participates in hostilities loses these protections and may become a legitimate target for an attack. But this is only if he is taking a direct part in hostilities, and only if the attack against him is carried out during the period of time when he is actually taking a direct part in the hostilities. This rule is enshrined in article 51(3) of the First Protocol, but it reflects a rule of customary international law. Prof. Cassese's position is that the expressions 'direct part' and 'period of time' should be interpreted strictly and narrowly. A civilian who takes part in hostilities loses the protections given to civilians only during the period of time when he actually takes part directly in hostilities, such as when he is shooting or laying a mine. Even a citizen who is making preparations to carry out hostile activity may be considered someone who is taking a direct part in hostile acts, provided that he is openly carrying a weapon. When he puts down his weapon, or when he is not carrying out hostilities he ceases to be a legitimate target for an attack. Therefore someone who only provides assistance in planning a hostile act, or someone who trains or sends others to carry out hostilities is not a legitimate target for an attack. Indirect assistance of this kind to hostile activities may expose the citizen to arrest and trial, but it does not make him a legitimate target for an attack.

8. The petitioners' position is that the targeted killing policy, as it is implemented in practice, also violates the requirements of proportionality that constitute a part of both Israeli law and customary international law. The principle of proportionality is a central principle of the laws of war. It prohibits attacking even legitimate targets if the

attack is expected to result in an excessively serious attack on the lives of innocent persons relative to the military advantage of the operation. This principle is enshrined in article 51(5)(B) of the First Protocol, which is a customary rule of war. The targeted killing policy does not satisfy this condition. Its perpetrators are aware that it may, sometimes almost certainly, result in death and injury to innocents. And this is indeed what happens time after time. Because of the *modus operandi* adopted within the framework of this policy, many of the preventative killing attempts end in the death and injury of innocent civilians. Thus, for example, on 22 July 2002 a bomb weighing 1,000 kg was dropped on the home of Salah Shehada, a wanted person, in a dense residential area in the city of Gaza. The bomb and the shockwave caused the death of the wanted person, his wife, his daughter and also twelve additional persons who lived nearby. Dozens of people were injured. This case, as well as other cases, illustrates damage caused by the targeted killing policy, which does not distinguish between terrorists and innocents. The petitioners' position is, therefore, that the targeted killing policy does not satisfy the test of proportionality in the narrow sense. Moreover, according to the petitioners the policy also does not satisfy the second test of proportionality, which concerns the least harmful measure. According to the petitioners, the respondents make use of the targeted killing measure on a frequent basis, including when there are also other measures available for apprehending the persons suspected of terrorist activity. The petitioners point to the fact that during the second Intifadeh the security forces have made hundreds of arrests in those parts of Judaea, Samaria and the Gaza Strip that are under the exclusive control of the Palestinian Authority. These figures show that the security forces have the operational ability to arrest suspects even in areas under the exclusive control of the Palestinian Authority and to bring them to arrest and interrogation facilities. In these circumstances, there is no justification for making use of targeted killings. Finally, the petitioners discuss how the targeted killings policy is not immune from serious mistakes. The targets of the killings are not given an opportunity to protest their innocence. The targeted killing policy works in a secret world where the public eye does not see the evidence on which basis the targets are chosen for the killings. There is no judicial review before or after the targeted killing operations. At least in one case there is a concern that a mistake of identity was made and a man who had a similar name to a wanted person and lived in the same village was killed.

*(3) The respondents' reply*

9. In their preliminary reply to the petition, the respondents stated that a petition that is identical to the petition before us, both in substance and with regard to the arguments that were raised in it, was considered and denied by the Supreme Court (HCJ 5872/01 *Barakeh v. Prime Minister* [1], judgment of 29 January 2002). In this judgment it was held that 'the choice of the method of combat that the respondents employ in order to prevent murderous terrorist attacks before they are committed is not one of the subjects in which this court will see fit to intervene.' The respondents' position is that this approach is a proper one. This petition, like its predecessor, seeks to bring the court into the battle zone in order to consider matters that are of a purely operational character, which are not justiciable. For these reasons the petition should be denied *in limine*. Notwithstanding, the respondents did not reiterate this argument in the supplementary pleadings that they filed.

10. On the merits, the respondents discuss the security background that led to the targeted killing policy. Since the end of September 2000, combat activities against Israel have been occurring in the territories of Judaea, Samaria and the Gaza Strip. As a result of these, more than one thousand Israeli citizens were killed in the years 2000-2005. Thousands more were injured. The security forces carried out various operations in order to contend with the combat activities and terrorism. In view of the armed conflict, these operations are subject to the laws of war, or the laws of armed conflicts that constitute a part of international law. The respondents' position is that the court should reject the argument that Israel may only defend itself against terrorism by using law enforcement measures. There is no longer any dispute that a state may respond with military force to a terrorist attack against it, by virtue of its right to self-defence that is provided in article 51 of the United Nations charter, which allows a state to protect itself against an 'armed attack.' Even if there is a dispute among scholars with regard to the question of what is an 'armed attack,' there cannot be any doubt that the terrorist barrage against Israel satisfies the definition of an armed attack. Therefore Israel may use military force against the terrorist organizations. The respondents point to the fact that other countries have stopped regarding terrorist operations merely as criminal offences and have begun to make use of military measures against terrorist operations that are directed against them. This is especially the case when the terrorist acts are on a large scale and continue for a long period. The respondents' position is

that the question whether the laws of belligerent occupation apply to all the territories is not relevant to the question before us, since the question whether the targeted killing policy is legal will be determined in accordance with the laws of war, which apply both to an occupied territory and to an unoccupied territory, provided that an armed conflict is taking place there.

11. The respondents' position is that the laws of war govern not only war in the classical sense, but also other armed disputes and conflicts. International law does not include an unambiguous definition of the concept of 'armed conflict.' But there is no doubt today that an armed conflict may take place between a state and groups or organizations that are not states, *inter alia* because of the military abilities and weapons in the possession of such organizations and their willingness to use them. The current dispute between Israel and the terrorist organizations is an armed conflict in which Israel is entitled to respond with military measures. This has also been upheld by the Supreme Court in a host of cases. With regard to the classification of the conflict, originally the respondents argued that it is an international conflict that is subject to the ordinary rules of war. In the closing reply (of 26 January 2004) the respondents said that the question of the conflict between Israel and the Palestinians is a complex question, and it has diverse aspects. In any case, there is no need to decide this for the purpose of the petition, since according to each of the categories the laws of armed conflict will apply to the state's actions. These laws permit an attack on someone who is a party to the armed dispute and takes an active part in it, whether it is an international armed conflict or it is an armed conflict that is not international, and even if we are dealing with a new category of armed conflict that has developed in the last decade in international law, which concerns armed conflicts between states and terror organizations. According to each one of these categories, someone who is a party to the armed conflict and takes an active part in it is a combatant, and he may be attacked. The respondents' position is that the terrorist organizations' operatives are a party to the armed conflict between Israel and the terrorist organizations, within which framework they take an active part in the combat. Therefore they are legitimate targets for an attack as long as the armed conflict continues. Notwithstanding, they are not entitled to the rights of combatants under the Third Geneva Convention and the Hague Regulations since they do not distinguish themselves from the civilian population, and because they do not observe the laws of war. In

view of this complex reality, the respondents' position is that a third category of persons should be recognized, namely the category of unlawful combatants. Persons who fall into this category are combatants, and therefore they constitute a legitimate target for an attack. Notwithstanding, they are not entitled to all the rights given to lawful combatants, since they do not themselves observe the requirements of the laws of war. The respondents' position is that the terror organizations' operatives in the territories fall into the category of 'unlawful combatants.' The status of the terrorists who participate actively in the armed conflict is not the status of civilians. They are a party to the armed conflict, and therefore it is permitted to attack them. They do not observe the laws of war, and therefore they do not enjoy the rights and protections given to lawful combatants, who observe the requirements of the laws of war. The respondents' position is therefore that according to each of the alternatives, 'the state is permitted to kill someone who is fighting against it, in accordance with the basic principles of the laws of war that govern every armed conflict' (para. 68 of the respondents' reply of 26 January 2004).

12. Alternatively, the respondents' position is that the targeted killing policy is lawful even if the court does not accept the argument that the terrorist organizations' operatives are combatants that are a party to the armed conflict, and even if the court regards them as persons who have a civilian status. This is because the laws of armed conflict permit an attack on civilians who are taking a direct part in the combat activities. Indeed, as a rule the laws of war give civilians immunity from attacks. But a 'civilian' who takes a direct part in the hostilities loses his immunity and may be the target of an attack. This also means that it is permitted to attack civilians in order to frustrate intentions to carry out future or planned hostile activity. Any person who takes a direct part in the commission, planning or dispatching of hostilities that are intended against civilian or military targets is a legitimate target for attack. This exception reflects a customary rule of international law. The respondents' position is that the condition of simultaneity provided in article 51(3) of the First Protocol, according to which a civilian who takes a direct part in hostilities may only be attacked at the time when he is taking part in the hostilities, does not bind Israel since it does not reflect a rule of customary international law. In this regard the respondents state that Israel, like other countries, was not a party to the First Protocol. Therefore it is permitted to attack civilians who are taking a

direct part in hostilities even when they are not carrying them out. There is nothing that prevents attacking terrorists at any time and place, as long as they have not laid down their weapons and left the cycle of combat. Finally, the respondents' position is that even if we regard art. 51(3) of the First Protocol, with all of its conditions, as a customary rule, the targeted killings policy satisfies its provisions. This is because they should be interpreted more broadly than the interpretation proposed by the petitioners. Thus the expression 'hostilities' should be interpreted to include acts such as the planning of terrorist attacks, the dispatching of terrorists and being in command of terrorist cells. There is no basis for Prof. Cassese's position that 'hostilities' should include the use of weapons or the carrying of weapons. The expression 'taking a direct part' should also be given a broad interpretation, so that anyone who plans, commits or sends another person to carry out a terrorist attack will be regarded as someone who takes a direct part in hostilities. Finally, the condition of simultaneity should also be interpreted broadly so that it will be possible to attack a terrorist at any time that he is systematically involved in acts of terror. The respondents' position is that the very restrictive interpretation of art. 51(3) that is proposed by the petitioners is unreasonable and outrageous. The petitioners' position and the opinion submitted on their behalf imply that terrorists have immunity from attack for as long as they are planning terrorist attacks and this immunity is removed for a short time only, when the attack is actually being carried out. After the attack has been carried out, the immunity returns to protect the terrorists, even if it is known and clear that they are going home in order to plan and carry out the next attack. This interpretation allows someone who takes an active part in hostilities 'to change hats' as he wishes between a combatant's hat and a civilian's hat. This result is unthinkable. It is also inconsistent with the purpose of the exception, which is intended to allow the state to take action against civilians who take an active part in the struggle against it. The respondents' conclusion is that the targeted killings policy satisfies the laws of war even if we regard the terrorists as civilians, and even if we regard the conditions set out in art. 51(3) of the First Protocol as customary rules.

13. The respondents' position is that the targeted killings policy, as it is carried out in practice, satisfies the requirement of proportionality. The requirement of proportionality does not lead to the conclusion that it is prohibited to carry out military operations that may harm civilians.

This requirement means that the harm to civilians should be proportionate to the security benefit that is likely to arise from the military operation. Moreover, the proportionality of the operation should be examined against the background of the uncertainty that inherently accompanies any combat activity, especially in view of the circumstances of the armed conflict between Israel and the terrorist organizations. The State of Israel satisfies the requirements of proportionality. Targeted killing operations are only carried out as an exceptional step, when there is no alternative to this activity. Its purpose is the saving of lives. It is considered at the highest levels of command. In every case an attempt is made to limit as much as possible the collateral damage that may be caused to civilians as a result of the targeted killing operation. In cases where the security establishment is of the opinion that there are other alternatives to the operation, these alternatives are implemented in so far as possible. Targeted killing missions have been postponed or cancelled on more than one occasion when it transpired that there was no possibility of carrying them out without endangering innocent persons disproportionately.

*(4) The petition and the hearing thereof*

14. The petition was filed on 24 January 2002, and after preliminary replies were filed it was set down for a hearing before a panel of three justices. After the first hearing on 18 April 2002 before Justices A. Barak, D. Dorner and I. Englard, the parties were asked to file supplementary statements that addressed a series of questions that were posed by the court. After the responses were filed, another hearing of the petition was held on 8 July 2003 before a panel of Justices A. Barak, T. Or and E. Mazza). During this, we considered the petitioners' application for an interim order. The application was denied. At the request of the parties, additional time was given for the filing of supplementary statements. At the request of the petitioners, an additional hearing of the petition was held on 16 February 2005 before a panel of Justices A. Barak, M. Cheshin and D. Beinisch). During this the respondents submitted the prime minister's statement at the Sharm El-Sheik conference according to which the State of Israel was suspending the use of the targeted killings policy. In view of this statement, we decided to defer the hearing of the petition to another date, in so far as this would be required. In the month of July 2005 the state began to employ the targeted killings policy once again. In view of this, at the request of the parties an additional hearing of the petition was held on

11 December 2005, before a panel of Justices A. Barak, M. Cheshin and D. Beinisch. At the end of this, we held that judgment would be given after further supplementary statements were filed by the parties. Pursuant to the decision of President D. Beinisch on 22 November 2006, Vice-President E. Rivlin replaced Vice-President M. Cheshin who had retired.

15. After the petition was filed, two applications were filed to join it. First on 22 July 2003 an application was filed by counsel for the petitioners on behalf of the National Lawyers Guild and the International Association of Democratic Lawyers to join the petition and to file written pleadings as *amicus curiae*. The respondents opposed the application. Subsequently an application was filed on 23 February 2004 on behalf of Shurat HaDin — Israel Law Centre and 24 additional applicants to join them as respondents in the petition. The petitioners opposed the application. We are deciding to grant the two applications and to join the applicants as parties to the petition. The pleadings on behalf of the *amicus curiae* support the main arguments of the petitioners. They also argue that the killing of religious and political leaders is contrary to international law and is not legitimate, whether in times of war or in times of peace. In addition, no use should be made of the targeted killings policy against anyone who is involved in terrorist activities except in cases where there is an immediate danger to human lives, and even then only in the absence of any other means of averting the danger. The pleadings of Shurat HaDin support the main arguments of the respondents. They also argue that the targeted killings are permitted, and even necessary, according to the principle of Jewish law 'If someone comes to kill you, kill him first!' (Babylonian Talmud, *Berachot* 58a) and according to the law of 'Someone who is pursuing his fellow-man to kill him…' (Mishnah, *Sanhedrin* 8, 7).

*(5) The general normative framework*

*A. An international armed conflict*

16. The fundamental premise is that, since the Intifadeh began, a continuous state of armed conflict has existed between Israel and the various terrorist organizations that operate from Judaea, Samaria and the Gaza Strip (hereafter — the territories). The court has discussed the existence of this conflict in a host of judgments (see HCJ 9255/00 *Al-Saka v. State of Israel* [2]; HCJ 2461/01 *Canaan v. IDF Commander in Judaea and Samaria* [3]; HCJ 9293/01 *Barakeh v. Minister of Defence* [4];

HCJ 3114/02 *Barakeh v. Minister of Defence* [5]; HCJ 3451/02 *Almadani v. Minister of Defence* [6]; HCJ 8172/02 *Ibrahim v. IDF Commander in West Bank* [7]; HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [8]). In one case I said:

> 'Since the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle' (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [9], at p. 358 {87}).

This approach is consistent with the definition of an armed conflict in international literature (see O. Ben-Naftali and Y. Shani, *International Law Between War and Peace* (2006), at p. 142; Y. Dinstein, *War, Aggression and Self-Defence* (fourth edition, 2005), at p. 201; H. Duffy, *The 'War on Terror' and the Framework of International Law* (2005), at p. 219). It clearly reflects what has been occurring and is still occurring in the 'territories.' The situation was described in the supplementary closing arguments of the State Attorney's Office (of 26 January 2004) as follows:

> 'For more than three years the State of Israel has faced an unceasing, continuous and murderous barrage of attacks, which are directed against Israelis wherever they are, without any distinction between soldiers and civilians or between men, women and children. Within the framework of the current terror barrage, more than 900 Israelis have been killed from September 2000 until the present, and thousands of other Israelis have been injured. Thousands of Palestinians have also been killed and injured during this period. By way of comparison we should point out that the number of Israeli victims relative to the population of the State of Israel is several times greater than the percentage of victims who were killed in the United States in the events of September 11 relative to the population of the United States. As is well known, and as we have already pointed out, the events of September 11 were defined by the countries of the world and international organizations without any hesitation as an "armed attack" that justifies the use of force in reply.
>
> The terror attacks are taking place both in Judaea, Samaria and the Gaza Strip (hereafter — the territories) and in the State of Israel itself. They are directed both against civilians,

> civilian population centres, shopping centres and marketplaces, and also against IDF forces and bases and facilities of the security forces. In these attacks the terrorist organizations employ measures that are of a purely military character, and what all of these measures have in common is their lethalness and callousness. These measures include shooting attacks, suicide attacks, the firing of mortars, the firing of rockets, the use of car bombs, etc.' (at p. 30).

17. This armed conflict (or dispute) does not take place in a normative vacuum. It is subject to normative arrangements as to what is permitted and what is prohibited. I discussed this in one case where I said:

> '"Israel is not an island. It is a member of an international community...". The military operations of the army are not conducted in a legal vacuum. There are legal norms — some from customary international law, some from international law enshrined in treaties to which Israel is a party, and some from the basic principles of Israeli law — which provide rules as to how military operations should be conducted' (HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [10], at p. 391 {205-206}).

What are the normative arrangements that apply in the case of an armed conflict between Israel and the terrorist organizations that operate in the territories?

18. The normative arrangements that apply to the armed conflict between Israel and the terrorist organizations in the territories are complex. They focus mainly on the rules of international law concerning an international armed conflict (or dispute). The international character of an armed conflict between a state that is occupying a territory in a belligerent occupation and guerrillas and terrorists that come from that territory — including the armed dispute between Israel and the terrorist organizations in the territories — was discussed by Prof. Cassese, who said:

> 'An armed conflict which takes place between an Occupying Power and rebel or insurgent groups — whether or not they are terrorist in character — in an occupied territory, amounts to an international armed conflict' (A. Cassese, *International Law* (second edition, 2005), at p. 420).

These laws include the laws of belligerent occupation. But they are not limited to them alone. These laws apply to every case of an armed conflict of an international character — i.e., one that crosses the borders of the state — whether the place where the armed conflict is occurring is subject to a belligerent occupation or not. These laws constitute a part of the laws of the conduct of war (*ius in bello*). From the humanitarian viewpoint, they are a part of international humanitarian law. This humanitarian law is a special law (*lex specialis*) that applies in an armed conflict. Where this law has a lacuna, it can be filled by means of international human rights law (see the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep. 226, at p. 240; the advisory opinion of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) 43 ILM 1009; *Banković v. Belgium* [67]; see also Meron, 'The Humanization of Humanitarian Law,' 94 *Am. J. Intl. L.* 239 (2000)). In addition to the provisions of international law governing an armed conflict, the basic principles of Israeli public law are likely to apply. These basic principles are carried by every Israeli soldier in his backpack and they go with him wherever he goes (see HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 810; *Ajuri v. IDF Commander in West Bank* [9], at p. 365 {96}; *Marabeh v. Prime Minister of Israel* [8], at para. 14 of the judgment).

19. Significant parts of international law that deal with an armed conflict are of a customary nature. These customary laws are a part of Israeli law, 'by virtue of the fact that the State of Israel is sovereign and independent' (*per* Justice S.Z. Cheshin in CrimA 174/54 *Stampeper v. Attorney-General* [12], at p. 15; see also CrimA 336/61 *Eichman v. Attorney-General* [13]; LCA 7092/94 *Her Majesty the Queen in Right of Canada v. Edelson* [14], at p. 639 {416}, and the cases cited there; see also R. Lapidot, 'The Place of Public International Law in Israeli Law,' 19 *Hebrew Univ. L. Rev. (Mishpatim)* 809 (1990); R. Sabel, *International Law* (2003), at p. 29). This was well expressed by President Shamgar, who said:

> 'According to the consistent case law of this court, customary international law is a part of Israeli law, subject to Israeli legislation containing a contrary provision' (HCJ 785/87 *Afu v. IDF Commander in Gaza Strip* [15], at p. 35).

International law that is enshrined in international conventions (whether Israel is a party to them or not) and which does not involve the adoption of customary international law is not a part of the internal law of the State of Israel (see HCJ 69/81 *Abu Ita v. IDF Commander in Judaea and Samaria* [16], at p. 234, and Y. Zilbershatz, 'Incorporating International Law in Israeli Law — The Law As It Is and As It Should Be,' 24 *Hebrew Univ. L. Rev. (Mishpatim)* 317 (1994)). In the petitions before us, no question arises with regard to any conflicting Israeli legislation. Public law in Israel recognizes the Israel Defence Forces as 'the army of the state' (s. 1 of the Basic Law: the Army). The army is authorized 'to do all the lawful actions that are required for the defence of the state and in order to achieve its national security goals' (s. 18 of the Government and Justice Arrangements Ordinance, 5748-1948). The Basic Law: the Government recognizes the constitutionality of 'military operations that are required for the purpose of protecting the state and public security' (s. 40(b)). Naturally, these operations also include an armed conflict with terrorist organizations outside the borders of the state. We should also mention the defence against criminal liability provided in s. 34M(1) of the Penal Law, 5737-1977, according to which a person will not be liable under the criminal law for an act that 'he was obliged or competent to do according to law.' When the soldiers of the Israel Defence Forces operate in accordance with the laws of armed conflict, they are acting 'according to law,' and they have the defence of justification. By contrast, if they act contrary to the laws of armed conflict, they are likely to be liable, *inter alia* under the criminal law, for their actions. Indeed, the question before us should be considered within the framework of customary international law concerning an armed conflict. This is also the source for all the other laws that may be relevant under our internal law. Conventional international law that has no customary force is not a part of our internal law.

20. International law concerning the armed conflict between Israel and the terrorist organizations is enshrined in several legal sources (see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), at p. 5). The main source is the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907 (hereafter — the Hague Convention). The provisions of this convention, to which Israel is a party, have a status of customary international law (see *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and*

*Samaria* [11], at p. 793; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [17], at p. 827 {283}; *Ajuri v. IDF Commander in West Bank* [9], at p. 364 {95-96}). In addition to this there is the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter — the Fourth Geneva Convention). Israel is a party to this convention. It was not adopted in Israeli legislation. Notwithstanding, its customary provisions are a part of the law of the State of Israel (see the opinion of Justice H.H. Cohn in HCJ 698/80 *Kawasma v. Minister of Defence* [18], at p. 638). It is well known that the position of the Government of Israel is that in principle the laws of belligerent occupation in the Fourth Geneva Convention do not apply with regard to the territories. Notwithstanding, Israel observes the humanitarian provisions of this convention (see *Kawasma v. Minister of Defence* [18]; *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 194; *Ajuri v. IDF Commander in West Bank* [9], at p. 364 {95-96}; HCJ 3278/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [19], at p. 396 {136}; *Beit Sourik Village Council v. Government of Israel* [17], at p. 827 {283}; *Marabeh v. Prime Minister of Israel* [8], at para. 14 of the judgment). For the purposes of the petition before us this is sufficient. In addition, the laws concerning an international armed conflict are enshrined in the Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 ('the First Protocol'). Israel is not a party to this protocol, and it has not been adopted in Israeli legislation. Of course, the customary provisions of the First Protocol are a part of Israeli law.

21. Our premise is that the law that governs the armed conflict between Israel and the terrorist organizations in the territories is the international law that relates to an armed conflict or dispute. This is how this court has regarded the character of the dispute in the past, and this is how we are also continuing to regard it in the petition before us. According to this approach, the fact that the terrorist organizations and its members do not act on behalf of a state does not make the struggle merely an internal matter of the state (see Cassese, *International Law*, *supra*, at p. 420). Indeed, in today's reality a terrorist organization may have a considerable military capacity, sometimes exceeding even the capacity of states. Dealing with these dangers cannot be limited merely to the internal affairs of a state and its criminal law. Contending with the

risk of terror constitutes a part of international law that concerns armed conflicts of an international nature. Additional possibilities have been raised in legal literature (see Duffy, *The 'War on Terror' and the Framework of International Law*, *supra*, at p. 218; E. Gross, *Democracy's Struggle Against Terrorism: Legal and Moral Aspects* (2004), at p. 585; O. Ben-Naftali and K. Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' 36 *Cornell Intl. L. J.* 233 (2003); D. Jinks, 'September 11 and the Law of War,' 28 *Yale J. I. L.* 1 (2003)). According to the approach of Prof. Kretzmer, this armed dispute should be classified as a dispute that is not merely an internal-national dispute, nor should it be classified as being of an international character, but it has a mixed character, in which both international human rights law and international humanitarian law apply (see D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' 16 *Eur. J. Int'l L.* 171 (2000)); counsel for the state raised these possibilities before us and indicated the problems that they raise, without adopting any position with regard to them. As we have seen, the premise on which the Supreme Court has relied for years — and which also was always the premise of counsel for the state before the Supreme Court — is that the armed dispute is of an international character. In this judgment we are continuing with this approach. It should be noted that even those who think that the armed dispute between Israel and the terrorist organizations is not of an international character hold that it is subject to international humanitarian law or international human rights law (see Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 194; Ben Naftali and Shani, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 142, and *Hamdan v. Rumsfeld* [62]; *Prosecutor v. Tadić* [73], at para. 127; on non-international armed conflicts see: Y. Dinstein, C. Garraway, M. Schmitt, *The Manual On Non-International Armed Conflict: With Commentary* (2006)).

22. International law concerning armed conflicts is based on a delicate balance between two conflicting considerations (see *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 794; *Centre for Defence of the Individual v. IDF Commander in West Bank* [19], at p. 396 {136}; *Beit Sourik Village Council v. Government of Israel* [17], at p. 833

{290}). *One* concerns the humanitarian considerations that relate to anyone who is harmed as a result of the armed conflict. These considerations are based on human rights and dignity. The *other* concerns military considerations, which lie at the heart of the armed conflict. These considerations are based on military necessity and success (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 16). The balance between these considerations is the basis for the international law of armed conflicts. This was discussed by Prof. Greenwood, who said:

> 'International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity' (Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* 32 (1995)).

In *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11] I said:

> 'The Hague Regulations revolve around two main focal points: one is ensuring the legitimate security interests of the occupier of a territory that is subject to a belligerent occupation; the other is ensuring the needs of the civilian population in the territory that is subject to a belligerent occupation' (*ibid*. [11], at p. 794).

In another case Justice A. Procaccia said that the Hague Convention authorizes the military commander to ensure two needs:

> 'The first need is a military need and the second is a civilian-humanitarian need. The first focuses on concern for the security of the military force that is occupying the area, and the second concerns the responsibility for preserving the welfare of the inhabitants. Within the latter sphere, the area commander is responsible not only for maintaining order and ensuring the security of the inhabitants but also for protecting their rights, especially their constitutional human rights. The concern for human rights lies at the heart of the humanitarian considerations that the area commander must consider' (HCJ 10356/02 *Hass v. IDF Commander in West Bank* [20], at p. 455 {65}).

In *Beit Sourik Village Council v. Government of Israel* [17] I added that:

> 'The laws of belligerent occupation recognize the authority of the military commander to maintain security in the area and thereby to protect the security of his country and its citizens, but it makes the exercising of this authority conditional upon a proper balance between it and the rights, needs, and interests of the local population' (*ibid.* [17], at p. 833 {290}).

Indeed —

> 'Indeed, like in many other areas of the law, the solution is not one of "all or nothing." The solution lies in finding the proper balance between the conflicting considerations. The solution is not to be found in giving absolute weight to one of the considerations; the solution lies in giving relative weight to the different considerations by balancing them in relation to the matter requiring a decision' (*Marabeh v. Prime Minister of Israel* [8], at para. 29 of the judgment).

The result of this balance is that human rights are protected by the laws of armed conflict, but not to their full extent. The same is true with regard to military necessity. It may be realized, but not to its full extent. This balance reflects the relativity of human rights and the limitations of military necessity. The proper balance is not fixed. 'In certain cases the emphasis is on military necessity whereas in other cases the emphasis is on the needs of the local population' (*Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 794). What, then, are the factors that affect the proper balance?

23. A main factor that affects the proper balance is the identity of the person who is harmed or the target that is harmed in the armed conflict. This is the basic principle of distinction (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 82; Ben-Naftali and Shani, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 151). Customary international law with regard to armed conflicts discusses a fundamental distinction between combatants and military targets, on the one hand, and non-combatants, i.e., civilians, and civilian targets on the other (see the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *supra*, at p. 257; art. 48 of the First Protocol).

According to the basic principle of distinction, the proper balance between the military needs of the state as opposed to combatants and military targets of the other party is different from the proper balance between the military needs of the state as opposed to civilians and civilian targets of the other party. As a rule, combatants and military targets are legitimate targets for a military attack. Their lives and bodies are subject to the risks of combat. It is permitted to kill and injure them. Notwithstanding, not every combat activity is permitted against them, nor is every military course of action permitted. Thus, for example, it is permitted to shoot them and kill combatants. But there is a prohibition against the treacherous killing of combatants or harming them in a manner that amounts to perfidy (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 198). Similarly the use of certain weapons is prohibited. A consideration of all this does not arise in the petition before us. Moreover, there are comprehensive laws that concern the status of prisoners of war. Thus, for example, prisoners of war may not be brought to a criminal trial because of their actual participation in the fighting, and they should be treated 'humanely' (art. 13 of the Third Geneva Convention). It is of course permitted to bring them to trial for war crimes that they committed during the hostilities. In contrast to the combatants and military targets there are the civilians and civilian targets. They may not be subjected to a military attack that is directed at them. Their lives and bodies are protected against the risks of combat, provided that they do not themselves take a direct part in the combat. This customary principle was formulated as follows:

> 'Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.
>
> Rule 6: Civilians are protected against attack unless and for such time as they take a direct part in hostilities.
>
> Rule 7: The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects' (J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (vol. 1, 2005), at pp. 3, 19, 25).

This approach, which protects the lives, bodies and property of civilians who do not take a direct part in an armed conflict, runs like a golden thread through the case law of the Supreme Court (see *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 794; HCJ 72/86 *Zaloom v. IDF Commander in Judaea and Samaria* [21], at p. 532; *Almadani v. Minister of Defence* [6], at p. 35 {53}; *Ajuri v. IDF Commander in West Bank* [9], at p. 365 {97}; *Centre for Defence of the Individual v. IDF Commander in West Bank* [19], at p. 396 {136}; HCJ 5591/02 *Yassin v. Commander of Ketziot Military Camp* [22], at p. 412; HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [23], at p. 364 {191}; *Hass v. IDF Commander in West Bank* [20], at p. 456 {65}; *Marabeh v. Prime Minister of Israel* [8], at paras. 24-29 of the judgment; HCJ 1890/03 *Bethlehem Municipality v. State of Israel* [24], at para. 15; HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [25], at para. 23 of my opinion; I discussed this in *Physicians for Human Rights v. IDF Commander in Gaza* [10], which considered combat activity during the armed conflict in Rafah:

> 'The basic injunction of international humanitarian law applicable in times of combat is that the local inhabitants are "… entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof…" (art. 27 of the Fourth Geneva Convention; see also art. 46 of the Hague Convention)… What underlies this basic provision is the recognition of the value of man, the sanctity of his life and the fact that he is entitled to liberty… His life or his dignity as a human being may not be harmed, and his dignity as a human being must be protected. This basic duty is not absolute. It is subject to "… such measures of control and security in regard to protected persons as may be necessary as a result of the war" (last part of art. 27 of the Fourth Geneva Convention). These measures may not harm the essence of the rights… They must be proportionate' (*ibid.* [10], at p. 393 {208-209}).

Later in that case I said that:

> 'The duty of the military commander, according to this basic rule, is twofold. *First*, he must refrain from operations that attack the local inhabitants. This duty is his "negative" obligation. *Second*, he must carry out acts required to ensure that the local inhabitants are not harmed. This is his "positive" obligation… Both these obligations — the dividing line between which is a fine one —should be implemented reasonably and proportionately in accordance with the needs of the time and place' (*ibid.* [10], at p. 394 {209}).

Are terrorist organizations and their members combatants for the purpose of their rights in the armed conflict? Are they civilians who take part directly in the armed conflict? Or are they perhaps neither combatants nor civilians? What, then, is the status of these terrorists?

*B. Combatants*

24. Who are combatants? This category naturally includes the armed forces. It also includes persons who satisfy the following conditions (art. 1 of the Regulations appended to the Fourth Hague Convention of 1907):

> 'The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> To be commanded by a person responsible for his subordinates;
>
> To have a fixed distinctive emblem recognizable at a distance;
>
> To carry arms openly; and
>
> To conduct their operations in accordance with the laws and customs of war.
>
> …'

This wording is repeated in art. 13 of the First and Second Geneva Conventions, and art. 4 of the Third Geneva Convention (cf. also art. 43 of the First Protocol). These conditions, together with additional conditions that are derived from the relevant conventions, have been examined in legal literature (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 39). We do not need

to consider all of these, because the terrorist organizations from the territories and their individual members do not satisfy the conditions of combatants (see Gross, *Democracy's Struggle Against Terrorism: Legal and Moral Aspects*, at p. 75). It is sufficient it we point out that they do not have a fixed recognizable mark that makes it possible to distinguish them from afar and they do not conduct their activities in accordance with the laws and customs of war. In one case I said:

> 'The Lebanese detainees should not be regarded as prisoners of war. It is sufficient that they do not satisfy the provisions of art. 41(2)(d) of the Third Geneva Convention, which provides that one of the conditions that must be satisfied in order to fulfil the definition of "prisoner of war" is "that of conducting their operations in accordance with the laws and customs of war." The organizations to which the detainees belonged are terrorist organizations that operate contrary to the laws and customs of war. Thus, for example, these organizations deliberately attack civilians and shoot from amongst a civilian population, which they use as a shield. All of these are acts that are contrary to international law. Indeed, Israel's consistent position over the years has been to refuse to regard the various organizations, such as Hezbollah, as organizations to which the Third Geneva Convention applies. We have found no reason to intervene in this position' (HCJ 2967/00 *Arad v. Knesset* [26], at p. 191; see also SFC 1158/02 (TA) *State of Israel v. Barghouti* [60], at para. 35); *Military Prosecutor v. Kassem* [61]).

25. The terrorists and their organizations, against which the State of Israel is conducting an armed conflict of an international character, are not included in the category of combatants. They do not belong to the armed forces nor are they included among the units that are given a status similar to that of combatants by customary international law. Indeed, the terrorists and the organizations that send them are unlawful combatants. They do not enjoy the status of prisoners of war. It is permitted to bring them to trial for their participation in the hostilities, to try them and sentence them. This was discussed by Chief Justice Stone of the United States Supreme Court, who said:

> 'By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatant are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful' (*Ex Parte Quirin* [63], at p. 30; see also *Hamdi v. Rumsfeld* [64]).

The Internment of Unlawful Combatants, 5762-2002, authorizes the chief of staff to issue an order for the administrative detention of an 'unlawful combatant.' This concept is defined in s. 2 of the law as —

> 'A person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, and who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War.'

It need not be said that unlawful combatants are not outside the law. They are not outlaws. They too were created by God in His image; even their human dignity should be respected; they too enjoy and are entitled to the protection of customary international law, no matter how minimal this may be (see G.L. Neuman, 'Humanitarian Law and Counterterrorist Force,' 14 *Eur. J. Int'l L.* 283 (2003); G. Nolte, 'Preventive Use of Force And Preventive Killings: Moves Into a Different Legal Order,' 5 *Theoretical Inquiries in Law* 111 (2004), at p. 119). This is certainly the case when they are interned or when they are brought to trial (see art. 75 of the First Protocol, which reflects customary international law, and K. Dörmann, 'The Legal Situation of "Unlawful / Unprivileged Combatants",' 85 *IRRC* 45 (2003), at p. 70). Does it follow from this that within the framework of Israel's war against the terrorist organizations, Israel is not entitled to target them nor is it entitled to kill them even if they are planning, ordering or committing terrorist attacks? Were we to regard them as (lawful) combatants, the answer of course would be that Israel would be entitled to target them. Just as it is permitted to target a soldier of an enemy state, so too it would be permitted to target them. At

the same time, they would enjoy the status of prisoners of war and the other protections given to lawful combatants. But, as we have seen, the terrorists operating against Israel are not combatants according to the definition of this expression in international law; they are not entitled to a status of prisoners of war; it is permitted to bring them to trial for their membership of terrorist organizations and for their actions against the army. Do they have the status of civilians? We will now turn to examine this question.

*C. Civilians*

26. Customary international law relating to armed conflicts protects 'civilians' from attacks against them as a result of the hostilities. This was discussed by the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, *supra*, where it said:

> 'States must never make civilians the object of attack' (p. 257).

This customary principle was given expression in art. 51(2) of the First Protocol, according to which:

> 'The civilian population as such, as well as individual civilians, shall not be the object of attack.'

This also gives rise to the duty to do everything to minimize the collateral damage to the civilian population when carrying out attacks on 'combatants' (see E. Benvenisti, 'Human Dignity in Combat: The Duty To Spare Enemy Civilians,' 39 *Isr. L. Rev.* 81 (2006)). This protection that is given to 'civilians' gives rise to the question of who is a 'civilian' for the purpose of this rule. The approach of customary international law is that 'civilians' are persons who are not 'combatants' (see art. 50(1) of the First Protocol and Sabel, *International Law*, *supra*, at p. 432). In *Prosecutor v. Blaškić* [74] the International Criminal Tribunal for the former Yugoslavia said that civilians are:

> 'Persons who are not, or no longer, members of the armed forces' (*Prosecutor v. Blaškić* [74], at para. 180).

This definition is of a 'negative' character. It determines the concept of 'civilians' as the opposite of 'combatants.' Thus it regards unlawful combatants — who, as we have seen, are not 'combatants' — as civilians. Does this mean that the unlawful combatants are entitled to the same protection to which civilians who are not unlawful combatants are entitled? The answer is no. Customary international law relating to armed conflicts provides that a civilian who takes a direct part in the

hostilities does not at the same time enjoy the protection given to a civilian who is not taking a direct part in those acts (see art. 51(3) of the First Protocol). Thus we see that the unlawful combatant is not a combatant but a 'civilian.' Notwithstanding, he is a civilian who is not protected against being targeted as long as he is taking a direct part in the hostilities. Indeed, the fact that a person is an 'unlawful combatant' is not merely a matter for national-internal criminal law. It is a matter for international law relating to international armed conflicts (see Jinks, 'September 11 and the Law of War,' *supra*). An expression of this is that civilians who are unlawful combatants are a legitimate target for attack, and therefore they do not enjoy the rights of civilians who are not unlawful combatants, provided that they are at that time taking a direct part in the hostilities. As we have seen, they also do not enjoy the rights given to combatants. Thus, for example, the laws relating to prisoners of war do not apply to them.

*D. Is there a third category of unlawful combatants?*

27. In its written and oral pleadings before us, the state requested that we recognize the existence of a third category of persons, namely the category of unlawful combatants. These are people who play an active and continuing part in an armed conflict, and therefore their status is the same as that of combatants in the sense that they constitute a legitimate target for attack and they are not entitled to the protections given to civilians. Notwithstanding, they are not entitled to all the rights and protections given to combatants, since they do not distinguish themselves from civilians and they do not observe the laws of war. Thus, for example, they are not entitled to the status of prisoners of war. The state's position is that the terrorists who participate in the armed conflict between Israel and the terrorist organizations fall into this category of unlawful combatants.

28. The literature on this subject is extensive (see R.R Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs,' 28 *Brit. Y. B. Int'l. L.* 323 (1951); K. Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and Struggle Over Legitimacy*, Harvard Program on Humanitarian Policy and Conflict Research, 'Occasional Paper' (Winter 2005, no. 2); J. Callen, 'Unlawful Combatants and the Geneva Conventions,' 44 *Va. J. Int'l L.* 1025 (2004); M.H. Hoffman, 'Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction With Implications for the Future of

International Humanitarian Law,' 34 *Case W. Res. J. Int'l L.* 227 (2002); S. Zachary, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' 38 *Isr. L. Rev.* 378 (2005); Nolte, 'Preventive Use of Force and Preventive Killings: Moves Into a Different Legal Order,' *supra*; Dörmann, 'The Legal Situation of "Unlawful / Unprivileged Combatants",' *supra*). We will not adopt a position on the question whether this third category should be recognized. The question before us is not a question of what the law should be but of what the law is. In our opinion, in so far as the law as it actually stands is concerned, we do not have before us sufficient information that allows us to recognize the existence of this third category on the basis of the existing position of international law, whether conventional or customary (see Cassese, *International Law*, *supra*, at pp. 408, 470). It is hard for us to see how it is possible to recognize a third category within the framework of interpreting the Hague and Geneva Conventions. We do not think that we have been presented with sufficient information that allows us to say that this third category has been recognized, as of the present, in customary international law. Notwithstanding, a new reality sometimes requires a new interpretation. Rules that were developed against the background of a reality that has changed should be given a dynamic interpretation that will adapt them, within the framework of the accepted rules of interpretation, to the new reality (see *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [11], at p. 800; *Ajuri v. IDF Commander in West Bank* [9], at p. 381 {116}). In this interpretive spirit we shall now address the rules of customary international law that consider the status of civilians who are also unlawful combatants.

*(6) The status of civilians who are unlawful combatants*

*A. The basic principle: civilians who take a direct part in hostilities are not protected at that time*

29. Civilians enjoy comprehensive protection of their lives, bodies, liberty and property. '… the safety of the lives of the civilian population is a central value in the humanitarian laws…' (*Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [25], at para. 23 of my opinion). '…the right to life and physical integrity is the most basic right that lies at the heart of the humanitarian laws that are intended to protect the local population…' (*per* Justice D. Beinisch in HCJ 9593/04 *Morar v. IDF Commander in Judaea and Samaria* [27], at para. 14 of her

opinion). As opposed to combatants, who may be targeted because they are combatants, civilians may not be targeted precisely because they are civilians. A provision in this vein is stipulated in art. 51(2) of the First Protocol, which constitutes customary international law:

> 'The civilian population as such, as well as individual civilians, shall not be the object of attack…'.

In a similar vein, art. 8(2)(b)(i)-(ii) of the Rome Statute of the International Criminal Court provides, in its definition of war crimes, that if an order is given intentionally to direct attacks against civilians, it is a war crime. This crime is applicable to those civilians who are 'not taking a direct part in hostilities.' Similarly civilians may not be attacked indiscriminately, i.e., an attack that, *inter alia*, is not directed at a specific military target (see art. 51(4) of the First Protocol, which constitutes customary international law: see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 37). This protection is given to all civilians, except for those civilians who are taking a direct part in hostilities. Indeed, the protection against attack is not granted to unlawful combatants, who take a direct part in the hostilities. I discussed this in one case, where I said:

> 'Indeed, the military operations are directed against terrorists and persons carrying out hostile acts of terror. They are not directed against the local inhabitants' (*Physicians for Human Rights v. IDF Commander in Gaza* [10], at p. 394 {209}).

What is the source of this basic principle, according to which the protection of international humanitarian law is removed from someone who is currently taking a direct part in hostilities, and what is the scope of its application?

*B. The source of the basic principle and its customary status*

30. The basic principle is that civilians who take a direct part in hostilities are not protected at that time from being targeted. This principle is expressed in art. 51(3) of the First Protocol, which provides:

> 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.'

It is well known that Israel is not a party to the First Protocol. Therefore it has not been adopted in Israeli legislation. Does this basic principle reflect customary international law? The position of the Red

Cross is that this is indeed a principle of customary international law (see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 20. We accept this position. It is consistent with the provisions of common article 3 of the Geneva Conventions, to which Israeli is a party and which everyone agrees reflect customary international law, according to which protection is given to —

'Persons taking no active part in the hostilities…'

The International Criminal Tribunal for the former Yugoslavia has held that article 51 of the First Protocol constitutes customary international law (*Prosecutor v. Strugar* [75], at para. 220). The military manuals of many countries, including Great Britain, France, the Netherlands, Australia, Italy, Canada, Germany, the United States (the air force) and New Zealand have copied this provision exactly or adopted its principles whereby civilians should not be targeted unless they are taking a (direct) part in the hostilities. Legal literature regards this provision as an expression of customary international law (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 11; Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 192; Ben-Naftali and Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 269; Cassese, *International Law*, *supra*, at p. 416; M. Roscini, 'Targeting and Contemporary Aerial Bombardment,' 54 *Int'l and Comp. L. Q.* 411 (2005), at p. 418; V-J. Proulx, 'If the Hat Fits Wear It, If the Turban Fits Run for Your Life: Reflection on the Indefinite Detention and Targeted Killings of Suspected Terrorists,' 56 *Hastings L.J.* 801 (2005), at p. 879; G.H. Aldrich, 'The Laws of War on Land,' 94 *Am. J. Int'l L.* 42 (2000), at p. 53). Counsel for the respondents pointed out to us that in the opinion of the State of Israel, not all of the provisions of art. 51(3) of the First Protocol reflect customary international law. According to the state's position, 'all that customary international law provides is that it is prohibited to target civilians in general and also that it is permitted to target a civilian "who is taking a direct part in hostilities." There is no restriction on the period of time when such an attack is permitted' (supplementary closing arguments of the State Attorney's Office of 26 January 2004, at p. 79). It follows that according to the state's position the non-customary part of art. 51(3) of the First Protocol is that part that provides that civilians do not enjoy protection against being targeted 'for such time' as they are taking a direct part in

the hostilities. As we have said, our position is that all the parts of art. 51(3) of the First Protocol reflect customary international law. What, then, is the scope of this provision? We shall now turn to this question.

*C. The nature of the basic principle*

31. The basic principle is therefore this: a civilian — namely someone who does not fall within the definition of combatants — should refrain from participating directly in hostilities (see Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, at p. 210). A civilian who breaches this rule and who carried out hostilities does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not at that time enjoy the protection given to a civilian. He is subject to the risks of an attack just like a combatant, but without enjoying the rights of a combatant, such as those given to him as a prisoner of war. Admittedly, his status is that of a civilian and he does not lose this status when he participates directly in carrying out hostilities. But he is a civilian who is carrying out the function of a combatant. As long as he is acting to realize this function, he is subject to the risks that this function entails and ceases to enjoy the protection given to a civilian against being attacked (see K. Watkin, 'Controlling The Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' 98 *Am. J. Int'l L.* 1 (2004)). This was discussed by H-P. Gasser in *The Handbook of Humanitarian Law in Armed Conflicts*, where he said:

> 'What are the consequences if civilians do engage in combat? … Such persons do not lose their legal status as civilians… However, for factual reasons they may not be able to claim the protection guaranteed to civilians, since anyone performing hostile acts may also be opposed, but in the case of civilians, only for so long as they take part directly in hostilities' (at p. 211, para. 501).
>
> In a similar vein, the manual of the Red Cross states:
>
> 'Civilians are not permitted to take direct part in hostilities and are immune from attack. If they take a direct part in hostilities they forfeit this immunity' (*Model Manual on the Law of Armed Conflict for Armed Forces*, at para. 610, p. 34 (1999)).

This is the law with regard to the unlawful combatant. As long as he retains his status as a civilian — i.e., he does not become a part of the military forces — but he carries out combat activities, he ceases to enjoy

the protection given to the civilian, and he is subject to the risks of being attacked like a combatant without enjoying the rights of the combatant as a prisoner of war. Indeed, guerrillas and terrorists who carry out hostilities are not entitled to the protection given to civilians. Admittedly, terrorists who carry out hostilities do not cease to be civilians, but by their actions they have deprived themselves of the benefit of being civilians that grants them protection from military attack. They also do not enjoy the rights of combatants, such as the status of prisoners of war.

32. We have seen that the basic principle is that the civilian population and individual civilians are protected against the dangers of military activity and are not a target for an attack. This protection is given to civilians 'unless and for such time as they take a direct part in hostilities.' (art. 51(3) of the First Protocol). This provision is made up of three main parts. The *first* part concerns the requirement that the civilians take part in hostilities; the *second* part concerns the requirement that the civilians take a 'direct' part in the hostilities; the *third* part concerns the provision that civilians are not protected against being attacked 'for such time' as they are taking a direct part in the hostilities. Let us discuss each of these parts separately.

*D. First part: 'take a… part in hostilities'*

33. Civilians lose the protection of customary international law concerning hostilities of an international character if they 'take a… part in hostilities.' What is the meaning of this provision? The accepted view is that 'hostilities' are all those acts that by their nature and purpose are intended to cause harm to armed forces. The Commentary on the Additional Protocols that was published in 1987 by the Red Cross states:

> 'Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces' (Y. Sandoz *et al*., *Commentary on the Additional Protocols* (1987), at p. 618).

A similar approach was adopted by the Inter-American Commission on Human Rights which is cited with approval by Henckaerts and Doswald-Beck (*Customary International Humanitarian Law*, *supra*, at p. 22). It would appear that to this definition we should add those acts that by their nature and purpose are intended to cause harm to civilians. According to the accepted definition, a civilian takes part in hostilities

when he uses weapons within the framework of the armed conflict, when he collects intelligence for this purpose or when he prepares himself for the hostilities. With regard to taking part in the hostilities, there is no requirement that the civilian actually uses the weapons that he has, nor is it a requirement that he carries weapons on him (openly or concealed). It is possible to take a part in hostilities without using weapons at all. This was discussed by the Commentary on the Additional Protocols as follows:

> 'It seems that the word "hostilities" covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon' (at pp. 618-619).

As we have seen, this approach is not limited solely to 'hostilities' against the armed forces of a state. It applies also to hostilities against the civilian population of the state (see Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 192).

*E. Second part: 'take a direct part'*

34. Civilians lose their protection against the attack of armed forces that is given to them under customary international law relating to international armed conflicts ((as adopted in art. 51(3) of the First Protocol) if 'they take a direct part in hostilities.' The provision therefore distinguishes between civilians who are taking a direct part in hostilities (who lose the protection from attack) and civilians who take an indirect part in the hostilities (who continue to enjoy protection from attack). What is this distinction? A similar provision appears in common article 3 of the Geneva Conventions, which adopts the expression 'active part in hostilities.' A judgment of the International Criminal Tribunal for Rwanda held that these two expressions have the same content (see *Prosecutor v. Akayesu* [691]). What is this content? It would appear that it is accepted in international literature that there is no agreed definition of the word 'direct' in the context before us (see *Direct Participation in Hostilities under International Humanitarian Law*, Report Prepared by the International Committee of the Red Cross (2003); *Direct Participation in Hostilities under International Humanitarian Law* (2004)). Henckaerts and Doswald-Beck (*Customary International Humanitarian Law*, *supra*, at p. 23) rightly said:

> 'It is fair to conclude… that a clear and uniform definition of direct participation in hostilities has not been developed in state practice.'

In such circumstances, and in the absence of a complete and agreed customary criterion, there is no alternative to judging each case on its own merits, while limiting the scope of the dispute (cf. *Prosecutor v. Tadić* [73]). In this regard we should mention the following remarks in the *Commentary* of the Red Cross:

> 'Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly' (*ibid*., at p. 516).

Indeed, a civilian who bears arms (openly or concealed) and is on his way to the place where he will use them against the armed forces, or who is at the place of shooting itself, or who is on his way back from the place of shooting is a civilian who is taking a 'direct part' in the hostilities (see Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' *supra*, at p. 17). By contrast, a civilian who supports the hostilities against the armed forces in a general manner does not take a direct part in the hostilities (see Duffy, *The 'War on Terror' and the Framework of International Law*, *supra*, at p. 230). Similarly, a civilian who sells food or medicines to unlawful combatants also is taking a merely indirect part in the hostilities. This was discussed in the third report of the Inter-American Commission on Human Rights:

> 'Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party' (IACHR, *Third Report on Human Rights in Columbia*, at paras. 53, 56 (1999)).

What is the law with regard to the area between these two extremes? *On the one hand*, the desire to protect innocent civilians leads in difficult cases to give a narrow interpretation to the expression 'taking a *direct* part in hostilities.' Prof. Cassese states:

> 'The rationale behind the prohibition against targeting a civilian who does not take a direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the *need to avoid killing innocent civilians*' (Cassese, *International Law*, *supra*, at p. 421; emphasis in the original).

*On the other hand*, it is possible to say that the desire to protect combatants and the desire to protect innocent citizens leads in difficult cases to giving a broad interpretation of the 'direct' character of the hostilities, since thereby civilians are encouraged to distance themselves from the hostilities as much as possible. As Prof. Schmitt says:

> 'Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible — in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted' (M.N. Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' in H. Fischerr (ed.), *Crisis Management and Humanitarian Protection: Festshrift Fur Dieter Fleck*, 505 (2004), at p. 509).

35. Against the background of these considerations, the following cases should be included within the scope of taking a 'direct part' in hostilities: someone who collects information about the armed forces, whether in the spheres in which the hostilities are being carried out (see W. Hays Parks, 'Air War and the Law of War,' 32 *A. F. L. Rev*. 1, 116 (1990)) or whether outside these spheres (see Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 511); someone who leads unlawful combatants to or from the place where the hostilities are being carried out; someone who operates

weapons being used by unlawful combatants or who supervises their operation or provides service for them, whatever the distance from the battlefield may be. All of these are carrying out a function of combatants. The function determines the directness of the taking part in the hostilities (see Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' *supra*, at p. 17; Roscini, 'Targeting and Contemporary Aerial Bombardment,' *supra*). By contrast, someone who sells an unlawful combatant food products or medicines does not take a direct part, but merely an indirect one, in the hostilities. The same is true of someone who helps unlawful combatants with a general strategic analysis and grants them general logistic support, including financial support. The same is true of someone who disseminates propaganda that supports those unlawful combatants. If these persons are harmed, the state may not be liable for this if they fall within the scope of collateral or incidental damage. This was discussed by Gasser:

> 'Civilians who directly carry out a hostile act against the adversary may be resisted by force. A civilian who kills or takes prisoners, destroys military equipment, or gathers information in the area of operations may be made the object of attack. The same applies to civilians who operate a weapons system, supervise such operation, or service such equipment. The transmission of information concerning targets directly intended for the use of a weapon is also considered as taking part in hostilities. Furthermore, the logistics of military operations are among the activities prohibited to civilians… not only direct and personal involvement but also preparation for a military operation and intention to take part therein may suspend the immunity of a civilian. All these activities, however, must be proved to be directly related to hostilities or, in other words to represent a direct threat to the enemy… However, the term should not be understood too broadly. Not every activity carried out within a state at war is a hostile act. Employment in the armaments industry for example, does not mean that civilian workers are necessarily participating in hostilities… Since, on the other hand, factories of this industry usually constitute lawful military objectives that may be attacked, the normal rules governing the assessment of possible

collateral damage to civilians must be observed' (Gasser, *The Handbook of Humanitarian Law in Armed Conflicts*, *supra*, at p. 232, paras. 517, 518).

In international literature there is a disagreement with regard to the following case: what is the law that applies to a civilian who drives a vehicle conveying ammunition? (see Parks, 'Air War and the Law of War,' *supra*, at p. 134; Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 507; A.P.V. Rogers, *Law on The Battlefield* (1996), at p. 8; L.L. Turner and L.G. Norton, 'Civilians At The Tip of the Spear,' 51 *Air Force L. Rev.* 1 (2001); J.R. Heaton, 'Civilians at War: Re-Examining The Status of Civilians Accompanying The Armed Forces,' 57 *Air Force L. Rev.* 171 (2005)). Some authorities hold that he is taking a direct part in the hostilities (and therefore he may be attacked), while others hold that he is not taking a direct part in the hostilities (and therefore he may not be attacked). The two opinions hold that the ammunition in the vehicle may be attacked. The disagreement is whether the civilian driver may be attacked. Those who believe he is taking a direct part in the hostilities hold that he may be attacked. Those who believe that he is not taking a direct part in the hostilities hold that he may not be attacked, but if he is harmed it is a case of collateral damage caused to a civilian who is in the vicinity of a military objective that may be attacked. In our opinion, if the civilian driver is taking the ammunition to the place where it will be used to carry out hostilities, he should be regarded as taking a direct part in the hostilities (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 27; Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 509; Rogers, *Law on the Battlefield*, at p. 7; A.P.V. Rogers and P. Malherbe, *Model Manual of the Law of Armed Conflict* (ICRC, 1999), at p. 29).

36. What is the law with regard to civilians who act as a human shield for terrorists who are taking a direct part in the hostilities? Certainly if they are acting in this way because they were compelled to do so, these innocent civilians should not be regarded as taking a direct part in the hostilities. They are themselves the victims of terrorism. But if they are acting in this way voluntarily because of their support for a terrorist organization, they should be regarded as persons who are taking a direct part in the hostilities (see Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 521, and M.N. Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private

Contractors or Civilian Employees,' 5 *Ch. J. Int'l Law* 511 (2004), at p. 541).

37. We have seen that a civilian who attacks armed forces is taking a 'direct part' in the hostilities. What is the law regarding the persons who recruit him to take a direct part in the hostilities and the persons who send him to carry out hostilities? Is there a difference between his direct commanders and those who are more senior to them? Is it only the last terrorist in the chain of command who is responsible for taking a 'direct' part in the hostilities or is the whole chain of command responsible? In our opinion, the 'direct' character of taking part in the hostilities should not be limited only to someone who carries out the physical attack. Someone who sends him to carry out the attack also takes a 'direct' part. The same is true of someone who decides upon the actual attack, or who plans it. It cannot be said that all of these only take an indirect part in the hostilities. Their participation is direct (and active) (see Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 529).

*F. Third part: 'for such time'*

38. Article 51(3) of the First Protocol provides that civilians enjoy protection against the dangers arising from military operations and may not be a target for attacks unless 'and for such time' as they take a direct part in hostilities. The provisions of art. 51(3) of the First Protocol introduce a requirement of time. A civilian who takes part in hostilities loses the protection from being attacked 'for such time' as he is taking a part in those hostilities. When this time has passed, the protection afforded to the civilian is restored. In the respondents' opinion, this part of art. 51(3) of the First Protocol does not reflect customary international law, and the State of Israel is not obliged to act accordingly. We cannot accept this approach. As we have seen, all of the parts of art. 51(3) of the First Protocol reflect customary international law, including the requirement concerning time. The key question concerns the interpretation of this provisions and its scope of application.

39. Just as there is no consensus in international literature with regard to the scope of the expression 'take a direct part in hostilities,' there is also no consensus with regard to the scope of the expression 'for such time.' Indeed, these two concepts are closely related. But they are not identical. In the absence of a consensus as to the interpretation of the expression 'for such time,' there is no alternative to taking each case as it

comes. Once again it is helpful to consider the extreme cases. At one extreme, a civilian who takes a direct part in hostilities on a single occasion or sporadically, and thereafter severs his connection with this activity, is a civilian who, when he severs his connection with the activity, is entitled to protection from an attack. He should not be attacked because of the hostilities that he carried out in the past. At the other extreme, a civilian who joins a terrorist organization that becomes his home, and within the framework of his position in that organization he carries out a series of hostilities, with short interruptions between them for resting, loses his immunity against being attacked 'for such time' as he is carrying out the series of operations. Indeed, for such a civilian the rest between hostilities is nothing more than preparation for the next hostile act (see D. Statman, 'Targeted Killing,' 5 *Theoretical Inquiries in Law* 179 (2004), at p. 195).

40. These examples indicate the dilemma presented by the requirement of 'for such time.' *On the one hand*, a civilian who takes a direct part in hostilities on a single occasion or sporadically, but has severed his connection with them (whether entirely or for a lengthy period), should not be attacked. *On the other hand*, we must avoid a phenomenon of the revolving door, whereby every terrorist may invoke sanctuary or claim refuge while he is resting and making preparations, so that he has protection from being attacked (see Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict,' *supra*, at p. 536; Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' *supra*, at p. 12; Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 193; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 29; Parks, 'Air War and the Law of War,' *supra*, at p. 118). In the considerable distance between these two extremes lie the 'grey' areas, where customary international law has not yet been formulated. There is no alternative, therefore, to examining each case on its merits. In this regard the following four issues should be addressed: *first*, reliable information is required before the civilian is classified as falling into one of the cases that we have discussed. Innocent civilians should not be harmed (see Cassese, *International Law*, *supra*, at p. 421). Properly verified information should exist with regard to the identity and activity of the civilian who is claimed to be taking a direct part in the hostilities (see *Ergi v. Turkey* [68]. Cassese rightly says that:

> '… if a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into question and the whole body of law relating to armed conflict would eventually be eroded' (Cassese, *International Law*, at p. 421).

The burden of proof of the armed forces in this matter is a heavy one (see Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 203; Gross, *Democracy's Struggle against Terrorism: Legal and Moral Aspects*, at p. 606). In case of doubt, a careful examination is required before an attack is carried out. This was discussed by Henckaerts and Doswald-Beck:

> '… when there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious' (*Customary International Humanitarian Law*, *supra*, at p. 24).

*Second*, a civilian should not be attacked at a time that he is taking a direct part in hostilities if it is possible to act against him by means of a less harmful measure. In our internal law this rule is derived from the principle of proportionality. Indeed, of the possible military measures one should choose the measure whose violation of the victim's human rights is the least. Therefore, if it is possible to arrest, interrogate and prosecute a terrorist who is taking a direct part in hostilities, these steps should be followed (see *Mohamed Ali v. Public Prosecutor* [66]). A trial is preferable to the use of force. A country governed by the rule of law resorts to the use of trials rather than the use of force. This question arose in *McCann v. United Kingdom* [69]. In that case, three terrorists from Northern Ireland who belonged to the I.R.A. were shot to death. They were shot in the streets of Gibraltar, where they were attacked by British agents. The European Court of Human Rights held that the United Kingdom unlawfully violated the victims' right to life (art. 2 of the European Convention on Human Rights). The court held:

> '… the use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk' (*ibid*. [69], at p. 148, para. 235).

Arrest, interrogation and trial are not measures that can always be adopted. Sometimes this possibility simply does not exist; sometimes it involves so great a risk to the lives of soldiers that there is no requirement to adopt it (see A. Dershowitz, *Preemption: A Knife that Cuts Both Ways* (2005), at p. 230). But it is a possibility that should always be considered. It is likely to be practical especially in conditions of a belligerent occupation where the army controls the territory where the operation is being carried out, and arrest, interrogation and trial are possibilities that can sometimes be carried out (see art. 5 of the Fourth Geneva Convention). Naturally, in a specific case this possibility may not exist. Sometimes it may cause greater harm to the lives of innocent civilians in the vicinity. In such a case, it should not be adopted. *Third*, after 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 (see Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,' *supra*, at p. 23; Duffy, *The 'War on Terror' and the Framework of International Law*, *supra*, at p. 310; Cassese, *International Law*, *supra*, at p. 419; C. Warbrick, 'The Principle of the European Convention on Human Rights and the Responses of States to Terrorism,' (2002) *E. H. R. L. R.* 287, at p. 292; *McCann v. United Kingdom* [69], at pp. 161, 163; *McKerr v. United Kingdom* [70], at p. 559). In appropriate cases there will be grounds for considering the payment of compensation for harming an innocent civilian (see Cassese, *International Law*, *supra*, at pp. 419, 423; art. 3 of the Hague Regulations; art. 91 of the First Protocol). *Finally*, if the attack is not only on the civilian who is taking a direct part in the hostilities but also on innocent civilians who are in the vicinity, the harm to them is collateral damage. This harm should satisfy the test of proportionality. Let us now turn to examine this question.

*(7) Proportionality*

*A. The principle of proportionality and its application in customary international law*

41. The principle of proportionality is a general principle in the law. It is a part of our legal approach to human rights (see s. 8 of the Basic Law: Human Dignity and Liberty; see also A. Barak, *A Judge in a Democracy* (2004), at p. 346). It is an important element in customary international law (see R. Higgins, *Problems and Process – International Law and How We Use It* (1994), at p. 219; J. Delbruck, 'Proportionality,' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), at p. 1144). It is an integral part of the law of self-defence. It is a major element in the protection of civilians in situations of armed conflicts (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 119; Gasser, *The Handbook of Humanitarian Law in Armed Conflicts*, *supra*, at p. 220; Cassese, *International Law*, *supra*, at p. 418; Ben-Naftali and Shani, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 154; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 60; J.G. Gardam, 'Proportionality and Force in International Law,' 87 *Am. J. Int'l L.* 391 (1993); J.S. Pictet, *Development and Principles of International Humanitarian Law* (1985), at p. 62; W.J. Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare,' 98 *Mil. L. Rev.* 91 (1982); T. Meron, *Human Rights and Humanitarian Norms as Customary International Law* (1989), at p. 74). It has a central role in the law of belligerent occupations (see *Hass v. IDF Commander in West Bank* [20], at p. 461 {71}; *Bethlehem Municipality v. State of Israel* [24]; *Beit Sourik Village Council v. Government of Israel* [17], at p. 836 {293}; HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [28], at para. 102 of the majority opinion; *Marabeh v. Prime Minister of Israel* [8], at para. 30 of my opinion; see also Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 119; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 60). In a whole host of cases the Supreme Court has examined the authority of the military commander in the territories according to the criterion of proportionality. It has done so, *inter alia*, with regard to assigning residence (*Ajuri v. IDF Commander in West Bank* [9]); surrounding towns and erecting road blocks on access routes to and from them for the purposes of fighting terrorism (see HCJ 2847/03 *Alauna v. IDF*

*Commander in Judaea and Samaria* [29]); damage to the property of protected inhabitants as a result of army operations (see HCJ 9252/00 *El-Saka v. State of Israel* [30]); upholding the rights to pray at holy sites and have access to them (*Hass v. IDF Commander in West Bank* [20]); demolishing houses for operational needs (HCJ 4219/02 *Gussin v. IDF Commander in Gaza Strip* [31]); imposing a blockade (*Almadani v. Minister of Defence* [6]); building the security fence (*Beit Sourik Village Council v. Government of Israel* [17]; *Marabeh v. Prime Minister of Israel* [8]).

*B. Proportionality in an international armed conflict*

42. The principle of proportionality plays a major role in the international law of armed conflicts (cf. arts. 51(5)(b) and 57 of the First Protocol; see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 46; Ben-Naftali and Shani, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 154). These laws are of a customary nature (see Henckaerts and Doswald-Beck, *ibid*., at p. 53; Duffy, *The 'War on Terror' and the Framework of International Law*, *supra*, at p. 235; *Prosecutor v. Kupreškić* [76]). The principle of proportionality arises when the military activity is directed against combatants and military targets, or against civilians for such time as they take a direct part in hostilities, and in the course of this civilians are also harmed. The rule is that the harm to innocent civilians that is caused as collateral loss in the course of the combat activities should be proportionate (see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 119). Civilians are likely to be harmed because of their presence inside a military target, such as civilians who work in a military base; civilians are likely to be hurt when they live, work or pass close to military targets; sometimes because of an error civilians are harmed even if they are not close to military targets; sometimes civilians are used, by means of coercion, as a 'human shield' against an attack on a military target, and they are hurt as a result. In all of these situations and others similar to them, the rule is that the harm to innocent civilians should, *inter alia*, satisfy the principle of proportionality.

43. The principle of proportionality applies in every case where civilians who are not taking a direct part in hostilities at the time are harmed. This was discussed by Justice Higgins in *Legality of the Threat or Use of Nuclear Weapons*, *supra*:

> 'The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack' (at p. 587).

An expression of this customary principle can be found in the First Protocol, according to which indiscriminate attacks are prohibited (art. 51(4). The First Protocol goes on to provide (in art. 51(5)):

> '5. Among others, the following types of attacks are to be considered as indiscriminate:
>
> (a) …
>
> (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'

44. The requirement of proportionality in the law of armed conflicts focuses mainly on what in our constitutional law is called proportionality 'in the narrow sense,' i.e., the requirement that there is a proper proportionate correlation between the military objective and the civilian harm. Notwithstanding, the law of armed conflicts includes additional elements, which are also an integral part of the theoretical principle of proportionality in its broad sense. It would be proper to consider the possibility of concentrating all of these laws into one body of material, by formulating a comprehensive doctrine of proportionality, as has been done in the internal law of many countries. We cannot examine this matter within the framework of the petition before us. We will concentrate on the aspect of proportionality that is agreed by everyone to be relevant to our case.

*Due proportion between the advantage and the damage*

45. The test of proportionality stipulates that an attack on innocent civilians is not permitted if the collateral damage to them is not commensurate with the military advantage (in protecting combatants and civilians). In other words, the attack is proportionate if the advantage arising from achieving the proper military objective is commensurate with the damage caused by it to innocent civilians. This is an ethical test. It is based on a balance between conflicting values and

interests (see *Beit Sourik Village Council v. Government of Israel* [17], at p. 850 {309-310}; HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [32], at para. 74 of my opinion). It is accepted in the national law of many countries. In Israel it constitutes a main normative test for examining government activity in general and army activity in particular. In one case I said:

> 'This subtest is in essence a vehicle for the constitutional outlook that the end does not justify the means. It is an expression of the idea that there is an ethical barrier that democracy cannot pass, even if the purpose that we wish to realize is a proper one' (HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [33], at para. 30 of my opinion); see also R. Alexy, *A Theory of Constitutional Rights* (2002), at p. 66).

As we have seen, this requirement of proportionality is found in customary international law concerning the protection of civilians (see Cassese, *International Law*, *supra*, at p. 418; Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *supra*, at p. 200; Ben-Naftali and Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings,' *supra*, at p. 278; Gardam, 'Proportionality and Force in International Law,' *supra*; art. 51(4)(c) of the First Protocol, which constitutes customary law). When the damage to innocent civilians is disproportionate to the advantage of the attacking army, the attack is disproportionate and prohibited.

46. Proportionality in this sense is not required with regard to an attack on a combatant or a civilian who is at that time taking a direct part in the hostilities. Indeed, a civilian who is taking part in hostilities endangers his life and he may, like a combatant, constitute a target for an attack that causes death. This is a permitted killing. By contrast, proportionality is required in any case where an innocent civilian is hurt. Therefore the requirements of proportionality in the narrow sense should be satisfied in a case where the attack on a terrorist causes collateral damage to innocent civilians in the vicinity. The rule of proportionality applies to the attack on these innocent civilians (see art. 51(5)b) of the First Protocol). The rule is that combatants or terrorists may not be attacked if the expected damage to innocent civilians in their vicinity is excessive in relation to the military benefit of attacking them

(see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, at p. 49). Making this balance is difficult. Here too we need to proceed on a case by case basis, while limiting the area of the dispute. Take an ordinary case of a combatant or terrorist sniper who is shooting at soldiers or civilians from the balcony of his home. Shooting at him will be proportionate even if as a result an innocent civilian who lives next to him or who passes innocently next to his home is hurt. This is not the case if the house is bombed from the air and dozens of residents and passers-by are hurt (cf. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, at p. 123; Gross, *Democracy's Struggle Against Terrorism: Legal and Moral Aspects*, at p. 621). The difficult cases are those that lie in the area between the extreme examples. Here a careful examination of each case is required; the military advantage should be concrete and direct (see art. 57(2)(a)(iii) of the First Protocol). Indeed, in international law just as in internal law, the end does not justify the means. The power of the state is not unlimited. Not all the means are permitted. This was discussed by the Inter-American Court of Human Rights, which said:

> '… regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the state resort to any means to attain its ends' (*Velásquez-Rodríguez v. Honduras* [71], at para. 154).

Notwithstanding, when there are hostilities, there are losses. A balance should be struck between the duty of the state to protect the lives of its soldiers and civilians and its duty to protect the lives of innocent civilians who are harmed when targeting terrorists. This balance is a difficult one, because it concerns human life. It gives rise to moral and ethical problems (see A. Kasher and A. Yadlin, 'Assassination and Preventive Killing,' 25 *SAIS Rev.* 41 (2005)). But despite the difficulty, the balance must be struck.

*8. Justiciability*

47. A large part of the initial reply of the State Attorney's Office (of 20 March 2002) was devoted to a preliminary argument. According to this, 'the combat activities of the IDF that are carried out within the framework of the combat activities taking place in the territories, which are of a purely operational character, are *not justiciable* — or at least are not institutionally justiciable — and this honourable court will not

consider them' (para. 26, p. 7; emphasis in the original). In explaining this position, counsel for the respondents emphasized that in his opinion 'the predominant character of the matter is not legal and *judicial restraint* requires the court neither to enter the battlefield nor to consider the purely operational activities taking place on the battlefield' (*ibid*, at para. 36, p. 11; emphasis in the original). Counsel for the respondents emphasized that:

> 'It is obvious that the fact that a matter is "not justiciable" does not mean that no supervision or control is exercised on the part of the executive authority itself… The army authorities have been instructed by the attorney-general and the Chief Military Attorney to act in this area, as in others, solely in accordance with the provisions of international law that apply to the laws of war, and this instruction is observed by them' (*ibid*., para. 40, p. 13).

48. It is well known that we distinguish between a claim of no normative justiciability and a claim of no institutional justiciability (see HCJ 910/86 *Ressler v. Minister of Defence* [34]). A claim of no normative justiciability proposes that there are no legal criteria for deciding a dispute that is before the court. A claim of no institutional justiciability proposes that it is not fitting that a dispute should be decided according to the law by the court. The claim of no normative justiciability has no legal basis, either in general or in the case before us. A claim of no normative justiciability has no legal basis in general because there is always a legal norm according to which a dispute may be decided, and the existence of a legal norm gives rise to the existence of legal criteria for it. Sometimes it is easy to recognize the norm and the criteria inherent in it and at other times it is difficult to do so. But ultimately a legal norm will always be found and legal criteria will always exist. This norm may be a general one, such as the norm that a person may do anything except what he has been prohibited from doing, and the government may do only what it has been permitted to do. Sometimes the norm is far more limited. Such is the position in our case. There are legal norms that address the question before us, and from these it is possible to derive criteria that determine what is permitted and what is prohibited. There is therefore no basis to the claim of a lack of normative justiciability.

49. The second type of non-justiciability concerns a lack of institutional justiciability. This non-justiciability concerns the question —

> '… whether the law and the court are the proper framework for deciding a dispute. The question is not whether it is possible to decide a dispute according to the law and in the court. The answer to this question is yes. The question is whether it is desirable to decide a dispute — which is normatively justiciable — according to legal criteria in the court' (*Ressler v. Minister of Defence* [34], at p. 489 {73}).

This type of non-justiciability is recognized in our legal system. Thus, for example, it has been held that as a rule questions of the day-to-day running of the affairs of the Knesset are not institutionally justiciable (see HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [35], at p. 812; HCJ 9056/00 *Kleiner v. Knesset Speaker* [36], at p. 708). Only if it is alleged that a breach of the rules concerning the internal proceedings undermines the fabric of parliamentary life and the foundations of the structure of our constitutional system will there be a basis for considering the claim in the court (see HCJ 652/81 *Sarid v. Knesset Speaker* [37]; HCJ 73/85 *Kach Faction v. Knesset Speaker* [38]; HCJ 742/84 *Kahane v. Knesset Speaker* [39]).

50. The scope of the doctrine of institutional non-justiciability in Israel is not extensive. There is no consensus with regard to its limits. My personal opinion is that it should only be recognized within very narrow limits (see Barak, *A Judge in a Democracy*, at p.275). Whatever the position is, the doctrine has no application in the petition before us, for four reasons: *first*, in the case law of the Supreme Court there is a clear policy that the doctrine of institutional non-justiciability does not apply where recognizing it would prevent an examination of a violation of human rights. This was discussed by Justice A. Witkon in HCJ 606/78 *Awib v. Minister of Defence* [40]. That case considered the legality of a settlement in the territories. It was argued by the state that the question of the legality of a settlement in the territories was non-justiciable. In rejecting this argument, Justice A. Witkon said:

> 'I was not impressed by this argument at all… It is clear that in matters of foreign policy, like in several other matters, the decision is made by political authorities and not by the judiciary. But on the assumption… that a person's property has been harmed or taken away from him unlawfully, it is

> difficult to believe that the court will refuse to hear that person because his right may be the subject of political negotiations' (*Awib v. Minister of Defence* [40], at p. 124).

In HCJ 390/79 *Dawikat v. Government of Israel* [41] the question of the legality of a settlement in the territories was considered once again. Vice-President M. Landau said:

> 'A military government that wishes to violate the property rights of the individual should show a legal basis for doing so, and it cannot avoid judicial scrutiny of its actions by claiming non-justiciability' (*Dawikat v. Government of Israel* [41], at p. 15).

In *Marabeh v. Prime Minister of Israel* [8] the court considered the legality of the separation fence in accordance with the rules of customary international law. With regard to the justiciability of this question I said:

> '… the court is not prevented from exercising judicial scrutiny merely because the military commander acts outside Israel, and his actions have political and military ramifications. When the decisions or actions of the military commander violate human rights, they are justiciable. The doors of the court are open. The argument that the violation of human rights was the result of security considerations does not prevent the exercising of judicial scrutiny. 'Security considerations' and 'military necessity' are not magic words… This is required by the protection of human rights' (*ibid*. [8], at para. 31 {p. 140}).

The petition before us seeks to determine what is permitted and what prohibited in military operations that may violate the most basic of human rights, the right to life. The doctrine of institutional non-justiciability cannot prevent an examination of this question.

51. *Second*, justices who think that there is a place for the doctrine of institutional non-justiciability point out that the test is one of the predominant nature of the question in dispute. When this is political or military, there are grounds for refusing to hear the case. By contrast, when the nature of the question is predominantly legal, the doctrine of institutional non-justiciability does not apply (see HCJ 4481/91 *Bargil v. Government of Israel* [42], at p. 218 {166}). The questions in dispute in the petition before us are not questions of policy. Nor are they military questions. The question is not whether or not to adopt a policy of a

preventative attack that causes the death of terrorists and sometimes also of innocent civilians in the vicinity. The question is a legal one, which can be seen from an analysis of our judgment; the question concerns the legal classification of the military dispute taking place between Israel and the terrorists who come from the territories; the question concerns the existence or non-existence of customary international law on the matter addressed by the petition; the question concerns the determination of the scope of application of this customary law, in so far as it is reflected in the provisions of art. 51(d) of the First Protocol; the question concerns the rules of proportionality that apply in this matter. The answer to all of these questions is predominantly a legal one.

52. Indeed, in a whole host of judgments the Supreme Court has considered the rights of the inhabitants of the territories. Thousands of judgments have been given by the Supreme Court, which, in the absence of any other competent judicial instance, has addressed these issues. These issues have concerned the powers of the army during combat and the restrictions imposed on it under international humanitarian law. Thus, for example, we have considered the rights of the local population to food, medicines and other needs of the population during the combat activities (*Physicians for Human Rights v. IDF Commander in Gaza* [10]); we have considered the rights of the local population when terrorists are arrested (*Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [25]); when transporting the injured (HCJ 2117/02 *Physicians for Human Rights v. IDF Commander in West Bank* [43]; when besieging a church (*Almadani v. Minister of Defence* [6]); during arrest and interrogation (*Centre for Defence of the Individual v. IDF Commander in West Bank* [19]; *Yassin v. Commander of Ketziot Military Camp* [22]; *Marab v. IDF Commander in Judaea and Samaria* [23]). More than one hundred petitions have examined the rights of the local inhabitants under international humanitarian law as a result of the construction of the separation fence (see *Beit Sourik Village Council v. Government of Israel* [17]; *Marabeh v. Prime Minister of Israel* [8]; HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* [44]). In all of these the predominant character of the question in dispute was legal. Admittedly, the legal answer is likely to have political and military ramifications. But they did not determine the nature of the question. It is not the results that arise from the judgment that determine its nature, but the questions that are considered by it and the way in which they are answered. These

questions have in the past been, and they remain today, predominantly of a legal nature.

53. *Third*, the types of question that were considered by us are considered by international courts. The international law that concerns the duties of armed forces to civilians during an armed conflict has been considered, for example, by the International Criminal Tribunals for war crimes in Rwanda and the former Yugoslavia (see paras. 26, 30 and 34 above). These courts have examined the legal aspects of the conduct of armed forces. Why cannot an Israeli court examine these matters too? Why should these questions, which are justiciable in international courts, not be justiciable in national courts?

54. *Finally*, the laws concerning the preventative operations of armed forces that cause the death of terrorists and innocent civilians in their vicinity require a retrospective investigation of the conduct of the armed forces (see para. 40 above). Customary international law provides that this investigation should be of an independent character. In order to enhance its objective nature and ensure the maximum possible objectivity, this investigation should be subject to judicial scrutiny. This judicial scrutiny is not a substitute for the ongoing scrutiny of army authorities, which exercise their scrutiny prospectively. 'Because of the court's structure and the scope of its functions, it cannot operate by way of ongoing scrutiny and supervision' (*per* President M. Shamgar in HCJ 253/88 *Sajadia v. Minister of Defence* [45], at p. 825). Moreover, this judicial scrutiny is not a substitute for an objective retrospective investigation after an event in which, it is alleged, innocent civilians who did not take a direct part in the hostilities were harmed. When a retrospective investigation has been made, judicial scrutiny of the decisions of the objective committee of investigation should be possible in appropriate cases. This will ensure that they function properly.

*(9) The scope of judicial scrutiny*

55. The Supreme Court, sitting as the High Court of Justice, exercises judicial scrutiny of the legality of the discretion of military commanders in the territories. This court has done this since the Six Day War. The premise that has guided the court was that the military commanders and officers who are subject to its authority are civil servants who carry out public duties according to the law (*Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in*

*Judaea and Samaria* [11], at p. 809). This scrutiny ensures the legality of the discretion exercised by the military commander.

56. The scope of judicial review on a decision of a military commander to carry out a preventative attack that causes the death of terrorists in the territories, and sometimes the death of innocent civilians, varies according to the nature of the concrete question that is under discussion. At *one* end of the spectrum lies the question, which we are considering in the petition before us, concerning the content of the international law of armed conflicts. This is simply a question of determining the applicable law. According to our legal approach, this question lies within the purview of the judiciary. 'The final and decisive decision as to the interpretation of a statute, according to its validity at any given time, rests with the court' (*per* President M. Shamgar in HCJ 306/81 *Flatto-Sharon v. Knesset Committee* [46], at p. 141). The task of interpreting the law rests with the court. This is the case with regard to the Basic Laws, statutes and regulations. This is the case with regard to Israeli common law. It is certainly also the case with regard to customary international law that applies in Israel. The court is not permitted to shirk this authority. The question that the court should ask itself is not whether the executive understood the law in a reasonable manner. The question that the court should ask itself is whether the executive understood the law correctly (HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [47], at p. 762). It is the court that has expertise in interpreting the law (see HCJ 3648/97 *Stamka v. Minister of Interior* [48], at p. 743; HCJ 399/85 *Kahane v. Broadcasting Authority Management Board* [49], at p. 305). It follows that the judicial scrutiny of the content of customary international law with regard to the question before us is comprehensive and complete. The court asks itself what the international law is and whether the military commander's approach is consistent with that law.

57. At the *other* end of the spectrum of possibilities lies the professional-military decision to carry out a preventative operation which causes the death of terrorists in the territories. This is a decision that falls within the authority of the executive branch. It has the professional security expertise in this sphere. The court will ask itself whether a reasonable military commander would have made the decision that was actually made. The question is whether the decision of the military commander falls within the margin of reasonable activity of a military commander. If the answer is yes, the court will not replace the

security discretion of the military commander with the security discretion of the court (see HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [50], at p. 539; *Ajuri v. IDF Commander in West Bank* [9], at p. 375 {109}). In *Beit Sourik Village Council v. Government of Israel* [17], which concerned the route of the security fence, we said:

> 'We, the justices of the Supreme Court, are not experts in military matters. We shall not examine whether the military outlook of the military commander corresponds with ours, in so far as we have a military outlook concerning the military character of the route. This is how we act with regard to all questions of expertise, and this is how we act with regard to military matters as well. All we can determine is whether a reasonable military commander could have determined a route as the military commander determined it' (*ibid.* [17], at p. 843 {300}).

It follows that judicial scrutiny with regard to military measures that should be taken is an ordinary scrutiny of reasonableness. It is true that 'military considerations' and 'state security' are not magic words that prevent judicial scrutiny. But the question is not what I would have decided in the given circumstances, but whether the decision that the military commander made is a decision that a reasonable military commander was entitled to make. In this regard special weight should be given to the military opinion of the person who has the responsibility for security (see HCJ 258/79 *Amira v. Minister of Defence* [51]; *Dawikat v. Government of Israel* [41], at p. 25; *Beit Sourik Village Council v. Government of Israel* [17], at p. 844 {300}; *Marabeh v. Prime Minister of Israel* [8], at para. 32 of the judgment).

58. Between these two ends of the spectrum there are cases that lie in the middle ground. Each of these requires a careful examination of the character of the decision. In so far as it involves a legal perspective, it will approach one end of the spectrum. In so far as it involves a professional military perspective, it will approach the other end of the spectrum of possibilities. Take the question whether a decision to carry out a preventative attack that causes the death of terrorists falls within the framework of the conditions determined by customary international law in this regard (as stated in art. 51(3) of the First Protocol). What is the scope of the judicial scrutiny of a decision of the military commander that these conditions are satisfied in a specific case? Our answer is that

the question whether the conditions provided in customary international law for carrying out a military operation are satisfied is a legal question, with regard to which the court has the expertise. I discussed this in *Physicians for Human Rights v. IDF Commander in Gaza* [10]:

> 'Judicial review does not examine the wisdom of the decision to carry out military operations. The issue addressed by judicial review is the legality of the military operations. Therefore we presume that the military operations carried out in Rafah are necessary from a military viewpoint. The question before us is whether these military operations satisfy the national and international criteria that determine the legality of these operations. The fact that operations are necessary from a military viewpoint does not mean that they are lawful from a legal viewpoint. Indeed, we do not replace the discretion of the military commander in so far as military considerations are concerned. That is his expertise. We examine their consequences from the viewpoint of humanitarian law. That is our expertise' (*ibid.* [10], at p. 393 {207-208}).

A similar approach exists with regard to proportionality. The decision on a question whether the benefit that accrues from the preventative attack is commensurate with the collateral damage caused to innocent civilians who are harmed by it is a legal question, with regard to which it is the judiciary that have the expertise. I discussed this in *Beit Sourik Village Council v. Government of Israel* [17] with regard to the proportionality of the harm that the security fence causes to the local inhabitants' quality of life:

> 'The military commander is the expert on the military aspect of the route of the separation fence. We are experts on its humanitarian aspects. The military commander determines whether the separation fence will pass over the hills or in the plain. That is his expertise. We examine whether the harm caused by this route to the local inhabitants is proportional. That is our expertise' (*ibid.* [17], at p. 846 {304}; *Marabeh v. Prime Minister of Israel* [8], at para. 32 of the judgment).

Proportionality is not a precise criterion. Sometimes there are several ways of satisfying its requirements. A margin of proportionality is created. The court is the guardian of its limits. The decision within the

limits of the margin of proportionality rests with the executive branch. This is its margin of appreciation (see HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [52], at p. 12; HCJ 4769/95 *Menahem v. Minister of Transport* [53], at p. 280; *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [32], at para. 78 of my opinion).

59. Judicial scrutiny of military decisions to carry out a preventative attack that causes the death of terrorists and innocent civilians is by its very nature of limited scope. There are two reasons for this: *first*, judicial scrutiny cannot be exercised prospectively. Once we have determined in this judgment of ours what the provisions of customary international law that apply in the matter before us are, we naturally cannot examine its realization prospectively. The judicial scrutiny in this matter naturally occurs retrospectively. *Second*, the main investigation should be made by the investigatory committee which according to international law should carry out an objective investigation that is made retrospectively. The scrutiny of this court can naturally be directed only against the decisions of that committee, according to the accepted criteria in this regard.

*(10) From general principles to the specific case*

60. The order *nisi* that was issued at the request of the petitioners is this:

> 'To order respondents 1-3 to come and explain why the "targeted killing" policy should not be cancelled and why they should not refrain from giving orders to respondents 4-5 to carry out this policy, and also to order respondents 4-5 to come and explain why they should not refrain from carrying out operations of killing wanted persons in accordance with the aforesaid policy.'

A consideration of the 'targeted killing' — or, as we call it, a preventative attack that causes the death of terrorists, and sometimes also of innocent civilians — shows that the question of the legality of the preventative attack under customary international law is a complex one (for an analysis of the Israeli policy, see Y. Shany, 'Israeli Counter-Terrorism Measures: Are They "Kosher" under International Law,' in M.N. Schmitt and G. Beruto (eds.), *Terrorism and International Law: Challenges and Responses* 96 (2002); M. Gross, 'Fighting by Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy,' 51 *Political Studies* 360 (2003); S.R. David, 'Debate: Israel's Policy of Targeted Killing,' 17 *Ethics and International Affairs* 111 (2003); Y. Stein,

'Response to Israel's Policy of Targeted Killing: By Any Name Illegal and Immoral,' 17 *Ethics and International Affairs* 127 (2003); A. Guiora, 'Symposium: Terrorism on Trial: Targeted Killing as Active Self-Defense,' 36 *Case Western Res. J. Int'l L*. 319; L. Bilsky, 'Suicidal Terror, Radical Evil, and the Distortion of Politics and Law,' 5 *Theoretical Inquiries in Law* 131 (2004)). What emerges is not that a preventative attack is always permitted or that it is always prohibited. The approach of customary international law as it applies to armed conflicts of an international character is that civilians are protected against being attacked by the armed forces. But this protection does not exist with regard to those civilians 'for such time as they take a direct part in hostilities' (art. 51(3) of the First Protocol). Targeting these civilians, even if it results in death, is permitted, provided that there is no less harmful measure and provided that innocent civilians in the vicinity are not harmed. The harm inflicted upon them should be proportionate. This proportionality is determined in accordance with an ethical test which seeks to strike a balance between the military advantage and the harm to civilians. It follows that we cannot determine that a preventative attack is always legal, just as we cannot determine that it is always illegal. Everything depends upon the question whether the criteria of customary international law relating to international armed conflicts permit a specific preventative attack or not.

*Conclusion*

61. The State of Israel is fighting against ruthless terrorism that is inflicted on it from the territories. The means available to it are limited. The state determined that an essential measure from a military perspective is the preventative attack upon terrorists in the territories that causes their death. This sometimes causes innocent civilians to be injured or killed. This use of this preventative attack, notwithstanding its military importance, should be done within the law. The maxim 'When the cannons speak, the Muses are silent' is well known. A similar idea was expressed by Cicero, who said: *silent enim leges inter arma* (laws are silent in times of war). These statements are regrettable. They do not reflect the law either as it is or as it should be (see Application under s. 83.28 of the *Criminal Code* (Re) [65], at p. 260). It is precisely when the cannons speak that we need laws (see HCJ 168/91 *Morcus v. Minister of Defence* [54], at p. 470). Every struggle of the state — whether against terrorism or against any other enemy — is carried out in accordance with rules and laws. There always exists a law that the state is liable to follow.

Black holes do not exist (see J. Steyn, *Democracy through Law: Selected Speeches and Judgments* (2004), at p. 195). In our case, the law is determined by customary international law relating to armed conflicts of an international character. Indeed, the struggle of the state against terrorism is not waged 'outside' the law. It is waged 'within' the law and with tools that the law makes available to a democracy.

62. The war of the state against terrorism is a war of the state against its enemies. It is also the war of the law against those who attack it (see HCJ 320/80 *Kawasma v. Minister of Defence* [55], at p. 132). In one case that considered the laws of war in an armed conflict, I said:

> 'This fighting is not carried out in a normative vacuum. It is carried out according to the rules of international law, which set out the principles and rules for waging war. The statement that "when the cannons speak, the Muses are silent" is incorrect. Cicero's aphorism that at a time of war the laws are silent does not reflect modern reality… The reason underlying this approach is not merely pragmatic, the result of the political and normative reality. The reason underlying this approach is much deeper. It is an expression of the difference between a democratic state that is fighting for its survival and the fighting of terrorists who want to destroy it. The State is fighting for and on behalf of the law. The terrorists are fighting against and in defiance of the law. The war against terror is a war of the law against those who seek to destroy it… But it is more than this: the State of Israel is a state whose values are Jewish and democratic. We have established here a state that respects law, that achieves its national goals and the vision of generations, and that does so while recognizing and realizing human rights in general and human dignity in particular; between these two there is harmony and agreement, not conflict and alienation' (*Almadani v. Minister of Defence* [6], at pp. 34-35 {52-53}; see also *Morcus v. Minister of Defence* [54], at p. 470; HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [56], at p. 369).

Indeed, in the struggle of the state against international terrorism, it is obliged to act in accordance with the rules of international law (see M. Kirby, 'Australian Law – After September 11, 2001,' 21 *Austl. Bar. Rev.*

253 (2001)). These rules are based on a balance. They are not a question of all or nothing. I discussed this in *Ajuri v. IDF Commander in West Bank* [9], where I said:

> 'In this balance, human rights cannot receive complete protection, as if there were no terror, and state security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle' (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [6], at p. 383 {120}).

Indeed, the struggle against terrorism has turned our democracy into a 'defensive democracy' or a 'militant democracy' (see A. Sajo, *Militant Democracy* (2004)). But this struggle must not be allowed to deprive our system of government of its democratic character.

63. The question is not whether it is permitted to defend oneself against terrorism. Certainly it is permitted to do so, and sometimes it is also a duty to do so. The question is the manner in which one responds. In this regard, a balance should be struck between security needs and the rights of the individual. This balance imposes a heavy burden on those involved in the defence of the state. Not every effective measure is also a legal one. The end does not justify the means. The armed forces need to train themselves to act in accordance with the rules of law. This balance imposes a heavy burden on the justices, who need to determine, on the basis of existing law, what is permitted and what is prohibited. I discussed this in one case, where I said:

> 'The decision has been placed at our door, and we must accept it. We have a duty to preserve the legality of government even in hard cases. Even when the cannons speak and the Muses are silent, the law exists and operates, and it determines what is permitted and what is prohibited, what is legal and what is illegal. And where there is law, there is also a court that determines what is permitted and what is prohibited, what is legal and what is illegal. Some of the public will rejoice at our decision; the rest of it will criticize it. It is possible that neither the former nor the latter will read out reasoning. But we shall do our duty' (HCJFH 2161/96 *Sharif v. Home Front Commander* [57], at p. 491).

Indeed, the decision in the petition before us is not simple:

> 'We are members of Israeli society. Although we sometimes find ourselves in an ivory tower, that tower is in the heart of Jerusalem, which has on more than one occasion suffered from ruthless terror. We are aware of the killing and destruction that the terror against the state and its citizens brings in its wake. Like every other Israeli, we too recognize the need to protect the State and its citizens against the serious harm of terror. We are aware that, in the short term, this judgment of ours will not make the state's struggle against those that attack it any easier. But we are judges. When we sit in judgment, we ourselves are being judged. We act to the best of our conscience and understanding. As to the struggle of the State against the terror that besets it, we are convinced that, in the final analysis, its struggle in accordance with the law and its provisions strengthens its power and its spirit. There is no security without law. Upholding the requirements of the law is an element of national security (*Beit Sourik Village Council v. Government of Israel* [17], at p. 861 {323}).

64. In one case we considered the question whether the state was entitled to order its interrogators to adopt special interrogation measures that involved the use of force against terrorists in a situation of a 'ticking bomb.' Our answer to this question was no. I described in my opinion the difficult security reality that Israel faced, and I added:

> 'We are aware that this decision does not make it easier to deal with that reality. 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 to it. A democracy must sometimes fight with one hand tied behind its back. Even so, democracy has the upper hand. The rule of law and the liberty of the individual constitute important components in its understanding of security. In the final analysis, they strengthen its spirit and this strength allows it to overcome its adversities' (HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [58], at p. 845 {605}).

Let us pray that this is so!

It has therefore been decided that it cannot be determined *ab initio* that every targeted killing is prohibited under customary international law, just as it cannot be determined *ab initio* that every targeted killing is permitted under customary international law. The laws relating to targeted killings are determined in customary international law, and the legality of each individual attack needs to be decided in accordance with them.

**Vice-President E. Rivlin**

1. I agree with the important and comprehensive opinion of my colleague President A. Barak.

The increase in terrorism in recent years — an increase both in scope and intensity — has raised difficult questions concerning the manner in which a democratic state should and may fight against the persons who rise up against it and its citizens to destroy them. Indeed, it is not disputed that a state may and should fight terrorism. It is also not disputed that not all means are permitted. It is difficult to map out the correct way of how to fight terrorism and defend oneself against it. The ordinary means whereby a state protects itself and its citizens are not necessarily effective against terrorist organizations and their members. Even policing and enforcement methods that characterize the fight against 'conventional' criminal activity are unsuited to the needs of fighting terrorism (see also D. Statman, 'Targeted Killing,' 5 *Theoretical Inquiries in Law* 179 (2004)). For these reasons, the State of Israel (like other states) has over the years employed and continues to employ various operations in order to deal with terrorism. This court, on various occasions, is called upon to consider the question of the delicate balances involved in making use of these courses of action.

The petition before us concerns the 'targeted killing' policy. In this policy, the State of Israel attacks persons that it identifies as being involved in the planning and execution of terror attacks. The goal, on the one hand, is to protect the civilians and armed forces of the State of Israel, and on the other hand, to prevent an attack upon, or to minimize collateral damage to, the Palestinian civilian population. My colleague President A. Barak is of the opinion that the question before us should be examined in light of the rules of international law relating to an armed conflict (or dispute) of an international character. I agree with this position (see also J. N. Kendall, 'Israeli Counter-Terrorism:

"Targeted Killings" under International Law,' 80 *N.C.L. Rev.* 1069 (2002)). An armed dispute has existed for many years between Israel and the various terrorist organizations operating in the territories. This dispute, as my colleague the president says, does not exist in a normative vacuum. Two normative sets of laws apply. In the words of my colleague the president: 'In addition to the provisions of international law governing an armed conflict, the basic principles of Israeli public law are likely to apply. These basic principles are carried by every Israeli soldier in his backpack and they go with him wherever he goes.' Indeed, two normative systems require consideration in our case: one is the rules of international law, and the other is the legal rules and moral principles of the State of Israel, including the basic value of human dignity.

2. In his consideration of the normative system incorporated in the rules of international law, my colleague the president addresses the question of the correct classification of terrorist organizations and their members: should they be regarded as combatants or civilians, or perhaps as a separate group of unlawful combatants? My colleague's conclusion is that, in so far as the law currently stands, 'we do not have before us sufficient information that allows us to recognize the existence of this third category' of unlawful combatants, and since such combatants do not satisfy the conditions for being included in the category of 'combatants,' they should be classified as civilians. He clarifies that this classification does not, within the framework of international law, grant protection to civilians who are taking a direct part in hostilities; these persons are therefore not protected against attack, when they are taking a direct part in terrorist operations.

The issue of the correct classification of terrorist organizations and their members gives rise to difficult questions. Customary international humanitarian law requires the parties to the dispute to distinguish between civilians and combatants, between military objectives and civilian objectives, and to refrain from causing excessive damage to enemy civilians. The question is whether *reality* has not created, *de facto*, an additional group that is subject to a special law. Indeed, the scope of the danger presented by the terrorist organizations to the State of Israel and the safety of its citizens, the unsuitability of the measures usually employed against civilian lawbreakers and the threat arising from terrorist activity all give rise to a feeling of discomfort when we try to adapt the traditional category of 'civilians' to those persons who are taking a direct part in acts of terrorism. The latter are not 'combatants'

according to the definition of international law. The manner in which the term 'combatants' has been defined in the relevant conventions resulted precisely from a desire to deny 'unlawful combatants' certain protections that are given to 'lawful combatants' (especially protections concerning the status of prisoners of war and not being brought to trial). They are 'unprivileged belligerents' (see K. Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle Over Legitimacy*, Harvard Program on Humanitarian Policy and Conflict Research, 'Occasional Paper' (Winter 2005, no. 2); R.R. Baxter, 'So Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs,' 28 *British Year Book of International Law* 342 (1951)). But it is precisely the characteristics of terrorist organizations and their members that exclude them from the category of 'combatants' — the absence of recognizable emblems and the refusal to observe the laws and customs of war — that create a difficulty, in so far as this exclusion gives a better status, even if only in certain matters, to someone who chooses to become an 'unlawful' combatant, who acts contrary to the rules of international law and the rules of morality and humanitarianism.

The classification of members of terrorist organizations under the category of 'civilian' is not, therefore, self-evident. Dinstein wrote in this context that:

> '… a person is not allowed to wear simultaneously two caps: the hat of civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War specifically permits derogation from the rights of such a person (the derogation being less extensive in occupied territories, pursuant to the second Paragraph of Article 5)' (Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, 2004) at pp. 29-30).

It has also been said that: '… If it is not fitting to regard terrorists as combatants, and in consequence of this to give them the protections

given to combatants, they should certainly not be regarded as civilians who are not combatants and be given far greater rights' (E. Gross, *Democracy's Struggle Against Terrorism: Legal and Moral Aspects* (2004), at p. 76; see also Y. Dinstein, 'Unlawful Combatancy,' 32 *Israel Yearbook on Human Rights* 249 (2002); Baxter, 'So Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs,' *supra*). Those who believe that a third category of lawbreakers exists emphasize that this includes those persons who seek to obscure the dividing line between civilians and combatants: J.C. Yoo and J.C. Ho, 'The New York University–University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists,' 33 *Virginia Journal of International Law* 217 (2003). The difficulty may become even greater if we take into account that those persons who do not satisfy the requirements either of lawful combatants or of innocent civilians are not homogeneous. They include groups that are not necessarily identical to one another from the viewpoint of their willingness to accept the basic legal and humanitarian norms. In particular, we should distinguish in this context between unlawful combatants who fight against armed forces and those who deliberately operate against civilians.

It would therefore appear that international law needs to be brought into line with the age in which we live. In view of the facts that were submitted before us, my colleague the president proposes that we adapt the law by interpreting the existing law, which in his opinion recognizes two categories — combatants and civilians (see also S. Zachary, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' 38 *Israel L. Rev.* 379 (2005)). As we have said, there may be other approaches. I see no need to expand upon them, since in view of the rules of interpretation proposed by my colleague the president, the fundamental difficulty loses much of its urgency.

The interpretation that my colleague President A. Barak proposes *de facto* creates an additional category, and rightly so. It is possible to derive this from the category of combatants ('unlawful combatants'), and it is possible to derive this from the category of civilians. My colleague the president follows the latter path. If we follow him, we will derive from this category the group of civilians who are international lawbreakers, whom I would call 'uncivilized civilians.' But whichever path we follow, there is no difference in the result, since the interpretation that my colleague the president proposes to give the provisions of international law adapts the rules to the new reality. I agree with this interpretation. It

is a dynamic interpretation that rises above the limitations of a literal reading of the laws of war.

3. Against the background of the differences between 'lawful' combatants and 'international lawbreaking' combatants, it is possible to draw an analogy between the combat methods that are permitted in a struggle between two armed forces and the 'targeted killing' of terrorists (see also Statman, 'Targeted Killing,' *supra*). The approach underlying the 'targeted killing' policy is that only persons who are actually involved in terrorist activity should be targeted. Indeed, in a conventional war the combatants are identifiable and distinguishable from the civilian population. It is permitted to target these combatants (subject to the limitations of international law). Civilians may not be targeted. Similarly, within the framework of the struggle against terrorism, it is permitted to target international lawbreaking combatants, but harming civilians should be avoided in so far as possible. The difficulty arises of course from the fact that the unlawful combatants by definition do not act in accordance with the laws of war, which means, *inter alia*, that they very often operate from a concealed position among the civilian population, which is contrary to the express provisions of the First Additional Protocol to the 1977 Geneva Conventions. They do this in order to obtain an advantage that arises from the fact that the opposing forces wish to respect the rules of international law (see J. Callen, 'Unlawful Combatants and the Geneva Conventions,' 44 *Va. J. Int'l L.* 1025 (2004)).

But even under the difficult conditions of fighting against terrorism, the distinction between lawbreaking combatants and civilians should be maintained. This, for our purposes, is the significance of the word 'targeted' in the expression 'targeted killings.' The significance is the requirement of proportionality that my colleague the president discusses at length.

4. In so far as the implementation of the requirement of proportionality is concerned, the proper premise emphasizes the rights of innocent civilians. The State of Israel has the duty to respect the lives of the civilians on the other side. It is liable to protect its own civilians while respecting the lives of the civilians who are not under its effective control. When we consider the rights of innocent civilians, we will find it easier to recognize the importance of the restrictions placed upon the manner in which the armed conflict is conducted. The duty to respect the civilians on the other side is clearly stated in the rules of international

law (see E. Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians,' 39 *Israel L. Rev.* 81 (2006), at p. 96).

This duty is also a part of the other normative system that governs the armed conflict: it is a part of the moral code of the state and the supreme principle of preserving human dignity. I discussed this with regard to the issue of the use of the 'prior warning' procedure (also known as the 'neighbour' procedure):

> '… In one matter the lines are clear and sharp — the respect for human dignity as such. An army occupying a territory under a belligerent occupation has the duty of protecting the life of the local inhabitant. It also has the duty of protecting his dignity. Making such an inhabitant, who is caught in a battle zone, choose whether or not to agree to the army's request to convey a warning to a wanted person places him in an impossible situation. The choice itself is immoral. It violates human dignity' (HCJFH 10739 *Minister of Defence v. Adalah Legal Centre for Arab Minority Rights in Israel* [59]).

The two normative systems that govern armed conflicts are as one in regarding the principle of human dignity as central. This principle nourishes the interpretation of international law, just as it nourishes the interpretation of Israeli internal public law. It expresses a general value that gives rise to various specific duties (on the importance of this principle in international law and its significance with regard to the treatment of civilians, see Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians,' *supra*; it should be noted that Benvenisti identifies two principles that are relevant to the implementation of the principle of respecting human dignity in the context under discussion: the principle of individualism, which states that every person is responsible solely for his own actions, and the principle of universalism, according to which all individuals are entitled to the same rights, irrespective of the group to which they belong. This principle is not expressly recognized in the law of armed conflicts. But this does not negate the duty relating to enemy civilians. The scope of the duty varies but not the existence of the duty itself (*ibid*., at p. 88)).

5. The principle of proportionality, which is a general principle that is enshrined in various provisions of international law, seeks to realize this duty. This principle does not allow disproportionate collateral damage to innocent civilians. Thus it demands that the benefit that arises from

realizing the proper military objective should be commensurate with the damage caused to innocent civilians. It demands that the collateral damage should not be excessive in the circumstances of the case. There are some who regard the weighing of the benefit against the damage as a concretization of the requirement to refrain from harming civilians excessively. Although the connection between the two is clear, it would appear that there may be collateral damage to the civilian population that is so serious that even a military objective of real benefit will not justify causing it. After all, we are speaking of ethical requirements. 'This is an ethical test,' my colleague the president says. 'It is based on a balance between conflicting values and interests.' This ethical outlook is accepted in customary international law with regard to the protection of civilians (art. 51 of the First Additional Protocol to the 1977 Geneva Conventions). It is also accepted in the national legal systems of many countries. This test, as President Barak said in one case, 'seeks in essence to realize the constitutional outlook that the end does not justify the means. It is an expression of the concept that there is an ethical barrier that democracy cannot pass, even if the purpose that is being sought is a proper one (*Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [33]).

The duty to respect the lives of innocent civilians is therefore the premise. It gives rise to the requirement that the collateral damage to civilians should not be excessive and should be proportionate to the benefit arising from the military operation. This ethical outlook logically imposes restrictions on attacks against the lawbreaking combatants themselves. The restrictions may relate to the type of weapon that is used during the targeted killing. The restrictions may also result in choosing a method that reduces the danger to the lives of innocent civilians. The restrictions may relate to the degree of care that should be taken in identifying the target for the killing. These are all restrictions that seek in essence to realize the duty to respect the lives of innocent civilians, and they will be interpreted accordingly.

The premise is therefore the rights of innocent civilians. It is the premise, but it is not the *only* premise. It does not detract from the human dignity of the lawbreaking combatants themselves. Admittedly, international law does not grant lawbreaking combatants equal rights to those given to lawful combatants or, conversely, to innocent civilians. But human dignity is a supreme principle that applies to every person, even in times of war and conflict. It is not conditional upon reciprocity. One of

the consequences of this, which is not disputed by the state, is that whenever it is possible to arrest a terrorist who is taking a direct part in hostilities and bring him to trial, the state will do so. This is a possibility that should always be considered. But as my colleague the president says, sometimes this possibility may be completely impractical or may endanger soldiers excessively.

6. The principle of proportionality is easy to state, but hard to implement. When we consider it prospectively, under time constraints and on the basis of limited sources of information, the decision may be a difficult and complex one. Frequently it is necessary to consider values and principles that cannot be easily balanced. Each of the competing considerations is based upon relative variables. None of them can be considered as standing on its own. Proportionate military needs include humanitarian elements. Humanitarian considerations take into account existential military needs. As my colleague the president says, the court determines the law that governs the decision of the military commander. The professional military decision is the responsibility of the executive branch, and the court will ask itself if a reasonable military commander could have made the decision that was actually made, in view of the normative principles that apply to the case (cf. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, which was submitted to the International Criminal Tribunal for the former Yugoslavia in June 2000).

7. In conclusion, like my colleague the president, I too am of the opinion that it cannot be decided *ab initio* that a targeted killing operation is always illegal, just as it cannot be decided *ab initio* that it is legal and permitted in all circumstances. Such an operation — in order to be legal — must satisfy the rules of law, including the requirement of proportionality as explained above, from an outlook that places the main emphasis on the right of the State of Israel to protect itself and the lives of its civilians, but at the same time regards the principle of human dignity as a fundamental value.

I therefore agree with the opinion of my colleague President A. Barak.

**President D. Beinisch**

I agree with the judgment of President (Emeritus) Barak and would like to emphasize several aspects of the difficult subject that has been brought before us.

In the petition before us the petitioners requested us to order the respondents to cancel the 'targeted killing' policy and to refrain from carrying out any operations within the framework of that policy. This is therefore a petition for a general and broad relief that relies on the petitioners' claim that Israel's policy in this regard is 'manifestly illegal.' Among the other arguments from the field of international law and Israeli internal law, the petitioners also based their claims on specific examples from the past, which they believe show the illegality of the aforesaid policy. These specific examples indicate the problems and the risks involved in the 'targeted killing' policy, but they cannot decide the legal question of the legality of the policy in general.

For the reasons set out in the opinion of my colleague President Barak, I agree with the conclusion that the question before us is governed by the laws applying to international armed conflicts, and that the petitioners' sweeping position is not mandated by the rules of international humanitarian law. The conclusion reached by President Barak, with which I agree, is that it cannot be said that the aforesaid policy is always prohibited, just as it cannot be said that it is permitted in all circumstances at the discretion of the military commander. The legal question before us is complex and cannot be addressed in the broad and all-embracing manner as argued by the petitioners.

This court has held many times in the past that even combat operations are governed by the norms enshrined in both international law and internal law, and that military activity does not take place in a normative vacuum. The legal difficulties that we are required to confront derive first and foremost from the fact that international law has not yet developed the laws of war in a manner that will make them suitable for war against terrorist organizations as opposed to a regular army. Therefore, we are required make use of interpretive tools in order to adapt existing humanitarian law to the needs of the cruel reality with which the State of Israel is contending. It should be noted that the spread of the scourge of terrorism in recent years is a concern of legal scholars in many countries and experts in international law, who seek to establish the norms of what is permitted and prohibited with regard to

terrorists who do not comply with any law. Against this normative reality, I too agree that within the framework of existing law, terrorists and their organizations should not be classified as 'combatants' but as 'civilians.' In view of this, they are subject to art. 51(3) of the First Additional Protocol to the 1977 Geneva Conventions — an arrangement that is a part of customary international law — according to which:

> 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.'

In his opinion President Barak discussed at length the interpretation of the main elements of the aforesaid art. 51(3), in view of the need to define the expression 'civilians' that 'take a direct part in hostilities' and to clarify the meaning of 'for such time.' As can be seen from the interpretation given in the president's opinion, the power of the state to carry out 'targeted killing' operations is subject to restrictions and reservations. From these reservations we see that not every involvement in terrorist activity will constitute taking 'a direct part in hostilities' under art. 51(3) and that we are speaking of activity relating to actual hostilities — activity which, although is not limited merely to the physical attack, does not include activity of indirect assistance (see para. 35 of the president's opinion). I agree that the dilemmas that arise in view of the interpretation of the elements of the aforesaid art. 51(3) require a specific examination on a case by case basis. It should be remembered that the purpose of the 'targeted killing' is to prevent harm to human life as a part of the duty of the state to protect its armed forces and civilians. Since art. 51(3) is an exception to the duty to refrain from harming the lives of innocent civilians, great caution should be exercised when considering, in the appropriate circumstances, the possibility of endangering the lives of civilians. When exercising this caution, an examination should be made of the level of information required in order to classify a 'civilian' as someone who is taking a direct part in the hostilities. This information should be reliable, substantial and convincing with regard to the risk presented by the terrorist to human life — a risk that includes persistent activity that is not limited to sporadic activity or a single concrete act. I would add that in appropriate circumstances information concerning the activity of the terrorist in the past may be used to examine the risk that he presents in the future. I would also add that when assessing the risk, the likelihood of the hostile activity that endangers human life should be considered. In this regard, a

remote suspicion is insufficient; there should be a significant probability that such a risk exists. I agree of course with the finding that a thorough and independent (retrospective) investigation should be made with regard to the correctness of the identification and the circumstances of the attack. To all of the above I would add two points: first, no use should be made of 'targeted killings' when it is possible to arrest a terrorist who is taking a direct part in hostilities without any real risk to the lives of the armed forces. Second, the principle of proportionality as accepted in customary international law, according to which disproportionate collateral damage to innocent civilians should be avoided, should be observed. When the harm to innocent civilians is not proportionate to the benefit of the military operation (the test of 'proportionality in the narrow sense'), the 'targeted killing' will be disproportionate. This matter was also discussed in depth by my colleague Vice-President Rivlin, and I agree with him too. Ultimately, when a 'targeted killing' operation is carried out in accordance with the reservations that have been discussed and within the framework of the law relating to international armed conflicts in customary humanitarian law as we have interpreted it, we are not speaking of taking human life in an arbitrary manner, but of an action that is intended to save human life.

Therefore I too am of the opinion that in Israel's difficult war against terror that besets it, we cannot say in a sweeping manner that the use of the measure of 'targeted killings' as one of the strategies in the war against terrorism is prohibited, and thereby prevent the state from using a strategy which, in the opinion of those responsible for security, is essential for the protection of the lives of Israeli inhabitants. Notwithstanding, in view of the extreme nature of the 'targeted killing' strategy, it should only be used subject to the restrictions and reservations outlined in our judgment and in accordance with the circumstances and merits of each individual case.

Petition denied.
23 Kislev 5767.
14 December 2006.

**Mayor of Ad-Dhahiriya v. IDF Commander in West Bank**
(Judgment)

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## Synopsis

The Israel Defence Forces constructed a concrete barricade (not to be confused with the security fence) along a section of road in the south of Mount Hebron in the territory of Judaea and Samaria. The barricade was built to a height of 82 centimetres, and its purpose was to prevent the passage of vehicles except at points where there was a gap in the barricade.

The military commander, who is responsible for security in the territories, argued that the barricade was required to counter various terrorist threats, and in particular the threat of drive-by shootings. It did this by limiting the possibilities of exiting the road and thereby making it difficult for terrorists to escape after carrying out a shooting. He further argued that the barricade caused minimal harm to the local population, since it was no different from the barricades found along many Israeli inter-city roads, whose purpose is to separate the traffic going in different directions. There were gaps in the barricades at regular intervals, where vehicles as well as pedestrians could pass freely.

The Supreme Court rejected the argument comparing the security barricade to traffic barricades on inter-city roads. In view of the agricultural lifestyle of the local inhabitants, the harm caused by the barricade to them was serious. Many of the Palestinian inhabitants of the area use donkeys and other animals as means of transport, and many of them travel by foot. Many of the inhabitants of the area earn their livelihood from herding sheep. The barricade impeded the passage of pack animals and flocks of sheep and goats. The barricade also impeded the passage of cetain pedestrians, since not everyone is capable of climbing over a concrete barricade with a height of 82 centimetres. The barricade denied passage to the disabled, the elderly and other persons

with limited movement, and it made the passage of women with small children difficult.

The court accepted that the concrete barricade had been built for a proper purpose, namely as a measure to counter terrorism, and especially 'drive-by shootings.' Nonetheless, the court held that the barricade as it had been constructed (solid concrete) was a disproportionate measure, since it was not the least harmful measure that was capable of achieving the security purpose. A metal barricade, which would allow livestock to pass underneath and would make it easier for people to climb over, would achieve the same security purpose, but cause less harm to the local inhabitants.

HCJ 1748/06

**Mayor of Ad-Dhahiriya**
**and others**
**v.**
**IDF Commander in West Bank**

HCJ 1845/06

**Khalil Mahmud Younis**
**and others**
**v.**
**1. IDF Commander in West Bank**
**2. Head of Civilian Administration in West Bank, Bethel**

HCJ 1856/06

**As-Samu Municipality**
**and others**
**v.**
**1. IDF Commander in West Bank**
**2. State of Israel**

**Amicus curiae: Council for Peace and Security**

The Supreme Court sitting as the High Court of Justice
[14 December 2006]
*Before Emeritus President A. Barak, President D. Beinisch*
*and Vice-President E. Rivlin*

Petition to the Supreme Court sitting as the High Court of Justice.

**Facts:** The petitioners challenged the construction of a concrete barricade, with a height of 82 centimetres, along a section of road in the south of Mount Hebron in the territory of Judaea and Samaria. The respondents argued that the barricade was required for security purposes. The petitioners argued that it impeded the movement of pedestrians and animals.

**Held:** The concrete barricade was disproportionate, since it was not the least harmful measure that was capable of achieving the security purpose. A metal barricade, which would allow livestock to pass underneath and would make it easier for people to climb over, would achieve the same security purpose, but cause less harm to the local inhabitants.

Petition granted.

**Israeli Supreme Court cases cited:**

[1] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
[2] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.
[3] HCJ 3680/05 *Tana Town Committee v. Prime Minister* (not yet reported).
[4] HCJ 4938/04 *Shuqba Village Council v. Prime Minister* (not yet reported).
[5] HCJ 1348/05 *Shatiyeh v. State of Israel* (not yet reported).
[6] HCJ 1998/06 *Bet Aryeh Local Council v. Minister of Defence* (not yet reported).
[7] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* **[2006] (1) IsrLR 443**.
[8] HCJ 2942/05 *Mansour v. State of Israel* (not yet reported).
[9] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.
[10] HCJ 399/06 *Susiya Agricultural Communal Settlement Cooperative Society Ltd v. Government of Israel* (not yet reported).
[11] HCJ 390/79 *Dawikat v. Government of Israel* [1980] IsrSC 34(1) 1.
[12] HCJ 258/79 *Amira v. Defence Minister* [1980] IsrSC 34(1) 90.
[13] HCJ 4825/04 *Alian v. Prime Minister* (not yet reported).
[14] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.

For the petitioners in HCJ 1748/06 — L. Yehuda.
For the petitioners in HCJ 1845/06 — N. Amar.
For the petitioners in HCJ 1856/06 — G. Nassir.
For the respondents — G. Shirman, D. Tirza.
For the Council for Peace and Security — Col. (res.) S. Arieli, Maj-Gen. (ret.) S. Givoli.

JUDGMENT

**President Emeritus A. Barak**

This petition is directed against the construction of a concrete barricade by the IDF forces in the south of Mount Hebron and against orders to requisition land that were made for the purpose of constructing this barricade.

*The background to the petition*

1. There are three roads in the south of Mount Hebron in Judaea. Road no. 60 runs from the south-west to the north-east and it passes through the Jewish town of Shima. Road no. 317 is the continuation of road 60, extending east from Shima Junction, and it connects the towns of Susiya, Maon and Carmel. The third road connects road 60 to the town of Tana. The petition concerns three sections of these roads, which jointly create a continuous road that is approximately 41 kilometres long, from the town of Tana in the west to the town of Carmel in the east (hereafter: the roads). North of the roads lie the Palestinian towns of Ad-Dhahiriya, As-Samu and Al-Carmel, and beyond these to the north lies the Palestinian city of Yatta. The Green Line passes to the south of the roads, at a distance of between three and seven kilometres. The route for constructing the separation fence was planned to run close to the Green Line. In the area between the planned separation fence and the roads there are approximately twenty small Palestinian villages in which there live a total of approximately 2,000 inhabitants. This area also contains agricultural land that is cultivated by the local Palestinian inhabitants. The roads are crossed by various paths that connect the Palestinian towns in the north with the Palestinian towns and agricultural land in the south.

2. On 14 December 2005 the respondents made three requisition orders: order R/185/05, order R/186/05 and order R/187/05 (hereafter — the new requisition orders). According to what is stated in the orders, they were issued 'in order to establish a defensive barricade in the south of Mount Hebron.' They requisition land in a strip adjacent to the roads, which has a length of approximately 41 kilometres and a width of several metres. The strip of land passes through the lands of the villages of Ad-Dhahiriya, Yatta, As-Samu, At-Tuwani, Khirbet Zanuta, Khirbet Ar-Rahwa and A-Tuba. The new requisition orders include a strip that is

adjacent to the whole length of the roads, with the exception of several sections, whose total length is approximately three kilometres, which according to the military commander are subject to old requisition orders by virtue of which he is in any case authorized to act as aforesaid (order R/82/19 of 17 March 1982, order R/82/31 of 28 June 1982, order R/99/2 of 23 March 1999 and order R/96/4 of 2 April 1996). In total the new requisition orders cover an area of approximately 230 dunams of private land. Objections to the requisition orders that the petitioners filed were rejected by the respondents on 12 February 2006.

3. The respondents began to construct a concrete barricade in the strip that was requisitioned along the roads, i.e., from Tana to Carmel. The barricade was built on the north side of the roads at a distance of up to three metres from the road itself. It is approximately 41 kilometres long. It is 82 centimetres high and the width of its base is 60 centimetres. There are 13 openings in the barricade that are intended to allow the traffic of vehicles on the paths that cross the roads. Two of these serve a quarry that is situated in the area and the remainder serve the local inhabitants and farmers. During the hearing of the petition, the respondents decided to make eleven additional openings so that there are a total of 24 openings in the barricade. Six of the openings are situated in close proximity to one another along a four-kilometre section of the road south of the town of Tana, and the remainder are at intervals of between one and three kilometres. Most of the openings are located at intervals of approximately two kilometres.

4. When they filed the petitions, the petitioners requested an interim order that would prevent the performance of the works to construct the concrete barricade until the petition is decided on its merits. We held a hearing of the interim order application on 3 April 2006. The application was denied. We held that in view of the scope of the harm that was anticipated from the works to construct the barricade, which was relatively small, and the fact that the measures were not irreversible, it was not proved that the petitioners' immediate damage from the performance of the works outweighed the risk involved in delaying the construction of the barricade. After the respondents sealed the opening in the concrete barricade that allowed the traffic of vehicles between the city of Yatta and the village of A-Tuwani and other towns, the petitioners filed an additional application for an interim order. We heard the positions of the parties on this matter at a hearing that took place on 27 July 2006. The respondents explained that the sealing of the opening was

carried out as an exceptional and temporary step in consequence of the serious deterioration in the security position, and on account of the redeployment of considerable forces from the territory of Judaea and Samaria to the combat areas in Gaza and Lebanon. In such circumstances, we decided (on 31 July 2006) that there was no basis for granting the application. On 6 September 2006 we held a hearing of the petitions themselves. The hearing was attended by Brigadier (res.) Danny Tirza, who is in charge of the 'Rainbow' administration, which deals with the construction of the separation fence, and Colonel (res.) Shaul Arieli from the Council for Peace and Security, which was joined as a party to the hearing, at its request, as *amicus curiae*. During the hearing the parties agreed to regard the petitions as if an order *nisi* had been made.

*The parties to the petition*

5. The petitioners in HCJ 1748/06 are the mayor of Ad-Dhahiriya, a part of whose land is included in the requisition orders made by the respondents; the head of the village council of A-Tuwani, which is situated south of the concrete barricade; and Palestinian inhabitants who live in the area or who own agricultural land in the area. The seventh petitioner is the Association for Civil Rights. The petitioners in HCJ 1845/06 are the mayor of Yatta and the mayor of the towns around Yatta, which are all near the area where the barricade is being built, and Palestinian inhabitants who live in the area south of the barricade or who live in towns in the area and have land in the area. Petitioner 30 is a non-profit association, Rabbis for Human Rights. The petitioners in HCJ 1856/06 are the municipality, mayor and inhabitants of As-Samu, a town whose agricultural lands are mostly situated in the area south of the concrete barricade. The respondent in the three petitions is the IDF Commander in Judaea and Samaria.

*The arguments of the parties*

6. The petitioners request that we set aside the decision to build the barricade. They emphasize that the barricade does not merely prevent the passage of motor vehicles but also the passage of livestock, whether these are herds or pack animals. The barricade also prevents the passage of pedestrians, including children, the elderly and the disabled. In view of the character of the local population, travel in the area takes place on foot, on horses or donkeys, or by means of agricultural vehicles such as tractors. The use of these forms of transport has increased as a result of

the travel restrictions imposed on the Palestinian population. The result is that the concrete barricade seriously disrupts the petitioners' mobility. The situation is even more serious on account of the proximity to the separation fence. The concrete barricade encloses an extensive area of land to the north and west, and the separation fence is being built to the south. This creates an enclave that is surrounded on all sides by a barrier. The ability of the inhabitants of the enclave to leave it and the ability of farmers from nearby towns to enter the cultivated areas in the enclave is very restricted and is only possible via the openings that remain in the concrete barricade.

7. The petitioners point out that the enclave contains approximately twenty villages, which are inhabited by two thousand people. These villages are very small and most of them are not connected to water and electricity. Therefore the inhabitants of the villages are dependent upon Palestinian towns on the other side of the roads for every sphere of life: the supply of water and fuel, health and education services, and a livelihood. According to the petitioners, the construction of the concrete barricade will result in the demographic and economic decline of the villages in the enclave to the point where their long-term existence is endangered. The petitioners attached to their petition a professional opinion of the non-profit association Bimkom — Planners for Planning Rights, which supports this conclusion. According to the petitioners, the concrete barricade bisects kilometres of agricultural land. It encloses within the enclave agricultural land that belongs to the inhabitants of the nearby towns. According to the records in the petitioners' possession, at least 3,500 families from the towns of Yatta, As-Samu and Ad-Dhahiriya own rights in land in the area of the enclave. It is becoming difficult for these farmers to have access to their land. Sheepherding is impeded because the movement of the flocks has become very restricted. These injuries exacerbate the harm to the property rights of the owners of the private land that has been requisitioned for building the barricade. In most places where openings have been left in the barricade, the paths that connect with the road on either side do not meet at the same point. This means that in order for an inhabitant of the area to pass from one side of the road to the other, he needs to reach the road via a path on one side that leads to an opening, enter the road and travel along it until he reaches another opening which connects with the other side. The problem with this, according to the petitioners, is that in recent years the

IDF forces prevent Palestinians from travelling on the roads that are the subject of this petition.

8. The petitioners claim that the construction of the barricade is not required at all for security reasons and therefore its construction is improper and falls outside the authority of the respondents. The petition was supported by a professional opinion signed by Brigadier (res.) Yehuda Golan-Ashenfeld and four other reserve IDF officers with the rank of colonel or lieutenant-colonel, who all formerly held senior army positions in Judaea and Samaria or the Gaza Strip. The authors of the opinion say that most of the terrain where the barricade was constructed could not in any case be negotiated by vehicles, and the construction of the barricade in fact increased certain threats, such as shooting ambushes, and created security problems. Their conclusion is that not only does the concrete barricade provide no benefit, but it is more of a security liability than an asset. According to the authors of the opinion, the IDF protects hundreds of kilometres of other roads in the territory of Judaea and Samaria without using concrete barricades of the type under discussion in this petition. The petitioners conclude their arguments in this regard by saying that the concrete barricade seriously violates the basic rights of the Palestinian inhabitants without there being any military need that can justify this violation. They therefore claim that this is an act that is *ultra vires*, or at the very least a disproportionate act that should be set aside.

9. Finally the petitioners point out that it was originally planned (in a government decision in 2003) to build the separation fence with a route that is close to the route chosen for the concrete barricade. The route of the separation fence was changed (in a government decision in 2005) in order to comply with the principles laid down by this court in HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [1]. According to the petitioners, the construction of the concrete barricade along a route that is very similar to the original route of the separation fence is a way of circumventing the requirement of determining a proportionate route for the separation fence. The petitioners express the concern that the barricade constitutes an initial stage on the way to building a barrier like the separation fence, which will be accompanied by the introduction of travel restrictions.

10. According to the respondents, the barricade is intended to protect persons travelling on the roads. These are roads that lead to Israeli

towns that are situated on the 'Palestinian' side of the security fence in the area, and therefore there is a special defensive need in this area. The respondents pointed out that 'the security need is based, *inter alia*, on a series of security incidents that have taken place in the area where the barricade is being constructed (including during 2005), namely stone throwing, Molotov cocktails, shooting at vehicles, etc.'. The concrete barricade restricts the possibilities of entering and exiting the road. It directs vehicles travelling along the road to specific exit openings. These openings will admittedly not be fitted with gates and they will allow free passage, but directing the traffic of vehicles in the area to specific openings will allow the IDF to control the traffic that crosses the road more effectively. The concrete barricade is especially useful in contending with the phenomenon of 'drive-by shootings,' because it limits the car's possibilities of escaping. The respondents claim that the harm to the inhabitants as a result of building the concrete barricade is minimal. The respondents insisted that a barricade that is 82 centimetres high does not create any restriction upon pedestrian traffic. Cars can cross the roads freely at the openings in the barricade. In their statements before us, both in oral argument and in written pleadings, the respondents insisted that there is no general restriction upon the movement of Palestinian cars on the roads themselves. At the last hearing that took place on 6 September 2006 the respondents stated that if the petitioners make specific requests to make additional openings in the concrete barricade, their requests will be considered favourably. On 19 October 2006 the respondents notified the court that they had made a 'detailed re-examination' of the route of the concrete barricade and the openings that were made in it. The petitioners' proposal of making 45 openings in the barricade was examined. The respondents found that the application was not sufficiently detailed and coherent and that it did not 'represent real needs.' Notwithstanding, a decision was made to add eleven openings that would be used for the passage of vehicles, pack animals and pedestrians, so that there would be a total of twenty-four openings in the barricade.

11. The experts of the Council for Security and Peace appeared before us and filed a detailed and coherent security opinion. According to them, the concrete barricade does not provide any protection for persons travelling on the roads. On the contrary, it creates security weaknesses. The barricade provides cover for persons wishing to ambush passing cars. It makes it impossible to carry out an immediate pursuit of

terrorists when necessary. According to the representatives of the Council for Security and Peace, no incident of 'shooting from a passing car,' which according to the respondents is the threat that the concrete barricade is supposed to prevent, ever occurred in the area under consideration in the petition, but only in remote parts of Judaea and Samaria. Instead, other security incidents have taken place in the area under consideration in the petition; these are no less serious, but the concrete barricade is of no use in preventing them. In their opinion the representatives of the Council for Security and Peace point out that the concrete barricade was also built along sections of roads that cannot be used by wheeled vehicles because of topographic conditions, natural obstacles and mounds of earth that are in the area. In view of this, the representatives of the Council for Security and Peace wonder why the concrete barricade was built, why in particular it was built on the roads that are under consideration in the petition, and why no such barricade has been built anywhere else in Judaea and Samaria.

*Deliberations*

12. According to the laws relating to a belligerent occupation, the military commander is competent to order the construction of a concrete barricade and to requisition land belonging to Palestinian inhabitants for this purpose. This power only exists when the reason that gave rise to the decision is a military or security one. According to art. 52 of the regulations appended to the Hague Convention Respecting the Laws and Customs of War on Land, 1907, the requisition of the land should be for the 'needs of the army of occupation.' According to art. 53 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, a requisition should be 'rendered absolutely necessary by military operations.' The military commander is also competent to requisition land and to build a concrete barricade on it in order to protect the lives and security of Israelis who live in Israeli towns in the territory of Judaea and Samaria, even though the Israelis who live in the territories are not 'protected persons' within the meaning of this term in art. 4 of the Fourth Geneva Convention. This was what we held with regard to the separation fence in HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [2], at paras. 18-22; see also HCJ 3680/05 *Tana Town Committee v. Prime Minister* [3], at paras. 8-10). It is also the position in the petition before us. Indeed, the normative position for deciding the matter before us is identical to the normative position that was determined for considering the petitions concerning the separation

fence in *Beit Sourik Village Council v. Government of Israel* [1] and in *Marabeh v. Prime Minister of Israel* [2] (see also HCJ 4938/04 *Shuqba Village Council v. Prime Minister* [4]; HCJ 1348/05 *Shatiyeh v. State of Israel* [5]; HCJ 1998/06 *Bet Aryeh Local Council v. Minister of Defence* [6]). The principles guiding the military commander when constructing the separation fence also apply when he decides to requisition land for other defensive activity, such as the construction of the concrete barricade under discussion in this petition.

13. When he considered the decision whether to construct the barricade, the military commander was required to take several considerations into account. The *first* consideration is the security or military consideration, which concerns the protection of the security of the state and the security of the army. The *second* consideration concerns the welfare of the inhabitants who live in the area. The military commander is obliged to protect the human dignity, life and security of every one of them. The *third* consideration is that the military commander is obliged to protect the human dignity, life and security of Israelis who live in Israeli towns in the territories. These considerations conflict with one another. The military commander should balance the conflicting considerations. Indeed —

> 'The laws of belligerent occupation recognize the authority of the military commander to maintain security in the area and thereby to protect the security of his country and its citizens, but it makes the exercising of this authority conditional upon a proper balance between it and the rights, needs, and interests of the local population' (*Beit Sourik Village Council v. Government of Israel* [1], at p. 833 {290}; see also *Marabeh v. Prime Minister of Israel* [2], at para. 29; *Tana Town Committee v. Prime Minister* [3], at para. 10).

14. The balance between security needs and the interests of Palestinian inhabitants and Israeli citizens is not simple. The military commander is responsible for striking a balance between them. A main criterion in this balance is 'proportionality,' with its three subtests. *First*, there should be a rational connection between the measure chosen and the purpose that it is supposed to realize. *Second*, the measure chosen should be the one that is least harmful to the violated rights. The question is whether, of all the various measures that are capable of realizing the security purpose, the least harmful one was chosen.

> 'The obligation to choose the least harmful measure does not amount to the obligation to choose the measure that is absolutely the least harmful. The obligation is to choose, of the reasonable options that are available, the least harmful. One must therefore compare the rational possibilities, and choose the possibility that, in the concrete circumstances, is capable of achieving the proper purposes with a minimal violation of human rights' (HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [7], at para. 68 of my opinion).

*Third*, the measure chosen should strike a proper balance between the purpose underlying its realization and the violated rights (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [7], at paras. 64-75 of my opinion; *Beit Sourik Village Council v. Government of Israel* [1], at p. 841 {297}; *Shatiyeh v. State of Israel* [5], at para. 22; HCJ 2942/05 *Mansour v. State of Israel* [8], at para. 23). When determining the proportional balance, the military commander's discretion is not absolute. His decision should be one that a reasonable military commander could make (see *Marabeh v. Prime Minister of Israel* [2], at para. 32, and the references cited there). His decision is subject to judicial scrutiny. Notwithstanding, the Supreme Court sitting as the High Court of Justice does not replace the military commander's discretion with its own discretion. This court exercises judicial scrutiny of the legality of the military commander's exercise of discretion. In this scrutiny —

> '… we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted… Our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld…' (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [9], at p. 375 {109-110}, and see: *Tana Town Committee v. Prime Minister* [3], at para. 11; *Bet Aryeh Local Council v. Minister of Defence* [6], at para. 8; *Shatiyeh v. State of Israel* [5], at para. 22).

The court does not take the place of the responsible military authority. Judicial scrutiny examines whether the actions and decisions of the military commander comply with the law.

*From general principles to the specific case*

15. In *Tana Town Committee v. Prime Minister* [3] and HCJ 399/06 *Susiya Agricultural Communal Settlement Cooperative Society Ltd v. Government of Israel* [10] we denied petitions of Jewish inhabitants of the towns of Tana and Susiya, which are situated in the area under discussion in this petition; they requested, contrary to the position of the army, that the separation fence should pass to the north of their towns so that they would be included on the 'Israeli' side. We held that the decisions of the military commander were made after he considered all the relevant factors and struck a proper balance between them. These factors included the protection of the Jewish inhabitants, the protection of the military forces and the protection of the human rights and needs of the protected inhabitants in the territory. Within the framework of the hearings of each of the petitions, the respondents told us that they believed that they could discharge their responsibility to provide the petitioners with security to a sufficient degree even if the town was on the northern side of the fence. The military commander gave details of security measures that would make it possible to provide security for the Jewish towns in the area. The position of the respondents was described in the judgment in *Tana Town Committee v. Prime Minister* [3] as follows:

> 'The military commander is of the opinion that he can discharge his responsibility to provide the inhabitants with security to a sufficient degree even if the town of Tana is left on the northern side of the fence. The town of Tana itself will receive perimeter protection by means of a special security zone, which is a security system that includes a security fence and a series of security measures whose purpose is to prevent any infiltration into the town and to allow advance warning of any attempt to infiltrate the town. The security fence itself will be constructed at a distance of approximately 400 metres from the most outlying houses of the town. A patrol route and lighting will be set up between the security fence and the fence that surrounds the town. The approach route to the town will be protected in the same way in which main traffic arteries are protected in the

> territories, by means of two long-range observation towers and by means of fences (which are not uninterrupted) along the road, to prevent the throwing of stones and other short-range terrorist measures. Apart from the physical protection measures, rapid response forces will operate in the area at all times' (*Tana Town Committee v. Prime Minister* [3], at para. 4; see also *Susiya Agricultural Communal Settlement Cooperative Society Ltd v. Government of Israel* [10], at para. 5).

Indeed, it should be taken into account that this area contains Jewish towns whose protection requires proper military deployment. The protection of persons travelling on the access routes to these towns also requires proper military deployment. The respondents have the authority to employ military measures in order to guarantee this essential protection. The construction of the concrete barricade is therefore an act that derives from the authority of the military commander.

16. Have the respondents exercised their power proportionately? Does the harm arising from the concrete barricade strike a proper balance between the rights of the petitioners on the one hand and security needs on the other? The respondents insist that the concrete barricade is similar in nature 'to the safety barricades on Israeli roads,' such as those that have been constructed along inter-city roads in order to separate the traffic going in different directions. According to them, this implies that the measure is a commonplace one that does not unduly harm the petitioners. We do not accept this argument. The extent of the harm should be examined against the background of the characteristics of the injured population. The principle of proportionality is a concrete test. It is 'a criterion that balances the authority of the military commander in the occupied area against the needs of the local population' (*Beit Sourik Village Council v. Government of Israel* [1], at p. 838 {295}). Proportionality focuses therefore on the harm caused by the administrative action to a certain group. The harm depends upon the circumstances. The harm caused by an administrative action varies from person to person and from one population group to another. The harm caused to an urban population by a barricade built along a paved and developed road that is used by motor vehicles cannot be compared to the harm caused by such a barricade to a rural population. The conditions and character of the petitioners' lives are such that the nature of the harm caused by the barricade to them is serious. Many of the Palestinian

inhabitants of the area make use of donkeys and other animals as means of transport, and many of them travel by foot. Many of the inhabitants of the area earn their livelihood from herding sheep. The barricade impedes the passage of pack animals and flocks of sheep and goats. The barricade impedes the passage of pedestrians. Not every person is capable of climbing over a concrete barricade with a height of 82 centimetres. The barricade denies passage to the disabled. The barricade prevents the passage of the elderly and other persons who have limited movement. The barricade makes the passage of women with small children difficult.

17. The concrete barricade causes serious harm. It is more than forty kilometres long. It restricts the movement of more than five thousand inhabitants who live or own agricultural plots to the south. The petitioners filed affidavits of dozens of inhabitants of the villages that are situated in the enclave, which is enclosed by the concrete barricade on one side and the separation fence on the other. The concrete barricade restricts the movement of the inhabitants of these villages in a way that will make it difficult for them to lead normal lives. It seriously impedes access to basic and essential services that are located in nearby urban centres. It makes it difficult for the inhabitants of these villages to earn a livelihood, since they need to reach the nearby urban centres in order to market their crops, and it substantially increases the costs of essential products such as water, food, fuel and animal fodder. Thus the concrete barricade violates property rights, the freedom of movement and the right to education, health, family life and dignity. Indeed, the effect of constructing the concrete barricade, which is more than forty kilometres long, is to isolate a large area and separate it from the other parts of Judaea and Samaria. The lifestyles of the inhabitants will be deeply affected by this isolation. It constitutes a major change for the local inhabitants and imposes a real burden on their ability to continue to live in this area. We are not speaking of self-sufficient towns. These are small villages that depend extensively on their contact with nearby towns. Moreover, the barricade separates the farmers who live north of the road from their crops and grazing land to the south of it. Thus it separates the town of Ad-Dhahiriya from approximately half of its inhabitants' agricultural land. More than 950 inhabitants of Ad-Dhahiriya own rights in agricultural land in the enclave. The barricade separates the city of as-Samu from 80 per cent of its agricultural land, an area of approximately 22,000 dunams. Admittedly we are not speaking of a complete isolation,

since the concrete barricade does have openings, which can be used by the inhabitants to cross the roads. But we are speaking of a significant impediment to the mobility of farmers in the area, especially in view of the extensive use that they make of pack animals and the considerable amount of sheep herding.

18. Does this harm satisfy the *first* test of proportionality? Is there a rational connection between the measure that was adopted and the purpose that the respondents are seeking to achieve? The petitioners claim that there is no rational connection between the declared security purpose and the construction of the concrete barricade. The representatives of the Council for Security and Peace also claimed before us that constructing the barricade not only makes no contribution to security, but does more harm than good, since it increases the security risks to persons travelling on the roads. By contrast, the professional opinion of the respondents is that restricting the movement of vehicles in the area is important from a security viewpoint and will make it possible to contend with threats presented to those travelling on the roads. We have before us two conflicting viewpoints. When there is a professional dispute between the military commander and other security experts, serious weight should be attached to the professional approach of the military commander in the area. '… we must attribute special weight to the military opinion of the party who has the responsibility for security' (*Beit Sourik Village Council v. Government of Israel* [1], at p. 844 {302}, and see HCJ 390/79 *Dawikat v. Government of Israel* [11], at p. 25; HCJ 258/79 *Amira v. Defence Minister* [12], at p. 92; HCJ 4825/04 *Alian v. Prime Minister* [13], at para. 15; *Marabeh v. Prime Minister of Israel* [2], at para. 32 of my opinion; HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [14], at pp. 574-576). Therefore, anyone who asks the court to prefer a professional opinion of another expert to the position of the military commander needs to discharge a heavy burden. The petitioners did not discharge this burden. We have not been persuaded that we should prefer the professional opinion of the members of the Council for Peace and Security or the professional opinion of the security experts representing the petitioners to the position of the military commander. In such circumstances we should base our judgment on the security opinion of the military commander. We therefore accept the respondents' position with regard to the military solution to the security needs in the area. We rely upon their position that the concrete barricade is an effective means of protecting whoever travels on the

roads. The result is therefore that the construction of the concrete barricade satisfies the first subtest of proportionality.

19. Does the harm satisfy the *second* subtest of proportionality? Have the respondents discharged their duty to choose the least harmful of all possible measures in order to realize the purpose? In their updated statement to the court, the respondents said that following a re-examination that they made, they made additional openings in the concrete barricade to allow the passage of pedestrians and livestock. The petitioners for their part replied to this statement by claiming that the vast majority of these openings do not allow anyone to cross the roads. Some of the openings are situated in impassable areas from a topographical viewpoint; some are not situated in places where the local inhabitants wish to cross the road; others are not even openings, but merely narrow slits that do not allow people and animals to pass through. In their most recent statements, the respondents even undertook that requests to make additional openings in the concrete barricade will be considered favourably. Indeed, this is capable of reducing the degree of harm caused by the barricade. We have taken the most recent statements of the respondents into account, but they are insufficient. The question that is considered by the second subtest of proportionality is whether in comparison to the measure chosen by the respondents — which we are considering in the light of their most recent statements — a less harmful alternative exists. The answer to this is that a less harmful alternative does indeed exist.

20. The alternative measure that is less harmful is a barricade as constructed by the respondents, with one difference: instead of concrete it should be a metal barricade, like the safety barricades that have been constructed at the sides of many roads in Israel and in various parts of the territories. This measure was proposed by the petitioners. It is a less harmful measure. Flocks of sheep will be able to pass under the metal bar of the fence. It will be easier for pedestrians to climb over the fence. The respondents themselves do not deny that a metal barricade is capable of achieving the same security benefit as the concrete barricade, but they argued before us that there is a concern that parts of the barricade will be dismantled by metal thieves. In view of this assessment, the respondents' position is this measure should not be adopted. Counsel for the respondents did not present any figures with regard to the scope of the phenomenon of the theft of metal in the area under discussion in the petition or in the territories in general. In any case, proportionality

demands the construction of a metal barricade and protecting it against theft, rather than a serious injury to the lifestyle of the local inhabitants. It should also be noted that the material before us shows that in addition to the alternative of the metal barricade there are other options. The representatives of the Council for Peace and Security said in their opinion that in order to achieve the respondents' declared security purpose, it is also possible to construct a lower barricade, which will prevent the passage of wheeled vehicles. A lower barricade is easier for pedestrians and livestock to cross. It is a less harmful measure. Additional options were raised during the petitions, such as the replacement of the barricade with metal posts or stone blocks that can be placed at distances in such a way that they will prevent the passage of cars but allow the free passage of pedestrians and animals. We are not considering the choice of the most suitable option from among these or other options. This matter lies within the respondents' authority. Our task is to examine whether there is an alternative measure to the one chosen by the respondents — a measure that achieves the same benefit but is less harmful. Such a measure exists. It can realize the security benefit that the barricade seeks to realize, while harming the lifestyle and human rights of the local population to a lesser degree.

21. In view of this finding, the conclusion is that the concrete barricade does not satisfy the requirement of the second subtest of proportionality. Since several rational options were available to the respondents for realizing the same security purpose, they should have chosen the one that is the least harmful to human rights. The respondents did not discharge this duty. In view of our finding with regard to the second condition of proportionality, we do not need to go on to examine whether the *third* subtest is satisfied.

22. The result is that we are making the order *nisi* absolute in respect of the construction of the concrete barricade. Within six months the respondents shall dismantle the concrete barricade that they built between the town of Carmel and the town of Tana, along road 60, road 317 and the road leading to the town of Tana. The respondents may construct an alternative barrier that is consistent with this judgment.

The respondents shall be liable for the petitioners' costs in a sum of NIS 25,000 in each of the petitions.

**President D. Beinisch**
I agree.

**Vice-President E. Rivlin**
I agree

Petition granted.
23 Kislev 5767.
14 December 2006.

**Mayor of Ad-Dhahiriya v. IDF Commander in West Bank**
(Contempt of Court Decision)

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## Synopsis

In the judgment in *Mayor of Ad-Dhahiriya v. IDF Commander in West Bank* (see page 163), the Supreme Court ordered the military commander to dismantle a solid concrete barricade, with a height of 82 centimetres, that had been built along a section of road in the south of Mount Hebron in the territory of Judaea and Samaria. According to the judgment, the concrete barricade was to be replaced by a metal barricade, which was not solid but made of a metal bar supported by posts, which allowed animals to pass underneath it.

The military commander was given six months to comply with the order. At the end of the six months, he applied for a four month extension, on the ground that the military authorities were considering making changes to the existing barricade rather than removing it. In response, the petitioners applied to the court for an order under the Contempt of Court Ordinance.

The Supreme Court saw no reason why the state's application should be granted. The state was ordered to remove the barricade within two weeks, in accordance with the original judgment.

HCJ 1748/06

**Mayor of Ad-Dhahiriya**
**and others**
**v.**
**IDF Commander in West Bank**

HCJ 1845/06

**Khalil Mahmud Younis**
**and others**
**v.**
**1. IDF Commander in West Bank**
**2. Head of Civilian Administration in West Bank, Bethel**

HCJ 1856/06

**As-Samu Municipality**
**and others**
**v.**
**1. IDF Commander in West Bank**
**2. State of Israel**

**Amicus curiae: Council for Peace and Security**

The Supreme Court sitting as the High Court of Justice
[24 July 2007]
*Before President D. Beinisch, Vice-President E. Rivlin*
*and Justice A. Procaccia*

Application of the respondents of 11 June 2007 to defer the date of compliance with the judgment, and applications of the petitioners of 17 June 2007 and 24 June 2007 under section 6 of the Contempt of Court Ordinance.

**Facts:** On 14 December 2006 the Supreme Court ordered the respondents to remove a concrete barricade along a forty-one kilometre section of road in the area to the south of Mount Hebron in the territory of Judaea and Samaria. The respondents were given six months to comply with the order. At the end of the six months the respondents applied for a four month extension, on the ground that they were considering making changes to the existing barricade rather than

removing it. In response, the petitioners applied to the court for an order under the Contempt of Court Ordinance.

**Held:** The state was ordered to remove the barricade within two weeks, in accordance with the original judgment.

**Legislation cited:**
Contempt of Court Ordinance, 1929, s. 6.

**Israel Supreme Court cases cited:**
[1] HCJ 1748/06 *Mayor of Ad-Dhahiriya v. IDF Commander in West Bank* **[2006] (2) IsrLR 602**.

Respondents' application denied; petitioners' applications granted.

For the petitioners in HCJ 1748/06 — L. Yehuda, D. Yakir.
For the petitioners in HCJ 1845/06 — Q. Mishirqi.
For the petitioners in HCJ 1856/06 — G. Nassir.
For the respondents — G. Shirman.

## DECISION

**President D. Beinisch**

1. On 14 December 2006, judgment was given by this court (President Emeritus A. Barak, President D. Beinisch and Vice-President E. Rivlin) in three petitions that were directed against a concrete barricade, 41 kilometres in length, that was built as a barrier by the Israel Defence Forces (IDF) in the south of Mount Hebron (hereafter: the barricade) and against orders to requisition land that were made for the purpose of constructing this barricade (HCJ 1748/06 *Mayor of Ad-Dhahiriya v. IDF Commander in West Bank* [1]; hereafter: the judgment). In the judgment, which was written by President Emeritus A. Barak with the agreement of the other members of the panel, the court discussed the serious harm caused by the barricade to the local population in the territories. It was held that the barricade restricted the movement of the inhabitants in such a way that made it difficult for the local population to

lead their normal lives. The court held that it involved '… a significant impediment to the mobility of farmers in the area, especially in view of the extensive use that they make of pack animals and the considerable amount of sheep herding' (at para. 17 of the judgment [1]).

The court addressed the serious harm to the population and held that it was disproportionate and did not strike a proper balance between the rights of the inhabitants and security needs. In this respect it was held in the judgment that there were less harmful options that realized these security needs. In view of the court's conclusion that the barricade harmed the local population disproportionately, an absolute order was made in the judgment in the following terms:

> 'The result is that we are making the order *nisi* absolute in respect of the construction of the concrete barricade. Within six months the respondents shall dismantle the concrete barricade that they built between the town of Carmel and the town of Tana, along road 60, road 317 and the road leading to the town of Tana. The respondents may construct an alternative barrier that is consistent with this judgment' (at para. 22 of the judgment [1]).

As can be seen from the aforesaid, according to the order the respondents were supposed to dismantle the barricade. At the same time, it was held that the respondents might construct an alternative barricade that was consistent with the principles laid down in the judgment.

2. On 11 June 2007, only three days before the date on which the respondents were supposed to carry out what was stated in our judgment, they filed an application to defer the date of compliance. This application described the sequence of events leading to the date on which it was filed. The respondents informed us that after the judgment was given, the security authorities began to examine other options that would satisfy the principles laid down in the judgment. Ultimately the respondents decided at the end of March 2007 to choose an alternative according to which *the barricade would not be destroyed*, as the court had ordered; instead, *changes would be made to the format of the existing barricade*, in order to make the harm to the inhabitants more proportionate. The details of this alternative (hereafter: the new alternative), as set out in a letter sent by the respondents to the

petitioners on 28 March 2007, included the creation of new openings along the existing barricade. The letter said:

> 'According to the new format of the barricade, every two hundred metres — and in populated areas, every one hundred metres — an element of the New Jersey type will be removed and replaced with an alternative element that will allow the easy and safe passage of pedestrians and animals… In its new format the barricade will continue to serve the security goal for which it was constructed — limiting the movement of vehicles to the openings provided for this purpose, while at the same time it will allow the convenient and easy passage of pedestrians and animals; from every point along the route they will be able to reach an opening within a range of approximately one hundred metres at the most in either direction.'

The respondents allowed the petitioners to present their reservations with regard to this alternative, and on 1 April 2007 counsel for the petitioners in HCJ 1748/06 and HCJ 1845/06 did indeed contact the respondents and express their opposition to the new alternative. In the letter sent by counsel for the petitioners, it was argued that the new alternative 'represented an attempt, in bad faith, to circumvent the judgment of the High Court of Justice, and to distort its clear instructions to dismantle the barricade.' It should also be pointed out that on the very same day counsel for the petitioners in HCJ 1748/06 received a letter from Mr Haggai Elon, who was at that time an adviser to the Minister of Defence (hereafter: the adviser to the Minister of Defence), in which he expressed his opposition to the respondents' planned alternative, according to which, instead of *dismantling* the barricade, *changes* would be made to it by creating openings that would allow the passage of humans beings and animals.

In view of the petitioners' opposition and in view of what was stated in the letter of the adviser to the Minister of Defence, the respondents decided to refer the matter for a reassessment and for the subsequent approval of the Chief of Staff and the Minister of Defence. But on 10 June 2007 the respondents notified the petitioners that they had decided not to change the new alternative. According to what was stated in this notice to the respondents —

> 'Contrary to what was claimed in the [petitioners'] reservations, the new format of the barricade is not identical or similar to the proposals that were raised in the past in the Supreme Court. In the current format, we are not speaking of an addition of several isolated openings for the passage of vehicles, but of a major and real change in the barricade by means of the dismantling of many dozens of elements and the creation of openings for pedestrians and animals throughout the length of the barricade.'

In view of the aforesaid, the respondents applied to this court for a deferral of execution of the judgment. They argued that the new administrative work that was carried out after the petitioners submitted their reservations rendered it impossible to complete the works on the ground within the period of time defined by the court in the judgment. The respondents therefore requested that the date by which they needed to comply with the judgment should be deferred by four months until 14 October 2007.

3. On 17 June 2007, six days after the respondents filed their application for additional time to comply with the judgment, the petitioners in HCJ 1748/06 filed an application under s. 6 of the Contempt of Court Ordinance. On the same day the petitioners in HCJ 1845/06 joined that application, and on 24 June 2007 a similar application was also filed by the petitioners in HCJ 1856/06. According to all of the petitioners, the respondents' conduct during the period since the judgment was given shows that no effort was made to ensure that the court's decision would be carried out by the stipulated date, despite the many requests made by the petitioners to the respondents that the latter should begin to carry out what was stated in the judgment. The petitioners also argued that even if the court granted the application to allow additional time for complying with the judgment, the respondents had no intention of complying with the terms of the judgment, since within the framework of the new alternative the respondents did not plan to dismantle the existing barricade, as stipulated in the judgment, but to take steps in order to make additional openings in it. According to the petitioners, the new alternative will continue to harm the local population, for the same reasons discussed by the court in the judgment. It should also be pointed out that in their application the petitioners asked the court to find the respondents liable for costs in a manner that would reflect the court's censure of their conduct.

4. In response to the petitioners' claims in the contempt of court application, the state referred to the new alternative as a proper and proportionate solution. From the response it can be seen that the state remains steadfast in its position that despite the order made by this court, it intends to leave the existing barricade in place, while making changes to it.

5. The state was ordered to remove the barricade within six months of the date of the judgment. The period of time that was granted for complying with the order was intended to allow the state to prepare a suitable alternative in the spirit of the principles set out in the judgment. The court ordered the respondents to remove the barricade, but it did not determine the proper alternative, so that the respondents could exercise their discretion in choosing a new barricade that harms the local inhabitants to a lesser degree. But now it transpires that the state has waited the whole length of the period of time that it was granted, it has not removed the barricade and it has even considered an alternative based on the existing barricade. From the correspondence exchanged between the parties and from the arguments that we heard, it is clear that counsel for the state knew that the petitioners were not in agreement with the attempt to modify the character of the existing barricade and also that they intended to apply to the court for a contempt order. Despite this, the state applied to the court to defer the execution of the judgment only at the end of the six month period that was granted to the state for removing the barricade.

The state chose not to comply with the order of the court, but to come before us after the period stipulated for complying with the order ended and to apply for what amounts to a change of the judgment. We cannot accept conduct of this kind. We therefore order the state to remove the barricade, as it was ordered to do in the judgment of this court. Counsel for the respondents stated that this can be done within fourteen days, and we so order. The respondents shall be liable for legal fees in the proceeding before us in a total amount of NIS 30,000, which shall be divided equally between the three petitions.

**Vice-President E. Rivlin**

I agree.

**Justice A. Procaccia**
I agree.

Respondents' application denied; petitioners' applications granted.
9 Av 5767.
24 July 2007.

## Yassin v. Government of Israel

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### Synopsis

This case concerns another challenge to the route of the security fence, this time in the area of the Palestinian village of Bil'in in the West Bank.

The petitioner, the head of the Bil'in Village Council, claimed that the route chosen for the security fence in the area was not motivated by security concerns, but by a desire to allow the future expansion of the Israeli town of Modi'in Illit. The route chosen required the expropriation of a large amount of land belonging to the village of Bil'in and left additional tracts of the village's cultivated land on the western (the 'Israeli') side of the fence.

The respondents argued that, in determining the route of the fence, the military commander was entitled to take into account plans for expanding Israeli towns. This means that the military commander is authorized to take into account new neighbourhoods that are currently being built, and also to consider valid plans when there is a real likelihood that they will be implemented within a reasonable time, since there is no logic in building the fence and leaving new neighbourhoods on the 'Palestinian' side of it.

The Supreme Court found that the route of the fence took into account the plans for the expansion of Modi'in Illit. In so far as this concerned new neighbourhoods that had already been mostly built, the court found no defect in the military commander's discretion. But the court found that the respondents had exercised their discretion improperly by also taking into account the possibility of future construction in Modi'in Illit. In view of the temporary nature of the security fence, the possibility of additional building in the future should not have been taken into account.

The respondents were therefore ordered to reconsider the route of the fence without taking into account the possibility of additional building in the future.

HCJ 8414/05

**Ahmed Issa Abdullah Yassin, Head of Bil'in Village Council**

**v.**

**1. Government of Israel**

**2. IDF Commander in West Bank**

**3. Green Park Inc.**

**4. Green Mount Inc.**

**5. Land Redemption Planning and Development Fund**

**6. Ein Ami Promotions and Development Ltd**

**7. Modi'in Illit Local Council**

**8. Heftziba Building and Development Ltd**

The Supreme Court sitting as the High Court of Justice

[4 September 2007]

*Before President D. Beinisch, Vice-President E. Rivlin and Justice A. Procaccia*

Petition to the Supreme Court sitting as the High Court of Justice.

**Facts:** The petitioner challenged the route of the security fence in the area of the Palestinian village of Bil'in, on the ground that it was not motivated by security concerns, but in order to allow the future expansion of the Israeli town of Modi'in Illit. The route that was chosen required the requisitioning of a large amount of land belonging to the village of Bil'in and left additional tracts of the village's cultivated land on the western (the 'Israeli') side of the fence.

**Held:** The first and second respondents exercised their discretion improperly, by taking into account, when determining the route of the fence, the possibility of the construction of the second stage of the neighbourhood of East Matityahu in Modi'in Illit. This second stage of construction requires the approval of the Minister of Defence, which has not been given, and in view of the temporary nature of the security fence, the possibility of building this second stage at some time in the future should not have been taken into account. The first and second respondents were ordered to re-examine the route of the fence in accordance with this guideline.

Petition granted.

**Israeli Supreme Court cases cited:**

[1] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.

[2] HCJ 7957/04 *Marabeh v. Prime Minister* **[2005] (2) IsrLR 106**.

[3] HCJ 1890/03 *Bethlehem Municipality v. State of Israel* [2005] IsrSC 59(4) 736; **[2005] (1) IsrLR 98**.

[4] HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* (not yet reported decision of 13 December 2006).

[5] HCJ 3680/05 *Tana Town Committee v. Prime Minister* (not yet reported decision of 1 February 2006).

[6] HCJ 1998/06 *Bet Aryeh Local Council v. Minister of Defence* (unreported decision of 21 May 2006).

[7] HCJ 1348/05 *Mayor of Salfit v. State of Israel* (unreported decision of 17 July 2006).

[8] HCJ 258/79 *Amira v. Minister of Defence* [1980] IsrSC 34(1) 90.

[9] HCJ 390/79 *Dawikat v. Government of Israel* [1980] IsrSC 34(1) 1.

[10] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.

[11] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.

[12] HCJ 2732/05 *Head of Azzun Town Council v. Government of Israel* (not yet reported decision of 15 June 2006).

[13] HCJ 3998/06 *Yassin v.Government of Israel* (unreported decision of 9 November 2006).

[14] HCJ 5495/06 *Midreshet Eretz Yisrael Fund Ltd v. Minister of Defence* (not yet reported decision of 15 August 2006).

[15] HCJ 399/06 *Susya Community Settlement Agricultural Cooperative Society Ltd v. Government of Israel* (not yet reported decision of 6 July 2006).

[16] HCJ 4289/05 *Bir Nabala Local Council v. Government of Israel* (not yet reported).

[17] HCJ 1844/06 *Rinawi v. Prime Minister* (not yet reported decision of 15 June 2006).

For the petitioner — M. Sfard.
For respondents 1-2 — A. Licht.
For respondents 3, 4 and 6 — R. Jarach, S. Hyam.
For the fifth respondent — M. Glick.
For the seventh respondent — G. Rogel.
For the eighth respondent — Y. Barsela.

JUDGMENT

**President D. Beinisch**

The petition is directed at land requisition order no. 40/04/A (amendment of borders), which was issued by the military commander for the purpose of constructing the security fence on the land of the village of Bil'in, which lies to the east of the town of Modi'in Illit in the Modi'in block, in the territory of Judaea and Samaria.

*Background*

1. The town of Modi'in Illit is an Israeli town in the Modi'in area that lies east of the Green Line, to the north of road 443. It has approximately 32,000 inhabitants, the majority of whom are strictly observant Jews. There are several Palestinian villages in the vicinity of Modi'in Illit. Within the framework of the plan of the Government of Israel to construct a security fence between Israel and the territories, the route for the fence in this area was also planned, as a part of the third stage of the fence's construction. The fence in this area separates the towns of the Modi'in block (Matityahu, Modi'in Illit and Hashmonaim) from the Palestinian villages of Bil'in, Saffa, Kharbatha, Deir Qaddis, Na'alin and Al-Midya. It is intended to protect the nearby inhabitants of Modi'in Illit and the inhabitants of the Modi'in block and the city of Modi'in. The petition before us is directed at a section of the fence that is being built on the land of the village of Bil'in, a Palestinian village that lies to the east of Modi'in Illit, which has a population of 1,700 inhabitants. The route of the fence on the land of Bil'in is the continuation of the route that passes over the land of Kharbatha to the north of Bil'in. The route continues southward over the land of the village of Saffa to road 443.

2. For the purpose of erecting the fence east of Modi'in Illit, three requisition orders were issued at the beginning of 2004: requisition order 27/04/A (on 21 March 2004), requisition order 40/04/A (on 25 April 2004) and requisition order 44/04/A (on 25 April 2004). In the course of examining objections that were filed by inhabitants of Bil'in against the route, several surveys of the area were carried out and meetings were

held between the parties. On 13 May 2004 the inhabitants were notified that the objections were rejected. Following the judgment in HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [1], the military commander re-examined the route of the fence in view of the criteria that were set out in that judgment. A decision was made to amend the route in such a way that the part of the fence passing over Modi'in Stream (west of Bil'in) would be moved westwards, with the result that the point where it crossed the stream would be 800 metres away from the original crossing point. The amendment to the route was presented to the inhabitants in October 2004 and on 24 November 2004 an amended requisition order — requisition order 40/04/A (amendment of borders) — was issued. This is the order that is the subject of the petition.

3. The revised route of the fence that passes over the land of Bil'in has a length of approximately 1.7 kilometres. It occupies approximately 260 dunams. The route passes up to a distance of approximately two kilometres from the nearest houses of Modi'in Illit. It leaves approximately half of the land of Bil'in (according to the allocation of village land made by the British Mandate) on the 'Israeli' side of the fence. According to the petitioner, the amount of land belonging to the village of Bil'in that remains in the area between the fence and the Green Line is approximately 1,980 dunams of village land, some of which is owned privately by inhabitants of Bil'in and some of which is village land that is cultivated by its inhabitants. According to the figures presented by the first and second respondents (hereafter — the respondents), the route leaves on the 'Israeli' side of the fence approximately 1,647 dunams of land belonging to the village of Bil'in, according to the allocation of village land made by the British Mandate (the total amount of all the land belonging to Bil'in according to that allocation is approximately 4,085 dunams). According to the respondents, 678 dunams of the land that remain between the fence and the Green Line are privately owned by inhabitants of the village and the rest is included in the area of Israeli master plans. Approximately 196 dunams of the land are cultivated land.

4. The route of the fence on the land belonging to Bil'in incorporates areas for which there are master plans to expand Modi'in Illit — plans that are in various stages of planning. One plan is master plan 210/4/2 for the construction of a residential neighbourhood called 'Neot HaPisga' to the east of Modi'in Illit and the north of Dolev Stream. The vast majority

of the neighbourhood is planned to be built on the land of the village of Kharbatha. The neighbourhood of Neot HaPisga is being built according to a valid master plan and the infrastructure works for building the neighbourhood began in 2004. Approximately 2,750 residential units are going to be built in the neighbourhood of Neot HaPisga, in multi-storey buildings. Hitherto hundreds of residential units have actually been built and works have been carried out to prepare the land.

5. South of the neighbourhood of Neot HaPisga, on the southern side of Dolev Stream, there is a plan to construct an additional residential neighbourhood called 'East Matityahu.' The original plan to build this neighbourhood was detailed master plan 210/8, which was approved and published as valid in 1999. According to plan 210/8, approximately 1,500 residential units were planned in the neighbourhood of East Matityahu, on an area of 900 dunams that was declared 'state land.' The main and central part of plan 210/8 is situated within the area of the municipal jurisdiction of Modi'in Illit, even though parts of it fall outside the municipal jurisdiction of the town. *De facto* until 2004 no steps were taken to implement plan 210/8. In the meantime, private developers of the neighbourhood of East Matityahu and the Modi'in Illit Local Council began to promote an amended plan for building the neighbourhood, plan 210/8/1, which was supposed to allow the number of residential units in the neighbourhood to be doubled to 3,000 units, by means of more dense building, while the area of the neighbourhood remained essentially the same as its area under plan 210/8. In February 2004 the settlement subcommittee of the Supreme Judaea and Samaria Planning Council (hereafter — the settlement subcommittee) approved the filing of plan 210/8/1 and it was published in August 2004 that it had been filed. But already during 2004, while plan 210/8/1 was being considered by the planning organizations, contracting firms began to implement it on the ground. It became clear that the promoters had taken the law into their own hands and had begun to build the neighbourhood in accordance with the prospective plan 210/8/1 before it was approved. As a result of this, since 2004 illegal building works have been carried out in the area of East Matityahu on a large scale.

6. In September 2005, shortly after the filing of the petition before us, plan 210/8/1 was approved. It should be pointed out in this context that plan 210/8/1 is divided into two parts, the western part (stage one) and the eastern part (stage two), which includes 1,082 residential units. Stage one can be built after approval of the plan. With regard to stage two,

according to a decision of the Minister of Defence in August 2005, this may not be developed or built during the first stage, and the marketing of this stage in the future will be conditional upon receiving an additional approval from the Minister of Defence. In practice, building was carried out on the western part of the neighbourhood of East Matityahu, on which hundreds of residential units were built on three compounds, two compounds by the eighth respondent and one by respondents 3-5. In one of the compounds belonging to the eighth respondent, which it began to build as long ago as the end of 2002, eight buildings are already inhabited to various degrees. All the buildings were built in accordance with the provisions of plan 210/8/1 and not in accordance with the provisions of plan 210/8, which is the plan that was valid at the time when the buildings were built.

7. Moreover, following the filing of the petition, the state attorney's office became aware of various defects that occurred in the proceedings for the approval of plan 210/8/1, which related *inter alia* to the fact that the plan includes areas outside the municipal jurisdiction of Modi'in Illit. In the course of preparing its response to the petition, the state attorney's office instructed the respondents not to publish the approval of plan 210/8/1, since it thought that the planning proceedings should be restarted from the beginning, from the deposit stage. The respondents also decided to re-examine claims with regard to the ownership of a part of the land in the area of the plan. Against this background a separate petition was filed by the petitioner and the 'Peace Now' movement, which focused on planning issues relating to the East Matityahu neighbourhood (HCJ 143/06, filed on 4 January 2006). That petition requested that the court should revoke the approval that was given by the settlement subcommittee to master plan 210/8/1 in September 2005 and it requested that action should be taken to enforce the planning and building laws in East Matityahu. When the petition was filed, a temporary order was made (on 6 January 2006) for the immediate cessation of all the building works that were being carried out in the area of plan 210/8 and the area of plan 210/8/1 without a building permit. The court also ordered the immediate cessation of any activity of moving into the apartments in the area and of transferring possession of additional residential units in the area. Entering the residential units and making use of them were also prohibited. Subsequently (on 12 January 2006) a provision was added to the temporary order to the effect that all the building works being carried out in the area by virtue of building permits

that had been issued, whether in accordance with the original plan (210/8) or in accordance with the new plan (210/8/1), should be stopped immediately. Because of serious economic difficulties that befell the Heftziba company (the thirteenth respondent in HCJ 143/06 and the eighth respondent in our case), a series of incursions by apartment buyers took place on the company's building sites, including Heftziba's site in the East Matityahu neighbourhood. Following this development, the Jerusalem District Court (Justice D. Cheshin) decided on 6 August 2006 (within the framework of the proceedings in Bankruptcy File 4202/07) that 'at this stage, buyers should not be evicted from the apartments which they have entered.' Against this background, the Supreme Court decided on 27 August 2007, within the framework of its hearing of HCJ 143/06, that despite the existence of the interim order —

> 'At this stage, as long as all of the facts relating to the position of the Heftziba company and the residents' chances of receiving the apartments that they bought or, alternatively, of receiving back the money that they paid for them have not been clarified, the *status quo* that currently exists on the ground shall not be changed.'

It was also held that no action should be taken at this stage to evict the residents who broke into the Heftziba apartments between 1 August 2007 and 6 August 2007.

8. After the current petition was filed, the state authorities gave instructions that the planning procedures for plan 210/8/1 should be cancelled and restarted from the beginning. Plan 210/8/1 was submitted once again. This plan originally included enclaves of private land that belong to Palestinians from the village of Bil'in. The revised plan states that these enclaves are not a part of the area of the plan, and that all of the operations that are being carried out to build on or use the private enclaves will be stopped, the enclaves will be returned to their original state by removing the buildings, building materials and any other debris, and the area will be covered with garden soil. In order to allow the promoters of the plan to comply with the aforesaid preliminary condition, the works required to return the private enclaves to their original position were exempted from the temporary order. The revised plan was approved for filing on 15 February 2006, the fact that it had been filed was published on 13 March 2006 (in both Hebrew and Arabic language newspapers) and objections to it were heard. On 3 July 2006 a

decision was made by the sub-committee on the question of the objections. Subject to several amendments that were made to the plan and to compliance with additional conditions that are set out in the provisions of the plan, the committee decided to recommend to the Supreme Planning Council that it should be approved. On 31 January 2007 a decision was made by the Supreme Planning Committee that the new plan 210/8/1 should be approved. Pursuant to the decision approving the plan and after the changes required by the decision were incorporated in the provisions of the plan, in February 2007 the approval of the plan was published in the Hebrew and Arabic newspapers.

9. The route of the fence on the land of Bil'in was considered by this court in several previous petitions. After requisition orders 27/04/A and 40/04/A (and their amendments in November 2004) were made, the heads of Bil'in Village Council and Saffa Village Court filed a joint petition against the route of the fence (HCJ 11363/04). In that petition, an agreed statement was filed in the court by the parties. The agreed statement relates, *inter alia*, to two sections of the fence on the land of Bil'in: 'segment C,' which begins at the border of the land of Saffa and Bil'in and continues northwards to Dolev Stream, and 'segment D,' from Dolev Stream to the border of the land of Bil'in and Kharbatha. The following is the text of the statement:

> 'c. From the border of the village lands of Saffa and Bil'in to the path to the east of the isolated house [segment C], the parties agree that works shall be carried out to implement requisition order 40/04/A. The width of the works, as a rule, shall not exceed 50 metres. In the course of carrying out the works, an effort shall be made to limit the harm to agricultural crops and to keep the route to the western part of the area of the requisition order. The works shall begin only after the route has been marked on the ground, the respondents have delivered to counsel for the petitioners the map of the master plan for the south-east neighbourhood of Modi'in Illit and final approval has been received from counsel for the petitioners.
>
> d. From the path east of the isolated house to the border of the lands of Bil'in and Kharbatha [segment D] the petitioners shall notify the respondents, by 12 December 2004, of their response with regard to the proposal to amend

> the route that was presented to counsel for the petitioners by the respondents, after the respondents have delivered to the petitioners' counsel the map of the master plan for the south-east neighbourhood of Modi'in Illit.'

According to the procedural agreement between the parties, an inspection of the route was made (on 22 December 2004) with counsel for the petitioners in HCJ 11363/04 (Advocate Atiya) and representatives of the village of Bil'in. During the inspection, the map of plan 210/8 was delivered to Advocate Atiya. From the response of the state to that petition it can be seen that contrary to what was agreed, Advocate Atiya did not attend the meeting with the respondents with regard to segments C and D nor did she give the respondents any written response with regard to these segments. At the beginning of the hearing of the aforesaid petition, Advocate Atiya notified the court that the petitioners withdrew the petition and the petition was struck out (on 16 February 2005). When the petition was struck out, the respondents began to implement requisition order 40/04/A (amendment of borders) and to construct the fence.

10. Within a few days (on 21 February 2005) several inhabitants of Bil'in filed a new petition through Advocate Atiya (HCJ 1778/05). This was based on the claim that the works to construct the fence began without their having been given a right to state their case and file objections. The new petition did not mention the existence of the previous petition, which was struck out at the request of the petitioners. At the end of the hearing of the petition (on 3 March 2005), the court ordered the petition to be struck out because of improper conduct. In the judgment the court said:

> 'The fact that the petition in HCJ 11363/04 existed — and was struck out — is essential and directly relevant to the matter. The petitioners, and at least their counsel, are presumed to have been aware of the existence of the petition and the proceedings that took place in it. In such circumstances, the failure to mention these facts in the petitions before us constitutes a serious case of improper conduct, which justifies the striking out of the petition.
>
> Moreover, in view of the proceedings that took place in HCJ 11363/04, it would appear that even on the merits of the matter there were no grounds for filing the petitions before

> us. The petitioners' claims (through the heads of the village councils and their lawyers) concerning the proper route in the area where they live were heard and considered in detail within the framework of the respondents' response to HCJ 11363/04, and they were given an objective solution, which even resulted in various procedural arrangements. Against that background, they chose to withdraw their previous petition and to request that it should be struck out. The petitioners before us have not shown any justification for recommencing proceedings on precisely the same issues within the framework of their current petitions.'

Another proceeding that is related to the route of the fence at Bil'in is HCJ 2847/04. The petition was originally directed against the route of the fence on the land of the village of Kharbatha north of Bil'in. On 26 April 2005 an application was filed to amend the petition, in which the petitioners applied to join inhabitants of the village of Bil'in as parties in the petition and also to amend the petition to challenge the route of the fence on the land of the village of Bil'in. The court decided to strike out the application to amend the petition 'because of delay, because of improper conduct and because Mr Shavita cannot apply to amend a petition that was filed by others' (decision of 14 June 2005).

*The petition and the proceedings*

11. The petition before us was filed on 5 September 2005 by the head of the village council of Bil'in. In the petition the court was requested to order that the fence should be moved further away from the houses of the village and from the agricultural land of its inhabitants. When the petition was filed, it was decided that it would be set down for a hearing after judgment was given in HCJ 7957/04 *Marabeh v. Prime Minister* [2], because both petitions addressed a common legal question concerning the effect of the advisory opinion of the International Court of Justice at the Hague. When judgment was given in *Marabeh v. Prime Minister* [2], the parties in the current petition were requested to file their revised positions. Respondents 3-6, the real estate companies that are involved in promoting and building the neighbourhood of East Matityahu (the real estate companies), applied to be joined as respondents in the petition. The petitioner's position was that the joinder should be made conditional upon the real estate companies proving their rights in the land that is the subject of the petition. The petition was heard on 1

February 2006 before a panel of President A. Barak and Justices D. Beinisch and E. Rivlin. Counsel for the respondents argued that the petition should be dismissed *in limine*. He said that the respondents had also clarified in the previous petitions that the route had been planned with a view to protecting the new neighbourhoods that would be built in Modi'in Illit and that this was within the authority of the military commander. At the end of the hearing, an order *nisi* was issued as requested in the petition. It was also decided to join the real estate companies, the Modi'in Illit Local Council and the Heftziba company, which had also carried out building in East Matityahu, as respondents in the petition. The court saw no need to make an interim order. Notwithstanding, it made a note of the state's declaration that no gate would be built at the northern end of 'segment C' and this area would remain open until the petition was decided on its merits.

12. After the affidavits-in-reply were filed, the petition was heard (on 14 May 2006) before President A. Barak and Justices E. Rivlin and A. Procaccia. The hearing before the court was attended by Colonel (res.) Dan Tirza, who was the head of Operation Rainbow (which deals with the planning of the route of the barrier between Israel and the territory of Judaea and Samaria). Colonel (res.) Tirza reviewed the route of the fence and the considerations that were taken into account by the route planners. Counsel for the respondents once again argued that the petition should be dismissed *in limine*. She also emphasized that the original plan for East Matityahu (210/8) was the basis for the route. Its borders were almost identical to those in the new plan (210/8/1). A similar position was presented by counsel for the real estate companies and counsel for the Modi'in Illit Council. Counsel for the petitioner argued in reply that the expansion of the neighbourhood of East Matityahu, where at the present only approximately 80 families are living, should not be taken into account. Moreover, the construction works for the neighbourhood were carried out partly without a permit and partly with illegal building permits.

13. At the petitioner's request, we held another hearing of the petition after President A. Barak retired. At the hearing (on 18 February 2007), the parties once again presented before us their arguments and their objections to the route of the fence. Just prior to the hearing we were told that the Supreme Planning Council had decided to approve the new plan 210/8/1 and that the plan had been published in the newspapers as valid. Counsel for the petitioner told us that currently the actual

building is taking place on the western part of the neighbourhood of East Matityahu. The eastern part of the plan, which is supposed to be built at a distance of up to 80 metres from the fence, is in a preliminary stage: no tenders have been held and no development works have been carried out. According to the conditions of the plan, implementing the eastern part of the plan requires the approval of the Minister of Defence. Counsel for the respondents told us once again that the route was planned on the basis of plan 210/8, and he emphasized that the security consideration underlying it is the protection of future inhabitants. Colonel Ofer Hindi, who is currently the head of Operation Rainbow, also appeared before us at the hearing, and he said that an agricultural gate was built at the site, which reduces the injury to the Palestinian inhabitants and allows them to enter the area between the fence and the Green Line in order to cultivate their land. The real estate companies further argued that now, after the new plan 210/8/1 has been approved, the implementation of the plan to build East Matityahu is not theoretical and it will take place in the very near future.

14. On 8 May 2007 the respondents filed an application to change the *status quo*, according to which they had undertaken not to build a gate at the northern end of 'segment C,' which would remain, by mutual consent, open for free passage until the petition was decided. They argued that allowing free passage to continue at the site was not essential for local agricultural purposes, while it constituted a security risk and required the stationing of a relatively large force of soldiers at the site. Therefore they applied to open the gate three times a day for half an hour each time, and to prohibit Palestinians from remaining in the aforesaid area during the night. On 12 June 2007 we decided that the opening of the gate for only one and a half hours each day, as requested by the respondents, would exacerbate the injury to the inhabitants of Bil'in and would seriously affect the access to and cultivation of their agricultural land. Notwithstanding, we said that we accepted the respondents' position that leaving the gate open on a constant basis, and especially at night, was not essential. In these circumstances, in order to reduce the risk to the safety of the soldiers stationed at the gate during the night, we held that until a decision is given in the petition, the Bil'in gate would remain open for the passage of the inhabitants of Bil'in from 6:00 a.m. until 8:00 p.m..

15. To complete the picture it should be noted that in the interim the petitioner filed another petition, which concerned the property law status

of the land on which the neighbourhood of East Matityahu was planned (HCJ 3998/06, filed on 14 May 2006). The petition sought the retrospective cancelation of notice no. 10/91 of 15 January 1991 and notice no. 20/90 of 25 November 1990 issued by the Director of Government and Abandoned Property in Judaea and Samaria, in which certain tracts of land that belonged to the village of Bil'in were declared government property. It was alleged that the notices should be cancelled since they were based on an act of fraud — 'a secret circular transaction' between the first and second respondents and the fourth respondent. The petition was denied on 9 November 2006. In the judgment, which was given by Justice E. Rivlin with the agreement of President A. Barak and Justice A. Procaccia, it was stated *inter alia* that:

> 'We have reached the conclusion that insufficient evidence has been brought before us to determine that a "circular transaction" as alleged did indeed take place in this instance; in other words, it has not been proved that the notices that are the subject of the petition were made in order to circumvent the proceedings required by law for the acquisition of rights in land of the aforesaid type.'

*The petitioner's arguments*

16. The petitioner's main argument is that the route of the fence is not legal, since it was not chosen for security reasons but for the purposes of Modi'in Illit, which wishes to expand into the areas east of it. Including hundreds of dunams to the east of the urban area of Modi'in Illit was designed to incorporate an area for the future development of the town in a strip of land that is contiguous with Israel. The fence does not serve a military need. It was alleged in the petition that the route of the fence follows the border of master plan 210/8/1, part of which is even located outside the municipal jurisdiction of Modi'in Illit, rather than a topographical route or a route based on the outlying houses of the town or any other route that can be considered a security route. A significant part of the route passes along the foot of a slope, which certainly cannot be considered a commanding strategic position. The petitioner says that the master plan for the Modi'in Illit block also includes agricultural land in the vicinity of the Dolev Stream (between the Neot HaPisga neighbourhood and the East Matityahu neighbourhood), which is private land that belongs to Palestinian inhabitants. The neighbourhood of East Matityahu is a part of the main plan. Thus the roads in plan 210/8/1 were

planned as a part of the network of roads that is set out in the master plan. In practice, the route of the fence follows the borders of the master plan in its entirety. The petitioner's concern is that in the future the respondents also intend to take control of these areas, in order to expand Modi'in Illit.

17. The petitioners argue further that the route of the fence separates the village of Bil'in from more than half of the village's remaining land. There are currently thousands of olive trees, almond trees and vines on this land. The land is also used as pasture for the flocks of sheep that are owned by the inhabitants of the village. These constitute the main source of livelihood for the approximately two hundred families in Bil'in. Without them these families are doomed to a life of poverty and want. They also claim that in order to access their land the Palestinian inhabitants will need to obtain an entry permit for the closed area and to pass a gate that will be made in the fence. In view of the intention to build the neighbourhood of West Matityahu, it appears that the construction of the fence will put an end to the cultivation of the land. The fence is *de facto* a part of a strategy to take control of the cultivated land of the village of Bil'in. The petition also contains claims against the proceeding that declared Bil'in land to be 'state land.' According to the petitioner, it is clear in retrospect that the declaration was made, apparently, with the knowledge of the civilian administration that the land was not abandoned or ownerless, and that there is a claim it was bought by Jews. The procedure is not legal since the land does not satisfy the conditions provided in the law for the declaration and because the declaration was intended to conceal the true nature of the transaction.

18. With regard to the preliminary arguments, the petitioner claims that former counsel for the inhabitants of Bil'in signed agreements without consulting and informing the inhabitants and it was not their fault that the proceedings were not conducted properly. Only in May 2005 did the petitioner and the inhabitants of the village find out about the agreements that had been signed by their counsel on their behalf, the manner in which the petitions had been conducted and the reasons why they had been denied. As a result of the sequence of events, despite the large number of proceedings the court has not hitherto addressed the questions of substance that arise from the determination of the route of the fence and the inhabitants have not had their day in court. Moreover, the petitioner has only recently discovered the truth concerning the motives for determining the route. During the period when the previous

proceedings were taking place, the petitioner and the inhabitants of Bil'in had not had any information about the plans to expand Modi'in Illit and whether these were coordinated with the planned route of the fence in the area. He claims that the inhabitants of Bil'in encountered a persistent refusal on the part of the civil administration in response to their demand to receive copies of the master plans for Modi'in Illit. The inspection of the plans became possible only several weeks after the present petition was filed, as a result of a proceeding pursuant to the Freedom of Information Law that was filed in the Administrative Affairs Court in Jerusalem.

19. The petitioner's legal argument is that the construction of the fence in the territories of Judaea and Samaria is not legal and constitutes a violation of public international law. The petition relies *inter alia* on the advisory opinion of the International Court of Justice at the Hague (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (International Court of Justice, July 9, 2004), 43 ILM 1009 (2004)). According to the argument, the route was not chosen for security reasons but merely for political ones, and it was intended to annex territory to the State of Israel for the future development of Modi'in Illit. Therefore it is argued that the fence is being constructed *ultra vires* or without authority. It was also argued in the petition that the route of the fence is disproportionate, since it causes immense harm to the village and the basic rights of its inhabitants, including property rights, the freedom of movement and the right to livelihood. It was also argued that it is possible to build the fence in such a way that it will neither rob the petitioner and the inhabitants of his village of their land nor will it violate their rights.

*The respondents' position*

20. The respondents argue that the petition should be dismissed *in limine* because of the lengthy delay in filing it, the serious improper conduct on the part of the petitioner and the existence of a valid agreement between the respondents and the petitioner. The petition should also be denied on its merits. With regard to the delay, it was argued that the petitioner was aware of the agreements that were signed by his counsel at the time, at least after the state filed its response to the application to amend the petition in HCJ 2847/04. The petition was filed four months after the petitioner became aware, according to him, of the facts concerning the agreements and almost three months after the

decision to deny the application in HCJ 2847/04. During this time the inhabitants could see the fence being built in front of them. The delay adversely changed the respondents' position. During these months various works were carried out for the construction of the fence. A considerable amount of money was invested in constructing the fence. Changing the route now will cause a serious and unreasonable delay in completing the fence and will require the investment of many additional resources. With regard to segment C, the respondents argue that the petitioner is estopped from raising any arguments in view of the agreement that was made with his counsel according to which it was possible to implement the requisition order relating to this segment. The respondents point out that although the agreement was not completely formalized, the continuation of the proceedings — which focused on segment D — clearly shows the existence of an agreement with regard to segment C. Dismissal of the petition *in limine* is also required on the ground of seriously improper conduct. The argument is based on the fact that the petitioner does not state in his petition the existence of plan 210/8, which has been in force since 1999, and it focuses on plan 210/8/1 that had not been approved on the date of filing the petition.

21. On the merits of the petition, the respondents claim that the route of the fence is legal and is consistent with the provisions of international law and the case law of the court. Because of the security position that prevails in the territories, there is an essential security need to construct the fence in accordance with the route that was determined. The fence is a security measure of supreme importance, which was designed to protect the citizens of the state that live in the Modi'in block and the security of the state and its inhabitants. According to the respondents, when determining the route of the fence the military commander is also authorized to take into account new plans for expanding Israeli towns. The military commander is authorized to take into account new neighbourhoods that are currently being built. He is also authorized to consider valid master plans when there is a real likelihood that they will be implemented within a reasonable time, since there is no logic in building the fence and leaving new neighbourhoods on the other side of it. The weight that should be attributed to the existence of a master plan is not always the same. It depends upon how far the proceedings to realize the valid master plan have progressed. It depends both on internal factors concerning the sector of the population which the

neighbourhood is intended to serve and external factors concerning the degree of harm to the Palestinian inhabitants.

22. In the present case, the determination of the route for the fence took into account the need to protect the neighbourhood that was approved for building under plan 210/8, which is very likely to be realized, and building has even begun on the area of the plan, albeit with major deviations from the provisions of the plan. The plan for building the neighbourhood has been valid since 1999 and the western part of it has already been built and is partly inhabited, albeit with illegal building, since it does not correspond to the provisions of the valid plan for the building. The route also took into account the need to protect the neighbourhood of Neot HaPisga, which is currently in advanced stages of construction. Since the neighbourhood of East Matityahu is supposed to be built within the municipal jurisdiction of Modi'in Illit, and since in the circumstances of time and place there is a very reasonable likelihood that the fence will remain in place for a considerable number of years after the new neighbourhood is built, there was no reason why the fact that there is a plan to build the new neighbourhood should not be taken into account when determining the route of the fence. The fact that the promoters of the East Matityahu neighbourhood took the law into their own hands and chose to start building illegally in the neighbourhood should not prevent proper weight being given, when determining the route, to the fact that a new neighbourhood will be built on the site.

*The position of the real estate companies*

23. The real estate companies also put forward several preliminary arguments with regard to serious delay and improper conduct, and they argued that they relied on the agreement of 15 December 2004 between the petitioner and the respondents, according to which the works would continue in accordance with the existing route. It was also alleged that the relief sought in the petition is vague and general, and that the petitioner has not proved ownership of the relevant land or pointed to any specific harm to any of the inhabitants of Bil'in. On the merits of the petition, the real estate companies claim that there is no justification for changing the route of the fence. They claim that they are the owners of the land that is the subject of city building plan 210/8, since the land was acquired lawfully and for full consideration from its Arab owners many years ago. But in view of the concern that revealing the purchase documents in a public proceeding will place the sellers of the parcels in

danger of their lives, the real estate companies did not attach the documents that prove this. For this reason, the real estate companies claim that at their request the state has declared the parcels that were bought to be government property, and they have been defined as 'private property under government administration.' A large number of the inhabitants of the village filed an appeal against this declaration, but the appeals committee rejected most of the appeals, including the petitioner's appeal, and approved the declaration that the parcels are government property, subject to a decision to exclude several parcels from the area of the declaration. The real estate companies claim that a large residential neighbourhood, which is an integral part of Modi'in Illit, is being built on the land that is the subject of city building plan 210/8, and the respondents are obliged to protect its inhabitants and to include this area on the Israeli side of the fence.

24. The real estate companies also claim that the solution provided by the current route is a reasonable one, even if it is not optimal, for the security purpose of the fence, and that any relocation of the route to the west will frustrate the original purpose of the fence and endanger the inhabitants of Modi'in Illit. According to their claim, moving the fence to the west will violate their established rights unnecessarily and disproportionately. In this regard the real estate companies are of the opinion that the current route also takes into account the lifestyle of the inhabitants of Bil'in, and they emphasize that this route distances the fence from the homes of the inhabitants, even though this involves a concession with regard to essential strategic positions. According to them, most of the area that is situated to the west of the route is owned by Jews; most of this is being used to build the residential neighbourhoods; there are no real signs in the area of the lifestyle of the Arab population; and even though the channel of the Dolev Stream has trees planted in it, it can be clearly seen that the area has been neglected for years and is untended and uncultivated. In such circumstances, they claim that the proper balance of interests requires the construction of the fence with the current route, which strikes a proper balance between the security of the inhabitants of Israel, and especially of Modi'in Illit, on the one hand, and the rights and lifestyle of the local inhabitants (both Arabs and Israelis), including the property rights of the real estate companies.

25. With regard to the defects that were discovered in connection with plan 210/8/1, the real estate companies explain that they had no intention

of building without a permit or of acting in defiance of the law. They claim that they had reasons to believe that until the works reached the relevant stages, they would have building permits that reflected the new planning. What made the building technically 'illegal' was the fact that the state attorney's office stopped plan 210/8/1 from coming into effect. Had matters proceeded as they were intended and expected to do, according to the long-standing practice of the Supreme Planning Council, the real estate companies would already have had building permits and everything would have been done according to law. The real estate companies further claim that the building offences on the area of plan 210/8, in so far as they were committed, are totally irrelevant to the route of the fence in the area of the village of Bil'in.

26. The response of the real estate companies was accompanied by an expert opinion of General (res.) Dr Yom-Tov Samia, which supports their claims. General Samia expressed the opinion that from a security perspective the location of the route of the fence represents the maximum extent to which the military commander can take into account the rights of the local Arab population, on the one hand, while providing security (albeit not optimally) for the inhabitants of Modi'in Illit, on the other. The route makes it possible to control the essential strategic areas in order to protect Modi'in Illit. On the other hand, there is very minor harm to the lifestyle of the Palestinians who will be required to pass through an agricultural gate three weeks in the year to tend the trees and harvest the olives. The location of the route at a reasonable distance from the houses of the Israeli town is the preferable position from a security perspective, despite the location of the route being in an area that is relatively low-lying from a topographical viewpoint relative to Modi'in Illit and Bil'in. A concession of a line of commanding hills has already been made in the planning of the route (which was changed following *Beit Sourik Village Council v. Government of Israel* [1]) and these remain to the east of the fence. If the hills are used as commanding positions, the targets will be the forces that patrol the fence. Moving the route to the west will bring the houses of the neighbourhood of East Matityahu and the neighbourhood of Neot HaPisga into the effective range of weapons that are in the possession of the terrorist organizations in the territories.

*Deliberations*

27. The decision on the question of the legality of the security fence that is located in the territories of Judaea and Samaria is made on the basis of a two-stage analysis. The first stage examines the authority of the military commander and the second stage examines his discretion in exercising his authority (HCJ 1890/03 *Bethlehem Municipality v. State of Israel* [3], at p. 747 {109-110}). The powers of the military commander derive from the rules of public international law with respect to a belligerent occupation. These are mainly enshrined in the Regulations concerning the Laws and Customs of War on Land, which are annexed to the Fourth Hague Convention of 1907 (hereafter — the Hague Regulations). These regulations reflect customary international law. The power of the military commander is also enshrined in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War, 1949 (hereafter — the Fourth Geneva Convention). According to the laws with respect to a belligerent occupation, the military commander is authorized to order the construction of a security fence in the territories of Judaea and Samaria for military-security reasons (*Beit Sourik Village Council v. Government of Israel* [1]; HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* [4]). He is competent to seize possession of land for this purpose, and this includes land that is privately owned.

28. The military commander has authority only where the reason underlying the construction of the fence is a military-security one:

> '… the military commander is not authorized to order the construction of the separation fence if his reasons are political. The separation fence cannot come into existence in order to "annex" territories from Judaea and Samaria to the State of Israel. The purpose of the separation fence cannot be to draw a political border' (*Beit Sourik Village Council v. Government of Israel* [1], at p. 828 {285}; see also *Marabeh v. Prime Minister* [2], at para. 15).

According to art. 52 of the Hague Regulations, the requisition should be done for the 'needs of the army of occupation.' According to art. 53 of the Geneva Convention, the requisition should be 'rendered absolutely necessary by military operations.' The power of the military commander to construct a separation fence also includes a power to erect a fence to protect the lives and security of Israelis who live in Israeli towns in the

territory of Judaea and Samaria, even though the Israelis who live in the territories are not 'protected persons,' within the meaning of this expression in art. 4 of the Fourth Geneva Convention (see *Marabeh v. Prime Minister* [2], at paras. 18-22; HCJ 3680/05 *Tana Town Committee v. Prime Minister* [5], at paras. 8-10; HCJ 1998/06 *Bet Aryeh Local Council v. Minister of Defence* [6]; HCJ 1348/05 *Mayor of Salfit v. State of Israel* [7], at para. 20). The question of the legality of the Israeli settlement of the territories does not affect the duty of the military commander to protect the lives and security of the Israeli inhabitants (*Marabeh v. Prime Minister* [2], at para. 20).

29. A second stage in examining the legality of the fence is the scrutiny of discretion. The military commander is not free to make any decision that realizes legitimate security needs. When he is determining the route of the fence, he should consider and balance several factors. The *first* factor is the military-security factor. By virtue of this the military commander is entitled to take into account considerations with regard to protecting the security of the state and the army. These considerations involve questions of military and security expertise. On these questions the military commander has broad discretion. It is he who is responsible for maintaining security. He has the security expertise, knowledge and responsibility. The court gives considerable weight to his position (see *Beit Sourik Village Council v. Government of Israel* [1], at para. 46; HCJ 258/79 *Amira v. Minister of Defence* [8], at p. 92; HCJ 390/79 *Dawikat v. Government of Israel* [9], at p. 25). It has therefore been said in our case law that:

> '… we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted… Our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld' (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [10], at pp. 375-376 {109-110}).

The *second* factor that the military commander should take into account is the interests of the members of the local population who are 'protected persons.' The military commander should protect the human rights of the members of the local population that are recognized by

international law (see *Marabeh v. Prime Minister* [2], at para. 24; *Tana Town Committee v. Prime Minister* [5], at para. 10; *Bet Aryeh Local Council v. Minister of Defence* [6], at para. 8). The *third* factor is the protection of the human rights of Israelis living in the territories (see HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [11], at p. 560; *Marabeh v. Prime Minister* [2], at paras. 18-22; *Tana Town Committee v. Prime Minister* [5], at paras. 8-10; *Bet Aryeh Local Council v. Minister of Defence* [6], at para. 8). This duty is derived from the rules of international law and the rules of Israeli law. In determining the substance of the rights of Israelis who live in the territories, consideration should be given to the character of the territory that is subject to a belligerent occupation and the powers of the military commander.

30. The human rights to which the 'protected persons' in the territories and the Israelis in the territories are entitled are not absolute. Like all human rights they are relative. They may be restricted. Some of the restrictions arise from the need to consider the rights of others. Some of the restrictions derive from the security interest. The military commander should strike a balance between the various considerations that often conflict with one another. A main criterion in this balance is 'proportionality,' which is examined by means of three tests. The *first* test provides that the means must correspond with the purpose. The *second* test provides that of the various measures that may be adopted to achieve the purpose, the least harmful measure should be adopted. The *third* test provides that the harm caused to the individual by the measure that is adopted should be commensurate with the benefit arising from it. With regard to the three elements of the proportionality test, it should be noted that —

> 'Not infrequently there are several ways that the requirement of proportionality can be satisfied. In these situations, a "margin of proportionality" should be recognized (similar to the margin of reasonableness). Any measure that the authority chooses within the margin is proportionate' (*Beit Sourik Village Council v. Government of Israel* [1], at p. 840 {297-298}; *Marabeh v. Prime Minister* [2], at para. 30).

*The legality of the fence on the land of Bil'in — framework of the deliberations*

31. Let us begin our deliberations with regard to the legality of the fence on the land of Bil'in by examining the respondents' preliminary arguments. After this we shall examine the question whether the fence on the land of Bil'in was built with authority. This examination will consider the reasons underlying the construction of the fence near Modi'in Illit. After examining the authority we shall turn to examine the scope of the harm to the local inhabitants and whether this harm is proportionate. We shall conclude our deliberations by examining the reliefs that may be required by the overall legal analysis.

*Preliminary arguments*

32. In their responses the respondents and the real estate companies raise three preliminary arguments: delay, improper conduct and the existence of an agreement with the petitioner with regard to 'segment C' of the fence. Counsel for the petitioner says in reply that before the present petition was filed, the petitioner and the inhabitants of Bil'in did not have any information with regard to the plans for expanding Modi'in Illit and with regard to whether these corresponded with the planned route of the fence in the area. Only shortly before filing the petition did he find out about plan 210/8/1 and about the illegal building. The petitioner also did not originally know about the master plan for Modi'in Illit. Therefore the filing of the petition should not be regarded as tainted by delay, improper conduct or estoppel on account of the agreement with his counsel in the previous petitions. Counsel for the petitioner also argued at the hearing before us that since the petition was filed additional facts have come to light, which in themselves justify a re-examination of the case.

33. Our opinion is that the preliminary arguments do not justify the denial of the petition. We accept the petitioner's claim that the previous contacts and proceedings concerning the fence in Bil'in were conducted solely on the basis of partial information regarding the planning position of the neighbourhood of East Matityahu, the actual building works and the considerations that formed the basis for the planning of the route of the fence. As can be seen from the material before us, counsel for the petitioner was in the past shown plan 210/8, but not plan 210/8/1, according to which the actual building was carried out. It follows that we should not attach much weight to the procedural agreement concerning

'segment C' (which lies on the border of plan 210/8/1), which did not even amount to a binding agreement from a formal viewpoint. Moreover, in the state's response to HCJ 11363/04 the two new neighbourhoods of Modi'in Illit were mentioned only in general terms, without any reference to the numbers of the plans. The neighbourhood of East Matityahu was also not mentioned in the response, only the names of Neot HaPisga and Or Sameach (para. 26 of the state's response to HCJ 11363/04 of 9 January 2005). Moreover, the state's response did not contain any hint that plan 210/8 deviated from the municipal jurisdiction of Modi'in Illit and that any building was being carried out on the 'enclaves' of private Palestinian land. The state in its response also emphasized that 'land that is situated within the borders of a master plan is necessarily state land or land that was bought by Israelis' (para. 15 of the response of the respondents in HCJ 11363/04 of 9 January 2005). It was only as a result of filing of the present petition that it transpired that there were serious defects in plan 210/8/1, which required extensive amendments and new proceedings to approve them. It was also discovered that additional information that was presented to the court was inaccurate. Thus, for example, the figure stated by the respondents to be the extent of the land privately owned by Palestinians on the 'Israeli' side of the fence increased from 500 dunams to 678 dunams. In view of all the circumstances — the petitioner encountered difficulties in ascertaining the facts relevant to the petition, the figures presented to his counsel and to the court did not present the complete picture, major defects were discovered over the course of time with regard to the building without an approved plan and the information concerning the detailed plan was not provided — we should not address the preliminary arguments raised by the respondents and the real estate companies. Even if there is a defect in the fact that the petition before us does not mention plan 210/8 (which is formally the valid plan), and the pleadings address plan 210/8/1 (which is the plan according to which the actual building was carried out), in view of the extent of the defects that were discovered in the manner in which the respondents and the real estate companies acted, I do not think that this is sufficient in order to justify dismissing the petition *in limine*, without considering it on its merits.

*The authority of the military commander*

34. Let us turn therefore to examine the first aspect of the legality of the fence, which is the question of authority. The question is whether the route of the fence on the land of Bil'in is based on military-security

considerations or on political considerations, as alleged in the petition. We have examined, with the tools available to us, the motive underlying the construction of the fence. We cannot accept the claim that the purpose of the fence is to annex areas of the territory of Judaea and Samaria to the territory of Israel and to the town of Modi'in Illit. According to the facts brought before us, the motive for building the security fence in the area that is the subject of the petition is a security one. The fundamental decision to build a fence did not arise as a political idea relating to the annexation of territory but was the result of military-security needs, as an essential measure for protecting the state and its citizens. The decision to build a fence to the north and east of the Modi'in block and the town of Modi'in Illit was also made against a background of the reality of the serious terrorism that has been directed at Israel since September 2000, and this gave rise to an essential security need to adopt measures to protect the lives and safety of Israeli citizens. Among these measures the government decided to construct a security fence whose purpose was to frustrate and prevent the infiltration of terrorist activity from Judaea and Samaria into the territory of the State of Israel. We have already held in our case law that the construction of the fence is based on a security need and not on a political motive (*Beit Sourik Village Council v. Government of Israel* [1], at p. 830; see also *Marabeh v. Prime Minister* [2], at para. 100).

35. Notwithstanding, in the matter before us it is clear that the determination of the route of the fence was significantly influenced by the plan to construct new neighbourhoods to the east of Modi'in Illit. In the case of building plans that are in advanced stages of construction and where the buildings are already inhabited, this does not give rise to any real difficulty for several reasons. This is the case with regard to the neighbourhood of Neot HaPisga which is being built in accordance with a valid master plan. Hundreds of residential units, some of which are inhabited, have already been built in the neighbourhood. This neighbourhood is a part of Modi'in Illit and as such it too should be protected. Therefore the fact that one of the considerations in the planning of the route is the protection of the neighbourhood of Neot HaPisga does not derogate from the authority of the military commander. But it transpires that a major additional consideration in the planning of the route was the protection of the neighbourhood of East Matityahu. In view of the planning position of the neighbourhood of East Matityahu and the decisive weight that the military commander

gave to the protection of this future neighbourhood, the legality of the route that takes this consideration into account gives rise to a difficulty. Naturally the planning of the route of the security fence should not be based on the desire to include on the 'Israeli' side of the fence areas that are designated for the expansion of towns, especially where we are speaking of master plans that are not going to be realized in the near future (see *Marabeh v. Prime Minister* [2], at para. 113; *Mayor of Salfit v. State of Israel* [7], at para. 29; HCJ 2732/05 *Head of Azzun Town Council v. Government of Israel* [12]). With regard to the neighbourhood of East Matityahu, it transpired that plan 210/8/1 in fact replaced plan 210/8 that has been valid since 1999 but was not realized. The route of the fence therefore took into account a plan that had been abandoned, before the new plan was approved. In such circumstances, it is not possible to continue to rely on the original plan, which was abandoned by the promoters and the local authority, in order to justify the route of the fence. It should be emphasized that in view of the temporary nature of the fence as a security measure (*Marabeh v. Prime Minister* [2], at para. 100), there is no basis when planning the route for considerations relating to building plans that are not valid or for future plans that have not yet been realized and are not even expected to be realized in the near future. Even today, despite the fact that plan 210/8/1 has undergone the approval proceedings once again, in view of the fact that the realization of stage two (the east part) is conditional upon the approval of the Minister of Defence, it is very doubtful whether the route of the fence can be based upon a desire to include the whole neighbourhood to the west of the fence. The planning position of the neighbourhood of East Matityahu is complex. It has undergone various changes since plan 210/8 was approved and since the route of the fence was planned. The provisions of the plan are also complex. In view of this complexity and in view of the conclusion that we have reached on the question of proportionality, we are refraining from deciding the question whether the fact that the neighbourhood of East Matityahu was a decisive consideration in the planning of the route leads to the conclusion that there was a defect in the actual authority of the military commander to order the construction of the fence on the land of Bil'in, or whether it should be determined that this was a defect in discretion as opposed to a lack of authority. We are therefore assuming, for the purposes of the case, that the construction of the fence was done within the framework of the authority given to the military commander. Let us turn, therefore,

to examine the question whether the exercising of the authority given to the military commander is proportionate.

*The proportionality of the route*

36. The route of the fence injures the inhabitants of Bil'in. This injury is caused as a result of the requisition of land for the purpose of constructing the fence itself, the uprooting of trees that are situated along the route, and the fact that cultivated agricultural areas are left on the 'Israeli' side of the fence. The route of the fence occupies 260 dunams. In addition, the route separates the inhabitants of Bil'in from hundreds of dunams of private land and cultivated agricultural land. Olive trees, vines and almond trees are planted on this land and it is also used for pasturing the flocks of sheep belonging to the inhabitants of the village. Many of the inhabitants of Bil'in derive their livelihood from it. The access to this land will be restricted to a crossing through an agricultural gate for persons holding permits, with all of the difficulties that this entails. The respondents do not deny that the inhabitants of Bil'in are being injured. Nonetheless, their position is that the injury is proportionate in view of the essential security need, which includes, in their opinion, giving protection to the inhabitants who will live in the new neighbourhoods to the east of Modi'in Illit, including the two stages of the neighbourhood of East Matityahu, which they claim can only be realized by constructing the fence with the route on which it is being built. The respondents say in this regard that they intend to minimize the injury to the inhabitants of Bil'in and that they are also prepared to pay compensation and payments for the use of the land being requisitioned for building the fence.

37. Is the injury to the inhabitants of Bil'in proportionate? It would appear that the fence satisfies the rational connection test. The fence realizes the security purpose that was the reason for building it, which is to create a barrier between the Israeli towns and the Palestinian towns in the territory of Judaea and Samaria, and to protect the Israeli inhabitants against acts of terrorism. Does the route of the fence satisfy the second subtest, the least harmful measure test? It was argued before us that the security purpose can be achieved by means of an alternative route that will pass closer to the houses of Modi'in Illit, along the existing perimeter fence of the town. At the hearing before us the petitioner further claimed that even if there is a desire to include the houses that have been built in the neighbourhood of East Matityahu on

the 'Israeli' side of the fence, it is still possible to move the fence to the west and to reduce the injury to the inhabitants of Bil'in. The respondents' position is that there is no other reasonable measure that can achieve the essential security purpose for which the fence is being built that will injure the inhabitants of Bil'in to a lesser degree. This position is based on their approach that the security purpose is to provide protection for the inhabitants who will live in the new neighbourhoods of Neot HaPisga and East Matityahu. It is possible to accept this position in so far as it concerns the neighbourhood of Neot HaPisga which has reached an advanced stage of construction and is already inhabited, but not with regard to East Matityahu. As can be seen from our deliberations, a route that is based on the master plans for the construction of East Matityahu gives rise to considerable difficulties. The basis at this time for examining the route of the fence should therefore by, as we said above, plan 210/8/1, both from the viewpoint of its planning status and provisions and from the viewpoint of its actual realization. Plan 210/8/1 is divided into two parts. Stage one (the western part) can be implemented when the plan comes into effect. By contrast, the development and marketing of stage two (the eastern part) is conditional upon receiving approval from the Minister of Defence. No one disputes that more than forty buildings have been built in the neighbourhood of East Matityahu, and these include hundreds of residential units. Dozens of apartments are already inhabited, but the building is all in the western part of the neighbourhood. No building or development works have been carried out in the eastern part. This part is still a long way from being implemented both from a normative viewpoint and from a practical one. The future realization of stage two is not certain at all. In these circumstances, we cannot accept the claim that protecting the eastern part of the neighbourhood of East Matityahu is an essential security need. With regard to the eastern part we are speaking merely of a future need. In view of the lack of certainty with regard to the construction of stage two of the neighbourhood and in view of the temporary nature of the fence, at this time we are not speaking of a definite security need. Moreover, as we shall explain below, it would appear that in view of the desire to ensure the construction of the eastern neighbourhood in the future, the route of the fence was planned according to a route that has no security advantage.

38. It follows that the question that needs to be decided is whether there is an alternative route that provides protection for the houses that

are being built in the western part of East Matityahu and that injures the Palestinian inhabitants to a lesser degree. The respondents did not explain why the security purpose underlying the fence cannot be achieved by changing the route so that it incorporates the western part of East Matityahu but allows the Palestinian land in the channel of the Dolev Stream and other areas, as well as the 'enclaves' in plan 210/8/1, to remain on the eastern side of the fence. The respondents did not provide figures with regard to the distance between the route of the fence and the houses that have already been actually built in the neighbourhood of East Matityahu. Moreover, no information was provided with regard to the distance between the route of the fence and the border of stage one of East Matityahu on the basis of the aforesaid. From the facts that were brought before us, the existing route of the fence also raises questions from the viewpoint of the security benefit that it provides. No one disputes that the route passes mostly over terrain that lies lower than both Modi'in Illit and Bil'in from a topographical viewpoint. It leaves several hills on the Palestinian side and two hills on the Israeli side. It endangers the forces patrolling the route. Against the background of the security approach that was presented to us in many other cases, according to which it is important for security reasons to construct the fence on commanding topographical terrain, the existing route is surprising. As a rule, in many cases concerning the planning of the route of the fence the military commander has presented the retention of commanding hills as a significant security advantage, whereas in the case before us a route was determined that at least in part is situated on an area that is overlooked by hills. This route cannot be explained other than by the desire to include the eastern part of East Matityahu on the western side of the fence. Otherwise it is doubtful whether there is a military or security reason for determining the route of the fence in the place where it now passes. The respondents do not even deny this, and they state openly in their pleadings that the route was chosen in accordance with a security purpose that also includes the protection of the new neighbourhoods that will be built in the future, and that the safety distances of the route from the Israeli towns was measured according to the borders of the future master plan, and not according to the existing building. The rejection of 'option A,' which was intended to exclude the channel of the Dolev Stream from the border zone, was also explained by the respondents on the ground that 'option A does not provide a proper security solution for the inhabitants of the new

neighbourhoods and the inhabitants of Modi'in Illit, because of its proximity to the residential houses in the new neighbourhoods.' It should be remembered, as we said above, that the future intention of developing the eastern part of East Matityahu is not a consideration that should be taken into account at all at this time. In these circumstances, we have not been persuaded that it is essential, for military and security reasons, to retain the existing route that passes over the land of Bil'in. We have not been persuaded that had plan 210/8 not been considered in its entirety, a proper security alternative would not have been found for constructing the fence in order to protect the inhabitants of Modi'in Illit. It seems to us that against the background of the respondents' reliance upon the original plan 210/8, no detailed consideration was given to any alternative route that can ensure security for the inhabitants of the western part of East Matityahu, while injuring the inhabitants of Bil'in to a lesser degree. All of the options that were considered by the respondents were rejected for security reasons relating to the protection of the new neighbourhoods, including both stages of the neighbourhood of East Matityahu, and in practice the military commander did not examine any other option that does not take into account, for example, the future stage two of the neighbourhood of East Matityahu. It should be recalled that moving the route to the west will result, so it would seem, in building the fence on the area of plan 210/8. This area is mostly 'state land' and not private Palestinian land, which will also reduce the injury to the Palestinian inhabitants. The respondents should reconsider the existing route once again, and examine a possibility of an alternative route that is not based on the protection of stage two of East Matityahu.

39. We have not overlooked the arguments of the real estate companies that moving the fence to the west will result in a violation of their property rights and economic expectations. But these arguments cannot affect the conclusion that the respondents should re-examine the route. There are several reasons for this. *First*, there is a disparity between the respondents' position that the area on which the neighbourhood of East Matityahu is supposed to be built is 'state land' and the position of the real estate companies that it is private land that was bought by them or for them. According to the determination of the court in HCJ 3998/06 *Yassin v. IDF Commander in West Bank* [13], the land that is the subject of city building plan 210/8 was declared to be government property on the basis of it being 'state land' and not on the basis of a claim that it is owned by private parties. This declaration does

not in itself determine or create rights of ownership in the land. As of the present there has been no determination, in accordance with substantive law, with regard to the rights of ownership of any of the real estate companies. A hearing on the question of the route of the fence is not the appropriate procedural framework for considering the rights of ownership. *Second*, even if we assume, for the purpose of the proceeding before us, that the real estate companies are the owners of parcels of land that are included in plan 210/8, this does not preclude the moving of the route to the west. Just as security needs may prejudice the land of the local inhabitants and their ability to use it, so too they may prejudice the land of Israelis and their ability to use it (see, for example, HCJ 5495/06 *Midreshet Eretz Yisrael Fund Ltd v. Minister of Defence* [14]). The rules of proportionality in planning the route of the fence may result in Israeli inhabitants and Israeli property being left on the 'Palestinian' side of the fence (see, *inter alia*, *Tana Town Committee v. Prime Minister* [5], HCJ 399/06 *Susya Community Settlement Agricultural Cooperative Society Ltd v. Government of Israel* [15]; *Al-Ram Local Council v. Government of Israel* [4]; HCJ 4289/05 *Bir Nabala Local Council v. Government of Israel* [16]; HCJ 1844/06 *Rinawi v. Prime Minister* [17]). The balance between the various interests — security needs, the rights of the Palestinian inhabitants and the rights of Israelis — should be made by the military commander within the framework of his re-examination of the route of the fence.

40. In summary, we have not been persuaded that the *second* subtest of proportionality is satisfied by the route of the fence on the land of Bil'in. We have not been persuaded that it is essential, for military and security reasons, to retain the existing route that passes through a topographically less advantageous area of the land of Bil'in and that there is no proper security alternative for constructing the fence in order to protect the inhabitants of Modi'in Illit. The respondents should reconsider the existing route and examine an alternative route that will be capable of ensuring the security of the inhabitants in the western part of East Matityahu, while injuring the inhabitants of Bil'in to a lesser degree. We are aware that this change cannot be made overnight, since it requires the demolition of the existing fence and the construction of a new fence in certain places. In view of the continuing injury to the inhabitants of Bil'in, the respondents should carry out the re-examination within a reasonable time.

41. In view of our determination with regard to the second subtest, we do not need to decide the question whether the route of the fence satisfies the third test of proportionality, which is the test of proportionality 'in the narrow sense.' Notwithstanding, we think we should point out that in view of all of the factors and considerations that we have mentioned above, the current route of the fence also does not satisfy the third test of proportionality. This test examines the question whether the injury caused by the route of the fence to the petitioner is commensurate with the benefit derived from the construction of the fence according to the route that was determined. In our case, the route that was determined seriously injures the inhabitants of Bil'in. The injury is caused as a result of requisitioning land to build the fence, uprooting trees along the route and leaving cultivated agricultural areas on the 'Israeli' side of the fence. As we have already said, the route of the fence separates the village of Bil'in from a large part of the village's remaining land. The route of the fence itself occupies approximately 260 dunams, and approximately 1,700 additional dunams of its land according to the land allocated to the village of Bil'in by the British Mandate, of which more than 670 dunams are privately owned by inhabitants of Bil'in, have been left on the western side of the fence. There are currently thousands of olive trees, almond trees and vines on this land. The land is also used as pasture for the flocks of sheep owned by the inhabitants of the village. It serves as the main source of livelihood for approximately 200 families in Bil'in. The respondents do not deny that the inhabitants of Bil'in have been injured, but they are of the opinion that the injury is reasonable and proportionate. According to them, the injury to the inhabitants of the village of Bil'in is proportionate to the essential security need of protecting the inhabitants of Israel in general and the inhabitants of the Modi'in block in particular. We cannot accept this position. The construction of the fence on a part of the land of Bil'in, and the restriction of access of the inhabitants of Bil'in to a significant additional part of their land by means of the construction of a checkpoint and an agricultural gate for permit holders only, create significant difficulties for the inhabitants of Bil'in and seriously harm the fabric of their lives. At the same time, the expected security benefit provided by the present route, which currently protects areas where no building is taking place, is not commensurate with the injury to the 'protected' inhabitants. Therefore the route that was determined does not satisfy a balance between security needs, on the one hand, and the welfare of the

inhabitants of Bil'in, on the other. Of course, we accept the respondents' position that choosing a route that is adjacent to the houses of Modi'in Illit does not provide a proper security solution. But the respondents' position was formulated in accordance with the borders of the future master plan of the neighbourhood of East Matityahu, and not in accordance with the building that is actually being carried out. As we held above, a future intention to develop the eastern part of East Matityahu is not a consideration that should be taken into account at this stage, and it would therefore seem that it is possible to reduce the harm to the local inhabitants by choosing an alternative route that does not take into account the areas that are designated for the future construction of stage two of the neighbourhood of East Matityahu.

42. As we have said, at the hearings that took place before us we were not presented with all of the facts concerning the proper alternative route that should replace the route of the fence under discussion in the petition, and in actual fact such a route has not been considered by the respondents. Therefore we have decided to make the order *nisi* absolute in the following manner: the first and second respondents shall reconsider, within a reasonable time, an alternative to the route of the separation fence on the land of Bil'in, which injures the inhabitants of Bil'in to a lesser degree, and leaves the cultivated areas in so far as possible on the eastern side of the fence; in this respect an alternative should be considered that includes the areas of stage one of the neighbourhood of East Matityahu on the western side of the fence, whereas the agricultural areas in the channel of the Dolev Stream which are designated for the future construction of the second stage of the neighbourhood of East Matityahu should be left on the eastern side of the fence. Until the re-examination of the alternative route has been completed, the interim order of 12 June 2007 shall remain in force, with the result that the Bil'in gate shall remain open for the passage of the inhabitants of Bil'in from 6:00 a.m. until 8:00 p.m..

**Vice-President E. Rivlin**
I agree.

**Justice A. Procaccia**
I agree.

Petition granted.
21 Elul 5767.
4 September 2007.

## Al-Bassiouni v. Prime Minister

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### Synopsis

In 2005 the Israel Defence Forces left the Gaza Strip and all of the Israeli inhabitants of the Gaza Strip were evacuated. However, a large proportion of the electricity in the Gaza Strip continues to be supplied from Israel. The Gaza Strip also remains largely dependent upon supplies of food and medicine, as well as many other products, from Israel.

Regrettably, the end of Israeli military rule in the Gaza Strip did not result in a decrease in attacks launched against Israel from the Gaza Strip, but in an increase of these attacks, both in the number of the attacks and the range of the areas affected. Following years of rocket and mortar attacks fired from the Gaza Strip into the territory of the State of Israel, the Israeli government decided in 2007 to limit the supply of fuel and electricity into the Gaza Strip.

The petitioner challenged the decision of the Israeli government, on the ground that the it prejudiced the humanitarian needs of the inhabitants of the Gaza Strip.

In reply, the respondents argued that the decision was made because some of the fuel and electricity supplied to the Gaza Strip was being used in order to carry out attacks on the State of Israel. The respondents argued that while they allowed unlimited amounts of food and medicine to enter the Gaza Strip, the amounts of fuel and electricity that they were obligated to supply to the Gaza Strip was limited to the amounts needed to satisfy the humanitarian needs of the inhabitants, in accordance with international humanitarian law. The respondents also argued that Hamas's portrayal of the humanitarian situation in the Gaza Strip as a crisis was exaggerated.

The petitioners argued that there was no physical way of restricting the electricity to the Gaza Strip without causing power stoppages in hospitals

and stopping the pumping of clean water to the civilian population in Gaza, and without causing serious disruptions to basic needs. They therefore claimed that implementation of the decision would cause certain, serious and irreversible damage to the essential humanitarian needs of the Gaza Strip, its hospitals, the water and sewage system, and the entire civilian population.

The Supreme Court held that since 2005 Israel does not have effective control of what happens in the Gaza Strip. Therefore, under the laws of belligerent occupation in international law Israel does not have a general responsibility for the welfare of the inhabitants of the Gaza Strip or for maintaining public order in the Gaza Strip. Neither does Israel have an effective capability of enforcing order and managing civilian life in the Gaza Strip. In these circumstances, the court held that the main duties of the State of Israel regarding the inhabitants of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip, the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.

While the State of Israel has a duty to refrain from intentional harm to the civilian population of the Gaza Strip, it has no duty to allow an unlimited amount of electricity and fuel to enter the Gaza Strip in circumstances where some of these products are in practice being used by the terrorist organizations in order to attack Israeli civilians. The duty of the State of Israel is to allow the supply of the humanitarian needs of the inhabitants of the Gaza Strip. In view of the relatively small scale of the reductions in the electricity supply (a reduction of 5% in only three of the ten lines supplying electricity from Israel to the Gaza Strip) and the undertakings given by the respondents to the court, the Supreme Court accepted that the State of Israel was discharging its humanitarian obligations properly and would continue to monitor the humanitarian situation in the Gaza Strip to ensure that no humanitarian crisis occurred.

HCJ 9132/07

**Jaber Al-Bassiouni Ahmed**
**and others**
**v.**
**1. Prime Minister**
**2. Minister of Defence**

The Supreme Court sitting as the High Court of Justice
[30 January 2008]
*Before President D. Beinisch and Justices E. Hayut, J. Elon*

Petition to the Supreme Court sitting as the High Court of Justice.

**Facts:** The petitioner challenged the respondents' decision to limit the supply of fuel and electricity to the Gaza Strip, which the petitioners claimed prejudiced the humanitarian needs of the inhabitants of the Gaza Strip. The respondents argued that the decision was made because some of the fuel and electricity supplied to the Gaza Strip is being used in order to carry out attacks on the State of Israel. The respondents argued that the amounts of fuel and electricity being supplied to the Gaza Strip satisfied the humanitarian needs of the inhabitants, in accordance with international humanitarian law.

**Held:** The State of Israel has no duty to allow an unlimited amount of electricity and fuel to enter the Gaza Strip in circumstances where some of these products are in practice being used by the terrorist organizations in order to attack Israeli civilians. The duty of the State of Israel derives from the essential humanitarian needs of the inhabitants of the Gaza Strip. The respondents satisfied the court that these needs are indeed being satisfied.

Petition denied.

**Israeli Supreme Court cases cited:**

[1] HCJ 3451/02 *Almadani v. Minister of Defence* [2002] IsrSC 56(3) 30; **[2002-3] IsrLR 47**.
[2] HCJ 168/91 *Morcus v. Minister of Defence* [1991] IsrSC 45(1) 467.
[3] HCJ 3114/02 *Barakeh v. Minister of Defence* [2002] IsrSC 56(3) 11; **[2002-3] IsrLR 39**.

[4] HCJ 320/80 *Kawasma v. Minister of Defence* [1981] IsrSC 35(3) 113.

For the petitioners: N. Peleg, Prof. K. Mann, F. El-Ajou, H. Jabareen, S. Bashi.
For the respondents: G. Shirman, O. Mendel.

## JUDGMENT

**President D. Beinisch**

1. The petition before us is directed against the respondents' decision to reduce or limit the supply of fuel and electricity to the Gaza Strip. In their petition for relief from this court, the petitioners mainly addressed the need for various types of fuel (gasoline and diesel) for the proper running of hospitals and water and sewage pumps, as well as for the supply of electricity, whether via power lines from Israel or by supplying industrial diesel for operating the Gaza Strip power plant.

2. The circumstances surrounding the petition are the combat activities that have been taking place in the Gaza Strip for a long period, and the continuing campaign of terrorism directed against the citizens of Israel. The terrorist attacks have intensified and worsened since the Hamas organization took control of the Gaza Strip. These attacks include the continuous firing of rockets and mortar shells at civilian targets in the territory of the State of Israel, as well as terrorist attacks and attempted attacks that target civilians and IDF soldiers at the border crossings between the Gaza Strip and the State of Israel, along the border fence and in the territory of the State of Israel. The respondents' decision to limit the supply of fuel and electricity to the Gaza Strip was made as a part of the State of Israel's operations against the continuous terrorism. The following is the text of the decision that was adopted by the Ministerial Committee on National Security Affairs on 19 September 2007:

> 'The Hamas organization is a terrorist organization that has taken control of the Gaza Strip and turned it into a hostile territory. This organization carries out acts of hostility against the State of Israel and its citizens, and the responsibility for these acts lies with it. It has therefore been resolved to adopt the recommendations presented by the security establishment, including the continuation of the

> military and intelligence operations against the terrorist organizations. Additional restrictions will also be placed upon the Hamas regime, so that the passage of goods to the Gaza Strip will be limited, the supply of fuel and electricity will be reduced and restrictions will be imposed upon the movement of persons to and from the Strip. The restrictions will be implemented after considering the legal ramifications of the humanitarian situation in the Gaza Strip, in order to prevent a humanitarian crisis.'

The petition is directed against this decision.

3. The petition against the decision was filed on 28 October 2007 and it was heard on 7 November 2007, in the presence of the parties. On the date of the hearing the state gave notice that a final decision as to whether to implement the restrictions upon the supply of electricity to the Gaza Strip had not yet been made, and therefore we only heard argument regarding the restrictions upon the supply of fuel. During the hearing, counsel for the respondents told the court that the state recognizes that it has a duty not to prevent the supply of basic humanitarian needs to the Gaza Strip, and therefore it announced that it would monitor the situation and ensure that the restrictions being made do not harm the supply of basic humanitarian needs. At the end of the hearing we held that within seven days the state should present the data on which it based its assessment of the effect of reducing the fuel supply to the Gaza Strip, and explain the methods of monitoring and of checking the data that it intends to adopt in order to safeguard the humanitarian needs of the inhabitants of the Gaza Strip.

*Reduction of the fuel supply to the Gaza Strip*

4. On 29 November 2007 we held, with regard to that part of the petition addressing the reduction of the fuel supply to the Gaza Strip, that the fuel that the Palestinian Energy Authority buys from the Israeli Dor Alon company, which is distributed by private suppliers to the highest bidder irrespective of any other concerns, can be distributed in another manner. We said that the various types of fuel supplied to the Gaza Strip can be distributed according to priorities that take into account the humanitarian needs of the civilian population, as well as the functioning of the generators that operate the water pumps and electricity plants in the Gaza Strip. In our decision we gave weight to the state's position that while combat operations and missile attacks are

being carried out against Israeli towns, some of the fuel that enters the Gaza Strip is used *de facto* for various objectives of the terrorist organizations, and in such circumstances the reduction of the fuel supply, in the controlled manner in which it is made, may damage the terrorist infrastructures and their ability to operate against the citizens of the State of Israel, considering that the amount of fuel that enters the Gaza Strip is supposed to satisfy only the humanitarian purposes that require the use of fuel. We were therefore not persuaded at that stage, on the basis of the data presented to us, that the respondents' decision to reduce the amount of fuel allowed into the Gaza Strip through the border crossings with Israel currently violates the basic humanitarian needs of the Gaza Strip. We therefore held that there was no basis for any order nisi or interim order concerning the reduction of the fuel supply (gasoline and diesel). Our decision was mainly based on the state's undertaking, as required by Israeli and international law, to monitor the situation in the Gaza Strip and ensure that the aforesaid reduction does not prejudice the humanitarian needs of the inhabitants of the Gaza Strip. In these circumstances we concluded the hearing of the issue of the restrictions on the fuel supply to the Gaza Strip, and proceeded to examine the arguments concerning the harm to the inhabitants of the Gaza Strip that could be anticipated as a result of the restrictions on the supply of electricity.

*Reduction of the supply of electricity to the Gaza Strip*

5. The hearing of the part of the petition regarding the reduction of the supply of electricity to the Gaza Strip required complex factual verification, and we encountered difficulty in receiving figures on this issue from the state's representatives. Therefore the proceedings on this issue were drawn out while on various dates we received detailed applications from the petitioners and written and oral responses from the respondents. On 15 November 2007 the petitioners filed an urgent application for an interim order in the petition, and on 23 November 2007 they applied for an urgent hearing of the petition in view of the state's notice that as of December 2007 it would begin to restrict the amount of electricity supplied to the Gaza Strip. The petitioners argued that there is no physical way of restricting the electricity to the Gaza Strip without causing power stoppages in hospitals and stopping the pumping of clean water to the civilian population in Gaza, and without causing serious disruptions to basic needs. Their main argument was that implementation of the decision would cause certain, serious and

irreversible damage to the essential humanitarian needs of the Gaza Strip, its hospitals, the water and sewage system, and the entire civilian population.

6. According to figures that are not disputed by either party, the amount of electricity needed for the Gaza Strip at peak times is slightly more than 200 megawatts. Approximately 120 megawatts are supplied by Israel, and approximately 17 megawatts are supplied by Egypt. The remainder is supplied by the Gaza Strip power plant. The electricity supplied to the Gaza Strip by the State of Israel is supplied via 10 power lines, on four of which load limiters have been installed. The respondents' intention was to reduce the supply of electricity through those four power lines gradually, by 5% of the amount of electricity transferred through each of the lines. The respondents' claim that this step would require the authority that controls the Gaza Strip to manage the load and reduce the actual consumption of electricity in the area to which the relevant line supplies electricity, to prevent the supply of electricity for terrorist purposes such as workshops where Qassam rockets are made. According to their approach, if the authorities in Gaza manage the consumption of electricity properly, the flow of electricity from Israel to the Gaza Strip will continue without interruption. But if consumption exceeds the permitted amount, the supply of electricity will cease automatically, due to the load limiters installed upon the four power lines described above. The respondents emphasized in their response that the aforesaid reduction of electricity does not affect the basic humanitarian needs of the residents of the Gaza Strip.

7. The petitioners argue that there is no physical way of reducing the supply of electricity to Gaza without causing power stoppages in hospitals and the pumping of clean water to the civilian population of Gaza, and therefore the implementation of this decision will cause certain, serious and irreversible harm to the necessary humanitarian needs of the Gaza Strip, its hospitals, the water and sewage system, and the entire civilian population. In their supplementary pleadings of 27 November 2007, the petitioners presented detailed arguments regarding the future reduction of electricity to the Gaza Strip, and according to them even now, since the bombing of the local power plant by the Israeli Air Force in 2006, the Gaza Strip has suffered from a shortage of electricity that compels the Electricity Distribution Company in Gaza to make electricity stoppages for several hours each day. They argue that even now the frequent power stoppages affect the functioning of

essential services in Gaza, such as hospitals, because the infrastructure in the Gaza Strip does not make it possible to disconnect the electrical supply to the civilian population without disconnecting essential services. Moreover, it was emphasized that stopping the supply of electricity to the homes of Gaza residents denies them the possibility of receiving clean drinking water in their homes and interrupts the functioning of the water and sewage pumps.

8. On 29 November 2007 we held a hearing of the petition, at which we heard the arguments of the parties. During the hearing we also heard the respondents' deponents, Colonel Shlomi Muchtar, head of the Operations Department at the Unit for Coordination of Government Activities in the Territories, and Mr Idan Weinstock, director of the Electricity Authority at the Ministry of National Infrastructures. For the petitioners we heard the second petitioner, Mr Maher Najar, the assistant-director of the Water Authority in the Coastal Cities Administration in Gaza. After we heard the arguments of the parties and their deponents regarding the planned reduction of the electricity supply to the Gaza Strip and after we received the incomplete facts that were presented to us, we saw fit to request further pleadings from the respondents on several points concerning the possibility of regulating the flow of electricity to the Gaza Strip so that humanitarian needs will not be harmed. We also made an order that until the aforesaid submissions were received, the plan to reduce the electricity supply to the Gaza Strip should not be implemented.

9. While the petition was pending, the petitioners once again filed applications to compel the state to continue the normal supply of electricity to the Gaza Strip without restrictions. Their arguments focused mainly on the fact that the local power plant, which supplies electricity to essential humanitarian facilities, cannot function properly due to a severe shortage of industrial diesel fuel. They argue that the amount of industrial diesel that the respondents are allowing to enter the Gaza Strip is insufficient for the needs of the power plant and does not enable it to produce the amount of electricity that the residents of the Gaza Strip need during the winter months. It was argued that the shortage of industrial diesel caused a reduction of approximately 30% in the amount of electricity produced by the power plant in the Gaza Strip, which has led to long electricity stoppages. It was emphasized that the industrial diesel supplied to the Gaza Strip is used solely for producing electricity at the power plant. On 9 January 2008 filed an update, in

which they said that as a result of the severe shortage of industrial diesel at the power plant in the Gaza Strip, power stoppages of eight hours every day were being imposed in central Gaza, and in the city of Gaza itself stoppages were being imposed for eight hours every two days. It was further alleged that as a result of the reduction in electricity production, the central hospital in Gaza was suffering power stoppages of 6-12 hours each day, which disrupted the functioning of the hospital. On 21 January 2008 the petitioners informed the court that, due to the shortage of industrial diesel, the power plant in Gaza had completely stopped the production of electricity, which resulted in a shortage of approximately 43% of the amount of electricity required by the residents of the Gaza Strip. They claimed that on 20 January 2008 the respondents imposed a complete ban on the entry of industrial diesel into the Gaza Strip, and in the absence of reserves this led to the shutdown of the power plant. In the prevailing circumstances, the petitioners claimed that many residents of the Gaza Strip had no access to clean drinking water, sewage was overflowing and residents were unable to operate in their homes the medical equipment that they needed.

10. Following the aforesaid, the respondents filed a further statement, in which they addressed the various claims and the dynamic changes in the factual position. They said that at a meeting between the head of the Operations Department of the Unit for Coordination of Government Activity in the Territories, Colonel Shlomi Muchtar, and the representatives of the Palestinian Energy Authority, the Palestinians had said that they were able to regulate loads by reducing the consumption of electricity in the distribution area of a certain line, and that such regulation had already been put into operation; thus, for example, the Palestinian authorities confirmed that they were able to reduce the consumption on a certain power line in order to allow the proper functioning of a hospital. We were also informed that as a result of an arrangement between the Israel Electric Corporation and the Palestinian Authority in 2005, the supply of electricity through two of the lines providing electricity from Israel to the Gaza Strip was limited to 11 megawatts. The respondents admitted that the Nachal Oz crossing, through which the industrial diesel fuel needed to run the Gaza power plant enters the Gaza Strip, had indeed been closed for several days, and therefore the supply of industrial diesel to the power plant in the Gaza Strip had been prevented during those days. The respondents explained that the closure of the crossing and the stoppage in the supply of

industrial diesel to the power plant occurred as a result of a very serious rocket barrage against Israel, in which between the fifteenth and eighteenth of January 2008, 222 mortar shells had been shot at Israeli towns near the Gaza Strip, Ashkelon and Sederot, which caused the wounding of seven civilians, many victims of trauma and considerable damage. Despite that, we were told that it has now been decided that the amount of industrial diesel supplied to the Gaza Strip will amount to 2.2 million litres a week, as it was before the reduction plan. Regarding the supply of electricity from Israel, the respondents said that they intend to implement a gradual reduction in only three power lines, in an amount of 5% of the total current in each of those lines, so that the amount of electricity supplied through them will total 13.5 megawatts in two of them and 12.5 megawatts in the third. The respondents emphasized in this context that the Palestinians themselves have said on several occasions that they are able to carry out load reductions if restrictions are imposed on the power lines, so that humanitarian purposes and needs are not affected. Finally, the respondents said that the opening of a Rafah crossing into Egypt, which was an action taken unilaterally by the Palestinians, might affect the entire situation in the Gaza Strip and all of the obligations of the State of Israel towards the Gaza Strip, but they added that this subject is a new development and is being examined from a factual, legal and political perspective. On 27 January 2008 we held a hearing that focused on the supply of industrial diesel fuel to the Gaza Strip, at which the parties reiterated their main arguments, as set out above, and the state announced, as aforesaid, that industrial diesel fuel was being supplied to the Gaza Strip in the same manner as it had in the past.

*Deliberations*

11. The question before us is whether the various restrictions upon the supply of fuel and electricity to the Gaza Strip harm the essential humanitarian needs of the residents of the Gaza Strip. As we said in our decision of 29 November 2007, the State of Israel has no duty to allow an unlimited amount of electricity and fuel to enter the Gaza Strip in circumstances where some of these products are in practice being used by the terrorist organizations in order to attack Israeli civilians. The duty of the State of Israel derives from the essential humanitarian needs of the inhabitants of the Gaza Strip. The respondents are required to discharge their duties under international humanitarian law, which requires them to allow the Gaza Strip to receive only what is needed in

order to provide the essential humanitarian needs of the civilian population.

12. The State argued before us that it conducts itself in accordance with the rules of international law and respects its humanitarian obligations under the laws of war. Counsel for the state argues that these duties are limited and are derived from the state of armed conflict that exists between the State of Israel and the Hamas organization that controls the Gaza Strip, and from the need to avoid harm to the civilian population that finds itself in the combat zone. We should point out in this context that since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. The military government that was in force in this territory in the past was ended by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip under all of the laws of a belligerent occupation under international law. Neither does Israel have any effective ability, in its present position, of enforcing order and managing civilian life in the Gaza Strip. In the prevailing circumstances, the main duties of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; these duties also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.

13. In this context, the respondents referred in their pleadings to various provisions of international humanitarian law that apply to this case. Inter alia, the respondents referred to art. 23 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: 'the Fourth Geneva Convention'), which requires a party to a conflict to allow the free passage of consignments intended for the civilians of the other party. They said, however, that this is a very limited obligation, since it only requires a party to a conflict to allow the unlimited passage of medical equipment, and to allow the passage of foodstuffs, clothing and medicine intended for children under the age of

fifteen and expectant mothers. The respondents also referred to art. 70 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977 (hereinafter: 'the First Protocol'), which in their opinion constitutes customary international law, and which imposes a general and broader obligation according to which parties to a conflict are required to allow the rapid and unimpeded passage of essential goods for the civilian population. Finally, the respondents also referred in their pleadings to art. 54 of the First Protocol, which prohibits the starvation of civilians as a method of warfare, as well as any attack, destruction, removal or rendering useless of installations required by the civilian population, including foodstuffs, agricultural areas and drinking water installations.

14. The state's pleadings in this regard are based upon norms that are part of the customary international law, which set out basic obligations that govern combatant parties during an armed conflict, and require them to ensure the welfare of the civilian population and respect its dignity and basic rights. It should also be noted that under the rules of customary international humanitarian law, each party to a conflict is obliged to refrain from disrupting the passage of basic humanitarian relief to populations needing it in areas under its control (J. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (ICRC, vol. 1, 2005), at pp. 197, 199). It is also stated in the commentary on art. 70 of the First Protocol that arts. 54 and 70 of the First Protocol should be read together, so that a party to a conflict should not be permitted to refuse to allow the passage of foodstuffs and basic humanitarian equipment necessary for the survival of the civilian population (*Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Y. Sandoz, C. Swinarski, B. Zimmermann, eds., ICRC, Geneva, 1987), at p. 820).

15. It follows from the aforesaid that the respondents do not in any way deny the existence of their humanitarian duties, which require the State of Israel to allow the passage of essential humanitarian goods to the Gaza Strip, and to refrain from intentional harm to humanitarian facilities. According to the respondents' arguments, which they supported with affidavits and statements of the responsible authorities, not only are the respondents allowing the transfer of essential goods to the civilian population in the Gaza Strip, but they also regard this as a humanitarian obligation for which they are liable pursuant to

international law and the decision of the ministerial committee. Notwithstanding, the respondents emphasized that this does not require them to allow the passage of unessential goods or amounts of goods that exceed what is required for basic humanitarian needs, and this is the heart of the disagreement between them and the petitioners.

16. In this last respect, Colonel Nir Press, the commander of the Coordination and Liaison Authority, appeared before us during the final hearing and gave details of the relevant data and information upon which the respondents rely. Colonel Press clarified the statements made on behalf of the state, and insisted that the amount of fuel and electricity entering the Gaza Strip is sufficient for the proper functioning of all the humanitarian services in the territory; Colonel Press further told us of contacts that he held with Palestinian representatives for the routine monitoring of the functioning of the humanitarian services in the Gaza Strip. *Inter alia*, he described how the State of Israel allows the safe conduct of the sick for treatment in the State of Israel, and allows the unlimited passage of food and medicine, in order to avoid harming the residents of the Gaza Strip beyond the extent necessitated by the state of armed conflict between the State of Israel and the Hamas organization. Colonel Press admitted to us that the situation of the civilian population in the Gaza Strip is indeed difficult, but he also gave examples of exaggerated descriptions published by the Hamas organization with regard to a humanitarian crisis in the territory.

17. The main issue remaining before us, as became clear from the last hearing, is the amount of industrial diesel fuel required for the operation of the power plant in the Gaza Strip. As stated above, we were persuaded by the respondents' declarations that they intend to continue to allow the supply of industrial diesel fuel at the same level as prior to the implementation of the limitations, namely 2.2 million litres per week. Since it has been clarified that industrial diesel can be used, and is used de facto, solely for the power plant in the Gaza Strip, it can be assumed that the supply of industrial diesel will not fall short of this amount. Our examination of the matter revealed that the supply of industrial diesel to the Gaza Strip during the winter months last year was similar to the amount that the respondents now promise will be permitted to enter the Gaza Strip, and this fact also indicates that it is a reasonable amount that is sufficient for the basic humanitarian needs of the Gaza Strip. Admittedly, for several days the border crossings were closed and consequently the required amount of diesel was not delivered. But this, it

was explained, was on account of a temporary security need that was caused by a very severe rocket attack launched against Israeli towns from within the Gaza Strip. It need not be said that even during this period, when there was a specific security need to close the border crossings, the State of Israel continued to supply the Gaza Strip with the same amount of electricity that it usually provides.

18. As for the revised plan presented to us, which concerns a five per cent reduction of the supply of electricity through three of the ten power lines supplying electricity to the Gaza Strip, to a level of 13.5 megawatts in two of the lines and 12.5 megawatts in the third, we have been persuaded that this reduction does not breach the State of Israel's humanitarian duties within the context of the armed conflict taking place between it and the Hamas organization that controls the Gaza Strip. This conclusion is based, inter alia, upon the fact that the respondents' affidavit shows that the relevant Palestinian authorities have said that they have the ability to carry out load reductions if limits are placed on the power lines, and they have made actual use of this ability in the past.

19. It should be emphasized that during the hearing of the petition the state reiterated its undertaking to monitor the humanitarian situation in the Gaza Strip, and in this context we were informed, in various affidavits filed on behalf of the respondents, that this commitment is being discharged very responsibly and seriously, and that the security establishment carries out a weekly assessment of the position in this regard, which is based, inter alia, upon contacts with Palestinian authorities in the fields of electricity and health, and on contacts with international organizations. It should be noted in this context that from the hearing of this issue before us, as well as from other cases where an immediate response was required on matters regarding humanitarian concerns, it has be seen that the parties are capable of reaching understandings and arrangements in these matters. Indeed, a solution in the form of communication between the persons in charge of the security establishment and those authorities in contact with them who can inform them of the essential basic needs is the best way of finding speedy solutions to concrete problems that arise from time to time; that is shown by the fact that even before we held a hearing, the state announced, of its own initiative, that it was renewing the supply of regular diesel fuel, which is required, inter alia, for ambulances and operating generators in hospitals, in the same amount as prior to the reduction, as well as the supply of industrial diesel. These facts shows that the state is indeed

monitoring the situation in the Gaza Strip, and allowing the supply of the amount of fuel and electricity needed for the essential humanitarian needs in the area.

20. We have said, on more than one occasion, that we do not intervene in the question of the effectiveness or the wisdom of the security measures adopted by those responsible for security, but only in the question of their legality. Our role is limited to judicial review of compliance with the rules of Israeli and international law that bind the State of Israel, which the respondents declared before us are being scrupulously observed by the state. In this regard it has been said in the past that in times of war legal norms continue to apply, and the laws of war should be observed. In HCJ 3451/02 *Almadani v. Minister of Defence* [1] we held, in a similar context, that:

> 'Israel finds itself in severe combat against raging terrorism. Israel acts pursuant to its right to self-defence (see art. 51 of the Charter of the United Nations). This combat is not carried out in a normative void. It is carried out pursuant to the rules of international law, which determines principles and rules for conduct of combat' (*Almadani v. Minister of Defence* [1], *per* President Barak; see also HCJ 168/91 *Morcus v. Minister of Defence* [2], at p. 470).

And in a judgment concerning the humanitarian obligations of the State of Israel during the combat operations carried out in the 'Defensive Shield' operation, we said that:

> 'Even during periods of combat the laws of war should be upheld. Everything should be done in order to protect the civilian population (see HCJ 2901/02; HCJ 2936/02; HCJ 2977/02, and HCJ 3022/02)' (HCJ 3114/02 *Barakeh v. Minister of Defence* [3]).

21. Indeed, in times of war, as in our case, the civilian population regrettably finds itself in a combat zone, and it is the first and main victim of the state of hostilities, even when efforts are made to limit the harm to it. In the territory of the State of Israel, in a period of terrorist attacks that have been continuing for years, the immediate and main victim of the state of hostilities is also the civilian population. But in so far as the operations being carried out against Israel are concerned, we are not speaking of accidental harm or collateral damage, but of persistent terrorist attacks that directly target the civilian population with

the intention of harming innocent civilians. This is the difference between the State of Israel, a democratic state fighting for its survival by the methods that the law permits, and the terrorist organizations that seek to destroy it. 'The state is fighting in the name of the law and in order to preserve it. The terrorists fight against the law and in violation thereof. The war against terrorism is also the struggle of the law against those who seek to undermine it' (HCJ 320/80 *Kawasma v. Minister of Defence* [4], at p. 132; see also *Almadani v. Minister of Defence* [1]). In this case, the facts that were presented to us, as set out above, show that the State of Israel accepts and respects the rules provided in the laws of war, and is committed to continuing to supply the amount of fuel and electricity needed for the essential humanitarian needs of the civilian population in the Gaza Strip.

22. In conclusion, we reiterate that the Gaza Strip is controlled by a murderous terrorist organization, which acts unceasingly to strike at the State of Israel and its inhabitants, violating every possible rule of international law in its violent acts, which are directed indiscriminately toward civilians — men, women and children. Notwithstanding, as we said above, the State of Israel is committed to acting against the terrorist organizations within the framework of the law and in accordance with the provisions of international law, and to refrain from intentional harm to the civilian population in the Gaza Strip. In view of all of the information presented to us with regard to the supply of electricity to the Gaza Strip, we are of the opinion that the amount of industrial diesel that the State said it intends to supply, as well as the electricity that is continually supplied through the power lines from Israel, are capable of satisfying the essential humanitarian needs of the Gaza Strip at the present.

Therefore, for the reasons set out above, the petition is denied.

**Justice E. Hayut**
I agree.

**Justice J. Elon**
I agree.

Petition denied.
23 Shevat 5768.
30 January 2008.

## A v. State of Israel

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### Synopsis

The appeals before the court focused on the Internment of Unlawful Combatants Law, 5762-2002. The appeals challenged specific internment orders that were made under the law, but the case focused mainly on fundamental questions concerning the interpretation of the provisions of the Internment of Unlawful Combatants Law and the extent to which it is consistent with international humanitarian law, as well as the constitutionality of the arrangements prescribed in the law.

The Internment of Unlawful Combatants Law was enacted against the background of a harsh security reality of murderous terrorist threats that have plagued the State of Israel for years and attacked innocent persons indiscriminately. In view of this, the court held that the law's security purpose — removing 'unlawful combatants' from the cycle of hostilities conducted by the terror organizations against the State of Israel — constitutes a proper purpose that is based on a public need of the kind that may justify a significant violation of the right to personal liberty.

The measure chosen by the legislature to realize the purpose of the Internment of Unlawful Combatants Law is administrative detention, in accordance with the arrangements provided in the law. There is no doubt that this is a measure that violates the right to personal liberty significantly. In view of the extent of the violation of personal liberty and in view of the extreme nature of the measure of detention provided in the law, the court held that an interpretive effort should be made in order to minimize, in so far as possible, the violation of the right to liberty so that it is commensurate with the need to achieve the security purpose, and not in excess thereof. This interpretation should be consistent with the basic outlook that prevails in the Israeli legal system, according

to which it is preferable to uphold a statute by interpretive means wherever possible, rather than to declare it void for constitutional reasons. The court also held that the provisions of the statute should be interpreted, in so far as possible, in a manner consistent with the accepted norms of international law.

Examining the arrangements that were provided in the law in the light of their interpretation, which the court discussed at length in the judgment, led to the conclusion that the arrangements provided in the law fall within the margin of proportionality. *First*, the measure chosen by the legislature, namely administrative detention that prevents the 'unlawful combatant' from returning to the cycle of hostilities against the State of Israel, serves the legislative purpose and therefore satisfies the requirement of the rational connection between the legislative measure and the purpose that the law was intended to realize. *Second*, the measures indicated by the appellants in their pleadings before the court, namely recognizing them as prisoners of war, bringing them to a criminal trial or detaining them under the Emergency Powers (Detentions) Law, do not realize the purpose of the Internment of Unlawful Combatants Law and therefore they cannot constitute a proper alternative measure to detention under the law under discussion. *Third*, the specific arrangements provided in the law do not, in themselves and irrespective of the manner in which they are applied, violate the right to personal liberty excessively, and they fall within the scope of the margin of constitutional appreciation given to the legislature. *Finally*, a look at the overall combination of the aforesaid provisions in light of the interpretation that the court discussed in the judgment leads to the conclusion that the violation of the constitutional right is reasonably commensurate with the social benefit arising from realizing the legislative purpose. This conclusion is based on the combined effect of the following considerations:

*First*, according to the interpretation of the provisions of the law, the scope of the law's application is relatively narrow: the law does not apply to citizens and residents of the State of Israel, but only to *foreign* parties who endanger the security of the state.

*Second*, the interpretation of the definition of 'unlawful combatant' in section 2 of the law is subject to constitutional principles and international humanitarian law that require proof of an individual threat as a basis for administrative detention. Accordingly the court held that for the purpose of detention under the law, the state is required to prove with administrative evidence that the detainee directly or indirectly played a real part — which is not negligible or marginal — in the hostilities against the State of Israel; or that the detainee belonged to an organization that carries out hostilities against the State of Israel, in view of the detainee's connection with, and the extent of his contribution to, the organization's cycle of hostilities in the broad sense of this concept. In the judgment the court said that proving the conditions of the definition of 'unlawful combatant' in the aforesaid sense includes proving a personal threat that derives from the actual *type of the detainee's involvement* in the terrorist organization. The court also said that the state declared before it that its policy until now has been to prove the personal threat of all the detainees who have been detained under the law on an individual basis, and it has refrained from relying on the probative presumptions provided in sections 7 and 8 of the law. In view of this, the court saw no reason to decide the question of the constitutionality of those presumptions.

*Third*, the court held that because administrative detention is an exceptional and extreme measure, and in view of the significant violation of the constitutional right to personal liberty, the state should prove, with clear and convincing evidence, that the conditions of the definition of 'unlawful combatant' are satisfied and that the continuation of the detention is essential, both in the initial judicial review and in the periodic judicial reviews. In this regard the court held that importance should be attached to the quantity and quality of the evidence against the detainee and also to whether the relevant intelligence information against him is up to date.

*Fourth*, the court saw fit to attribute significant weight to the fact that detention orders under the Internment of Unlawful Combatants Law are subject to initial and periodic judicial reviews

before a District Court judge, whose decisions may be appealed to the Supreme Court that will hear the case with one judge. In view of the reliance upon administrative evidence and privileged evidence that is heard *ex parte*, the court held that the judge should act cautiously and carefully when examining the material brought before him. It was also held that the court that exercises judicial review of detention under the law may restrict and shorten the period of detention in view of the nature and strength of the evidence brought before it with regard to the security threat presented by the detainee as an 'unlawful combatant,' and in view of the time that has passed since the detention order was issued. This led the court to say that judicial review may ensure that the absence of a specific date for the termination of the detention order under the law does not excessively violate the right to personal liberty, and that detainees under the law are not held in detention for a period longer than what is required by major security considerations.

*Finally*, the court emphasized that the periods of time that were provided in the law with regard to the holding of an initial judicial review after the detention order is made and with regard to preventing a meeting between the detainee and his lawyer constitute maximum periods that do not release the state from the duty to make efforts to shorten these periods in each case on its merits, in so far as this is possible in view of security constraints and all the circumstances of the case. The court also held that detention under the Internment of Unlawful Combatants Law cannot continue indefinitely, and that the question of the proportionality of the continuation of the detention should also be considered on a case by case basis in accordance with its specific circumstances.

In view of all of the aforesaid considerations, the relatively broad margin of appreciation given to the legislature when choosing the proper measure for realizing the essential purpose of the law and the fact that according to the interpretation that the court discussed above the law does not allow the detention of innocent persons who have no real connection to the cycle of violence of terrorist organizations, while it provides mechanisms whose purpose is to

limit the violation of the detainees' rights, the court's conclusion is that notwithstanding the fact that the law significantly violates the constitutional right to personal liberty, the Internment of Unlawful Combatants Law satisfies the conditions of the constitutional limitations clause and there is no constitutional ground for any intervention in the law.

Regarding the specific internment orders made against the appellants under the law, here too the court found that the appeals should be denied. From the evidence in the case it could clearly be seen that the appellants are closely connected with the Hezbollah organization and hold positions in the organization's fighting force, including involvement in hostile terrorist activity against Israeli civilian targets. In view of this, the court was persuaded that the individual threat presented by the appellants to state security was proved.

CrimA 6659/06
CrimA 1757/07
CrimA 8228/07
CrimA 3261/08

**1. Raid Saadi Abed El-Hamid Iyyad**
**2. Hassan Masoud Hassin Iyyad**
**v.**
**State of Israel**

The Supreme Court sitting as the High Court of Justice
[11 June 2008]
*Before President D. Beinisch and Justices A. Procaccia, E.E. Levy*

Appeals of the decisions of the Tel-Aviv-Jaffa District Court (the honourable Justice Z. Caspi) of 16 July 2006, 19 July 2006, 13 February 2007 and 3 September 2007, and the decision of the Tel-Aviv-Jaffa District Court (the honourable Justice D. Rozen) of 20 March 2008.

**Facts:** The appellants were detained under the provisions of the Internment of Unlawful Combatants Law, 5762-2002, on the ground that they were members of the Hezbollah organization operating in the Gaza Strip. Their appeals challenged not only the specific decisions made in their cases to detain them, but also the constitutionality of the law under which they were detained. The appellants argued that the Internment of Unlawful Combatants Law was unconstitutional in that it contravened the provisions of the Basic Law: Human Dignity and Liberty, and also that it contravened international law. They argued that international law only recognizes two classes of persons — combatants and civilians — and it does not recognize a class of 'unlawful combatants.' They also argued that since Israel's rule in the Gaza Strip ended in 2005, it was no longer entitled to detain them under the laws of war.

**Held:** The Internment of Unlawful Combatants Law applies to foreign combatants that belong to terrorist organizations operating against the State of Israel. Since Israel's rule in the Gaza Strip ended in 2005, the Internment of Unlawful Combatants Law is the law that applies to the detention of unlawful combatants in the Gaza Strip, and not the security legislation that was in force in the Gaza Strip until 2005.

The Internment of Unlawful Combatants Law is consistent with international law that recognizes only two classes of persons: combatants and civilians. It treats unlawful combatants as civilians. But under international law, civilians who are involved in unlawful combat are not entitled to the same degree of protection as innocent civilians, and they may be detained when they present a threat to security. The Internment of Unlawful Combatants Law satisfied the requirements of international law and Israeli law, *inter alia* by virtue of its provisions requiring periodic judicial review of all internment decisions.
The evidence before the court showed that the appellants presented a serious threat to security, and therefore their continued detention was justified.

Appeal denied.

**Legislation cited:**
Administrative Detentions (Temporary Provision) (Territory of Gaza Strip) Order (no. 941), 5748-1988.
Basic Law: Human Dignity and Liberty, ss. 1, 5, 8, 11.
Emergency Powers (Detentions) Law, 5739-1979.
Entry into Israel Law, 5712-1952.
Internment of Unlawful Combatants Law, 5762-2002, ss. 1, 2, 3, 3(a), 3(b), 3(c), 5, 5(a), 5(b), 5(c), 5(d), 5(e), 6, 6(a), 6(b), 7, 8, 9, 11.
Military Jurisdiction Law, 5715-1955, s. 318(c).

**Israeli Supreme Court cases cited:**
[1] CrimFH 7048/97 *A v. Minister of Defence* [2000] IsrSC 44(1) 721.
[2] HCJ 4562/92 *Zandberg v. Broadcasting Authority* [1996] IsrSC 50(2) 793.
[3] HCJ 9098/01 *Ganis v. Ministry of Building and Housing* [2005] IsrSC 59(4) 241; **[2004] IsrLR 505**.
[4] HCJ 769/02 *Public Committee against Torture v. Government of Israel* **[2006] (2) IsrLR 459**.
[5] HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(4) 785.
[6] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
[7] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83.**
[8] HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(2) 349; **[2002-3] IsrLR 173**.
[9] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.

[10] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* **[2006] (1) IsrLR 442**.
[11] HCJ 2599/00 *Yated, Children with Down Syndrome Parents Society v. Ministry of Education* [2002] IsrSC 56(5) 834; **[2002-3] IsrLR 57**.
[12] HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* **[2006] (1) IsrLR 260**.
[13] HCJ 9132/07 *Al-Bassiouni v. Prime Minister* **[2006-9] IsrSR 215**.
[14] ADA 8607/04 *Fahima v. State of Israel* [2005] IsrSC 59(3) 258.
[15] HCJ 554/81 *Beransa v. Central Commander* [1982] IsrSC 36(4) 247.
[16] HCJ 11026/05 *A v. IDF Commander* (unreported decision of 22 December 2005).
[17] CrimA 3660/03 *Abeid v. State of Israel* (unreported decision of 8 September 2005).
[18] HCJ 1853/02 *Navi v. Minister of Energy and National Infrastructures* (unreported decision of 8 October 2003).
[19] HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; **[1998-9] IsrLR 635**.
[20] HCJ 4827/05 *Man, Nature and Law — Israel Environmental Protection Society v. Minister of Interior* (unreported decision of 20 July 2005).
[21] CA 7175/98 *National Insurance Institute v. Bar Finance Ltd (in liquidation)* (unreported decision of 17 December 2001).
[22] HCJ 5319/97 *Kogen v. Chief Military Prosecutor* [1997] IsrSC 51(5) 67; **[1997] IsrLR 499.**
[23] CrimA 4596/05 *Rosenstein v. State of Israel* **[2005] (2) IsrLR 232**.
[24] CrimA 4424/98 *Silgado v. State of Israel* [2002] IsrSC 56(5) 529.
[25] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.
[26] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.
[27] HCJ 3434/96 *Hoffnung v. Knesset Speaker* [1996] IsrSC 50(3) 57.
[28] HCJ 6893/05 *Levy v. Government of Israel* [2005] IsrSC 59(2) 876.
[29] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**.
[30] HCJ 5627/02 *Saif v. Government Press Office* [2004] IsrSC 58(5) 70; **[2004] IsrLR 191**.
[31] EA 2/84 *Neiman v. Chairman of Central Elections Committee for Tenth Knesset* [1985] IsrSC 39(2) 225; **IsrSJ 8 83**.
[32] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.
[33] HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [1998] IsrSC 52(2) 433.
[34] AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa*

*Municipality* [2004] IsrSC 58(3) 782.
[35] HCJ 2967/00 *Arad v. Knesset* [2000] IsrSC 54(2) 188.
[36] CrimApp 8780/06 *Sarur v. State of Israel* (unreported decision of 20 November 2006).
[37] HCJ 403/81 *Jabar v. Military Commander* [1981] IsrSC 35(4) 397.
[38] HCJ 102/82 *Tzemel v. Minister of Defence* [1983] IsrSC 37(3) 365.
[39] ADA 4794/05 *Ufan v. Minister of Defence* (unreported decision of 12 June 2005).
[40] ADA 7/94 *Ben-Yosef v. State of Israel* (unreported decision of 1 September 1994).
[41] ADA 8788/03 *Federman v. Minister of Defence* [2004] IsrSC 58(1) 176.
[42] HCJ 5445/93 *Ramla Municipality v. Minister of Interior* [1996] IsrSC 50(1) 397.
[43] HCJ 2159/97 *Ashkelon Coast Regional Council v. Minister of the Interior* [1998] IsrSC 52(1) 75.
[44] HCJ 253/88 *Sajadia v. Minister of Defence* [1988] IsrSC 42(3) 801.
[45] ADA 334/04 *Darkua v. Minister of Interior* [2004] IsrSC 58(3) 254.
[46] HCJ 4400/98 *Braham v. Justice Colonel Shefi* [1998] IsrSC 52(5) 337.
[47] HCJ 11006/04 *Kadri v. IDF Commander in Judaea and Samaria* (unreported decision of 13 December 2004).
[48] CrimApp 3514/97 *A v. State of Israel* (unreported decision of 22 June 1997).
[49] HCJ 5994/03 *Sadar v. IDF Commander in West Bank* (unreported decision of 27 July 2003).
[50] CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* **[2006] (1) IsrLR 320**.
[51] HCJ 3412/93 *Sufian v. IDF Commander in Gaza Strip* [1993] IsrSC 47(2) 843.
[52] HCJ 6302/92 *Rumhiah v. Israel Police* [1993] IsrSC 47(1) 209.
[53] HCJ 2901/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [2002] IsrSC 56(3) 19.
[54] CrimA 1221/06 *Iyyad v. State of Israel* (unreported decision of 14 March 2006).

**American cases cited:**
[55] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

For the appellants: H. Abou-Shehadeh.
For the respondents: S. Nitzan, Y. Roitman, Z. Goldner, O.J. Koehler.

JUDGMENT

**President D. Beinisch:**

We have before us appeals against the decisions of the Tel-Aviv-Jaffa District Court (Justice Z. Caspi), in which the detention of the appellants under the Internment of Unlawful Combatants Law, 5762-2002 (hereafter: 'the Internment of Unlawful Combatants Law' or 'the law') was upheld as lawful. Beyond the specific cases of the appellants, the appeals raise fundamental questions concerning the interpretation of the provisions of the Internment of Unlawful Combatants Law, whether the arrangements provided in the law are constitutional and to what extent the law is consistent with international humanitarian law.

*The main facts and sequence of events*

1. The first appellant is an inhabitant of the Gaza Strip, born in 1973, who was placed under administrative detention on 1 January 2002 pursuant to the Administrative Detentions (Temporary Provision) (Territory of Gaza Strip) Order (no. 941), 5748-1988. The detention of the first appellant was extended from time to time by the military commander and upheld on judicial review by the Gaza Military Court. The second appellant is also an inhabitant of Gaza, born in 1972, and he was placed under administrative detention on 24 January 2003 pursuant to the aforesaid order. The detention of the second appellant was also extended from to time and reviewed by the Gaza Military Court.

On 12 September 2005 a statement was published by the Southern District Commander with regard to the end of military rule in the territory of the Gaza Strip. On the same day, in view of the change in circumstances and also the change in the relevant legal position, internment orders were issued against the appellants; these were signed by the chief of staff under section 3 of the Internment of Unlawful Combatants Law, which is the law that is the focus of the case before us. On 15 September 2005 the internment orders were brought to the attention of the appellants. At a hearing that took place pursuant to the law, the appellants said that they did not wish to say anything, and on 20 September 2005 the chief of staff decided that the detention orders under the aforesaid law would remain valid.

2. On 22 September 2005 a judicial review proceeding began in the Tel-Aviv-Jaffa District Court (Justice Z. Caspi) in the appellants' case. On 25 January 2006 the District Court held that there had been no impropriety in the procedure of issuing internment orders against the appellants and that all the conditions prescribed in the Internment of Unlawful Combatants Law were satisfied, including the fact that their release would harm state security. The appellants appealed this decision to the Supreme Court, and on 14 March 2006 their appeal was denied (Justice E. Rubinstein). In the judgment it was held that from material that was presented to the court it could be seen that the appellants were clearly associated with the Hezbollah organization and that they participated in combat activities against the citizens of Israel before they were detained. The court emphasized in this context the individual threat presented by the two appellants and the risk that they would return to their activities if they were released, as could be seen from the material presented to the court.

3. On 9 March 2006 the periodic judicial review under section 5(c) of the law began in the District Court. In the course of this review, not only did the court consider the specific complaints of the appellants against their detention but also fundamental arguments against the constitutionality of the law through an indirect attack on its provisions. On 16 July 2006 the District Court gave its decision with regard to the appellant's specific claims. This decision said that from the information that was presented to the court it could be seen that the appellants were major activists in the Hezbollah organization who would very likely return to terror activities if they were released now, and that their release was likely to harm state security. On 19 July 2006 the District Court gave its decision on the fundamental claims raised by the appellants concerning the constitutionality of the law. The District Court also rejected the appellants' claims in this regard and held that the law befitted the values of the State of Israel, its purpose was a proper one and its violation of the appellants' rights was proportionate. The court said further that in its opinion the law was also consistent with the rules of international law. The appeal in CrimA 6659/06 is directed at these two decisions of 16 July 2006 and 19 July 2006.

On 13 February 2007 the District Court gave a decision in a second periodic judicial review of the appellants' detention. In its decision the District Court approved the internment orders, discussed the appellants' importance to the activity of the Hezbollah organization as shown by the

testimonies of experts who testified before it and said that their detention achieved a preventative goal of the first order. The appeal in CrimA 1757/07 is directed at this decision.

On 3 September 2007 the District Court gave its decision in the third periodic review of the appellants' detention. In its decision the District Court said that the experts remained steadfast in their opinion that there was a high probability that the two appellants would return to their terrorist activity if they were released, and as a result the operative abilities of the Hezbollah infrastructure in the Gaza Strip would be improved and the risks to the State of Israel and its inhabitants would increase. It also said that the fact that the Hamas organization had taken control of the Gaza Strip increased the aforesaid risks and the difficulty of contending with them. The court emphasized that there was information with regard to both of the appellants concerning their desire to return to terrorist activity if they were released, and that they had maintained their contacts in this regard even while they were imprisoned. In such circumstances, the District Court held that the passage of time had not reduced the threat presented by the appellants, who were the most senior persons in the Hezbollah terrorist infrastructure in the Gaza Strip, and that there was no basis for cancelling the internment orders made against them. The appeal in CrimA 8228/07 is directed at this decision.

On 20 March 2008 the District Court gave its decision in the fourth periodic review of the appellants' detention. During the hearing, the court (Justice D. Rozen) said that the evidence against each of the two appellants contained nothing new from recent years. Notwithstanding, the court saw fit to approve their continued internment after it found that each of the two appellants was closely associated with the Hezbollah organization, both of them were intensively active in that organization, the existing evidence with regard to them showed that their return to the territory was likely to act as an impetus for terror attacks and the long period during which both of them had been imprisoned had not reduced the threat that they present. The appeal in CrimA 3261/08 was directed at this decision.

Our judgment therefore addresses all of the aforesaid appeals together.

*The arguments of the parties*

4. The appellants' arguments before us, as in the trial court, focused on two issues: *first*, the appellants raised specific arguments concerning the illegality of the internment orders that were made in their cases, and they sought to challenge the factual findings reached by the District Court with regard to their membership in the Hezbollah organization and their activity in that organization against the security of the State of Israel. *Second*, once again the appellants indirectly raised fundamental arguments with regard to the constitutionality of the law. According to them, the law in its present format violates the rights to liberty and dignity enshrined in the Basic Law: Human Dignity and Liberty, in a manner that does not satisfy the conditions of the limitations clause in the Basic Law. The appellants also claimed that the law is inconsistent with the rules of international humanitarian law that it purports to realize. Finally the appellants argued that the end of Israel's military rule in the Gaza Strip prevents it, under the laws of war, from detaining the appellants.

The state's position was that the petitions should be denied. With regard to the specific cases of the appellants, the state argued that the internment orders in their cases were made lawfully and they were in no way improper. With regard to the arguments in the constitutional sphere, the state argued that the law satisfies the tests of the limitations clause in the Basic Law: Human Dignity and Liberty, since it was intended for a proper purpose and its violation of personal liberty is proportionate. With regard to the rules of international law applicable to the case, the state argued that the law is fully consistent with the norms set out in international law with regard to the detention of 'unlawful combatants.'

5. In order to decide the questions raised by the parties before us, we shall first address the background that led to the enactment of the Internment of Unlawful Combatants Law and its main purpose. With this in mind, we shall consider the interpretation of the statutory definition of 'unlawful combatant' and the conditions that are required to prove the existence of a ground for detention under the law. Thereafter we shall examine the constitutionality of the arrangements provided in the law and finally we shall address the specific detention orders made in the appellants' cases.

*The Internment of Unlawful Combatants Law — the background to its legislation and its main purpose*

6. The Internment of Unlawful Combatants Law gives the state authorities power to detain 'unlawful combatants' as defined in section 2 of the law, i.e., persons who participate in hostilities or are members of forces that carry out hostilities against the State of Israel and who do not satisfy the conditions that grant a prisoner of war status under international humanitarian law. As we shall explain below, the law allows the internment of *foreign* persons who belong to a terrorist organization or who participate in hostilities against the security of the state, and it was intended to prevent these persons returning to the cycle of hostilities against Israel.

Originally the initiative to enact the law arose following the judgment in CrimFH 7048/97 *A v. Minister of Defence* [1], in which the Supreme Court held that the state did not have authority to hold Lebanese nationals in detention by virtue of administrative detention orders, if the sole reason for the detention was holding them as 'bargaining chips' in order to obtain the release of captives and missing servicemen. Although the original draft law came into being against a background of a desire to allow detainees to be held as 'bargaining chips,' the proposal underwent significant changes during the legislative process after lengthy deliberations were held in this matter by the Knesset's Foreign Affairs and Defence Committee, which was chaired by MK Dan Meridor. On 4 March 2002, the Internment of Unlawful Combatants Law was passed by the Knesset. Its constitutionality has not been considered by this court until now.

At the outset it should be emphasized that examining the historical background to the enactment of the law and the changes that were made to the original draft law, what was said during the Knesset debates, the wording of the law as formulated at the end of the legislative process and the effort that was made to ensure that it conformed to the provisions of international humanitarian law, as can be seen from the statute's purpose section which we shall address later, all show that the Internment of Unlawful Combatants Law as formulated during the legislative process was not intended to allow hostages to be held as 'bargaining chips' for the purpose of obtaining the release of Israeli captives and missing servicemen being held in enemy territory, as alleged by the appellants before us. The simple language of the law and its

legislative history indicate that the law was intended to prevent a person who represents a threat to the security of the state because of his activity or his belonging to a terrorist organization from returning to the cycle of hostilities. Thus, for example, MK David Magen, who was chairman of the Foreign Affairs and Defence Committee at the time of the debate in the plenum of the Knesset prior to the second and third readings, said:

> 'The draft law is very complex and of course gave rise to many disagreements during the committee deliberations. The Foreign Affairs and Defence Committee held approximately ten sessions at which it discussed the difficult questions raised by this draft law and considered all the possible ramifications of its passing the second and third readings. The draft before you is the result of considerable efforts to present an act of legislation whose provisions are consistent with the rules of international humanitarian law and which satisfies the constitutional tests, in consequence of our outlook and insistence that a balance should be maintained between security and human rights…
>
> I should like to emphasize that the draft also seeks to determine that a person who is an unlawful combatant, as defined in the new law, will be held by the state as long as he represents a threat to its security. *The criterion for interning someone is whether he represents a threat. No one should be interned under the draft law as a punishment or, as many persons tend to think in error, as a bargaining chip*. No mistake should be made in this regard. Notwithstanding, we should ask ourselves whether it is conceivable that the state should release a detainee who will return to the cycle of hostilities against the State of Israel?' (emphasis supplied).

The law was therefore not intended to allow detainees to be held as 'bargaining chips.' The purpose of the law is to remove from the cycle of hostilities someone who belongs to a terrorist organization or who takes part in hostilities against the State of Israel. The background to this is the harsh reality of murderous terrorism, which has for many years plagued the inhabitants of the state, harmed the innocent and indiscriminately taken the lives of civilians and servicemen, the young and old, men, women and children. In order to realize the aforesaid purpose, the law applies only to persons who take part in the cycle of

hostilities or who belong to a force that carries out hostilities against the State of Israel, and not to innocent civilians. We shall return to address the security purpose of the law later.

*Interpreting the provisions of the law*

7. As we have said, in their arguments before us the parties addressed in detail the question of the constitutionality of the arrangements provided in the law. In addition, the parties addressed at length the question whether the arrangements provided in the Internment of Unlawful Combatants Law are consistent with international law. The parties addressed this question, *inter alia*, because in section 1 of the law, which is the purpose section, the law states that it is intended to realize its purpose 'in a manner that is consistent with the commitments of the State of Israel under the provisions of international humanitarian law.' As we shall explain below, this declaration gives clear expression to the basic outlook prevailing in our legal system that the existing law should be interpreted in a manner that is as consistent as possible with international law.

In view of the two main focal points in the fundamental arguments of the parties before us — whether the arrangements prescribed in the law are constitutional and whether they are consistent with international humanitarian law — we should clarify that both the constitutional scrutiny from the viewpoint of the limitations clause and the question of compliance with international humanitarian law may be affected by the interpretation of the arrangements provided in the law. Because of this, before we decide the aforesaid questions, we should first consider the interpretation of the main arrangements prescribed in the Internment of Unlawful Combatants Law. The interpretation of these arrangements will be made in accordance with the language and purpose of the law, and on the basis of two interpretive presumptions that exist in our legal system: one, the presumption of constitutionality, and the other, the interpretive presumption of consistency with the norms of international law — both those that are part of Israeli law and those which Israel has taken upon itself in its undertakings in the international arena.

8. Regarding the presumption of constitutionality, in our legal system there is a presumption that the legislature should be regarded as being aware of the content and the ramifications of the Basic Laws on every statute that is enacted subsequently. According to this presumption, a provision of statute is examined while attempting to interpret it so that it

is consistent with the protection that the Basic Laws afford to human rights. This realizes the presumption of normative harmony, according to which 'we do not assume that there exists a conflict between legal norms and every possible attempt is made to achieve "uniformity in the law" and harmony between the various norms' (A. Barak, *Legal Interpretation – the General Theory of Interpretation* (1992), at page 155). According to the presumption of constitutionality, we are therefore required to examine the meaning and scope of the detention provisions prescribed in the Internment of Unlawful Combatants Law while aspiring to realize, in so far as possible, the provisions of the Basic Law: Human Dignity and Liberty. It should immediately be said that the detention powers provided in the law significantly and seriously violate the personal liberty of the detainee. This violation is justified in appropriate circumstances in order to protect state security. Notwithstanding, in view of the extent of the violation of personal liberty and in view of the exceptional nature of the measure of detention that is provided in the law, an interpretive effort should be made in order to minimize the violation of the right to liberty as much as possible so that it is proportionate to the need to achieve the security purpose and does not go beyond this. Such an interpretation will be consistent with the basic outlook that prevails in our legal system, according to which a statute should be upheld by interpretive means and the court should refrain, in so far as possible, from setting it aside on constitutional grounds. In the words of President A. Barak:

> 'It is better to arrive at a reduced scope of a statute by interpretive means rather than being compelled to arrive at the same reduced scope by declaring a part of a statute void because it conflicts with the provisions of a Basic Law… A reasonable interpretation of a statute is preferable to a decision on the question of its constitutionality' (HCJ 4562/92 *Zandberg v. Broadcasting Authority* [2], at page 812; see also HCJ 9098/01 *Ganis v. Ministry of Building and Housing* [3], at page 276).

9. With regard to the presumption of conformity to international humanitarian law, as we have said, section 1 of the law expressly declares that its purpose is to regulate the internment of unlawful combatants '… in a manner that is consistent with the commitments of the State of Israel under the provisions of international humanitarian law.' The premise in this context is that an international armed conflict prevails between the

State of Israel and the terrorist organizations that operate outside Israel (see HCJ 769/02 *Public Committee against Torture v. Government of Israel* [4], at paragraphs 18, 21; see also A. Cassese, *International Law* (second edition, 2005), at page 420).

The international law that governs an international armed conflict is enshrined mainly in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereafter: 'the Hague Convention') and the regulations appended to it, whose provisions have the status of customary international law (see HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [5], at page 793; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [6], at page 827; HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [7], at page 364); the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter: 'the Fourth Geneva Convention'), whose customary provisions constitute a part of the law of the State of Israel and some of which have been considered in the past by this court (*Ajuri v. IDF Commander in West Bank* [7], at page 364; HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [8]; HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [9], at paragraph 14 of the judgment); and the Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereafter: 'the First Protocol'), to which Israel is not a party, but whose customary provisions also constitute a part of the law of the State of Israel (see *Public Committee against Torture in Israel v. Government of Israel* [4], at paragraph 20). In addition, where there is a lacuna in the laws of armed conflict set out above, it is possible to fill it by resorting to international human rights law (see *Public Committee against Torture in Israel v. Government of Israel* [4], at paragraph 18; see also *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep. 226, at page 240; *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 43 ILM 1009 (2004)).

It should be emphasized that no one in this case disputes that an express provision of statute enacted by the Knesset overrides the provisions of international law (see in this regard the remarks of President A. Barak in HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [10], at paragraph 17). Notwithstanding, according to the presumption of interpretive

consistency, an Israeli act of legislation should be interpreted in a manner that is consistent, in so far as possible, with the norms of international law to which the State of Israel is committed (see HCJ 2599/00 *Yated, Children with Down Syndrome Parents Society v. Ministry of Education* [11], at page 847; HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* [12], at paragraph 37). According to this presumption, which as we have said is clearly expressed in the purpose clause of the Internment of Unlawful Combatants Law, the arrangements provided in the law should be interpreted in a manner that is as consistent as possible with the international humanitarian law that governs the matter.

Further to the aforesaid it should be noted that when we approach the task of interpreting provisions of the statute in a manner consistent with the accepted norms of international law, we cannot ignore the fact that the provisions of international law that exist today have not been adapted to changing realities and the phenomenon of terrorism that is changing the form and characteristics of armed conflicts and those who participate in them (see in this regard the remarks of President A. Barak in *Ajuri v. IDF Commander in West Bank* [7], at pages 381-382). In view of this, we should do our best in order to interpret the existing laws in a manner that is consistent with new realities and the principles of international humanitarian law.

10. In view of all of the aforesaid, let us now turn to the interpretation of the statutory definition of 'unlawful combatant' and the interpretation of the conditions required for proving the existence of a ground for detention under the law. The presumption of constitutionality and the provisions of international law to which the parties referred will be our interpretive tools and they will assist us in interpreting the provisions of the statute and in evaluating the nature and scope of the power of detention provided in it.

*The definition of 'unlawful combatant' and its scope of application*

11. Section 2 of the law defines 'unlawful combatant' as follows:

'Definitions

2. In this law —

…

'Unlawful combatant' — a person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a

> member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War;
> …'

This statutory definition of 'unlawful combatant' relates to those persons who take part in hostilities against the State of Israel or who are members of a force that carries out such hostilities, and who are not prisoners of war under international humanitarian law. In this regard two points should be made: *first*, from the language of the aforesaid section 2 it can clearly be seen that it is not essential for someone to take part in hostilities against the State of Israel; his being a member of a 'force carrying out hostilities' — i.e., a terrorist organization — may include that person within the definition of 'unlawful combatant.' We will discuss the significance of these two alternatives in the definition of 'unlawful combatant' later (paragraph 21 below).

*Second*, as we said above, the purpose clause in the law refers expressly to the provisions of international humanitarian law. The definition of 'unlawful combatant' in the aforesaid section 2 also refers to international humanitarian law when it provides that the law applies to someone who does not enjoy a prisoner of war status under the Third Geneva Convention. As a rule, the rules of international humanitarian law were not intended to apply to the relationship between the state and its citizens (see, for example, the provisions of article 4 of the Fourth Geneva Convention, according to which a 'protected civilian' is someone who is *not* a citizen of the state that is holding him in circumstances of an international armed conflict). The express reference by the legislature to international humanitarian law, together with the requirement stipulated in the wording of the law that there is no prisoner of war status, show that the law was intended to apply only to *foreign* parties who belong to a terror organization that operates against the security of the state. We are not unaware that in the draft law of 14 June 2000 there was a provision that stated expressly that the law would not apply to Israeli inhabitants (and also to inhabitants of the territories), except in certain

circumstances that were set out therein (see section 11 of the draft Internment of Enemy Forces Personnel Who Are Not Entitled to a Prisoner of War Status Law, 5760-2000, *Draft Laws 5760*, no. 2883, at page 415). This provision of statute was omitted from the final wording of the law. Notwithstanding, in view of the express reference made by the law to international humanitarian law and the laws concerning prisoners of war as stated above, we are drawn to the conclusion that according to the wording and purpose of the law it was not intended to apply to *local* parties (citizens and residents of Israel) who endanger state security. For these there are other legal measures that are intended for a security purpose, which we shall address later.

It is therefore possible to summarize the matter by saying that an 'unlawful combatant' under section 2 of the law is a *foreign* party who belongs to a terrorist organization that operates against the security of the State of Israel. This definition may include residents of a foreign country that maintains a state of hostilities against the State of Israel, who belong to a terrorist organization that operates against the security of the state and who satisfy the other conditions of the statutory definition of 'unlawful combatant.' This definition may also include inhabitants of the Gaza Strip which today is no longer held under belligerent occupation. In this regard it should be noted that since the end of Israeli military rule in the Gaza Strip in September 2005, the State of Israel has no permanent physical presence in the Gaza Strip, and it also has no real possibility of carrying out the duties required of an occupying power under international law, including the main duty of maintaining public order and security. Any attempt to impose the authority of the State of Israel on the Gaza Strip is likely to involve complex and prolonged military operations. In such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner, the Gaza Strip should not be regarded as a territory that is subject to a belligerent occupation from the viewpoint of international law, even though because of the unique situation that prevails there, the State of Israel has certain duties to the inhabitants of the Gaza Strip (for the position that the Gaza Strip is not now subject to a belligerent occupation, see Yuval Shany, 'Faraway So Close: The Legal Status of Gaza after Israel's Disengagement,' 8 *Yearbook of International Humanitarian Law* 2005 (2007) 359; see also the judgments of the International Court of Justice in *Democratic Republic of the Congo v. Uganda*, where the importance of a physical

presence of military forces was emphasized for the existence of a state of occupation: *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda* (ICJ, 19 December 2005), at paragraph 173; with regard to the existence of certain obligations that the State of Israel has in the prevailing circumstances vis-à-vis the inhabitants of the Gaza Strip, see HCJ 9132/07 *Al-Bassiouni v. Prime Minister* [13]. In our case, in view of the fact that the Gaza Strip is no longer under the effective control of the State of Israel, we are drawn to the conclusion that the inhabitants of the Gaza Strip constitute foreign parties who may be subject to the Internment of Unlawful Combatants Law in view of the nature and purpose of this law.

With regard to the inhabitants of the territory (Judaea and Samaria) that is under the effective control of the State of Israel, for the reasons that will be stated later (in paragraph 36 below), I tend to the opinion that in so far as this is required for security reasons, the administrative detention of these inhabitants should be carried out pursuant to the security legislation that applies in the territories and not by virtue of the Internment of Unlawful Combatants Law. Notwithstanding, the question of the application of the aforesaid law to the inhabitants of the territories does not arise in the circumstances of the case before us and it may therefore be left undecided.

*Conformity of the definition of 'unlawful combatant' to a category recognized by international law*

12. The appellants argued before us that the definition of 'unlawful combatant' in section 2 of the law is contrary to the provisions of international humanitarian law, since international law does not recognize the existence of an independent and separate category of 'unlawful combatants.' In their view there are only two categories in international law, 'combatants' and 'civilians,' who are subject to the provisions and protections enshrined in the Third and Fourth Geneva Conventions respectively. In their view international law does not have an intermediate category that includes persons who are not protected by either of these conventions.

With regard to the appellants' aforesaid arguments we should point out that the question of the conformity of the term 'unlawful combatant' to the categories recognized by international law has already been addressed in our case law in *Public Committee against Torture v. Government of Israel* [4], in which it was held that the term 'unlawful

combatants' does not constitute a separate category but is a sub-category of 'civilians' recognized by international law. This conclusion is based on the approach of customary international law, according to which the category of 'civilians' includes everyone who is not a 'combatant.' We are therefore dealing with a negative definition. In the words of President A. Barak:

> 'The approach of customary international law is that "civilians" are persons who are not "combatants" (see article 50(1) of the First Protocol, and Sabel, *supra*, at page 432). In the Blaskic case, the International Tribunal for War Crimes in Yugoslavia said that civilians are "persons who are not, or no longer, members of the armed forces" (*Prosecutor v. Blaskic* (2000), Case IT-95-14-T, at paragraph 180). This definition is of a "negative" character. It derives the concept of "civilians" from its being the opposite of "combatants." Thus it regards unlawful combatants, who as we have seen are not "combatants," as civilians' (*ibid*., at paragraph 26 of the opinion of President A. Barak).

In this context, two additional points should be made: *first*, the finding that 'unlawful combatants' belong to the category of 'civilians' in international law is consistent with the official interpretation of the Geneva Conventions, according to which in an armed conflict or a state of occupation, every person who finds himself in the hands of the opposing party is entitled to a certain status under international humanitarian law — a prisoner of war status which is governed by the Third Geneva Convention or a protected civilian status which is governed by the Fourth Geneva Convention:

> 'There is no "intermediate status"; nobody in enemy hands can be outside the law' (O. Uhler and H. Coursier (eds.), *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary* (ICRC, Geneva, 1950), commentary to article 4, at page 51).

(See also S. Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror",' 87(857) IRRC 39 (2005), at pages 48-49).

*Second*, it should be emphasized that *prima facie* the statutory definition of 'unlawful combatant' under section 2 of the law applies to a broader group of people than the group of 'unlawful combatants'

discussed in *Public Committee against Torture v. Government of Israel* [4], in view of the difference in the measures under discussion: the judgment in *Public Committee against Torture v. Government of Israel* [4] considered the legality of the measure of a military operation intended to cause the death of an 'unlawful combatant.' According to international law, it is permitted to attack an 'unlawful combatant' only during the period of time when he is taking a direct part in the hostilities. By contrast, the Internment of Unlawful Combatants Law addresses the measure of internment. For the purposes of detention under the law, it is not necessary that the 'unlawful combatant' will take a *direct* part in the hostilities, nor is it essential that his detention will take place during the period of time when he is taking part in hostilities; all that is required is that the conditions of the definition of 'unlawful combatant' in section 2 of the law are proved. This statutory definition does not conflict with the provisions of international humanitarian law since, as we shall clarify clear below, the Fourth Geneva Convention also permits the detention of a protected 'civilian' who endangers the security of the detaining state. Thus we see that our reference to the judgment in *Public Committee against Torture v. Government of Israel* [4] was not intended to indicate that an identical issue was considered in that case. Its purpose was to support the finding that the term 'unlawful combatants' in the law under discussion does not create a separate category of treatment from the viewpoint of international humanitarian law, but constitutes a sub-group of the category of 'civilians.'

13. Further to our finding that 'unlawful combatants' are members of the category of 'civilians' from the viewpoint of international law, it should be noted that this court has held in the past that international humanitarian law does not grant 'unlawful combatants' the same degree of protection to which innocent civilians are entitled, and that in this respect there is a difference from the viewpoint of the rules of international law between 'civilians' who are not 'unlawful combatants' and 'civilians' who are 'unlawful combatants.' (With regard to the difference in the scope of the protection from a military attack upon 'civilians' who are not 'unlawful combatants' as opposed to 'civilians' who are 'unlawful combatants,' see *Public Committee against Torture v. Government of Israel* [4], at paragraphs 23-26). As we shall explain below, in the present context the significance of this is that someone who is an 'unlawful combatant' is subject to the Fourth Geneva Convention, but according to the provisions of the aforesaid convention it is possible to

apply various restrictions to them and *inter alia* to detain them when they represent a threat to the security of the state.

In concluding these remarks it should be noted that although there are normative disagreements between the parties before us as to the scope of the international laws that apply to 'unlawful combatants,' including the application of the Fourth Geneva Convention and the scope of the rights of which they may be deprived for security reasons under article 5 of the convention, we are not required to decide most of these disagreements. This is because of the state's declaration that in its opinion the law complies with the most stringent requirements of the Fourth Geneva Convention, and because of the assumption that the appellants enjoy all the rights that are enshrined in this convention (see paragraphs 334 and 382 of the state's response).

14. In summary, in view of the purpose clause of the Internment of Unlawful Combatants Law, according to which the law was intended to regulate the status of 'unlawful combatants' in a manner that is consistent with the rules of international humanitarian law, and in view of the finding of this court in *Public Committee against Torture v. Government of Israel* [4] that 'unlawful combatants' constitute a subcategory of 'civilians' under international law, it is possible to determine that, contrary to the appellants' claim, the law does not create a new reference group from the viewpoint of international law, but it merely determines special provisions for the detention of 'civilians' (according to the meaning of this term in international humanitarian law) who are 'unlawful combatants.'

*The nature of detention of 'unlawful combatants' under the law — administrative detention*

15. Now that we have determined that the definition of 'unlawful combatant' in the law does not conflict with the two-category classification of 'civilians' and 'combatants' in international law and the case law of this court, let us turn to examine the provisions of the law that regulate the detention of unlawful combatants. Section 3(a) of the law provides the following:

'Internment of unlawful combatant

> 3. (a) If the chief of staff has a reasonable basis for believing that a person who is held by state authorities is an unlawful combatant and that his release will harm state security, he may make an order with

his signature requiring his internment in a place that he will determine (hereafter — an internment order); an internment order will include the reasons for internment without harming the security needs of the state.
…'

Section 7 of the law adds in this context a probative presumption, which provides the following:

'Presumption 7. With regard to this law, a person who is a member of a force that carries out hostilities against the State of Israel or who took part in the hostilities of such a force, whether directly or indirectly, shall be regarded as someone whose release will harm state security as long as the hostilities of that force against the State of Israel have not ended, as long as the contrary has not been proved.'

The appellants argued before us that the detention provisions provided in the law *de facto* create a third category of detention, which is neither criminal arrest nor administrative detention, and which is not recognized at all by Israeli law or international law. We cannot accept this argument. The mechanism provided in the law is a mechanism of administrative detention in every respect, which is carried out in accordance with an order of the chief of staff, who is an officer of the highest security authority. As we shall explain below, we are dealing with an administrative detention whose purpose is to protect state security by removing from the cycle of hostilities anyone who is a member of a terrorist organization or who is taking part in the organization's operations against the State of Israel, in view of the threat that he represents to the security of the state and the lives of its inhabitants.

16. It should be noted that the actual power provided in the law for the administrative detention of a 'civilian' who is an 'unlawful combatant' on account of the threat that he represents to the security of the state is not contrary to the provisions of international humanitarian law. Thus article 27 of the Fourth Geneva Convention, which lists a variety of rights to which protected civilians are entitled, recognizes the possibility

of a party to a dispute adopting 'control and security' measures that are justified on security grounds. The wording of the aforesaid article 27 is as follows:

> '… the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.'

With regard to the types of control measures that are required for protecting state security, article 41 of the convention prohibits the adoption of control measures that are more severe that assigned residence or internment in accordance with the provisions of articles 42-43 of the convention. Article 42 enshrines the rule that a 'civilian' should not be interned unless it is 'absolutely necessary' for the security of the detaining power. Article 43 goes on to oblige the detaining power to approve the detention in a judicial or administrative review, and to hold periodic reviews of the continuing need for internment at least twice a year. Article 78 of the convention concerns the internment of protected civilians that are inhabitants of a territory that is held by an occupying power, and it provides that it is possible to employ various security measures against them for essential security reasons, including assigned residence and internment. Thus we see that the Fourth Geneva Convention allows the internment of protected 'civilians' in administrative detention, when this is necessary for reasons concerning the essential security needs of the detaining power.

17. In concluding these remarks we should point out that the appellants argued before us that the aforesaid provisions of the Fourth Geneva Convention are not appropriate in their case. According to them, articles 41-43 of the convention concern the detention of protected civilians who are present in the territory of a party to a dispute, whereas the appellants were taken into detention when they were in the Gaza Strip in the period prior to the implementation of the disengagement plan and the departure of IDF forces from the Gaza Strip. In view of this, the appellants argued that there is no provision of international humanitarian law that allows them to be placed in administrative detention, and therefore they argued that their detention under the Internment of Unlawful Combatants Law is contrary to the provisions of international law.

With regard to these arguments we shall reply that the detention provisions set out in the Fourth Geneva Convention were intended to

apply and realize the basic rule provided in the last part of article 27 of the convention, which was cited above. As we have said, this article provides that the parties to a dispute may adopt security measures against protected civilians in so far as this is required as a result of the war. The principle underlying all the detention provisions provided in the Fourth Geneva Convention is that it is possible to detail 'civilians' for security reasons in accordance with the extent of the threat that they represent. According to the aforesaid convention, there is a power of detention for security reasons, whether we are concerned with the inhabitants of an occupied territory or we are concerned with foreigners who were found in the territory of one of the states involved in the dispute. In the appellants' case, although the Israeli military rule in the Gaza Strip has ended, the hostilities between the Hezbollah organization and the State of Israel have not ended, and therefore the detention of the appellants in the territory of the State of Israel for security reasons is not inconsistent with the detention provisions in the Fourth Geneva Convention.

*The ground for detention under the law — the requirement of an individual threat to security and the effect of the interpretation of the statutory definition of 'unlawful combatant'*

18. It is one of the first principles of our legal system that administrative detention is conditional upon the existence of a ground for detention that derives from the individual threat of the detainee to the security of the state. This was discussed by President Barak when he said that:

> '[In order that there may be a ground for detention] it is necessary that the circumstances of the detention are such that they give rise with regard to [the detainee] — with regard to him personally and not with regard to someone else — to a concern of a risk to security, whether because he was found in the combat area when he was actually fighting or carrying out terrorist acts, or because there is a concern that he is involved in fighting or terrorism' (*Marab v. IDF Commander in Judaea and Samaria* [8], at page 367).

The requirement of an individual threat for the purposes of placing someone in administrative detention is an essential part of the protection of the constitutional right to dignity and personal liberty. This court has held in the past that administrative detention is basically a preventative

measure; administrative detention was not intended to punish someone for acts that have already been committed or to deter others from committing them, but its purpose is to prevent the tangible risk presented by the acts of the detainee to the security of the state. It is this risk that justifies the use of the unusual measure of administrative detention that violates human liberty (see and cf. *Ajuri v. IDF Commander in West Bank* [7], at pages 370-372, and the references cited there).

19. It should be noted that the individual threat to the security of the state represented by the detainee is also required by the principles of international humanitarian law. Thus, for example, in his interpretation of articles 42 and 78 of the Fourth Geneva Convention Pictet emphasizes that the state should make use of the measure of detention only when it has serious and legitimate reasons to believe that the person concerned endangers its security. In his interpretation Pictet discusses the membership of organizations whose goal is to harm the security of the state as a ground for recognizing a threat, but he emphasizes the supreme principle that the threat is determined in accordance with the individual activity of that person. In Pictet's words:

> 'To justify recourse to such measures, the state must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security' (J.S. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at pages 258-259).

20. No one before us disputes that the provisions of the Internment of Unlawful Combatants Law should be interpreted in accordance with the aforesaid principle, which make administrative detention conditional upon proving the existence of a ground that establishes an individual threat. Indeed, an examination of the provisions of the law in accordance with the aforesaid principles shows that the law does not allow anyone to be detained arbitrarily, and that the power of detention under the law is conditional upon the existence of a ground of detention that is based on the individual threat represented by the detainee: *first*, the definition of 'unlawful combatant' in section 2 of the law requires proof that the detainee himself took part or belonged to a force that is carrying out hostilities against the State of Israel, the significance of which we shall address below. *Second*, section 3(a) of the law expressly provides that the

ground of detention under the law arises only with regard to someone for whom there is a reasonable basis to believe 'that his release will harm state security.' Section 5(c) of the law goes on to provide that the District Court shall set aside a detention order that was issued pursuant to the law only when the release of the detainee 'will not harm state security' (or when there are special reasons that justify the release). To this we should add that according to the purpose of the law, the administrative detention is intended to prevent the 'unlawful combatant' from returning to the cycle of hostilities, thus indicating that he was originally a part of that cycle.

The dispute between the parties before us in the context under discussion concerns the level of the individual threat that the state is liable to prove for the purpose of administrative detention under the law. This dispute arises because of the combination of two main provisions of the law: *one* is the provision of section 2 of the law that according to a simple reading states that an 'unlawful combatant' is not only someone who takes a direct or indirect part in hostilities against the State of Israel, but also someone who is a 'member of a force carrying out hostilities.' The *other* is the probative presumption provided in section 7 of the law, according to which a person who is a member of a force that carries out hostilities against the State of Israel shall be regarded as someone whose release will harm the security of the state unless the contrary is proved. Relying on the combination of these two provisions of the law taken together, the state argued that it is sufficient to prove that a person is a member of a terrorist organization in order to prove his individual threat to the security of the state in such a manner that gives rise to a ground for detention under the law. By contrast, the appellants' approach was that relying upon a vague 'membership' in an organization that carries out hostilities against the State of Israel as a basis for administrative detention under the law makes the requirement of proving an individual threat meaningless, which is contrary to constitutional principles and international humanitarian law.

21. Deciding the aforesaid dispute is affected to a large degree by the interpretation of the definition of 'unlawful combatant' in section 2 of the law. As we have said, the statutory definition of 'unlawful combatant' contains two limbs: one, 'a person who took part in hostilities against the State of Israel, whether directly or indirectly,' and the other, a person who is 'a member of a force carrying out hostilities against the State of Israel,' when the person concerned does not satisfy the conditions

granting a prisoner of war status under international humanitarian law. These two limbs should be interpreted with reference to the security purpose of the law and in accordance with the constitutional principles and international humanitarian law that we discussed above, which require the proof of an individual threat as a ground for administrative detention.

With regard to the interpretation of the first limb that concerns 'a person who took part in hostilities against the State of Israel, whether directly or indirectly,' according to the legislative purpose and the principles that we have discussed, we are drawn to the conclusion that in order to detain a person it is not sufficient for him to have made a remote, negligible or marginal contribution to the hostilities against the State of Israel. In order to prove that someone is an 'unlawful combatant,' the state needs to prove that the detainee made a contribution to the waging of hostilities against the state, whether directly or indirectly, in a manner that can indicate his individual threat. Naturally it is not possible to define the nature of such a contribution precisely and exhaustively, and the matter will be examined on a case by case basis according to the circumstances.

With regard to the second limb that concerns a person who is 'a member of a force carrying out hostilities against the State of Israel,' here too we require an interpretation that is consistent with the purpose of the law and the constitutional principles and international humanitarian law that we discussed above: on the one hand it is insufficient to show any tenuous connection with a terrorist organization in order to be included within the cycle of hostilities in the broad meaning of this concept. On the other hand, in order to establish a ground for detention with regard to someone who is a member of an active terrorist organization whose self-declared goal is to fight unceasingly against the State of Israel, it is not necessary for that person to take a direct or indirect part in the hostilities themselves, and it is possible that his connection and contribution to the organization will be expressed in other ways that are sufficient to include him in the cycle of hostilities in its broad sense, in such a way that his detention will be justified under the law.

Thus we see that for the purpose of detention under the law at issue, the state is liable to prove with administrative proofs that the detainee is an 'unlawful combatant' with the meaning that we discussed, namely that

the detainee took a direct or indirect part that involved a contribution to the fighting — a part that is not negligible or marginal — in the hostilities against the State of Israel, or that the detainee belongs to an organization that is carrying out hostilities, in which case we should consider the detainee's connection and the nature of his contribution to the cycle of hostilities of the organization in the broad sense of this concept.

It should be noted that providing the conditions of the definition of an 'unlawful combatant' in the aforesaid sense naturally includes proof of an individual threat that derives from the type of involvement in the organization. It should also be noted that only after the state has proved that the detainee satisfies the conditions of the statutory definition of 'unlawful combatant' can the state make use of the probative presumption set out in section 7 of the law, according to which the release of the detainee will harm state security as long as the contrary has not been proved. It is therefore clear that section 7 of the law does not negate the duty imposed on the state to prove the threat represented by the detainee, which derives from the type of involvement in the relevant organization that is required in order to prove him to be an 'unlawful combatant' under section 2 of the law. In view of this, we are drawn to the conclusion that the argument that the law includes no requirement of an individual threat goes too far and should be rejected.

*Proving someone to be an 'unlawful combatant' under the law — the need for clear and convincing administrative evidence*

22. In our remarks above, we discussed the interpretation of the definition of 'unlawful combatant.' According to the aforesaid interpretation, the state is required to prove that the detainee took a direct or indirect part, which was of significance, in the hostilities against the State of Israel, or that the detainee belonged to an organization that carries out hostilities, all of which while taking into account the connection and the extent of his contribution to the organization's cycle of hostilities. In these circumstances a person's detention may be required in order to remove him from the cycle of hostilities that harms the security of the citizens and residents of the State of Israel. The question that arises in this regard is: what evidence is required in order to persuade the court that the detainee satisfies the conditions of the definition of an 'unlawful combatant' with the aforesaid meaning.

This court has held in the past that since administrative detention is an unusual and extreme measure, and in view of its violation of the constitutional right to personal liberty, clear and convincing evidence is required in order to prove a security threat that establishes a basis for administrative detention (see *Ajuri v. IDF Commander in West Bank* [7], at page 372, where this rule was determined with regard to the measure of assigned residence; also see and cf. the remarks of Justice A. Procaccia in ADA 8607/04 *Fahima v. State of Israel* [14], at page 264; HCJ 554/81 *Beransa v. Central Commander* [15]). It would appear that the provisions of the Internment of Unlawful Combatants Law should be interpreted similarly. In view of the importance of the right to personal liberty and in view of the security purpose of the aforesaid law, the provisions of sections 2 and 3 of the law should be interpreted in such a way that the state is liable to prove, with clear and convincing administrative evidence, that even if the detainee did not take a direct or indirect part in the hostilities against the State of Israel, he belonged to a terrorist organization and made a significant contribution to the cycle of hostilities in its broad sense, in such a way that his administrative detention is justified in order to prevent his returning to the aforesaid cycle of hostilities.

The significance of the requirement that there is clear and convincing evidence is that importance should be attached to the quantity and quality of the evidence against the detainee and the degree to which the relevant intelligence information against him is up to date; this is necessary both for proving the detainee to be an 'unlawful combatant' under section 2 of the law and also for the purpose of the judicial review of the need to continue the detention, to which we shall return later. Indeed, the purpose of administrative detention is to prevent anticipated future threats to the security of the state, and naturally we can learn of these threats from tangible evidence concerning the detainee's acts in the past (see the remarks of President M. Shamgar in *Beransa v. Central Commander* [15], at pages 249-250; HCJ 11026/05 *A v. IDF Commander* [16], at paragraph 5). Notwithstanding, for the purposes of long-term detention under the Internment of Unlawful Combatants Law, adequate administrative evidence is required, and a single piece of evidence with regard to an isolated act carried out in the distant past is insufficient.

23. It follows that for the purposes of detention under the Internment of Unlawful Combatants Law the state is required to prove with clear and convincing evidence that, even if the detainee did not take a

significant direct or indirect part in the hostilities against the State of Israel, he belonged to a terror organization and made a contribution to the cycle of hostilities in its broad sense. It should be noted that this requirement is not always easy to prove, since proving that someone is a member of a terrorist organization is not the same as proving that someone is a member of a regular army, because of the manner in which terrorist organizations work and the manner in which people joint their ranks. The court held in *Public Committee against Torture v. Government of Israel* [4] that unlike lawful combatants, unlawful combatants do not as a rule carry any clear and unambiguous indication that they belong to a terrorist organization (see *Public Committee against Torture v. Government of Israel* [4], at paragraph 24). Therefore proving that someone belongs to an organization as aforesaid is not always an easy task. Notwithstanding, the state is required to prove with sufficient administrative evidence the nature of the detainee's connection to the terrorist organization, and the degree or manner of his contribution to the broad cycle of hostilities or operations carried out by the organization.

It should also be noted that in its pleadings before us, the state discussed how the power of detention provided in the Internment of Unlawful Combatants Law was intended to apply to members of terrorist organizations in a state of ongoing hostilities in an area that is not under the full control of the State of Israel, where in the course of the hostilities a relatively large number of unlawful combatants may fall into the hands of the security forces and where there is a need to prevent them returning to the cycle of hostilities against Israel. The special circumstances that exist in situations of this kind require a different course of action from the one that is possible within the territory of the state or in an area subject to a belligerent occupation. In any case, it may be assumed that the reality under discussion may give rise to additional difficulties of assembling evidence with regard to whether those persons detained by the state during hostilities on the field of battle belong to a terrorist organization and how great a threat they are.

*The probative presumptions provided in sections 7 and 8 of the law*

24. As we have said, section 7 of the law provides a presumption according to which a person who satisfies the conditions of the definition of 'unlawful combatant' shall be regarded as someone whose release will harm the security of the state as long as the hostilities against the State

of Israel have not come to an end. This is a rebuttable presumption, and the burden of rebutting it rests with the detainee. We should emphasize what we said above, that the presumption provided in the aforesaid section 7 may be relevant only after the state has proved that the detainee satisfies the conditions of the definition of 'unlawful combatant.' In such circumstances it is presumed that the release of the detainee will harm state security as required by section 3(a) of the law.

As we said above, one of the appellants' main claims before us was that the aforesaid presumption makes it unnecessary to prove an individual threat from the detainee and that this is inconsistent with constitutional principles and international humanitarian law. The respondent opposed this argument but went on to declare before us that, as a rule, the state acts in order to present a broad and detailed basis in evidence with regard to the threat presented by detainees, and it has done this in the past with regard to everyone who has been detained under the law, including in the appellants' case. The significance of this claim is that *de facto* the state refrains from relying on the probative presumption provided in section 7 of the law and it proves the individual threat presented by detainees on an individual basis, without making use of the aforesaid presumption. It should be noted that this practice of the state is consistent with our finding that proving the conditions of the definition of 'unlawful combatant' in section 2 of the law involves proving the individual threat that arises from the type of involvement in an organization as explained above.

In any case, since the state has refrained until now from making use of the presumption provided in section 7 of the law, no question arises in this case as to whether the aforesaid presumption reduces the requirement of proving the individual threat needed for detention under the law, and whether this violates the constitutional right to liberty and the principles of international humanitarian law excessively. We can therefore leave these questions undecided, since as long as the state produces *prima facie* evidence of the individual threat presented by the detainee and does not rely on the presumption under discussion, the question of the effect of the presumption on proving an individual threat remains theoretical. It should be noted that if the state chooses to make use of the presumption provided in section 7 of the law in the future rather than proving the threat to the required degree, it will be possible to bring the aforesaid questions before the court, since it will be necessary to decide them concretely rather than theoretically (see CrimA

3660/03 *Abeid v. State of Israel* [17]; HCJ 1853/02 *Navi v. Minister of Energy and National Infrastructures* [18]; HCJ 6055/95 *Tzemah v. Minister of Defence* [19], at page 250; HCJ 4827/05 *Man, Nature and Law — Israel Environmental Protection Society v. Minister of Interior* [20], at paragraph 10; CA 7175/98 *National Insurance Institute v. Bar Finance Ltd (in liquidation)* [21]).

25. With regard to the probative presumption provided in section 8 of the law, this section states the following:

> 'Determination concerning hostilities
>
> 8. The determination of the Minister of Defence, in a certificate signed by him, that a certain force carries out hostilities against the State of Israel or that the hostilities of that force against the State of Israel have come to an end or have not yet come to an end shall serve as evidence in any legal proceeding, unless the contrary is proved.'

The appellants argued before us that the aforesaid probative presumption places the burden of proof on the detainee in a matter which he will never be able to refute, since it is a matter that is subject to the discretion of the Minister of Defence. In reply, the state argued that in all the proceedings under the law it has refrained from relying solely on the determination of the Minister of Defence, and it has seen fit to present the court and counsel for the detainees with an up to date and specific opinion with regard to the relevant organization to which the detainee belongs. This was also done in the case of the appellants, who are alleged to belong to the Hezbollah organization. In view of this, we are not required to decide the fundamental questions raised by the appellants with regard to the aforesaid section 8. In any case, it should be stated that in the situation that currently prevails in our area, in which the organizations that operate against the security of the State of Israel are well known to the military and security services, it may be assumed that there is no difficulty in proving the existence and nature of the activity of hostile forces by means of a specific and up to date opinion, in order to provide support for the determination of the Minister of Defence as stated in clause 8 of the law.

*The constitutional scrutiny*

26. Up to this point we have deal with the interpretation of the statutory definition of 'unlawful combatant' and the conditions required

for proving the existence of a ground for detention under the law. This interpretation was made with reference to the language and purpose of the Internment of Unlawful Combatants Law, and in accordance with the presumption of constitutionality and the principles of international humanitarian law to which the purpose clause of the law expressly refers.

Now that we have discussed the scope of the law's application and the nature of the power of detention provided in it, let us turn to the arguments of the parties concerning the constitutionality of the arrangements provided in it. These arguments were raised in the District Court and before us during the hearing concerning the appellants' detention, within the framework of an indirect attack on the aforesaid law.

*The violation of the constitutional right to personal liberty*

27. Section 5 of the Basic Law: Human Dignity and Liberty provides the following:

> 'Personal liberty
>
> 5. A person's liberty shall not be denied or restricted by imprisonment, arrest, extradition or in any other way.'

There is no dispute between the parties before us that the Internment of Unlawful Combatants Law violates the constitutional right to personal liberty enshrined in the aforesaid section 5. This is a significant and serious violation, in view of the fact that the law allows the use of the extreme measure of administrative detention that deprives a person of his personal liberty. It should be clarified that the Internment of Unlawful Combatants Law was admittedly intended to apply to *foreign* parties who belong to a terrorist organization that operates against the security of the state (see paragraph 11 above). Notwithstanding, the detention of unlawful combatants is carried out in Israel by the government authorities that are obliged to uphold the rights enshrined in the Basic Law in every case (see sections 1 and 11 of the Basic Law). Consequently the violation of rights inherent in the arrangements of the Internment of Unlawful Combatants Law should be examined in accordance with the tests in the Basic Law.

*Examining the violation of the constitutional right from the perspective of the limitations clause*

28. No one disputes that the right to liberty is a constitutional right with a central role in our legal system and it lies at the heart of the values

of the State of Israel as a Jewish and democratic state (see *Marab v. IDF Commander in Judaea and Samaria* [8], at paragraph 20). It has been held in our case law that 'personal liberty is a constitutional right of the first degree and from a practical viewpoint it is also a condition for realizing other basic rights' (*Tzemah v. Minister of Defence* [19], at page 251; see also HCJ 5319/97 *Kogen v. Chief Military Prosecutor* [22], at page 81; CrimA 4596/05 *Rosenstein v. State of Israel* [23], at paragraph 53; CrimA 4424/98 *Silgado v. State of Israel* [24], at pages 539-540). Notwithstanding, like all protected human rights, the right to personal liberty is not absolute and a violation of the right is sometimes required in order to protect essential public interests. The balancing formula in this regard is provided in the limitations clause in section 8 of the Basic Law, which states:

'Violation of rights

8. The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive, or in accordance with a law as aforesaid by virtue of an express authorization therein.'

The question before us is whether the violation of the right to personal liberty caused by the Internment of Unlawful Combatants Law satisfies the conditions of the limitations clause. The arguments of the parties before us focused on the requirements of the proper purpose and proportionality, and we too will focus our deliberations on these.

29. At the outset and before we examine the provisions of the law from the perspective of the limitations clause, we should mention that the court will not be quick to intervene and set aside a provision of statute enacted by the legislature. The court should uphold the law as an expression of the will of the people (HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [25], at pages 552-553; HCJ 4769/95 *Menahem v. Minister of Transport* [26], at pages 263-264; HCJ 3434/96 *Hoffnung v. Knesset Speaker* [27], at pages 66-67). This is an expression of the principle of the separation of powers: the legislative authority determines the measures that should be taken in order to achieve public goals, whereas the judicial authority examines whether these measures violate basic rights in contravention of the conditions provided for this purpose in the Basic Law. It is the legislature that determines national

policy and formulates it in statute, whereas the court scrutinizes the constitutionality of the legislation to discover to what extent it violates constitutional human rights (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [10], at paragraph 78 of the opinion of President A. Barak). It has therefore been held in the case law of this court that when we examine the legislation of the Knesset from the perspective of the limitations clause, the court will act 'with judicial restraint, caution and moderation' (*Menahem v. Minister of Transport* [26], at page 263). The court will not refrain from constitutional scrutiny of legislation, but it will act with care and exercise its constitutional scrutiny in order to protect human rights within the restrictions of the limitations clause, while refraining from reformulating the policy that the legislature saw fit to adopt. Thus the delicate balance between majority rule and the principle of the separation of powers on the one hand and the protection of the basic values of the legal system and human rights on the other will be maintained.

*The requirement of a proper purpose*

30. According to the limitations clause, a statute that violates a constitutional right must have a proper purpose. It has been held in our case law that a legislative purpose is a proper one if it is designed to protect human rights, including by determining a reasonable and fair balance between the rights of individuals with conflicting interests, or if it serves an essential public purpose, an urgent social need or an important social concern whose purpose is to provide an infrastructure for coexistence and a social framework that seeks to protect and promote human rights (see *Menahem v. Minister of Transport* [26], at page 264; HCJ 6893/05 *Levy v. Government of Israel* [28], at pages 889-890; HCJ 5016/96 *Horev v. Minister of Transport* [29], at pages 52-53). It has also been held that not every purpose may justify a violation of constitutional basic rights, and that the essence of the violated right and the degree of the violation thereof may have ramifications for the purpose that is required to justify the violation.

In our remarks above we discussed how the Internment of Unlawful Combatants Law, according to its wording and its legislative history, was intended to prevent persons who threaten the security of the state because of their activity or their membership in terrorist organizations that carry out hostilities against the State of Israel from returning to the cycle of hostilities (see paragraph 6 above). This legislative purpose is a

proper one. Protecting the security of the state is an urgent and even essential public need in the harsh reality of unceasing murderous terrorism that attacks innocent people indiscriminately. It is difficult to exaggerate the security importance of preventing members of terrorist organizations from returning to the cycle of hostilities against the State of Israel in a period when there is relentless terrorist activity that threatens the lives of the citizens and residents of the State of Israel. In view of this, the purpose of the law under discussion may justify a significant and even serious violation of human rights, including the right to personal liberty. Thus was discussed by President A. Barak when he said that:

> 'There is no alternative — in a freedom and security seeking democracy — to striking a balance between liberty and dignity on the one hand and security on the other. Human rights should not become a tool for depriving the public and the state of security. A balance — a delicate and difficult balance — is required between the liberty and dignity of the individual and state and public security' (*A v. Minister of Defence* [1], at page 741).

(See also *Ajuri v. IDF Commander in West Bank* [7], at page 383; the remarks of Justice D. Dorner in HCJ 5627/02 *Saif v. Government Press Office* [30], at pages 76-77; EA 2/84 *Neiman v. Chairman of Central Elections Committee for Tenth Knesset* [31], at page 310).

The purpose of the Internment of Unlawful Combatants Law is therefore a proper one. But this is not enough. Within the framework of constitutional scrutiny, we are required to go on to examine whether the violation of the right to personal liberty does not exceed what is necessary for realizing the purpose of the law. We shall now turn to examine this question.

*The requirement that the measure violating a human right is not excessive*

31. The main issue that arises with regard to the constitutionality of the law under consideration before us concerns the proportionality of the arrangements provided in it. As a rule, it is customary to recognize three subtests that constitute fundamental criteria for determining the proportionality of an act of legislation that violates a constitutional human right: the first is the *rational connection test* that requires the legislative measure that violates the constitutional right to correspond to

the purpose that the law is intended to realize; the second is the *least harmful measure test*, which requires the legislation to violate the constitutional right to the smallest degree possible while achieving the purpose of the law; and the third is the *test of proportionality in the narrow sense*, according to which the violation of the constitutional right must be commensurate with the social benefit arising from it (see *Menahem v. Minister of Transport* [26], at page 279; *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [10], at paragraphs 65-75; *Beit Sourik Village Council v. Government of Israel* [6], at pages 839-840).

It has been held in the case law of this court that the test of proportionality, with its three subtests, is not a precise test since by its very nature it involves assessment and evaluation. The subtests sometimes overlap and each of them allow the legislature a margin of discretion. There may be circumstances in which the choice of an alternative measure that violates the constitutional right slightly less results in a significant reduction in the realization of the purpose or the benefit derived from it, and therefore it would not be right to oblige the legislature to adopt the aforesaid measure. Consequently this court has recognized a 'margin of constitutional appreciation' which is also called the 'margin of proportionality.' The limits of the margin of constitutional appreciation are determined by the court in each case on its merits and according to its circumstances, with a view to the nature of the right that is being violated and the extent of the violation thereof, as compared with the nature and substance of the competing rights or interests. This court will not substitute its own discretion for the criteria chosen by the legislature and will refrain from intervention as long as the measure chosen by the legislature lies within the margin of proportionality. The court will only intervene when the chosen measure significantly departs from the limits of the margin of constitutional appreciation and is clearly disproportionate (see CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [32], at page 438; HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [33]; AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [34], at page 815; *Gaza Coast Local Council v. Knesset* [25], at pages 550-551).

In the circumstances of the case before us, the extent of the violation of the constitutional right to personal liberty is significant and even severe. Notwithstanding, as we said above, the legislative purpose of removing 'unlawful combatants' from the cycle of hostilities in order to

protect state security is essential in view of the reality of murderous terrorism that threatens the lives of the residents and citizens of the State of Israel. In these circumstances, I think that we ought to recognize that the legislature has a relatively broad margin of appreciation, in order to choose the proper measure for realizing the purpose of the law.

*The first subtest: a rational connection between the measure and the purpose*

32. The measure chosen by the legislature in order to realize the purpose of the Internment of Unlawful Combatants Law is administrative detention. As we explained in paragraph 21 above, for the purpose of detention under the aforesaid law, the state is required to prove with clear and convincing evidence that the detainee is an 'unlawful combatant' with the meaning that we have discussed. Consequently the state is required to prove the personal threat presented by the detainee that derives from his involvement in the organization. Administrative detention constitutes a suitable means of averting the security threat presented by the detainee, in that it prevents the 'unlawful combatant' from returning to the cycle of hostilities against the State of Israel and thereby serves the purpose of the law. For this reason the first subtest of proportionality — the rational connection test — is satisfied.

The main question concerning the proportionality of the law under discussion before us concerns the second subtest, namely the question whether there are alternative measures that violate the constitutional right to a lesser degree. In order to examine this question, we should first consider the appellants' argument that there are more proportionate measures for realizing the purpose of the Internment of Unlawful Combatants Law. Next we should consider the specific arrangements that were provided in the law and examine whether they depart from the margin of proportionality. Finally we should examine the law in its entirety and examine whether the combination of arrangements that were provided in the law satisfies the test of proportionality in the narrow sense, namely whether the violation of the right to personal liberty is reasonably commensurate with the public benefit that arises from it in realizing the legislative purpose.

*The argument that there are alternative measures to detention under the law*

33. The appellants' main argument on the subject of proportionality was that there are alternative measures to administrative detention under the law under discussion and that these violate the right to liberty to a lesser degree. In this regard, the appellants raised two main arguments: *first*, it was argued that for the purpose of realizing the legislative purpose it is not necessary to employ the measure of administrative detention and the appellants ought to be recognized as prisoners of war, or alternatively use should be made of the measure of bringing the appellants to a criminal trial. *Second*, it was argued that even if there is a need for administrative detention in the appellants' case, this should be done under the Emergency Powers (Detentions) Law, 5739-1979, since they argue that this is a law that is less harmful than the Internment of Unlawful Combatants Law.

The first argument that the appellants should be declared prisoners of war should be rejected. In HCJ 2967/00 *Arad v. Knesset* [35], which considered the case of Lebanese detainees, a similar argument to the one raised in the appellants' case was rejected as follows:

> 'We agree with the position of Mr Nitzan that the Lebanese detainees should not be regarded as prisoners of war. It is sufficient that they do not satisfy the provisions of section 4(2)(d) of the Third Geneva Convention, which provides that one of the conditions that must be satisfied in order to comply with the definition of "prisoners of war" is "that of conducting their operations in accordance with the laws and customs of war." The organizations to which the Lebanese detainees belonged are terrorist organizations, which operate contrary to the laws and customs of war. Thus, for example, these organizations deliberately attack civilians and shoot from the midst of the civilian population, which they use as a shield. All of these are operations that are contrary to international law. Indeed, Israel's consistent position over the years was not to regard the various organizations such as Hezbollah as organizations to which the Third Geneva Convention applies. We have found no reason to intervene in this position' (*ibid*., at page 191).

(See also CrimApp 8780/06 *Sarur v. State of Israel* [36]; HCJ 403/81 *Jabar v. Military Commander* [37]; and also HCJ 102/82 *Tzemel v. Minister of Defence* [38], at pages 370-371).

Similar to what was said in *Arad v. Knesset* [35], in the circumstances of the case before us the appellants should also not be given a prisoner of war status, since they do not satisfy the conditions of article 4 of the Third Geneva Convention, and especially the condition concerning the observance of the laws of war.

The appellants' argument that a more proportionate measure would be to bring them to a criminal trial should also be rejected, in view of the fact that bringing a person to a criminal trial has a different character and purpose to the measure of administrative detention. Bringing someone to a criminal trial is intended to punish him for acts that were committed in the past, and this depends upon the existence of evidence that can be brought before a court in order to prove guilt beyond a reasonable doubt. By contrast, administrative detention was not intended to punish but to prevent activity that is prohibited by law and that endangers the security of the state. The quality of evidence that is required for administrative detention is different from the quality of evidence that is required for a criminal trial. Moreover, as a rule the use of the extreme measure of administrative detention is justified in circumstances where other measures, including holding a criminal trial, are impossible, because of the absence of sufficient admissible evidence or the impossibility of revealing privileged sources, or when holding a criminal trial does not provide a satisfactory solution to averting the threat presented to the security of the state in circumstances where after serving the sentence the person concerned is likely to become a security danger once again (see, *inter alia*, ADA 4794/05 *Ufan v. Minister of Defence* [39]; ADA 7/94 *Ben-Yosef v. State of Israel* [40]; ADA 8788/03 *Federman v. Minister of Defence* [41], at pages 185-189; *Fahima v. State of Israel* [14], at pages 263-264). In view of all this, it cannot be said that holding a criminal trial constitutes an alternative measure for realizing the purpose of the Internment of Unlawful Combatants Law.

34. As we have said, the appellants' alternative claim before us was that even if it is necessary to place them in administrative detention this should be done by virtue of the Emergency Powers (Detentions) Law. According to this argument, the Emergency Powers (Detentions) Law violates the right to personal liberty to a lesser degree than the

arrangements provided in the Internment of Unlawful Combatants Law. Thus, for example, it is argued that the Emergency Powers (Detentions) Law requires an individual threat as a ground for detention, without determining presumptions that place the burden of proof on the detainee as provided in the Internment of Unlawful Combatants Law. Moreover, the Emergency Powers (Detentions) Law requires judicial scrutiny to be held within 48 hours of the time of detention and a periodic review every three months, whereas the Internment of Unlawful Combatants Law allows a detainee to be brought before a judge as much as fourteen days from the time he is detained, and it requires the holding of a periodic review only once every half a year; the Emergency Powers (Detentions) Law makes the power of detention conditional upon the existence of a state of emergency in the state, whereas detention under the Internment of Unlawful Combatants does not make such a condition and it is even unlimited in time, apart from the stipulation that the detention will end by the time that the hostilities against the State of Israel have come to an end. To this it should be added that detention under the Emergency Powers (Detentions) Law is effected by an order of the Minister of Defence whereas detention under the Internment of Unlawful Combatants is effected by an order of the chief of staff, who is competent to delegate his authority to an officer with the rank of general. In view of all this, the appellants' argument before us was that detention under the Emergency Powers (Detentions) Law constitutes a more proportionate alternative than administrative detention under the Internment of Unlawful Combatants Law.

35. *Prima facie* the appellants are correct in their argument that in certain respects the arrangements provided in the Emergency Powers (Detentions) Law violate the right to personal liberty to a lesser degree than the Internment of Unlawful Combatants Law. Notwithstanding, we accept the state's argument in this regard that the Internment of Unlawful Combatants Law is intended for a different purpose than that of the Emergency Powers (Detentions) Law. In view of the different purposes, the two laws contain different arrangements, such that the Emergency Powers (Detentions) Law does not constitute an alternative measure for achieving the purpose of the law under discussion in this case. Let us clarify our position.

The Emergency Powers (Detentions) Law applies in a time of emergency and as a rule its purpose is to prevent threats to state security arising from *local* individuals (i.e., citizens and residents of the state).

Consequently the law contains a power of administrative detention that is usually used with regard to isolated individuals who threaten state security and whose detention is intended to last for relatively short periods of time, apart from in exceptional cases. On the other hand, as we clarified in paragraph 11 above, the Internment of Unlawful Combatants Law is intended to apply to *foreign* individuals who operate within the framework of terrorist organizations against the security of the state. The law was intended to be of use at a time when there are organized and persistent hostilities against Israel on the part of terrorist organizations. The purpose of the law is to prevent persons who belong to these organizations or who take part in hostilities under their banner from returning to the cycle of hostilities, as long as the hostilities against the State of Israel continue. In order to achieve the aforesaid purpose, the Internment of Unlawful Combatants Law contains arrangements that are different from those in the Emergency Powers (Detentions) Law (we will discuss the question of the proportionality of these arrangements below). Moreover, according to the state, the power of detention provided in the Internment of Unlawful Combatants Law was intended to apply to members of terrorist organizations in a persistent state of war in a territory that is not a part of Israel, where a relatively large number of enemy combatants is likely to fall into the hands of the military forces during the fighting. The argument is that these special circumstances justify the use of measures that are different from those usually employed.

Thus we see that even though the Emergency Powers (Detentions) Law and the Internment of Unlawful Combatants Law provide a power of administrative detention whose purpose is to prevent a threat to state security, the specific purposes of the aforesaid laws are different and therefore the one cannot constitute an alternative measure for achieving the purpose of the other. In the words of the trial court: 'We are dealing with a horizontal plane on which there are two acts of legislation, one next to the other. Each of the two was intended for a different purpose and therefore, in circumstances such as ours, they are not alternatives to one another' (page 53 of the decision of the District Court of 19 July 2006). It should be clarified that in appropriate circumstances the Emergency Powers (Detentions) Law may be used to detain foreigners who are not residents or citizens of the State of Israel. Notwithstanding, the premise is that the specific purposes of the Emergency Powers (Detentions) Law and the Internment of Unlawful Combatants Law are

different, and therefore it cannot be determined in a sweeping manner that detention under the Emergency Powers (Detentions) Law constitutes a more appropriate and proportionate alternative to detention under the Internment of Unlawful Combatants Law.

36. In concluding these remarks it should be pointed out that the appellants, who are inhabitants of the Gaza Strip, were first detained in the years 2002-2003, when the Gaza Strip was subject to belligerent occupation. At that time, the appellants' administrative detention was carried out by virtue of the security legislation that was in force in the Gaza Strip. A change occurred in September 2005, when Israeli military rule in the Gaza Strip ended and the territory ceased to be subject to a belligerent occupation (see paragraph 11 above). One of the consequences accompanying the end of the Israeli military rule in the Gaza Strip was the cancellation of the security legislation that was in force there. In consequence of this, the chief of staff issued detention orders for the appellants under the Internment of Unlawful Combatants Law.

In view of the cancellation of the security legislation in the Gaza Strip, obviously no question arises with regard to inhabitants of the Gaza Strip as to whether administrative detention by virtue of security legislation may constitute a suitable and more proportionate measure than detention under the Internment of Unlawful Combatants Law. Notwithstanding, I think it right to point out that the aforesaid question may arise with regard to inhabitants of the territories that are under the belligerent occupation of the State of Israel (Judaea and Samaria). As can be seen from what is stated in paragraph 11 above, I tend to the *prima facie* opinion that both under the international humanitarian law that governs the matter (article 78 of the Fourth Geneva Convention) and according to the test of proportionality, the administrative detention of inhabitants of Judaea and Samaria should be carried out by virtue of the current security legislation that is in force in the territories, and not by virtue of the Internment of Unlawful Combatants Law in Israel. Notwithstanding, this issue does not arise in the circumstances of the case before us and therefore I think it right to leave it for the future.

*Proportionality of the specific arrangements provided in the law*

37. In view of all of the reasons set out above, we have reached the conclusion that the measures indicated by the appellants in their pleadings cannot constitute alternative measures to administrative

detention under the law that we are considering. The appellants further argued that the specific arrangements provided in the Internment of Unlawful Combatants Law violate the right to personal liberty excessively, and more proportionate arrangements that violate personal liberty to a lesser degree could have been determined. Let us therefore turn to examine this argument with regard to the specific arrangements provided in the law.

*(1) Entrusting the power of detention to military personnel*

38. Section 3(a) of the law, which was cited in paragraph 15 above, provides that a detention order under the law will be issued by the chief of staff 'with his signature' and will include the reasons for the detention 'without harming the security needs of the state.' Section 11 of the law goes on to provide that 'the chief of staff may delegate any of his powers under this law to an officer with the rank of general that he may determine.' According to the appellants, entrusting the power of detention under the law to the chief of staff who may delegate it to an officer with the rank of general violates the detainees' right to personal liberty excessively. In this context, the appellants emphasized that the Emergency Powers (Detentions) Law entrusts the power of administrative detention to the Minister of Defence only.

In the circumstances of the case, we have come to the conclusion that the state is correct in its argument that entrusting the power of detention to the chief of staff or an officer with the rank of general falls within the margin of proportionality and we should not intervene in it. *First*, as we said above, the specific purposes of the Internment of Unlawful Combatants Law and the Emergency Powers (Detentions) Law are different, and therefore there is a difference in the arrangements provided in the two laws. Since the law under consideration before us was intended to apply, *inter alia*, in a situation of combat and prolonged military activity against terrorist organizations in a territory that is not subject to the complete control of the State of Israel, there is logic in determining an arrangement that entrusts the power of detention to military personnel of the highest rank. *Second*, it should be made clear that the provisions of international law do not deny the power of detention to the military authority responsible for the security of a territory where there are protected civilians. This is capable of supporting the conclusion that entrusting the power of detention to the

chief of staff or an officer with a rank of general does not, in itself, violates the right to personal liberty disproportionately.

*(2) The detainee's right to a hearing after a detention order is issued*

39. Sections 3(b) and 3(c) of the law provide the following:

'Internment of unlawful combatant

> 3. (a)…
>
> (b) An internment order may be given without the person being held by the state authorities being present.
>
> (c) An internment order shall be brought to the attention of the internee at the earliest possible time, and he shall be given an opportunity to state his case with regard to the order before an officer with the rank of at least lieutenant-colonel who will be appointed by the chief of staff; the arguments of the internee shall be written down by the officer and shall be brought before the chief of staff; if the chief of staff, after he has studied the internee's arguments, finds that the conditions provided in sub-section (a) are not satisfied, he shall cancel the internment order.

It can be seen from the aforesaid section 3(b) that a detention order may be made by the chief of staff (or a general who is appointed by him) without the detainee being present. Section 3(c) of the law goes on to provide that the order shall be brought to the attention of the detainee 'at the earliest possible time' and that he shall be given a hearing before an army officer with the rank of at least lieutenant-colonel, in order to allow the detainee to state his case; the detainee's arguments shall be written down by the officer and brought before the chief of staff (or a general acting for him). According to the law, if after studying the detainee's arguments the chief of staff (or the general) is persuaded that the conditions for detention under the law are not satisfied, the internment order shall be cancelled.

The appellants' argument in this regard was that the aforesaid arrangement violates the right to personal liberty excessively in view of

the fact that the detainee may state his case only after the event, i.e., after the detention order has been issued, and only before an officer with the rank of lieutenant-colonel, who will refer his arguments to the chief of staff (or a general) in order that they will consider their position once again. According to the appellants, the person who issues the order — the chief of staff or the general — should be obliged to hear the detainee's arguments, and this should occur before the order is made. These arguments should be rejected, for several reasons: *first*, it has been established in case law that the person who makes the decision does not need to conduct the hearing personally, and that it is also permissible to hold the hearing before someone who has been appointed for this purpose by the person making the decision, provided that the person making the decision — in our case the chief of staff or the general acting on his behalf — will have before him all of the arguments and facts that were raised at the hearing (see HCJ 5445/93 *Ramla Municipality v. Minister of Interior* [42], at page 403; HCJ 2159/97 *Ashkelon Coast Regional Council v. Minister of the Interior* [43], at pages 81-82). *Second*, from a practical viewpoint, providing a duty to hold hearings *ab initio* and before the chief of staff or the general personally at times of combat and in circumstances where many detentions may take place in the combat zone may give rise to significant practical problems. Moreover, holding a hearing in the manner proposed by the appellants is contrary to the purpose of the law, which is to allow an immediate removal of the 'unlawful combatants' from the cycle of hostilities in an effective manner. It should be emphasized that the hearing under section 3(c) of the law is an initial procedure whose main purpose is to prevent mistakes of identity. As we shall explain below, in addition to the initial hearing, the law requires a judicial review to take place before a District Court judge no later than 14 days from the date of issuing the internment order, which reduces the violation argued by the appellants. In view of all of the aforesaid, it cannot be said that the arrangement provided in the law with regard to the hearing falls outside the margin of proportionality.

*(3) The judicial review of detention under the law*

40. Section 5 of the law, which is entitled 'Judicial review,' provides in subsections (a) to (d) the following arrangement:

'Judicial review

5. (a) An internee shall be brought before a judge of the District Court no later than 14 days from the date of issuing the internment order; if a District Court judge finds that the conditions provided in section 3(a) are not satisfied, he shall cancel the internment order.

(b) If the internee is not brought before the District Court and the hearing before it is not begun within 14 days of the date of issuing the internment order, the internee shall be released unless there is another ground for his detention under the law.

(c) Once every six months from the date of issuing the order under section 3(a) the internee shall be brought before a judge of the District Court; if the court finds that his release will not harm state security or that there are special reasons that justify his release, it shall cancel the internment order.

(d) A decision of the District Court under this section may be appealed within thirty days to the Supreme Court which shall hear the appeal with one judge; the Supreme Court shall have all the powers given to the District Court under this law.

(e) …

(f) …'

The appellants argued before us that the judicial review proceeding provided in the aforesaid section 5 violates the right to personal liberty excessively, for two main reasons: *first*, under section 5(a) of the law the detainee should be brought before a District Court judge no later than 14 days from the date of his detention. According to the appellants, this is a long period of time that excessively violates the right to personal

liberty and the detainee's right of access to the courts. In this respect the appellants argued that in view of the constitutional status of the right to personal liberty and in accordance with the norms applicable in international law, the legislature should have determined that the detainee should be brought to a judicial review 'without delay.' *Second*, it was argued that the period of time provided in section 5(c) of the law for carrying out a periodic judicial review of the detention — every six months — is too long and is therefore disproportionate. By way of comparison, the appellants pointed out that the Emergency Powers (Detentions) Law provides in this regard a period of time that is shorter by half — only three months. In reply, the state argued that in view of the purpose of the law, the periods of time provided in section 5 are proportionate and they are consistent with the provisions of international law.

41. Section 5 of the law is based on the premise that judicial review constitutes an integral part of the administrative detention procedure. In this respect it has been held in the past that:

> 'Judicial involvement with regard to detention orders is essential… Judicial involvement is a safeguard against arbitrariness; it is required by the principle of the rule of law… It ensures that the delicate balance between the liberty of the individual and the security of the public — a balance that lies at the heart of the laws of detention — will be upheld' (*per* President A. Barak in *Marab v. IDF Commander in Judaea and Samaria* [8], at page 368).

The main dispute with regard to the constitutionality of section 5 of the law concerns the question of the proportionality of the periods of time provided in it.

With regard to the periods of time between the detention of the detainee and the initial judicial review of the detention order, it has been held in the case law of this court that in view of the status of the right to personal liberty and in order to prevent mistakes of fact and discretion whose price is likely to be a person's loss of liberty without just cause, the administrative detainee should be brought before a judge 'as soon as possible' in the circumstances (*per* President M. Shamgar in HCJ 253/88 *Sajadia v. Minister of Defence* [44], at pages 819-820). It should be noted that this case law ruling is consistent with the arrangements prevailing in international law. International law does not stipulate the number of

days during which it is permitted to detain a person without judicial involvement, but it determines a general principle that can be applied in accordance with the circumstances of each case on its merits. According to the aforesaid general principle, the detention decision should be brought before a judge or another person with judicial authority 'promptly' (see in this regard the provisions of article 9(3) of the International Covenant on Civil and Political Rights, 1966, which is regarded as being of a customary nature; see also the references cited in *Marab v. IDF Commander in Judaea and Samaria* [8], at pages 369-370). A similar principle is provided in sections 43 and 78 of the Fourth Geneva Convention according to which the judicial (or administrative) review of a detention decision should be made 'as soon as possible' (in the wording of article 43 of the convention) or 'with the least possible delay' (in the wording of article 78 of the convention). Naturally the question as to what is the earliest possible time for bringing a detainee before a judge depends upon the circumstances of the case.

In the case before us, the Internment of Unlawful Combatants Law provides that the date for holding the initial judicial review is 'no later than 14 days from the date of issuing the internment order.' The question that arises in this context is whether the aforesaid period of time excessively violates the right to personal liberty. The answer to this question lies in the purpose of the law and the special circumstances of the detention thereunder, as well as in the interpretation of the aforesaid provision of the law. As we have said, the Internment of Unlawful Combatants Law applies to foreign parties who belong to terrorist organizations and who conduct persistent hostilities against the State of Israel. As we have said, the law was intended to apply, *inter alia*, in circumstances where hostilities are taking place in a territory that is not a part of Israel, in the course of which a relatively large number of enemy combatants may fall into the hands of the military forces. In view of these special circumstances, we do not see fit to hold that the maximum period of time of fourteen days for holding an initial judicial review of the detention order departs from the margin of proportionality in such a way that it justifies our intervention by shortening the maximum period provides in the law. At the same time, it should be emphasized that the period of time provided in the law is a maximum period and it does not exempt the state from making an effort to bring the detainee to an initial judicial review as soon as possible in view of all the circumstances of the case. In other words, whereas we do not see fit to intervene in the

proportionality of the maximum period provided in the law, exercising the power of detention in each specific case should be done proportionately, and there should not be a delay of 14 whole days before holding an initial judicial review where it is possible to hold a judicial review earlier (see and cf. ADA 334/04 *Darkua v. Minister of Interior* [45], at page 371, where it was held that even though under the Entry into Israel Law, 5712-1952, a person taken into custody should be brought before the Custody Review Tribunal no later than fourteen days from the date on which he was taken into custody, the whole of the aforesaid fourteen days should not be used when there is no need to do so).

In concluding these remarks it should be noted that section 3(c) of the law, whose wording was cited above, provides that 'An internment order shall be brought to the attention of the internee *at the earliest possible time*, and he shall be given an opportunity to state his case with regard to the order before an officer with the rank of at least lieutenant-colonel who will be appointed by the chief of staff…' (emphasis supplied). Thus we see that although section 5(a) of the law provides a maximum period of fourteen days for an initial *judicial* review, section 3(c) of the law provides a duty to hold a hearing for the detainee before a military officer at the earliest possible time after issuing the order. Certainly the aforesaid hearing is not a substitute for a review before a judge of the District Court, which is an independent and objective judicial instance, but the holding of an early hearing on a date as soon after the issuing of the order as possible is capable of reducing to some degree the concern of an erroneous or ostensibly unjustified detention, which will lead to an excessive violation of the right to liberty.

42. As stated, the appellants' second argument concerned the frequency of the periodic judicial review of detention under the law. According to section 5(c) of the law, the detainee should be brought before a District Court judge once every six months from the date of issuing the order; if the court finds that the release of the detainee will not harm state security or that there are special reasons that justify his release, the court shall cancel the internment order.

The appellants' argument before us was that the frequency of once every six months is insufficient and disproportionately violates the right to personal liberty. With regard to this argument, we should point out that the holding of a periodic review of the necessity of continuing the administrative detention once every six months is consistent with the

requirements of international humanitarian law. Thus article 43 of the Fourth Geneva Convention provides that:

> 'Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.'

From the aforesaid article 43 it can be seen that holding a periodic review of a detention order 'at least twice yearly' is consistent with the requirements of international humanitarian law, in a manner that supports the proportionality of the arrangement provided in section 5(c) of the law. Moreover, whereas section 43 of the Fourth Geneva Convention is satisfied with the holding of an administrative review that is carried out by an administrative body, the Internment of Unlawful Combatants provides that a District Court judge is the person who should carry out a judicial review of the detention orders under the aforesaid law, and his decision may be appealed to the Supreme Court which shall hear the appeal with one judge (section 5(d) of the law). In view of all this, it cannot be said that the arrangement provided in the law with regard to the nature and frequency of the judicial review violates the constitutional right to personal liberty excessively.

*(4) Departure from the rules of evidence and reliance upon privileged evidence within the framework of proceedings under the law*

43. Section 5(e) of the law provides the following:

'Judicial review

> 5. …
>
> (e) In proceedings under this law it is permitted to depart from the rules of evidence, for reasons that will be recorded; the court may admit evidence, even without the internee or his counsel being present or without disclosing it to them, if, after it has seen the evidence or heard argument, even without the

> internee or his counsel being present, it is persuaded that disclosure of the evidence to the detainee or his counsel is likely to harm the security of the state or the security of the public; this provision does not derogate from any right not to produce evidence under chapter 3 of the Evidence Ordinance [New Version], 5731-1971.
>
> …'

The appellants' argument before us was that the arrangement provided in the aforesaid section 5(e) disproportionately violates the right to personal liberty, since it allows the holding of a judicial review of a detention order under the law to depart from the rules of evidence and it allows evidence to be heard *ex parte* without the detainee and his counsel being present and without disclosing it to them.

With respect to this argument it should be noted that by their very nature administrative detention proceedings are based on administrative evidence concerning security matters. The nature of administrative detention for security reasons requires use to be made of evidence that does not satisfy the admissibility tests of the rules of evidence and that therefore may not be brought in a normal criminal trial. Obviously the confidentiality of the sources of the information is important, and therefore it is often not possible to disclose all of the intelligence material that is used to prove the ground for detention. Reliance on inadmissible administrative evidence and on privileged material for reasons of state security lies at the heart of administrative detention, since had there been sufficient admissible evidence that could have been shown to the detainee and brought before the court, in general the measure of holding a criminal trial should be chosen (see *Federman v. Minister of Defence* [41], at pages 185-186). There is no doubt that a proceeding that is held *ex parte* for the sake of presenting privileged evidence to the court has many deficiencies. But the security position in which we find ourselves in view of the persistent hostilities against the security of the State of Israel requires the use of tools of this kind when making a detention order under the Internment of Unlawful Combatants Law, the Emergency Powers (Detentions) Law or the security legislation in areas under military control.

It should be emphasized that in view of the problems inherent in relying upon administrative evidence for the purpose of detention, the judicial system has over the years developed a tool for control and scrutiny of intelligence material, in so far as this is possible in a proceeding of the kind that takes place in judicial review of administrative detention. In these proceedings the judge is required to question the validity and credibility of the administrative evidence that is brought before him and to assess its weight. In this regard the following was held in HCJ 4400/98 *Braham v. Justice Colonel Shefi* [46], at page 346, *per* Justice T. Or:

> 'The basic right of every human being as such to liberty is not a slogan devoid of content. The protection of this basic value requires that we give significant content to the proceeding of judicial review for administrative detention. In this framework, I am of the opinion that the professional judge can and should consider not only the question whether *prima facie* the competent authority was entitled to decide what it decided on the basis of the material that was before it, but the judge should also consider the question of the credibility of the material that was submitted as a part of its assessment of the weight of the material. Indeed, that fact that certain "material" is valid administrative evidence does not exempt the judge from examining its degree of credibility against a background of the other evidence and all of the circumstances of the case. As such, the "administrative evidence" label does not exempt the judge from the need to demand and receive explanations from the authorities that are capable of providing them. In other words, its significance is to weaken considerably the process of judicial review, and to allow the loss of liberty for prolonged periods on the basis of scanty and insufficient material. Such an outcome is unacceptable in a legal system that regards human liberty as a basic right.'

It has also been held in our case law that in view of the problems inherent in submitting privileged evidence *ex parte*, the court that carries out a judicial review of an administrative detention is required to act with caution and great care when examining the material that is brought before it for its inspection alone. In such circumstances, the court has a duty to act with great caution and to examine the privileged material

brought before it from the viewpoint of the detainee, who has not seen the material and cannot argue against it. In the words of Justice A. Procaccia: '… the court has a special duty to act with great care when examining privileged material and to act as the "mouth" of the detainee where he has not seen the material against him and cannot defend himself' (HCJ 11006/04 *Kadri v. IDF Commander in Judaea and Samaria* [47], at paragraph 6; see also CrimApp 3514/97 *A v. State of Israel* [48]).

Thus we see that in view of the reliance on administrative evidence and the admission of privileged evidence *ex parte*, the court carrying out a judicial review under the Internment of Unlawful Combatants Law is required to act with caution and care in examining the material brought before it. The scope of the judicial review cannot be defined *ab initio* and it is subject to the discretion of the judge who will take into account the circumstances of each case on its merits, such as the quantity, level and quality of the privileged material brought before the judge for his inspection, as opposed to the activity attributed to the detainee that gives rise to the allegation that he represents a threat to state security. In a similar context it has been held that:

> 'Information relating to several incidents cannot be compared to information concerning an isolated incident; information from one source cannot be compared to information from several sources; and information that is entirely based on the statements of agents and informers only cannot be compared to information that is also supported or corroborated by documents submitted by the security or intelligence services that derive from employing special measures' (*per* Justice E. Mazza in HCJ 5994/03 *Sadar v. IDF Commander in West Bank* [49], at paragraph 6).

In view of all of the aforesaid reasons, we are drawn to the conclusion that reliance on inadmissible evidence and privileged evidence is part and parcel of administrative detention. In view of the fact that there is a judicial review of the quality and quantity of the administrative evidence that supports the ground of detention, and in view of the care with which the court is required to examine the privileged material brought before it *ex parte*, it cannot be said that the arrangement provided in section 5(e) of the law in itself violates the rights of detainees disproportionately.

*(5) Detainee's meeting with his lawyer*

44. Section 6 of the law, which is entitled 'Right of internee to meet with lawyer' provides the following:

'Right of internee to meet with lawyer

6. (a) The internee may meet with a lawyer at the earliest opportunity when it is possible to hold the meeting without prejudicing the needs of state security, but no later than seven days before he is brought before a judge of the District Court in accordance with the provisions of section 5(a).

(b) The Minister of Justice may in an order restrict the right of representation in proceedings under this law to someone who has been given unconditional approval to act as defence counsel in the military tribunals under the provisions of section 318(c) of the Military Jurisdiction Law, 5715-1955.'

In their arguments before us the appellants raised two main arguments against the proportionality of the arrangements that were provided in the aforesaid section 6: *first*, it was argued that under section 6(a) of the law, it is possible to prevent a meeting of a detainee with his lawyer for a period of up to seven days, during which a hearing is supposed to be held for the detainee under section 3(c) of the law. It is argued that holding a hearing without giving the detainee a possibility of first consulting a lawyer is likely to make the hearing meaningless in such a way that it violates the right to personal liberty excessively. *Second*, it was argued that section 6(b) of the law, which makes representation dependent upon an unconditional approval for a lawyer to act as defence counsel, also violates the rights of the detainee disproportionately.

With regard to the appellants' first argument, no one disputes that the right of the detainee to be represented by a lawyer constitutes a major basic right that has been recognized in our legal system since its earliest days (see in this regard CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* [50], at paragraph 14, and the references cited there). Both according to the basic principles of Israeli law and the principles of international law, the rule is that a detainee should be allowed to meet

with his lawyer as a part of the right of every human being to personal liberty (see the remarks of President A. Barak in *Marab v. IDF Commander in Judaea and Samaria* [8], at pages 380-381). For this reason section 6(a) of the law provides that a detainee should be allowed to meet with his lawyer 'at the earliest opportunity.' Notwithstanding, it should be remembered that like all human rights the right to legal counsel is also not absolute, and it may be restricted if this is essential for protecting the security of the state (see HCJ 3412/93 *Sufian v. IDF Commander in Gaza Strip* [51], at page 849; HCJ 6302/92 *Rumhiah v. Israel Police* [52], at pages 212-213). Section 6(a) of the law therefore provides that it is possible to postpone the meeting of the detainee with his lawyer for security reasons, but no more than seven days before he is brought before a District Court judge under the provisions of section 5(a) of the law. Since under the aforementioned section 5(a) a detainee should be brought before a District Court judge no later than 14 days from the date on which the internment order is made, this means that a meeting between a detainee and his lawyer may not be prevented for more than seven days from the time the detention order is made against him.

In view of the security purpose of the Internment of Unlawful Combatants Law and in view of the fact that the aforesaid law was intended to apply in prolonged states of hostilities and even in circumstances where the army is fighting in a territory that is not under Israeli control, it cannot be said that a maximum period of seven days during which a meeting of a detainee with a lawyer may be prevented when security needs so require falls outside the margin of proportionality (see and cf. *Marab v. IDF Commander in Judaea and Samaria* [8], where it was held that 'As long as the hostilities continue, there is no basis for allowing a detainee to meet with a lawyer,' at page 381; see also HCJ 2901/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [53]).

In addition to the aforesaid, two further points should be made: *first*, even though the detainee may present his arguments in the course of the hearing under section 3(c) of the law without consulting a lawyer previously, section 6(a) of the law provides that the state should allow the detainee to meet with his defence counsel 'no later than seven days before he is brought before a judge of the District Court.' It follows from this that as a rule the detainee is represented in the judicial review proceedings concerning the making of the detention order under the law.

I think that this reduces the intensity of the violation of the right to consult a lawyer as a part of the right to personal liberty. *Second*, it should be emphasized that the maximum period of seven days does not exempt the state from its duty to allow the detainee to meet with his lawyer at the earliest possible opportunity, in circumstances where security needs allow this. Therefore the question of the proportionality of the period during which a meeting between the detainee and his defence counsel is prevented is a function of the circumstances of each case on its merits. It should be noted that a similar arrangement exists in international law, which determines the period of time during which a meeting with a lawyer may be prevented with regard to all the circumstances of the case, without stipulating maximum times for preventing the meeting (see, in this regard, *Marab v. IDF Commander in Judaea and Samaria* [8], at page 381).

45. The appellants' second argument concerning section 6(b) of the law should also be rejected. Making representation dependent upon an unconditional approval of the lawyer to act as defence counsel under the provisions of section 318(c) of the Military Jurisdiction Law, 5715-1955, is required for security reasons in view of the security sensitivity of administrative detention proceedings. The appellants did not argue that the need for an unconditional approval as aforesaid affected the quality of the representation that they received, and in any case they did not point to any real violation of their rights in this regard. Consequently the appellants' arguments against the proportionality of the arrangement provided in section 6 of the law should be rejected.

*(6) The length of the detention under the law*

46. From the provisions of sections 3, 7 and 8 of the Internment of Unlawful Combatants Law it can be seen that a detention order under the law need not include a defined date for the end of the detention. The law itself does not provide a maximum period of time for the detention imposed thereunder, apart from the determination that the detention should not continue after the hostilities of the force to which the detainee belongs against the State of Israel 'have ended' (see sections 7 and 8 of the law). According to the appellants, this is an improper detention without any time limit, which disproportionately violates the constitutional right to personal liberty. In reply, the state argues that the length of the detention is not 'unlimited,' but depends on the duration of

the hostilities being carried out against the security of the State of Israel by the force to which the detainee belongs.

It should immediately be said that making a detention order that does not include a specific time limit for its termination does indeed raise a significant difficulty, especially in the circumstances that we are addressing, where the 'hostilities' of the various terrorist organizations, including the Hezbollah organization which is relevant to the appellants' cases, have continued for many years, and naturally it is impossible to know when they will end. In this reality, detainees under the Internment of Unlawful Combatants Law may remain in detention for prolonged periods of time. Notwithstanding, as we shall explain immediately, the purpose of the law and the special circumstances in which it was intended to apply, lead to the conclusion that the fundamental arrangement that allows detention orders to be made without a defined date for their termination does not depart from the margin of proportionality, especially in view of the judicial review arrangements that are provided in the law.

As we have said, the purpose of the Internment of Unlawful Combatants Law is to prevent 'unlawful combatants' as defined in section 2 of the law from returning to the cycle of hostilities, as long as the hostilities are continuing and threatening the security of the citizens and residents of the State of Israel. For similar reasons the Third Geneva Convention allows prisoners of war to be interned until the hostilities have ended, in order to prevent them returning to the cycle of hostilities as long as the fighting continues. Even where we are concerned with civilians who are detained during an armed conflict, international humanitarian law provides that the rule is that they should be released from detention immediately after the specific ground for the detention has elapsed and no later than the date when the hostilities end (see J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (vol. 1, 2005), at page 451; also see and cf. *Hamdi v. Rumsfeld* [55], at pages 518-519, where the United States Supreme Court held that the detention of members of forces hostile to the United States and operating against it in Afghanistan until the end of the specific dispute that led to their arrest is consistent with basic and fundamental principles of the laws of war).

In view of the aforesaid, we are drawn to the conclusion that the fundamental arrangement that allows a detention order to be made

under the law without a defined termination date, except for the determination that the detention will not continue after the hostilities against the State of Israel have ended, does not depart from the margin of constitutional appreciation. Notwithstanding, it should be emphasized that the question of the proportionality of the duration of detention under the law should be examine in each case on its merits and according to its specific circumstances. As we have said, the Internment of Unlawful Combatants Law provides a duty to hold a periodic judicial review once every six months. The purpose of the judicial review is to examine whether the threat presented by the detainee to the security of the state justifies the continuation of the detention, or whether the internment order should be cancelled in circumstances where the release of the detainee will not harm the security of the state or where there are special reasons justifying the release (see section 5(c) of the law). When examining the need to extend the detention, the court should take into account *inter alia* the period of time that has passed since the order was made. What was held in *A v. Minister of Defence* [1] concerning detention under the Emergency Powers (Detentions) Law, *per* President A. Barak, is also true in our case:

> 'Administrative detention cannot continue indefinitely. The longer the period of detention has lasted, the more significant the reasons that are required to justify a further extension of detention. With the passage of time the measure of administrative detention becomes burdensome to such an extent that it ceases to be proportionate' (*ibid*., at page 744).

Similarly it was held in *A v. IDF Commander* [16] with regard to administrative detention under the security legislation in the territories that:

> '… The duration of the detention is a function of the threat. This threat is examined in accordance with the circumstances. It depends upon the level of risk that the evidence attributes to the administrative detainee. It depends upon the credibility of the evidence itself and how up to date it is. The longer the duration of the administrative detention, the greater the burden imposed on the military commander to show the threat presented by the

> administrative detainee' (*ibid*., at paragraph 7 of the judgment).

Indeed, unlike in the arrangements provided in the Emergency Powers (Detentions) Law, a court that is trying a case under the Internment of Unlawful Combatants Law does not exercise judicial review with regard to the *duration* of the detention order but examines the question whether there is a justification for cancelling an existing order, for the reasons listed in section 5(c) of the law. Notwithstanding, even a detention order under the Internment of Unlawful Combatants Law cannot continue indefinitely. The period of time that has elapsed since the order was made constitutes a relevant and important consideration in the periodic judicial review for determining whether the continuation of the detention is necessary. In the words of Justice A. Procaccia in a similar context:

> '… The longer the period of the administrative detention, the greater the weight of the detainee's right to his personal liberty in its balance against considerations of public interest, and therefore the greater the burden placed upon the competent authority to show that it is necessary to continue holding the person concerned in detention. For this purpose, new evidence relating to the detainee's case may be required, and it is possible that the original evidence that led to his original detention will be insufficient' (*Kadri v. IDF Commander in Judaea and Samaria* [47], at paragraph 6).

In view of all of the aforesaid, a court that exercises judicial review of detention under the Internment of Unlawful Combatants Law may restrict and shorten the period of detention in view of the nature and weight of the evidence brought before it with regard to the security threat presented by the detainee as an 'unlawful combatant' and in view of the time that has passed since the detention order was made. By means of judicial review it is possible to ensure that the absence of a specific date on which the detention order under the law ends will not violate the right to personal liberty excessively and that detainees under the law will not be held in detention for a period greater than what is required by significant security considerations.

*(7) The possibility of conducting criminal proceedings in addition to a detention proceeding under the law*

47. Section 9 of the law, which is entitled 'Criminal proceedings,' provides the following:

'Criminal proceedings

> 9. (a) It is permitted to conduct a criminal proceeding against an unlawful combatant under any law.
>
> (b) The chief of staff may make an order for the detention of an unlawful combatant under section 3, even if a criminal proceeding is being conducted against him under any law.'

According to the appellants, the aforesaid section 9 violates the right to personal liberty disproportionately since it makes it possible to detain someone under the Internment of Unlawful Combatants Law even though there are already criminal proceedings against him, and *vice versa*. The argument is that by conducting both sets of proceedings it is possible to continue to inter a person even after he has finished serving the sentence handed down to him in the criminal proceeding in a manner that it is argued amounts to cruel punishment. In reply the state said that this is a proper and proportionate arrangement in view of the fact that it is intended to apply in circumstances where a person will shortly finish serving his criminal sentence and hostilities are still continuing between the organization of which he is a member and the State of Israel, so that his release may harm state security.

With regard to these arguments we should reiterate what we said earlier in our remarks (at paragraph 33 above), that bringing someone to a criminal trial is different in its nature and purpose to the measure of administrative detention. In general it is desirable and even preferable to make use of criminal proceedings where this is possible. The use of the extreme measure of administrative detention is justified in circumstances where other measures, including the holding of a criminal trial, are not possible, because of a lack of sufficient admissible evidence or because it is impossible to disclose privileged sources. Notwithstanding, the reality of prolonged terrorist operations is complex. There may be cases in which a person is detained under the Internment of Unlawful Combatants Law and only at a later stage evidence is discovered that makes it possible to bring him to a criminal trial. There may be other

cases in which a person was brought to a criminal trial and was convicted and served his sentence, but this does not provide a satisfactory solution to preventing the threat that he presents to state security in circumstances where after serving the sentence he may once again become a security threat. Since bringing someone to a criminal trial and administrative detention are proceedings that are different from one another in their character and purpose, one cannot rule out the other, even though in my opinion substantial and particularly weighty security considerations are required to justify the use of both types of proceeding with regard to the same person. In any case, the fundamental arrangement that allows criminal proceedings to be conducted alongside detention proceedings under the law does not, in itself, create a disproportionate violation of the right to liberty of the kind that requires our intervention.

*Interim summary*

48. Our discussion hitherto with regard to the requirement of proportionality has led to the following conclusions: *first*, the measure chosen by the legislator, namely administrative detention that prevents the 'unlawful combatant' returning to the cycle of hostilities against the State of Israel, realizes the legislative purpose and therefore satisfies the requirement of a rational connection between the legislative measure and the purpose that the law is supposed to realize. *Second*, the measures indicated by the appellants in their arguments before us, namely recognizing them as prisoners of war, bringing them to a criminal trial or detaining them under the Emergency Powers (Detentions) Law, do not realize the purpose of the Internment of Unlawful Combatants Law and therefore they cannot constitute a fitting alternative measure to detention in accordance with the law under discussion. *Third*, the specific arrangements provided in the law do not, in themselves and irrespective of the manner in which they are implemented, violate the right to personal liberty excessively, and they fall within the margin of constitutional appreciation given to the legislature. In view of all this, the question that remains to be examined is whether the combination of the arrangements provided in the law satisfies the test of proportionality in the narrow sense. In other words, is the violation of the right to personal liberty reasonably commensurate with the public benefit that arises from it in achieving the legislative purpose? Let us now turn to examine this question.

*Proportionality in the narrow sense — is the violation of the constitutional right reasonably commensurate with the public benefit arising from it*

49. The Internment of Unlawful Combatants Law was enacted against a background of a harsh reality. The citizens and residents of the State of Israel have been threatened unceasingly by murderous terrorism that has attacked them indiscriminately for many years. In view of this, we held that the law's security purpose — removing 'unlawful combatants' from the terrorist organizations' cycle of hostilities against the State of Israel — constitutes a proper purpose that is based on a public need of a kind that is capable of justifying a significant violation of the right to personal liberty. In view of all this, we were of the opinion that we should recognize that the legislature has a relatively broad margin of appreciation in order to choose the proper measure for realizing the legislative purpose (see paragraph 31 above).

As we have said, the measure that the legislature chose in order to realize the purpose of the Internment of Unlawful Combatants Law is administrative detention in accordance with the arrangements that are provided in the law. There is no doubt that this is a harmful measure that should be employed as little as possible. Notwithstanding, a look at the total combination of the aforesaid arrangements, in view of the interpretation that we have discussed above, leads to the conclusion that according to constitutional criteria the violation of the constitutional right is reasonably commensurate with the social benefit that arises from the realization of the legislative purpose. This conclusion is based on the following considerations taken together:

*First*, for the reasons that we discussed at the beginning of our deliberations (paragraph 11 above), the scope of application of the law is relatively limited: the law does not apply to citizens and residents of the State of Israel but only to *foreign* parties who endanger the security of the state (see paragraph 11 above).

*Second*, the interpretation of the definition of 'unlawful combatant' in section 2 of the law is subject to constitutional principles and international humanitarian law that require proof of an individual threat as a basis for administrative detention. Consequently, for the purpose of detention under the Internment of Unlawful Combatants Law the state is required to prove with administrative evidence that the detainee directly or indirectly played a real part — which is not negligible or

marginal — in the hostilities against the State of Israel; or that the detainee belonged to an organization that is carrying out hostilities, in view of his connection and the extent of the detainee's contribution to the organization's cycle of hostilities in the broad sense of this concept. In our remarks above we said that proving the conditions of the definition of 'unlawful combatant' in the aforesaid sense includes proof of a personal threat that arises from the manner in which the detainee was involved in the terrorist organization. We also said that the state has declared before us that until now it has taken pains to prove the personal threat of all of the detainees under the law specifically, and it has refrained from relying on the probative presumptions provided in sections 7 and 8 of the law. In view of this, we saw no reason to decide the question of the constitutionality of those presumptions (see paragraphs 24 and 25 above).

*Third*, we held that in view of the fact that administrative detention is an unusual and extreme measure, and in view of its significant violation of the constitutional right to personal liberty, the state is required to prove, with clear and convincing evidence, that the conditions of the definition of 'unlawful combatant' are satisfied and that the continuation of the detention is essential. This needs to be done in both the initial and the periodic judicial reviews. In this context we held that importance should be attached both to the quantity and the quality of the evidence against the detainee and to the extent that the relevant intelligence information against him is up to date (see paragraphs 22 and 23 above).

*Fourth*, we saw fit to attribute significant weight to the fact that detention orders under the Internment of Unlawful Combatants Law are subject to an initial and periodic judicial reviews before a District Court judge, whose decisions may be appealed to the Supreme Court, which will hear the case with one judge. Within the framework of the aforesaid proceedings, the judge is required to consider the question of the validity and credibility of the administrative evidence that is brought before him and to assess its weight. In view of the reliance upon administrative evidence and the fact that privileged evidence is admitted *ex parte*, we held that the judge should act with caution and great care when examining the material brought before him. We also held that a court that exercises judicial review of detention under the law may restrict and shorten the period of detention in view of the nature and weight of the evidence brought before him with regard to the security threat presented by the detainee as an 'unlawful combatant,' and in view of the time that

has passed since the detention order was made. For this reason we said that it is possible, by means of the judicial review, to ensure that the lack of a specific date for the termination of the detention order under the law does not excessively violate the right to personal liberty, and that detainees under the law will not be held in detention for a longer period than what is required by significant security considerations (paragraph 46 above).

*Finally*, although the arrangements that were provided in the law for the purpose of exercising the power of detention therein are not the only possible ones, we reached the conclusion that the statutory arrangements that we considered do not depart from the margin of proportionality to an extent that required our intervention. In our remarks above we emphasized that the periods of time that were determined in the law with regard to holding an initial judicial review after the detention order has been made, and with regard to preventing a meeting between the detainee and his lawyer, constitute maximum periods that do not exempt the state from the duty to make an effort to shorten these periods in each case on its merits, in so far as this is possible in view of the security constraints and all of the circumstances of the case. We also held that detention under the Internment of Unlawful Combatants Law cannot continue indefinitely, and that the question of the proportionality of the duration of the detention must also be examined in each case on its merits according to the specific circumstances.

In view of all of the aforesaid considerations, and in view of the existence of a relatively broad margin of constitutional appreciation in view of the essential purpose of the law as explained above, our conclusion is that the Internment of Unlawful Combatants Law satisfies the third subtest of the requirement of proportionality, namely that the violation of the constitutional right to personal liberty is reasonably commensurate with the benefit accruing to the public from the aforesaid legislation. This conclusion of ours is based on the fact that according to the interpretation that we discussed above, the law does not allow the detention of innocent persons who have no real connection with the cycle of hostilities of the terror organizations, and it provides mechanisms whose purpose is to reduce the violation of the detainees' rights, including a ground for detention that is based on a threat to state security and the holding of a hearing and initial and periodic judicial reviews of detention under the law.

Therefore, for all the reasons that we have mentioned above, it is possible to determine that the violation of the constitutional right to personal liberty caused by the law, although it is a significant and severe violation, is not excessive. Our conclusion is therefore that the Internment of Unlawful Combatants Law satisfies the conditions of the limitations clause and there is no constitutional ground for our intervention.

*From general principles to the specific case*

50. As we said at the outset, the appellants, who are inhabitants of the Gaza Strip, were originally detained in the years 2002-2003, when the Gaza Strip was subject to a belligerent occupation. At that time, the administrative detention of the appellants was effected by virtue of the security legislation that was in force in the Gaza Strip. Following the end of military rule in the Gaza Strip in September 2005 and the cancellation of the security legislation in force there, on 20 September 2005 the chief of staff issued detention orders for the appellants under the Internment of Unlawful Combatants Law.

On 22 September 2005 the Tel-Aviv-Jaffa District Court began the initial judicial review of the appellants' case. From then until now the District Court has held four periodic judicial reviews of the appellants' continuing detention. The appeal against the decision of the District Court not to order the release of the appellants within the framework of the initial judicial review was denied by this court on 14 March 2006 (Justice E. Rubinstein in CrimA 1221/06 *Iyyad v. State of Israel* [54]). Before us are the appeals on three additional periodic decisions of the District Court not to order the cancellation of the appellants' detention orders.

51. In their pleadings before us, the appellants raised two main arguments with regard to their specific cases: *first*, it was argued that according to the provisions of the Fourth Geneva Convention, Israel should have released the appellants when the military rule in the Gaza Strip ended, since they were inhabitants of an occupied territory that was liberated. *Second*, it was argued that even if the Internment of Unlawful Combatants Law is constitutional, no ground of detention thereunder has been proved with regard to the appellants. According to this argument, it was not proved that the appellants are members of the Hezbollah organization nor has it been proved that their release would harm state security.

52. We cannot accept the appellants' first argument. The end of military rule in the Gaza Strip did not oblige Israel to release automatically all the detainees held by it who are inhabitants of the Gaza Strip, as long as the personal threat that the detainees represented continued against the background of the continued hostilities against the State of Israel. This conclusion is clearly implied by the arrangements set out in articles 132-133 of the Fourth Geneva Convention. Section 132 of the aforesaid convention provides the general principle that the date for the release of detainees is when the grounds of detention that originally led to their detention no longer exist. The first part of article 133 of the convention, which relates to a specific case that is included within the scope of the aforesaid general principle, goes on to provide that the detention will end as soon as possible after the hostilities have ended. Article 134 of the convention, which concerns the question of the place where the detainees should be released, also relates to the date on which hostilities end as the date on which detainees should be released from detention. Unfortunately, the hostilities of the terrorist organizations against the State of Israel have not yet ended, and they lead almost on a daily basis to physical injuries and mortalities. In such circumstances, the laws of armed conflict continue to apply. Consequently it cannot be said that international law requires Israel to release the detainees that were held by it when the military rule in the Gaza Strip came to an end, when it is possible to prove the continued individual threat presented by the detainees against the background of the continued hostilities against the security of the state.

53. With regard to the specific internment orders against the appellants under the Internment of Unlawful Combatants Law, the District Court heard the testimonies of experts on behalf of the security establishment and studied the evidence brought before it. We have also studied the material that was brought before us during the hearing of the appeal. The material shows clearly the close links of the appellants to the Hezbollah organization and their role in the organization's ranks, including involvement in hostilities against Israeli civilian targets. In view of this, we have been persuaded that the individual threat of the appellants to state security has been proved, even without resorting to the probative presumption provided in section 7 of the law (see and cf. the remarks of Justice E. Rubinstein in *Iyyad v. State of Israel*, at paragraph 8(k) of his opinion). In view of the aforesaid, we cannot accept the appellants' claim that the change in the form of their

detention — from detention by virtue of an order of the IDF Commander in the Gaza Strip to internment orders under the law — was done arbitrarily and without any real basis in evidence. As we have said, the change in the form of detention was required by the end of the military rule in the Gaza Strip, and that was why it was done when it was done. The choice of internment under the Internment of Unlawful Combatants Law as opposed to detention under the Emergency Powers (Detentions) Law was made, as we explained above, because of the purpose of the law under discussion and because it is appropriate to the circumstances of the appellants' cases.

The appellants further argued that their release does not represent any threat to state security since their family members who were involved in terrorist activities have been arrested or killed by the security forces in such a way that the terrorist infrastructure that existed before they were detained no longer exists. They also argued that the passage of time since the appellants were arrested reduces the risk that they represent. With regard to these arguments it should be said that after we examined the material brought before us, we have been persuaded that the arrest or death of some of the appellants' family members in itself does not remove the security threat that would be presented by the appellants, were they released from detention. We were also persuaded that, in the circumstances of the case, the time that has passed since the appellants were first detained has not reduced the threat that they present. In its decision in the third periodic review, the trial court addressed this issue as follows:

> 'The total period of the detention is not short. But this is countered by the threat anticipated to state security, if the internees are released. As we have said, a proper balance should be struck between the two. The experts are once again adamant in their opinion that there is a strong likelihood that the two internees will return to their terrorist activity if they are released. In such circumstances, the operational abilities of the Hezbollah infrastructure in the Gaza Strip and outside it will be improved and the threats to the security of the state and its citizens will be increased. The current situation in the Gaza Strip is of great importance to our case. The fact that the Hamas organization has taken control of the Gaza Strip and other recent events increase

> the risks and, what is more, the difficulty of contending with them…
>
> It would therefore be a serious and irresponsible act to release these two persons, especially at this time, when their return to terrorism can be anticipated and will increase the activity in this field…
>
> I cannot say, therefore, that the passage of time has reduced the threat presented by the two internees who are senior figures in the terrorist infrastructure, despite the differences between them. The passage of time has also not reduced the threat that they represent to an extent that will allow their release.'

In its decision in the fourth periodic review the trial court also emphasized the great threat presented by the two appellants, and said that:

> 'The privileged evidence brought before me shows that the return of the two to the field is likely to act as a springboard for serious attacks and acts of terror. In other words, according to the evidence brought before me, the respondents are very dangerous. In my opinion it is not at all possible to order their release. This conclusion does not ignore the long years that the two of them have been held behind prison walls. The long period of time has not reduced the threat that they represent' (at page 6 of the court's decision of 20 March 2008).

In view of all of the aforesaid reasons, and after we have studied the material that was brought before us and have been persuaded that there is sufficient evidence to show the individual security threat represented by the appellants, we have reached the conclusion that the trial court was justified when it refused to cancel the internment orders in their cases. It should be pointed out that there is naturally increasing significance to the passage of time when we are dealing with administrative detention. Notwithstanding, at the present time we have found no reason to intervene in the decision of the trial court.

In view of the result that we have reached, we are not required to examine the appellants' argument against the additional reasoning that the trial court included in its decision, with regard to the fact that the evidence was strengthened by the silence of the first appellant in the

judicial review proceeding that took place in his case, a proceeding that was based, *inter alia*, on privileged evidence that was not shown to the detainee and his counsel. The question of the probative significance of a detainee's silence in judicial review proceedings under the Internment of Unlawful Combatants Law does not require a decision in the circumstances of the case before us and we see no reason to express a position on this matter.

Therefore, for all of the reasons set out above, we have reached the conclusion that the appeals should be denied.

**Justice E.E. Levy**

I agree with the comprehensive opinion of my colleague, the president.

It is in the nature of things that differences may arise between the rules of international humanitarian law, and especially those in writing, and the language of Israeli security legislation, if only because those conventions that regulate the conduct of players on the international stage were formulated in a very different reality, and their drafters did not know of entities such as the Hezbollah organization and the like.

Therefore in so far as it is possible to do so by means of legal interpretation, the court will try to narrow these differences in a way that realizes both the principles of international law and the purpose of internal legislation. In this regard I will say I would have preferred to refrain from arriving at any conclusions, even in passing, with regard to the provisions of sections 7 and 8 of the Internment of Unlawful Combatants Law, 5762-2002. These provisions are a central part of this law, as enacted by the Knesset. In so far as there are differences between them and the provisions of international law, as argued by the appellants and implied by the state's declarations with regard to the manner in which it conducts itself *de facto*, it would be preferable if the legislature took the initiative and addressed the matter.

**Justice A. Procaccia**

I agree with the profound opinion of my colleague, President Beinisch.

Appeals denied.
8 Sivan 5768.
11 June 2008.

## Physicians for Human Rights v. Prime Minister

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### Synopsis

Since 2000, when the Second Intifadeh broke out, Palestinian terrorist organizations in the Gaza Strip have fired rockets and mortars into the State of Israel. In the summer of 2005, Israel withdrew all its forces from the Gaza Strip and evacuated all the Israeli citizens inhabiting the Gaza Strip. Regrettably, this led to a surge in the firing of rockets and mortars from the Gaza Strip into the State of Israel, both in terms of the number of missiles fired and in terms of the ever-increasing range of the various missiles.

For years Israel acted with restraint, but during this period the terrorists acted in order to increase their military capabilities, by smuggling arms through tunnels under the border with Egypt.

On 19 December 2008, a six-month period of 'calm' between Israel and the Hamas organization, which has effective control over the Gaza Strip, came to an end. The Hamas organization announced that it had no intention of extending the ceasefire. In order to stop the firing of missiles into the State of Israel, on 27 December 2008 the Israel Defence Forces (IDF) began a large-scale operation ('Cast Lead') in the Gaza Strip.

The two petitions in this case were filed by human rights organizations. One petition claimed that the IDF had carried out attacks on medical personnel and was not allowing the prompt evacuation of the injured for medical treatment, contrary to its obligations under international humanitarian law. The other petition addressed the shortage of fuel in the Gaza Strip since the 'Cast Lead' operation began, and the damage to electricity lines resulting from the military operations. It was alleged that as a result hospitals and the main sewage plant in the Gaza Strip were unable to function properly, leading to serious hardship for the civilian population of the Gaza Strip.

The Supreme Court reiterated that the IDF's combat operations are governed by international humanitarian law, which requires 'protected civilians' to be treated humanely and protected against acts of violence. Medical facilities and personnel may not be attacked, unless they are exploited for military purposes. The IDF is obliged to allow the evacuation and treatment of the wounded and to permit the entry of convoys of humanitarian relief into the Gaza Strip.

The respondents did not dispute their duties under international humanitarian law and they gave detailed explanations of all the measures that had been and were being taken in order to discharge these duties and to minimize civilian casualties. They gave details of the steps taken to repair the damage to infrastructure in Gaza and to allow the evacuation of the injured.

In view of the establishment and enhancement of the humanitarian mechanisms; in view of the statement made to us that a serious effort will be made to improve the evacuation and treatment of the wounded; in view of the setting up of a clinic in the vicinity of the Erez crossing; in view of the steps that have been taken in order to repair the faults in the electricity network in the Gaza Strip; and in view of the efforts that have been made to facilitate the entry into the Gaza Strip of industrial diesel oil for operating the local power station in Gaza, as well as additional humanitarian requirements; the court found no further reason to grant relief in the form of an order *nisi* at this time.

HCJ 201/09

**Physicians for Human Rights**
**and others**
**v.**
**Prime Minister of Israel**
**and others**

HCJ 248/09

**Gisha Legal Centre for Freedom of Movement**
**and others**
**v.**
**Minister of Defence**

The Supreme Court sitting as the High Court of Justice
[19 January 2009]
*Before President D. Beinisch and Justices A. Grunis, E. Rubinstein*

Petition to the Supreme Court sitting as the High Court of Justice.

**Facts:** Following years during which rockets were fired at Israel from the Gaza Strip, on 27 December 2008 the IDF began a large-scale military operation in the Gaza Strip. The petition in HCJ 201/09 concerns delays in evacuating the wounded to hospitals in the Gaza Strip, and claims that ambulances and medical personnel are being attacked by the IDF. The petition in HCJ 248/09 addresses the shortage of electricity in the Gaza Strip, which prevents hospitals, clinics, the water system and the sewage system from functioning properly. According to the petitioners, this is a result of disruptions caused by the IDF.

**Held:** The IDF's combat operations are governed by international humanitarian law. This requires 'protected civilians' to be treated humanely and protected against acts of violence; medical facilities and personnel may not be attacked, unless exploited for military purposes; the evacuation and treatment of the wounded and convoys of humanitarian relief should be allowed. The respondents do not dispute their duties under international humanitarian law and they gave detailed explanations of all the measures that have been and are being carried out in order to discharge these duties. In such circumstances, the court found no basis for granting relief.

Petition denied.

**Israeli Supreme Court cases cited:**


[1] HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [2004] IsrSC 58(5) 385; **[2004] IsrLR 200**.

[2] HCJ 3452/02 *Almadani v. Minister of Defence* [2002] IsrSC 56(3) 30; **[2002-3] IsrLR 47**.

[3] HCJ 3114/02 *Barakeh v. Minister of Defence* [2002] IsrSC 56(3) 11; **[2002-3] IsrLR 39**.

[4] HCJ 769/02 *Public Committee against Torture v. Government* **[2006] (2) IsrLR 459**.

[5] HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* **[2005] (2) IsrLR 206**.

[6] HCJ 2117/02 *Physicians for Human Rights v. IDF Commander in West Bank* [2002] IsrSC 53(3) 26.

[7] HCJ 3278/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [2003] IsrSC 57(1) 385; **[2002 3] IsrLR 123**.

[8] HCJ 5591/02 *Yassin v. Commander of Ketziot Military Camp* [2003] IsrSC 57(1) 403.

[9] HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(2) 349; **[2002-3] IsrLR 173**.

[10] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.

[11] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.

[12] HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* (not yet reported).

[13] HCJ 102/82 *Tzemel v. Minister of Defence* [1983] IsrSC 37(3) 365.

[14] HCJ 69/81 *Abu Ita v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(2) 197.

[15] HCJ 9132/07 *Al-Bassiouni v. Prime Minister* **[2006-9] IsrSR 215**.

[16] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.

[17] CrimA 6659/06 *A v. State of Israel* **[2006-9] IsrSR 230**.

[18] HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(4) 785.

[19] HCJ 2936/02 *Physicians for Human Rights v. IDF Commander in West Bank* [2002] IsrSC 56(3) 3; **[2002-3] IsrLR 35**.

**Jewish law sources cited:**
[20] Jerusalem Talmud, *Sanhedrin* 4, 9.
[21] Tosefta, *Shabbat* 16, 14.

For the petitioners — T. Feldman, Y. Elam, F. El-Ajou, H. Jabarin.
For the respondents — A. Helman, A. Segal-Elad, H. Gorni.

## JUDGMENT

**President D. Beinisch**

1. We have before us two petitions filed by human rights organizations, which concern the humanitarian situation in the Gaza Strip due to the state of hostilities that prevails there as a result of the military operation known as 'Cast Lead.' The petition in HCJ 201/09 addresses delays in evacuating persons wounded in the Gaza Strip to hospitals, and claims that ambulances and medical personnel are being attacked by the Israel Defence Forces (the 'IDF'). The petition in HCJ 248/09 addresses the shortage of electricity in the Gaza Strip, which prevents hospitals, clinics, the water system and the sewage system from functioning properly. According to the petitioner, this is a result of disruptions caused by the IDF.

*Background*

2. For approximately eight years the towns near the Gaza Strip have confronted the threat of missiles and mortars that are fired by members of the terrorist organizations that operate from within the Gaza Strip and are directed at the civilian population in the cities and towns of southern Israel. After the Hamas organization came to power in Gaza, the terrorist operations became more intense and more numerous. The scope of the attacks was extended to a large part of Israel; the range of the missile attacks became greater, causing the deaths of civilians and disrupting the lives of all the residents of southwest Israel.

For a long time, while Israel acted with restraint and moderation, the terrorist organizations in the Gaza Strip, led by Hamas, took steps to increase their abilities, smuggled a huge quantity of weapons and missiles through hundreds of subterranean tunnels that they dug, improved the weapons that they used and increased the threat to the inhabitants within range of the missiles.

3. On 27 December 2008 the IDF began a large-scale military operation that Israel initiated in the Gaza Strip, in order to stop the shooting of mortars and Qassam and Grad rockets at the Israeli towns in the south of the country, and to change the security position in the south of the country that had been brought about by Hamas, the terrorist organization that controls the Gaza Strip. In the course of this operation, the Israeli Air Force attacked targets that are used by the Hamas leadership in the Gaza Strip, and on 3 January 2009 tanks, infantry and engineering forces entered the fighting in the Gaza Strip. Intensive fighting is taking place in the area in difficult conditions. The military compounds and targets are situated in areas that are inhabited by the civilian population, and sometimes even in actual homes. Regrettably the local population is suffering serious and considerable harm.

4. The two petitions were filed on 7 January 2009, and on 9 January 2009 we held an urgent hearing of both of them. During the hearing it became clear from the state's response that the IDF had set up a humanitarian operations room, which was intended to contend with the coordination difficulties in evacuating the injured, and that operations were being carried out to restore the electricity infrastructure in the Gaza Strip. Unfortunately, the hearing on 9 January 2009 was not attended by any of the army personnel responsible for the humanitarian situation in the Gaza Strip, in order to clarify the position and the manner in which the humanitarian mechanisms set up by the state were operating, and to respond to specific questions. We therefore decided at the end of the hearing that the state needed to submit a detailed response with regard to the mechanisms that it had set up and the steps that it had taken in order to allow the evacuation of the wounded in a more effective manner. We also found that we required an update with regard to the operations that were being carried out in order to repair the electricity lines and the electricity supply to the Gaza Strip. We therefore ordered counsel for the state to submit a revised detailed response, supported by an affidavit of a senior officer responsible for the humanitarian arrangements in the Gaza Strip. On 13 January 2009 the state filed its detailed response together with the affidavit of the head of the District Coordination Office for the Gaza Strip, Colonel Moshe Levy, and on 15 January 2009 we held an additional hearing of the petition, to which Colonel Levy was summoned. Shortly before the hearing the petitioners also filed revised statements.

*The arguments of the petitioner in HCJ 201/09*

5. The petitioner claims that since the military operation in the Gaza Strip began on 27 December 2008, there have been many cases in which the IDF forces shot at medical personnel while they were carrying out their duties, despite the fact that the vehicles and uniforms of the medical personnel bear the distinguishing mark that is recognized and agreed in the Geneva conventions. It alleges that on 4 January 2009 alone four medical personnel were killed as a result of an IDF strike while they were carrying out their duties, and it gave details of additional cases in which medical personnel were injured as a result of IDF attacks. An additional claim made by the petitioner is that the Palestinian Red Crescent and the International Red Cross have encountered serious difficulties in coordinating the evacuation of the injured for medical treatment, because of the ongoing military operations, the refusal of the army to allow movement between the north and the south of the Gaza Strip and coordination difficulties. According to the petitioner, many hours pass from the time when the coordination request is made until the time when it is actually carried out. It is alleged that in some cases the medical personnel waited a whole day for coordination. According to the petitioner, these attacks on the medical personnel and the evacuation efforts are contrary to the provisions of customary international humanitarian law and are also prohibited under the constitution of the International Criminal Court; they are also contrary to the provisions of Israeli administrative law, in that they are disproportionate. Finally the petitioner requested that the court make an interim order that the respondents should allow and coordinate the evacuation of the injured members of the Elaidi family, who were injured by shells fired by the IDF at their home on the night of 3 January 2009 and who have been trapped in their home since that night because all of the coordination efforts to evacuate them have been unsuccessful. In the petitioner's revised statement, which was only filed on the date of the last hearing, details were given of additional incidents in which it was alleged that shots were fired at medical personnel and swift assistance was not given to families that were injured.

*The arguments of the petitioners in HCJ 248/09*

6. This petition focuses on the shortage of electricity in the Gaza Strip; in the petition, the petitioners gave details of the quantities of electricity and industrial diesel oil that are needed in the Gaza Strip, as

compared with the quantities that Israel allowed to enter the Gaza Strip in recent months. It was alleged that since 27 December 2008 the State of Israel has prevented any entry of industrial diesel oil into the Gaza Strip, and as a result the power station in the Gaza Strip (which supplies approximately a third of the amount of electricity needed by the inhabitants of the Gaza Strip) has been completely shut down since 30 December 2008. It was also alleged in the petition that on 3 January 2009 an IDF attack in the Gaza Strip damaged seven of the twelve electricity lines that bring electricity from Israel and Egypt into the Gaza Strip. As a result, it was alleged that the inhabitants, including hospitals, the main sewage purification plant in the Gaza Strip and other essential facilities, were deprived of electricity. It was further alleged that it is impossible to repair the damaged electricity lines because Israel is preventing the transfer of the necessary spare parts and because of the ongoing hostilities, which do not allow sufficient time for Palestinian workers to make the repairs. The petitioners gave details in their petition of the humanitarian harm to the civilian population that results from the shortage of electricity: thousands of people do not have access to running water; sewage has spilled onto the streets as a result of the shortage of electricity for the sewage pumps and purification facilities, and at the purification plant in the city of Gaza the spillage has so far reached a distance of approximately one kilometre from the plant; approximately a quarter of a million people have had no electricity for more than two weeks; the hospitals in the Gaza Strip are completely dependent on generators, which are going to break down entirely because they are operating round the clock beyond their capacity; the activity of most of the bakeries in the Gaza Strip has been stopped because of a shortage of cooking gas and electricity, and this has led to a serious shortage of bread in the Gaza Strip. In this respect it was alleged in the petition that since the State of Israel controls the supply of electricity to the Gaza Strip, especially at the present when the IDF forces control large parts of the Gaza Strip, the State of Israel has a greater duty to provide the needs of the civilian population in the Gaza Strip, especially with regard to the proper functioning of medical facilities, water supply facilities and sewage facilities.

*The respondents' arguments*

7. The respondents' preliminary response to the two petitions, which was filed on 8 January 2009, contained legal argument and initial factual contentions on the merits of the case. In their revised statements that

were filed in the court and at the hearings that we held on the petitions, the respondents gave additional descriptions of the factual position in the Gaza Strip, in so far as circumstances allowed. Originally they requested that we dismiss the petitions *in limine* because they are too general and because the matters raised in them are not justiciable. They argued that while the hostilities are taking place, the court cannot address issues of this kind, if only for the reason that it is not possible to present the dynamic picture of the battlefield to the court in real time. Notwithstanding the respondents stated that the IDF is operating in accordance with international humanitarian law, and it accepts that the army has duties to respect the humanitarian needs of the civilian population even during hostilities and that preparations to this effect should be made in advance, as this court held in HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [1], subject to any changes required by the circumstances. In this context it was alleged that since the disengagement plan was implemented in September 2005, there is no longer any state of occupation in the Gaza Strip and the State of Israel has no control over what is done in it. Therefore there is today no 'military commander,' within the meaning of this term under the laws of occupation, who can operate throughout the Gaza Strip. It was also argued that since there are no channels of communication between Israel and the terrorist leadership of the Hamas organization in the Gaza Strip, it is necessary to make the various humanitarian arrangements with international organizations and with the Palestinian Civil Committee, whose offices are in Ramallah.

8. With regard to the various mechanisms that have been established by the State of Israel for providing humanitarian assistance for the civilian population in the Gaza Strip, the state set out in its response that prior to the military operation known as 'Cast Lead,' an additional sixty-six reserve officers and twenty regular officers were assigned to the District Coordination Office for Gaza, and the District Coordination Office as a whole was increased to a complement of three hundred staff. Moreover a set of humanitarian operation rooms was set up, each for a separate issue: health, international organizations and infrastructures. The purpose of these is to provide a solution in real time for the humanitarian problems that arise during the fighting and to strengthen communications between the operation forces and the coordination authorities. Each of these war rooms operates twenty-four hours a day, with on-site professional and legal support. Furthermore, a humanitarian

unit was established in each operational division; each of these has five officers, and their purpose is to coordinate the operations in the field with the international organizations. It was claimed that the activities are also coordinated with private organizations that are known to the District Coordination Office, and also with the doctor in charge at Al-Shifa Hospital, the Ministry of Health in Ramallah and sometimes also with individual doctors and ambulance drivers.

9. With regard to the evacuation of the wounded and the coordination of the movements of medical personnel in the Gaza Strip, it was argued in the state's response that the guideline that was given to the forces operating in the area is to refrain from attacking medical personnel and ambulances in the course of carrying out their duties, except in cases where it is clearly known that ambulances are been exploited for the purpose of fighting the IDF. According to the respondents, from intelligence information that they have in their possession it transpires that terrorists are making use of ambulances to carry out terrorist activity and to transport rockets and ammunition from one place to another, and in these circumstances even international humanitarian law provides that these protected institutions lose the protection that they usually enjoy. Setting up the coordination mechanism was intended to ensure that humanitarian rescue operations are carried out. The respondents further argued that they do not have complete and up-to-date information, but in so far as medical personnel have been and are being harmed during the fighting, this has not been done intentionally, but it is a result of the hostilities that have been taking part in the vicinity. The respondents also pointed out in this respect that it is well known that IDF forces have also been injured by mistake as a result of shots fired by other IDF forces. The respondents gave details of the measures taken before and during the military operations in order to maintain and improve the coordination of the evacuation of the wounded. With regard to the application for an interim order for the immediate evacuation of the members of the Elaidi family, the respondents said at the hearing of 9 January 2009 that after making arrangements with the forces in the field and the Palestinians, the evacuation of the members of the family was completed, with the exception of two adult women who chose not to be evacuated.

10. With regard to the claims concerning the supply of electricity to the Gaza Strip during the operation, the respondents said that in view of the ongoing combat operations in the Gaza Strip it is not possible to

ensure there is no damage to the local electricity network. They argued that although the electricity network in the Gaza Strip was indeed damaged during the IDF's combat operations, operations were carried out all the time to repair the electricity lines that were damaged during the combat operations. At the last hearing that we held, we were told that nine of the ten electricity lines that provide electricity from Israel to the Gaza Strip had been repaired, a fault would be repaired in the other line and that the state was taking steps to allow optimal supply of electricity to the Gaza Strip, subject to the security restrictions and constraints that will be described below.

*Judicial review*

11. It should be stated at the outset that we do not accept the preliminary arguments of the state in which we were requested to dismiss the petitions *in limine* because they are not justiciable. We have already held in a series of judgments that the combat operations of the IDF do not take place in a normative vacuum. There are legal norms in customary international law, in treaties to which Israel is a party and in Israeli law, which provide rules and principles that apply in times of war and which demand that steps are taken to provide humanitarian assistance and protection for the civilian population (see, for example, HCJ 3452/02 *Almadani v. Minister of Defence* [2], at p. 35 {53}; HCJ 3114/02 *Barakeh v. Minister of Defence* [3], at p. 16 {46}; *Physicians for Human Rights v. IDF Commander in Gaza* [1], at pp. 391-393 {205-208}). In HCJ 769/02 *Public Committee against Torture v. Government* [4], we discussed this question at length, and in our decision President A. Barak said the following:

> 'Indeed, in a whole host of judgments the Supreme Court has considered the rights of the inhabitants of the territories. Thousands of judgments have been given by the Supreme Court, which, in the absence of any other competent judicial instance, has addressed these issues. These issues have concerned the powers of the army during combat and the restrictions imposed on it under international humanitarian law. Thus, for example, we have considered the rights of the local population to food, medicines and other needs of the population during the combat activities (*Physicians for Human Rights v. IDF Commander in Gaza* [1]); we have considered the rights of the local population when terrorists

> are arrested (HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [5]); when transporting the injured (HCJ 2117/02 *Physicians for Human Rights v. IDF Commander in West Bank* [6]; when besieging a church (*Almadani v. Minister of Defence* [2]); during arrest and interrogation (HCJ 3278/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [7]; HCJ 5591/02 *Yassin v. Commander of Ketziot Military Camp* [8]; HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [9]). More than one hundred petitions have examined the rights of the local inhabitants under international humanitarian law as a result of the construction of the separation fence (see HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [10]; HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [11]; HCJ 5488/04 *Al-Ram Local Council v. Government of Israel* [12]). In all of these the predominant character of the question in dispute was legal. Admittedly, the legal answer is likely to have political and military ramifications. But they did not determine the nature of the question. It is not the results that arise from the judgment that determine its nature, but the questions that are considered by it and the way in which they are answered. These questions have in the past been, and they remain today, predominantly of a legal nature' (*Public Committee against Torture v. Government* [4], at para. 52).

12. As can be seen from the judgment in *Physicians for Human Rights v. IDF Commander in Gaza* [1] and from additional judgments, cases in which the court examines the legality of military operations while they are happening are not uncommon occurrences, in view of the reality of our lives in which we are constantly confronting terrorism that is directed against the civilian population of Israel, and in view of the need to respond to it while discharging the duties imposed by law even in times of combat. Of course, the court does not adopt any position with regard to the manner in which military operations are conducted or with regard to the wisdom of the decisions to carry out military operations. Notwithstanding, it is the role of the court, even in times of combat, to determine whether within the framework of the combat operations the obligation to act in accordance with legal guidelines — both within the

context of Israeli law and within the context of international humanitarian law — is being upheld.

13. In the present case the petitions were filed while the hostilities were still taking place in the area, and they request guidelines for the immediate conduct of the army in humanitarian matters in order to benefit the civilian population that finds itself at the heart of the hostilities taking place around it. Our judicial scrutiny is exercised in such a case while the hostilities are continuing. Naturally this imposes restrictions upon the court's ability to exercise its scrutiny and to ascertain all of the relevant facts at this stage of the hostilities. The difficulty of obtaining information in real time was discussed in our judgment in *Physicians for Human Rights v. IDF Commander in Gaza* [1] (at para. 8 of the judgment). Indeed, while the hostilities are taking place it is not always possible to obtain all of the information that is required for exercising judicial scrutiny, in view of the dynamic changes that are continually occurring. But the court endeavours to examine the claims in real time, so that it may grant effective relief or arrive at an agreed settlement. Thus, for example, I said in this respect in *Physicians for Human Rights v. IDF Commander in Gaza* [1] that:

> '… judicial review concerning the fulfilment of humanitarian obligations during wartime is limited for many reasons. First, from a practical viewpoint, the urgency with which the court is required to hold the judicial review process, while dynamic developments are taking place in the field of battle, makes it difficult to carry out the process and to make an investigation of the facts required to authenticate the contentions of the parties. Unlike the process of judicial review in regular petitions, where the mechanism of ascertaining the facts takes place after they have occurred and the particulars has been clarified, and the factual picture has been set out before the court, judicial review that seeks to examine the need for relief when the combat activities are still in progress requires a judicial proceeding of a special kind, and the petition before us is a clear example of this. The petition was heard while the changes and developments in the field were taking place during the hearing itself. The parties that presented their arguments before us based their contentions on continuous reports from the field of battle, and these reports changed the circumstances and the facts

> during the hearing of the petition. The factual description of ascertaining the particulars as aforesaid finds expression in the opinion of the President. In such circumstances, the judicial review process is limited and suffers from the lack of adequate arrangements with which to ascertain the relevant particulars in order to examine them in real time and to grant effective relief for them.'

Naturally, where it is not possible to obtain all of the necessary information in real time, the legality of specific incidents is often reviewed retrospectively, after all of the necessary information has been obtained, whereas while the hostilities are taking place, the role of the court focuses upon exercising scrutiny as to whether the army is upholding the rules of customary international law, international treaties and Israeli administrative law during the hostilities.

*The normative arrangements*

14. The normative arrangements that govern the armed conflict between the State of Israel and the Hamas organization are complex. They revolve around the international laws relating to an international armed conflict. Admittedly, the classification of the armed conflict between the state of Israel and the Hamas organization as an international conflict raises several difficulties. But in a host of judgments we have regarded this conflict as an international conflict. Thus, for example, we held in the judgment in *Public Committee against Torture v. Government* [4], *per* President Barak:

> 'Contending with the risk of terror constitutes a part of international law that concerns armed conflicts of an international nature… the premise on which the Supreme Court has relied for years — and which also was always the premise of counsel for the state before the Supreme Court — is that the armed dispute is of an international character. In this judgment we are continuing with this approach. It should be noted that even those who think that the armed dispute between Israel and the terrorist organizations is not of an international character hold that it is subject to international humanitarian law or international human rights law' (*Public Committee against Torture v. Government* [4], at para. 21).

In addition to the laws concerning an international armed conflict, the laws of belligerent occupation may also apply. In HCJ 102/82 *Tzemel v. Minister of Defence* [13], this court held that the application of the laws of occupation in international humanitarian law depends upon the existence of a potential to exercise administrative powers on the ground as a result of the entry of military forces, and not necessarily upon the actual exercising of such power. It was also held that:

> 'If the army takes *de facto* and effective control of a certain area, the temporary nature of the presence in the area or the intention to maintain only temporary military control cannot derogate from the fact that such conditions give rise to the application of those provisions of the laws of war that address the consequences that also arise in the belligerent occupation. Moreover, the application of the third chapter of the Hague Regulations and the application of the corresponding provisions in the Fourth Geneva Convention are not dependent upon the establishment of a special organizational system that takes the form of military rule. The duties and powers of the military force that derive from the effective occupation of a certain territory come into existence as a result of the military control of the territory, i.e., even if the military force exercises its control solely through its ordinary combat units, without setting up and designating a special military framework for administration purposes (see HCJ 69/81 *Abu Ita v. IDF Commander in Judaea and Samaria* [14])' (*Tzemel v. Minister of Defence* [13], at p. 373).

Recently, in HCJ 9132/07 *Al-Bassiouni v. Prime Minister* [15], we discussed the changes in the factual and normative position in the Gaza Strip after the implementation of the disengagement plan and the abrogation of Israeli military rule in the Gaza Strip. We held:

> 'Since September 2005 Israel no longer has effective control of what happens in the territory of the Gaza Strip. The military administration that governed this territory in the past was abrogated by a decision of the government, and Israeli soldiers are no longer present in this territory on a permanent basis, nor do they control what takes place there. In such circumstances, the State of Israel does not have a

> general duty to ensure the welfare of the inhabitants of the Gaza Strip and to maintain public order in the Gaza Strip under all of the laws of occupation in international law. Israel also does not have an effective ability in its present status to impose order and to manage civilian life in the Gaza Strip. In the circumstances that have been created, the main obligations imposed on the State of Israel with regard to the inhabitants of the Gaza Strip derive from the state of hostilities that prevails between it and the Hamas organization that rules the Gaza Strip; these obligations derive also from the degree to which the State of Israel controls the border crossings between it and the Gaza Strip and also from the connection that was created between the State of Israel and the territory of the Gaza Strip after years of Israeli military rule of the territory, as a result of which for the time being the Gaza Strip is almost completely dependent upon the supply of electricity from Israel' (*Al-Bassiouni v. Prime Minister* [15], at para. 12 of the judgment).

The position described in *Al-Bassiouni v. Prime Minister* [15] as aforesaid is also dynamic and variable, and currently it is not yet possible to draw conclusions with regard to the factual position in the territory of the Gaza Strip and the scope of control that the IDF has in the new situation that has arisen. Notwithstanding, there is no need to decide this question now, since the state in any case agrees that the humanitarian laws that are relevant to the petitions apply.

15. According to the aforesaid, the normative arrangements that govern the State of Israel when it conducts combat operations in the Gaza Strip derive from several legal sources. These legal sources include international humanitarian law, which is enshrined mainly in the Fourth Hague Convention Respecting the Laws and Customs of War on Land, 1907, and the regulations annexed thereto, whose provisions have the status of customary international law; the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, whose customary provisions constitute a part of the law of the State of Israel and have required interpretation by this court in several judgments (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [16], at p. 364 {95-96}; *Marab v. IDF Commander in Judaea and Samaria* [9]; *Marabeh v. Prime Minister of Israel* [11], at para. 14 of the judgment); and the first Protocol Additional to the Geneva Conventions of 12 August 1949

Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereafter — 'the First Protocol'), to which Israel is not a party, but whose customary provisions also constitute a part of Israeli law (see *Public Committee against Torture v. Government* [4], at para. 20; CrimA 6659/06 *Iyad v. State of Israel* [17], at para. 9). In addition to international law, the fundamental rules of Israeli public law also apply (see HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [18], at p. 810; *Ajuri v. IDF Commander in West Bank* [16], at p. 365 {96}; *Marabeh v. Prime Minister of Israel* [11], at para. 14 of the judgment; *Public Committee against Torture v. Government* [4], at para. 18). According to the rules of Israeli public law, the army is liable to act, *inter alia*, fairly, reasonably and proportionately, while properly balancing the liberty of the individual against the needs of the public and while taking into account security considerations and the nature of the hostilities occurring in the area (see *Physicians for Human Rights v. IDF Commander in Gaza* [1], at para. 10).

16. The fundamental provision of international humanitarian law that applies while conducting hostilities (both in a territory subject to a belligerent occupation and in the territory of the parties to the conflict) is enshrined in art. 27 of the Fourth Geneva Convention, which provides that protected civilians — whether they are located in a territory that is subject to a belligerent occupation or a territory that is under the sovereignty of the parties to the conflict — are entitled in all circumstances, *inter alia*, to be humanely treated and to be protected against all acts of violence or threats thereof (see also art. 46 of the Hague Regulations). Notwithstanding, these basic obligations to the civilian population are not absolute, but they should be balanced against security considerations and the measures that need to be taken as a result of the hostilities. Alongside this general and basic provision, international humanitarian law contains additional specific obligations that relate directly to the matters raised in the petitions.

17. Before we turn to the specific laws that govern the matters raised in the petitions, we should point out that *de facto* there is no dispute between the parties with regard to the binding legal arrangements. Everyone agrees that the rules of customary international law — which grant protection to medical personnel and institutions, demand that the wounded should be allowed to be evacuated from the site of the hostilities and require the civilian population to be protected and its

basic rights to be upheld — apply to the combat operations that are being carried out in the 'Cast Lead' operation and bind the actions of the IDF.

*The prohibition of intentionally harming medical personnel*

18. The provisions of international humanitarian law grant protection to medical facilities and personnel from being attacked. Thus art. 18 of the Fourth Geneva Convention provides protection for hospitals; arts. 24-25 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, prohibit any attack upon medical personnel, if they are exclusively or currently engaged in medical activities; art. 26 of the Fourth Geneva Convention extends this protection to members of the Red Cross or other international organizations that fulfil similar functions (see also art. 20 of the Fourth Geneva Convention). A detailed definition of what constitutes protected medical personnel is laid down in art. 8(c) of the First Protocol, and detailed provisions with regard to the protections that are given to medical personnel are laid down in arts. 12-16 of the First Protocol.

19. It is clear from these provisions that international humanitarian law attaches great importance to medical personnel and facilities. Notwithstanding, this protection is not absolute, and it will be lost if use is made of medical facilities for non-humanitarian purposes, or if they are exploited for military purposes. In accordance with this principle, the medical personnel are only entitled to full protection when they are exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, and similar matters (arts. 24-26 of the First Geneva Convention), whereas the protection of medical facilities will cease if they are used 'to commit, outside their humanitarian duties, acts harmful to the enemy' (art. 21 of the First Geneva Convention; art. 19 of the Fourth Geneva Convention). In this regard, the Supreme Court emphasized in *Physicians for Human Rights v. IDF Commander in West Bank* [6], at p. 29, that the abuse that is sometimes made of medical personnel, hospitals and ambulances requires the IDF to act in order to prevent such activity, but it does not in itself permit a sweeping violation of the principles of humanitarian law, and that 'this position is required not only by international law, on which the petitioners rely, but also by the values of the State of Israel as a Jewish and democratic state.'

*The duty to allow the evacuation and medical treatment of the wounded*

20. In addition to the protections given by international humanitarian law to medical personnel and facilities, there are provisions that require the parties to allow the evacuation and medical treatment of the wounded. In this respect, art. 16 of the Fourth Geneva Convention provides a special protection for the sick and wounded, and it requires the parties to the conflict to allow and facilitate searches for and assistance of the wounded and to protect them from improper treatment, in so far as military considerations allow:

> 'The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.
>
> *As far as military considerations allow*, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded...'
>
> (Emphasis supplied).

In addition, art. 15 of the First Protocol provides that medical personnel should be allowed access to every site where they are needed, subject to supervision and security measures that are essential to the relevant party. In *Physicians for Human Rights v. IDF Commander in Gaza* [1] the court held in this regard that:

> 'The army must do everything possible, subject to the state of the fighting, to allow the evacuation of local inhabitants that were wounded in the fighting' (*ibid*. [1], at para. 23).

(See also HCJ 2936/02 *Physicians for Human Rights v. IDF Commander in West Bank* [19], at pp. 4-5 {37}; *Physicians for Human Rights v. IDF Commander in West Bank* [6], at p. 29).

*The duty to ensure the needs of the civilian population*

21. One of the fundamental principles of international humanitarian law is the principle that distinguishes combatants and military targets from civilians and civilian targets, and grants protection to the latter (see *Public Committee against Torture v. Government* [4]). *Inter alia*, the protections given to the civilian population of all of the parties to the conflict also include the duty to allow free passage of humanitarian medical supplies, as well as consignments of essential foodstuffs and clothing for children, pregnant women and mothers at the earliest opportunity, subject to several restrictions (art. 23 of the Fourth Geneva

Convention). Article 70 of the First Protocol provides a more general and broader duty, whereby parties to a conflict are obliged to allow the passage of articles that are essential for the civilian population, at the earliest opportunity and without delay. Article 30 of the Fourth Geneva Convention requires parties to a conflict to allow citizens to contact the Red Cross or similar international organizations, in order to receive assistance. In *Al-Bassiouni v. Prime Minister* [15] we considered these provisions expressly, and we held:

> 'The state's arguments in this regard are based on norms that are a part of customary international law, which set out basic duties that govern combatant parties during an armed conflict and require them to guarantee the safety of the civilian population and to protect its dignity and its basic rights. It is not superfluous to add that according to the rules of customary international humanitarian law each party to a conflict is bound to refrain from impeding the transfer of basic humanitarian items of aid to the population that requires them in the areas that are under the control of that party to the dispute.'

*From general principles to the specific case*

22. The respondents' position, as it was presented to us in their written statements and in the testimony of Colonel Levy during the hearing, is that they do not repudiate the obligations enshrined in international law as set out above and as they were interpreted by the court in *Physicians for Human Rights v. IDF Commander in Gaza* [1]. Thus Colonel Levy explained during the hearing of the petitions the mode of operation of the various mechanisms that they state set up in order to discharge the humanitarian obligations that govern it, and it discussed the various difficulties with which they were required to contend as a result of the complexity of the conflict and the lack of cooperation with the Hamas authorities. These difficulties include, for example, the refusal of the Hamas authorities to allow the IDF to evacuate the wounded to receive treatment in the State of Israel and the Hamas organization's cynical exploitation of the humanitarian ceasefires, which were initiated by the IDF, in order to rearm and carry out attacks against the IDF. From the aforesaid it appears that the dispute between the parties does not relate to the legal arrangements that bind Israel, but concerns the manner in which these obligations are to be discharged *de*

*facto*. We shall therefore give details below of the developments and changes in Israel's deployment for and ways of dealing with the humanitarian problems that underlie the petitions.

23. Within the framework of the obligations that the IDF confirms are binding upon it, preparations were made — some in advance and some in response to developments during the war — in order to contend with the collateral damage to the civilian population and in order to provide a response to the humanitarian needs of the local inhabitants. With regard to the various mechanisms that were established and enhanced during the fighting in order to contend with the difficulties of coordinating the evacuation of the wounded, the respondents said that on 5 January 2009 a special health operations room was established, under the command of an officer with the rank of major, who is responsible for providing a response to any civilian population that is in danger and for coordinating the evacuation of the wounded and the dead from the area where hostilities are taking place. Professional matters that arise in the operations room are decided by a doctor, who is an officer with the rank of lieutenant-colonel and who is available around the clock to receive communications from Palestinian inhabitants, the Palestinian health coordinator, the Red Cross and human rights organizations. Colonel Levy told us in great detail, in writing and orally, about the deployment of the officers and soldiers of the District Coordination Office among the combat units, and he explained how the various units communicate with one another in order to coordinate the evacuation of the wounded and to make it possible for them to be given safe passage by the combat units. Colonel Levy also gave details of the way in which each party contacts the humanitarian operations rooms that were set up, and he said that when a request is made to coordinate the evacuation of a wounded person, the operations room initiates contact with an international organization (the Red Cross operating through the Red Crescent or UNWRA) in order to coordinate the evacuation and the assistance of Palestinian personnel, and the IDF does all that it can in order to overcome difficulties in evacuating the wounded, which are sometimes caused as a result of the hostilities or damage to infrastructures. With regard to the alleged attacks on medical personnel, the respondents told us that in so far as there were any attacks upon medical personnel that were genuinely seeking to provide medical assistance, this did not happen as a result of a deliberate attack on the medical personnel. It was also claimed that a considerable number of problems have been caused

by the conditions in which the fighting is taking place, and in the same way Israeli soldiers have sustained serious injuries as a result of friendly fire.

Although Colonel Levy was willing to answer all of our questions, it was clear that he lacked information about the various incidents that took place during the evacuation of the wounded, in so far as the extent of the attacks on ambulances and medical personnel was concerned. Notwithstanding, the specific case of evacuation, for which an order was requested in the petition, was resolved during the hearing of the petition. With regard to other cases there is insufficient information at this stage to examine the contentions, and we asked Colonel Levy to provide us with detailed information concerning the additional cases that were brought before us by the petitioners on the date of the hearing. The use of ambulances and medical facilities that was allegedly made by the terrorist organizations in order to carry out and further combat operations without doubt greatly undermined the coordination of evacuation and rescue operations, and this is to be regretted. But as we said above, the army has a duty to examine each case on its merits and to do all that it can in order to allow the swift and safe passage of ambulances and medical personnel to the areas where there are injured and wounded persons that require treatment.

In view of the establishment and enhancement of the humanitarian mechanisms, which it may be assumed will prove their effectiveness, in view of the statement made to us that a serious effort will be made to improve the evacuation and treatment of the wounded, in view of the setting up of a clinic in the vicinity of the Erez crossing (and to the extent that the Palestinian side will also agree to the transfer of the wounded to Israel for treatment), it is to be hoped that the humanitarian mechanisms will operate properly in accordance with the obligations of the State of Israel. In these circumstances, we see no further reason to grant relief in the form of an order *nisi* at this time.

24. With regard to the problems of the electricity supply to the Gaza Strip, we were told that an infrastructures operations room was set up, and this is staffed twenty-four hours a day and is under the command of an officer with the rank of lieutenant-colonel, who is responsible for providing a response to infrastructure problems in the combat areas, obtaining an up-to-date picture of the economic situation and coordinating consignments of humanitarian aid to the Gaza Strip. In this

respect, the respondents explained that after receiving a request to coordinate the treatment of infrastructure problems, the operations room examines the nature of the problem and its effect on the civilian population, and subsequently, where this is required, it coordinates the arrival of Palestinian technical personnel at the site of the problem, together with an international organization. With regard to the current position concerning the supply of electricity to the Gaza Strip, we were told at the last hearing of the petitions that, as of the date of the hearing (15 January 2009), nine out of the ten electricity lines that transfer electricity from the State of Israel to the Gaza Strip had been repaired and were operating, and that the remaining line would be repaired. In addition, we were told that there is direct contact between the Palestinian Energy Authority and the Israeli Electric Corporation in order to identify problems and repair them as soon as possible. With regard to the two electricity lines that are transferring electricity from Egypt to the Gaza Strip, the respondents apprised us that as of the morning of 13 January 2009 the two lines were intact and operational. We were also told that as of 11 January 2009, the line that transfers electricity from the Palestinian power station throughout the Gaza Strip had been repaired and that the power station had returned to partial operation, with a supply of 50% of the manufacturing capacity of the station. In this respect Colonel Levy told us that in the course of the fighting significant quantities of industrial diesel oil had been brought into the Gaza Strip for the use of the Palestinian power station. According to him, the supply of industrial diesel oil had been reduced after a tunnel was discovered near the Nahal Oz crossing point, in which there was evidence of preparations for a major attack. Notwithstanding, despite the risk, the supply of industrial diesel oil to the Gaza Strip was renewed via the Kerem Shalom crossing point. Colonel Levy also told us that some of the fuel that is waiting on the Palestinian side of the Nahal Oz crossing point is not being transported from there by the Palestinians, because the international organizations have other priorities. He also clarified that the intention is to continue to send industrial diesel oil into the Gaza Strip for the purpose of operating the power station, subject to security constraints. He also said that four large vehicles containing equipment for maintaining the electricity network in the Gaza Strip entered the Gaza Strip between 9 January 2009 and 12 January 2009 (in this regard the petitioners claim in their revised statement that these spare parts were destroyed as a result of an IDF bombardment of the

storage facility where the parts were transported from the Karni station, and in this matter Colonel Levy was unable to provide us with any information).

25. In addition to the industrial diesel oil that was intended for operating the Palestinian power station, we were told by the respondents that in the course of the fighting 200,000 litres of diesel oil for transport, 234 tons of cooking gas, water hygiene and purification kits and bottled water were also brought into the Gaza Strip. He also said that in order to allow the distribution of the humanitarian supplies to the inhabitants of the Gaza Strip, the respondents decided to introduce cessations of hostilities in the Gaza Strip for several hours, during which they did not initiate any combat operations. Notwithstanding, these cessations of hostilities are exploited by the Hamas organization in order to rearm and carry out shooting attacks, and this sometimes interrupts the transfer of the humanitarian aid. In addition, we were told of the establishment of an operations room for dealing with the international organizations, under the command of an officer with the rank of lieutenant-colonel, who is responsible for coordinating the movement of the workers and vehicles of the international organizations within the framework of their (non-medical) humanitarian work in the Gaza Strip, and for coordinating the transfer of humanitarian donations from international organizations or foreign countries. This operations room is also responsible for obtaining an up-to-date picture of the humanitarian situation, on the basis of reports that are received from the various international bodies. Finally, we were told that an additional humanitarian operations room had been established in Tel-Aviv, under the command of a reserve officer with the rank of lieutenant-colonel, for the purpose of improving the coordination work in the field of humanitarian aid between the security establishment and the representatives of the international organizations.

26. From the aforesaid it can be seen that steps have been taken in order to repair the faults in the electricity network in the Gaza Strip, and despite the state of combat and the security risks, efforts have been made to facilitate the entry into the Gaza Strip of industrial diesel oil for operating the local power station in Gaza, as well as additional humanitarian requirements, such as cooking gas, diesel oil for transport, water, food and medications. In these circumstances, this petition should also be denied.

*Conclusion*

27. The civilian population is suffering considerably as a result of the IDF's combat operations. The operations are taking place in built-up and densely populated areas. Because of these conditions, many of the victims — hundreds of dead and thousands of wounded — are civilians who were not involved in the dispute and are paying a high price. Regrettably, the children on both sides are innocent victims who are suffering the consequences of the intense fighting. Because of the circumstances in which the hearing took place, we did not receive all of the information that was needed to clarify the position, but it cannot be denied that a strenuous effort should be made to discharge the humanitarian obligations of the State of Israel. It is true the IDF forces are fighting against a terrorist organization. That organization does not observe international law; it does not respect humanitarian obligations; there is also no channel of communication with it that might further the implementation of the principles and laws that govern the parties that are involved in the armed conflict of the type that is being waged here. It appears that there may soon be a ceasefire. Notwithstanding, the state of conflict is still continuing, and in this context, as long as Israel has control of the transfer of necessities and the supply of humanitarian needs to the Gaza Strip, it is bound by the obligations enshrined in international humanitarian law, which require it to allow the civilian population to have access, *inter alia*, to medical facilities, food and water, as well as additional humanitarian products that are needed to maintain civilian life.

28. We have heard the petitioners' claims, and we requested and received detailed responses from the respondents with regard to the various humanitarian concerns that were raised in the petitions. It was made clear to us that the IDF and the high-level command authorities acting on its behalf are aware of and prepared to carry out their humanitarian obligations. We said in a similar context in *Al-Bassiouni v. Prime Minister* [15]:

> 'The Gaza Strip is controlled by a murderous terrorist organization, which acts continually to harm the State of Israel and its inhabitants and violates every possible rule of international law in its acts of violence, which are directed indiscriminately against civilians — men, women and children. Notwithstanding, as we said above, the State of

> Israel is obliged to act against the terrorist organizations within the framework of the law and in accordance with the provisions of international law, and to refrain from any intentional attack upon the civilian population in the Gaza Strip' (*ibid*. [15], at para. 22).

29. As we said above, at the time of giving judgment it is possible that the combat activities are about to end. Notwithstanding, no-one disputes that the humanitarian aid and rehabilitation work has not yet ended. It is our hope that the state will indeed do its very best to comply with Israeli and international law, in order to alleviate the suffering of the civilian population in the Gaza Strip, which has been seriously affected by the combat operations. This suffering is a result of the conduct of the cruel terrorist organization that controls the Gaza Strip and operates from within the civilian population while endangering it and abandoning it to its fate. Despite this, even in the face of a terrorist organization that has declared its goal of harming the civilian population of the State of Israel indiscriminately, we shall carry out our duty to uphold the principles and values underlying our existence as a Jewish and democratic state, which cherishes human rights and humanity.

Subject to all of the aforesaid, the petitions are denied.

**Justice E. Rubinstein**

1. I agree with the opinion of my colleague the president. The combat in which the State of Israel is engaged is not 'symmetrical,' in so far as respect for the law is concerned. As noted by my colleague, Israel was forced into battle in self-defence — lawfully, in accordance with the Charter of the United Nations and international law — against those who seek to take our lives, and it is doing so only after many years of restraint. It is difficult to imagine many free-world countries holding back for such a long time while many of their citizens are subject to the constant — and all-too-often realized — threat of missile fire resulting in physical injury and property damage. The enemy is cynical and cruel, and in addition to its disregard for every accepted norm of conduct, it also operates from within a civilian population, which regrettably pays the price of its actions. It openly, deliberately and indiscriminately targets the Israeli civilian population, while our forces are ordered to take every possible measure to avoid harming civilians, as prescribed by binding legal norms.

2. This court is disposed to hearing petitions that raise humanitarian concerns without delay, and this is what it has done in the present case. Often the role of the court in such cases is to urge and monitor compliance with the provisions of Israeli and international law, even when it knows and trusts that the authorities are unreservedly committed to the appropriate legal framework; the court has a judicial perspective that allows it to see the whole picture. Therefore judicial review is always called for.

3. My colleague mentioned the difficulty of classifying the battle against terrorism in terms of international law. From time to time, the international legal system encounters distressing innovations in international terrorism, including the weapons it employs (aided by members of the United Nations, ostensibly committed to international law) and its methods of combat. Steady efforts toward legislation and enforcement notwithstanding, the international legal system has been unable to contend with these new challenges. Despite this, as President Barak said in *Public Committee against Torture v. Government* [4], which was cited by my colleague, the State of Israel, which is probably the most prominent victim of terrorism among the countries of the free world, regards itself as committed in this conflict to the various aspects of international humanitarian law.

4. In hearing these petitions, we have been persuaded that the military establishment and the political echelon are committed to the relevant legal norms. In practice, this commitment should mean a systematic and unceasing endeavour to implement these norms, to learn from failures and mistakes and to make persistent efforts to improve.

5. Indeed, in the current situation the Israeli establishment not infrequently finds itself 'between a rock and a hard place,' since, as my colleague the president said, accidents happen in times of war, and our soldiers have also been hit by friendly fire; sometimes in our fight against the enemy, even when the intentions and planning are beyond reproach, harm is caused to Palestinian civilians, including innocent bystanders and children, for whom the heart grieves. Israel has also suffered such losses and seen its own children suffer, and so it deeply regrets casualties on the other side. A concerted effort should be made at all levels — and we have no reason to believe that it is not — to restrict regrettable accidents to a minimum, even in evil or unimaginable scenarios.

6. Finally, as a Jewish and democratic state, we are committed to the norms prescribed by Jewish law with regard to the proper attitude towards human beings, who were all created in the image of God. The Jerusalem Talmud (*Sanhedrin* 4, 9 [20]) states: 'Therefore Adam was created alone, to teach you that whoever destroys one person is deemed to have destroyed an entire world, and whoever saves one person is deemed to have saved an entire world.' Where matters of life and death are concerned, 'nothing stands in the way of saving a life, except for idolatry, sexual immorality and homicide' (Tosefta, *Shabbat* 16, 14 [21]). This ethos has accompanied the Jewish people throughout the generations, and will continue to do so.

**Justice A. Grunis**

I agree with the opinion of my colleague, President D. Beinisch, on the merits of the case. In the circumstances I see no need to address the question of justiciability.

Petition denied.
23 Tevet 5769.
19 January 2009.


# Israel Supreme Court

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